SPEEDING CHARGES

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1. Statutory Definition of Evidence of Speed

Section 79 of the *Road Safety Act* 1986 provides:

> **79 Evidence of speed**
> (1) If in any criminal proceedings the speed at which a motor vehicle or trailer travelled on any occasion is relevant, evidence of the speed of the motor vehicle or trailer as indicated or determined on that occasion by a prescribed road safety camera or prescribed speed detector when tested, sealed and used in the prescribed manner is, without prejudice to any other mode of proof and in the absence of evidence to the contrary, proof of the speed of the motor vehicle or trailer on that occasion.
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> (2) For the purpose of any criminal proceedings in which the speed at which a motor vehicle or trailer travelled on any occasion is relevant, if a trailer or a motor vehicle that is being towed is attached to a motor vehicle, the trailer or towed motor vehicle and the towing motor vehicle are to be taken to be travelling at the same speed.

2. Proof of testing, sealing and use of speed measuring device – combined error tolerances of speedometer and police speed measuring device – defence of honest and reasonable mistake

Reg 306 of the *Road Safety (General) Regulations* 1999 provides that a speed measuring device is tested in the prescribed manner if the testing officer who tests the device is satisfied that the device is in a satisfactory electrical condition, has been satisfactorily maintained and that the device is properly calibrated.

HELD:

1. The word "satisfied" in reg 306 is not to be construed in a manner that mandates the use of a particular scientific method before the relevant testing officer could reach the state of satisfaction required by the regulation. The legislation contemplates that the assertion that a testing officer was relevantly “satisfied” may be challenged. If so, he or she could not be found to have been “satisfied” of the relevant matters if that state of mind is seen to be baseless or pretended or indeed not held at all. As an ordinary English word, to be satisfied, in the relevant connotation, means to be furnished with sufficient proof or information, to be assured or convinced. The tester’s state of mind is a matter of fact. That state of mind is, *prima facie*, established if a schedule 2 certificate is admitted because that “satisfaction” is one of the elements which the certificate implicitly proves. But if it is challenged, as it may be, the challenger may seek to adduce evidence to prove that the testing officer was not so “satisfied”.

2. When the Victorian Parliament legislated as to the method by which a speed measuring device is to be tested for the purpose of law enforcement, it was not obliged to import any specific legal metrology methodology. It chose not to specify any method of testing the relevant devices but, rather, it adopted an alternative, rational method of assuring certain qualitative standards by prescribing the technical competence of the testing officer. In those circumstances, there is no warrant to imply the application of legal metrological principles in construing the meaning of “satisfied” where it appears in reg 306, either as a necessary legal consequence of Australia’s treaty obligations or as a consequence of the Commonwealth legislation.

3. The error tolerance in the speed measuring device is taken into account because, as is clear from the legislative regime, it is the speed indicated by that device that is used by the prosecuting authority to establish a case against the driver, not the driver’s vehicle’s speedometer. Proof of the prosecution case does not involve any assumption as to the accuracy of the speedometer in the car driven by the appellant.

Van Reesma v Police [2010] SASC 201 at [13], considered.

4. The defence of honest and reasonable mistake of fact did not apply.

Kearon v Grant [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377; MC 25/1990, applied.

Per Macaulay J:

> "1. Mr Agar (the Plaintiff) seeks judicial review of a decision of a County Court judge who, on an appeal from a Magistrates’ Court decision, convicted and fined Mr Agar for driving a vehicle at a speed exceeding the speed limit.
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> 2. On 29 August 2006 Mr Agar was detected driving his motor vehicle at 78km/h in a 70km/h zone on the Nepean Highway, Seaford. After electing to contest a traffic infringement notice Mr Agar was charged with driving over the speed limit contrary to reg 20 of the Road Rules. The speed alleged was 75km/h.

... 8. In substance, and as argued before me, those grounds reduced to three fundamental complaints: first, Judge Campbell misconstrued, and thus failed to correctly apply, reg 306 of the *Road Safety (General) Regulations* 1999 (General Regulations) with respect to the testing of the relevant speed measuring device; secondly, his Honour wrongly failed to take into account the combined error tolerances of both the police speed measuring device and the speedometer fitted to Mr Agar's vehicle; and, thirdly, his Honour wrongly denied him the defence of honest and reasonable mistake in answer to the charge.

Regulation 306

13. The relevant offence with which Mr Agar was charged was that of exceeding the applicable speed limit (ie. Road Rule 20). The speed measuring device used in detecting his speed was a Gatsometer MRC System (Gatsometer), a speed camera, with an identifying number RG050.

14. Section 79 of the *Road Safety Act* 1986 (Vic) provides:

> If in any criminal proceedings the speed at which a motor vehicle travelled on any occasion is relevant, evidence of the speed of the motor vehicle as indicated or determined on that occasion by a prescribed speed measuring device <u>when tested, sealed and used in the prescribed manner</u> is, without prejudice to any other mode of proof and in the absence of evidence to the contrary, proof of the speed of the motor vehicle on that occasion.

[underlining added]

15. Exceeding the speed limit was (at the relevant date) a "prescribed offence" which may be detected by an "automatic detection device" (Reg 301 of the *General Regulations* and s66 of the *Road Safety Act)* such automatic detection devices included the Gatsometer (Regs 302(c) and 105) and a prescribed speed measuring device, as referred to in s79, includes the Gatsometer referred to in reg 302(c) (Reg 305).

16. As can be seen from s79 of the *Road Safety Act*, the relevant speed measuring device can only supply admissible proof of the speed of the vehicle on the relevant occasion if it has been tested, sealed and used in the prescribed manner.

17. Regulations 303, 306 and 307 of the General Regulations prescribe the manner for the use, testing and sealing of the speed measuring devices, including the Gatsometer.

... 22. The statutory scheme provides a means of proof (at least *prima facie* proof) that a speed measuring device has been tested (and sealed) in the prescribed manner. Section 83 of the *Road Safety Act* provides:

> A certificate in the prescribed form to the effect that any device referred to in section 79 or 82 has been tested or sealed in the prescribed manner, signed or purporting to be signed by a person authorised to do so by the regulations is, without prejudice to any other mode of proof and in the absence of evidence to the contrary, proof that the device has been so tested or sealed.

23. In order to constitute acceptable proof of the testing (and sealing) of the device s83 requires, first, a certificate in the prescribed form and, secondly, that the certificate be signed by a person authorised by the regulations to do so.

24. As to the prescribed form, reg 311(1) prescribes the form set out in schedule 2 to those regulations. As to the authorised signatory, reg 311(2) authorises a "testing officer" to sign a schedule 2 certificate.

... 30. In order to meet the set of conditions required under s79 of the Act for the speed indicated by the Gatsometer to amount to proof of the vehicle's speed, there also needed to be evidence that the speed testing device had been used in the prescribed manner (as stipulated in reg 303(b)). Evidence on that issue was given to the County Court by the person responsible for setting up and operating the Gatsometer on the day in question.

31. Accordingly, such evidence having been adduced, Judge Campbell had before him sufficient proof as to the testing, sealing and use of the speed measuring device to enable him to receive and act upon the speed indicated by the Gatsometer as proof of the speed of the vehicle on the relevant occasion.

... 33. Focusing first on proof of proper testing, by qualifying s83 with the words "and in the absence of evidence to the contrary", the legislature contemplated that a person may challenge the *prima facie* conclusion that a device has been tested in the prescribed manner – implying that a challenge may be made to any of the elements specified in reg 306.

34. It is to be noted that the prescription of the "manner" in which a device is to be tested, as set out in

reg 306, is expressed in terms of the outcome of the testing and the satisfaction of the testing officer, rather than any methodology to be employed in achieving that outcome or the requisite satisfaction.

35. Neither the Act nor the regulations stipulate how the testing officer is to go about his or her task. Instead, the legislation achieves a measure of qualitative assurance in the testing process by specifying the technical competence of the testing officers through the definition of that term in reg 105, and the requirement that only such person be authorised to sign a schedule 2 certificate.

36. With that background it is necessary to turn to the decision of the County Court in the light of the evidence before it and the arguments that were advanced by Mr Agar.

... 42. There are aspects of Mr Agar's argument with which I can agree. The legislation contemplates that the assertion that a testing officer was relevantly "satisfied" may be challenged. If so, he or she could not be found to have been "satisfied" of the relevant matters if that state of mind is seen to be baseless or pretended or indeed not held at all. As an ordinary English word, to be satisfied, in the relevant connotation, means to be furnished with sufficient proof or information, to be assured or convinced. The tester's state of mind is a matter of fact. That state of mind is, *prima facie*, established if a schedule 2 certificate is admitted because that "satisfaction" is one of the elements which the certificate implicitly proves. But if it is challenged, as it may be, the challenger may seek to adduce evidence to prove that the testing officer was not so "satisfied".

... 56. I conclude from this analysis that when the Victorian parliament legislated as to the method by which a speed measuring device is to be tested for the purpose of law enforcement, it was not obliged to import any specific legal metrology methodology. It chose not to specify any method of testing the relevant devices but, rather, it adopted an alternative, rational method of assuring certain qualitative standards by prescribing the technical competence of the testing officer.

57. In those circumstances, there is no warrant to imply the application of legal metrological principles in construing the meaning of "satisfied" where it appears in reg 306, either as a necessary legal consequence of Australia's treaty obligations or as a consequence of the Commonwealth legislation.

58. For completeness, I mention that Mr Agar also argued the implicit application of certain Australian Standards to the process of testing required by reg 306. I accept the Crown's argument that where this is required, one would expect the standard to be specifically incorporated by reference in the legislation. None have been so incorporated.

... 75. In conclusion, his Honour was not in error in declining to afford to Mr Agar the defence of honest and reasonable mistake of fact (assuming for present purposes that such a defence might have been made out on the facts of the case). ..."

Per Macaulay J in *Agar v Dolheguy & Anor* [2010] VSC 506; 2010; (2010) 246 FLR 179; MC 50/2010, 11 November 2010.

3. Defence of honest and reasonable mistake

(a) Speeding – *mens rea* – whether strict liability imposed

Having regard to the subject matter and character of Reg 1001 of the *Road Safety (Traffic) Regulations* 1988 concerning the offence of driving a motor vehicle at an excessive speed, it is clear that strict responsibility is imposed for a speeding infringement and accordingly, the defence of honest and reasonable mistake as a ground of exculpation is precluded.

Per Brooking J:

"... These speed limits are imposed by the regulations in the interests of road safety. This must be apparent to all without having regard to the title of the regulations, the *Road Safety (Traffic) Regulations* 1988, or the title of the Act under which they are made, the *Road Safety Act* 1986, or to the objects of the Act and regulations as stated in s1 of the Act and clause 102 of the regulations. If ever one might expect an intention to impose strict responsibility, it would be in relation to this offence of driving a motor vehicle at an excessive speed. (Compare what was said by the Chief Justice in *Welsh v Donnelly* [1983] VicRp 79; (1983) 2 VR 173 at p177, and what was said in the same case by Southwell J at pp199-200, where His Honour cited a passage from *Franklin v Stacey* (1981) 27 SASR 490 concerning the subordination of interests of individuals to the interest of the public in view of the purpose and policy of the statute, the *Motor Vehicles Act*, as securing the public welfare and promoting safety of the public).

Speeding motor cars have become dreadful engines of destruction. The cost to the community in terms of death and injury and economic loss has been enormous. I would expect a provision of this

> kind to require drivers to keep within the applicable speed limit at their peril. If the defence of honest and reasonable belief were applicable, then mistakes could be of two kinds. There could be a mistake of fact, the fact bearing on whether one was in a speed zone, and there could be a mistake of fact as to the speed at which the vehicle was travelling. I think that the intention here is that motorists shall at their peril be aware of the applicable speed limit, and shall then at their peril so govern their speed as to keep within it. I do not think that they can be heard to say, except in mitigation, that a badly parked pantechnicon obscured a speed restriction sign from their view, or that a power failure at night led them to believe that there was no provision for street lighting along the road, or that they believed their faulty speedometer to be working properly, as in *Hearn v McCann* (1982) 29 SASR 448; (1982) 5 A Crim R 368, or that for any other reason they believed they were not breaking the speed limit. Human ingenuity and human nature being what they are, I should not expect the law to recognize mistake as a defence to a charge of this kind. That defence was rejected by Zelling J in the speeding case to which Mr Monteith very properly referred us, *Hearn v McCann* (*supra*).
>
> A conviction for speeding carries no stigma; perhaps it should, but it does not. This summary offence carries a maximum penalty of only $500. Licence cancellation and suspension are dealt with by s28 of the *Road Safety Act* 1986. A licence cancellation or suspension may bear heavily on the defendant, but in the overall scheme of things, a licence cancellation or suspension, irksome though it may be, may be regarded as towards the bottom end of the scale of criminal punishment. In my view, the ground of the order nisi has been made out and the order nisi should be made absolute with costs, including costs reserved, and the order below should be set aside. ..."

Per Brooking J (Kaye and Murphy JJ agreeing) in *Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377; MC 25/1990, 21 June 1990.

(b) In ***Hearn v McCann*** (1982) 29 SASR 448; (1982) 5 A Crim R 368; MC 15.3/1983, 7 May 1982, the Crown appealed against the dismissal of a charge of driving a motor vehicle at an excessive speed. The ground of the dismissal was that the Justices considered that "the defendant honestly believed that he was travelling well below the speed with which he (was) charged." The South Australian Supreme Court (Zelling J) in allowing the appeal said that the defence of honest and reasonable belief in a state of facts, which, if they existed, would make the defendant's act innocent, is not available as a defence to a charge of an offence of excessive speed under s49 of the *Road Traffic Act* (SA) 1961-1981.

4. *National Measurement Act* 1960 (Cth)

(a) Whether traffic cameras were required to comply with the requirements of the *National Measurement Act* 1960 (Cth) and the *National Measurement Regulations* 1999 (Cth)

HELD: Originating motion dismissed.

1. The system of verification of utility meters used for trade is contained in Part VA of the *National Measurement Act* 1960 (Cth). However, a speed camera is not a utility meter for the purposes of Part VA. Part VI contains the provisions (ss19A, 19AAA and 19AB) which do not require the doing of anything. Rather, they provide for the making of regulations, specifically for or in relation to the examination, approval and verification of 'patterns' of measuring instruments, for the issuing of certificates in respect of the approval and verification of patterns of measuring instruments and for the reception in evidence of documents purporting to be such certificates.

2. The *National Measurement Regulations* are largely permissive in character. A person may apply for approval or certification of a pattern or of an individual measuring instrument, but it is not mandatory.

3. Having regard to the Regulations, there is no requirement that speed camera types or individual speed cameras be certified, verified, calibrated or otherwise approved under the *National Measurement Act* or the Regulations. There is no specific requirement in the *National Measurement Act* or the Regulations that speed cameras be approved, verified or certified either individually or more generally as to pattern.

4. Accordingly, the County Court was not prevented from finding the charges proven in the absence of approval, verification or certification under the *National Measurement Act* of either the pattern of the speed cameras or the individual speed cameras, as there was no such requirement.

5. It is not clear if or how the defendant sought to avail himself of the protections of *Magna Carta* or if or how he contended there was a failure to afford him these protections. The judge did not

err in warning the defendant that the *Magna Carta* did not have the force or effect for which was sometimes contended. In this case, the County Court was bound to give effect to the provisions of the *Road Safety Act*. The express terms of the *Road Safety Act* enabled the County Court to find the charges against the defendant proven, based upon the certificates produced under ss83 and 83A of that Act. His Honour's refusal to countenance lengthy argument that would have required him, in essence, to ignore the express terms of the *Road Safety Act* did not reflect any bias or prejudgment on his part or otherwise amount to a denial of procedural fairness.

6. As the recipient of infringement notices for excessive speed infringements, the defendant had no right to internal review under Division 3 of Part 2 of the *Infringements Act* as the relevant provisions of the *Infringements Act* were inapplicable.

7. In relation to the Judge's refusal to allow the hearing to be adjourned in order to sub-poena a documentary about speed cameras, there was no error in the approach taken by the judge. The refusal of the adjournment did not prevent the defendant from presenting his case as fully as necessary within the limits of the law, in circumstances where the adjournment was sought for the purpose of gathering evidence that was likely to be neither admissible nor relevant.

8. There is no requirement that the s83A certificates be produced in accordance with a 'prescribed process'. In any event, even if the legislation referred to a 'prescribed process' for the production of s83A certificates by the authorised person, but no process was in fact prescribed, the certificates would have legal effect, providing that they otherwise complied with the legislation.

9. The protection afforded by s27(2) of the *Charter of Human Rights and Responsibilities Act* is, in substance, a protection against the retrospective operation of laws that are harsher than the laws in force when the offence was committed. The focus of s27(2) is 'the penalty that applied to the offence' when the offence was committed. The penalty that applied to the offence at the time that it was committed is the penalty specified in or authorised by the legislation or rules in force at that time.

10. The defendant failed to establish that the County Court imposed a penalty on him that it was not authorised to impose under the laws in force at the time of the offences.

Per Emerton J:

> "1. The plaintiff, Mr Macdonald, was convicted in the Magistrates' Court of Victoria and subsequently in the County Court of Victoria of driving in excess of the speed limit on two occasions, the first on 11 April 2008 and the second on 16 April 2008. On both occasions, the speeding was detected by a traffic camera and infringement notices were issued. Although Mr Macdonald was not the owner of either car (both were rental vehicles), he was identified by the owners or their agents as being in charge of the vehicles at the relevant times.
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> 2. In respect of each infringement, certificates were issued by authorised persons under s83 and s83A of the *Road Safety Act* 1986 (Vic) certifying, among other things, that the traffic camera had been tested in accordance with the *Road Safety (General) Regulations* 1999, and that the test confirmed that the camera was working correctly in accordance with the Regulations
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> ... 13. The prosecution relied on certificates given under ss83 and 83A of the *Road Safety Act* to establish the commission of the speeding offences. Mr Macdonald objected to the use of the certificates issued under s83A on the basis that it had not been established that they were produced using 'the prescribed process'.
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> ... 25. Mr Macdonald contends that the speed cameras that were used to take the photos and record the speed of the vehicles in question did not comply with the requirements of the *National Measurement Act* and that, in the absence of approval and the provision of the certificate under by the *National Measurement Act* and *National Measurement Regulations* 1999 (Cth), the speed cameras were illegal. Mr Macdonald referred to the requirements of ss19A, 19AAA and 19AAB of the *National Measurement Act* and asserted that the prosecution had failed to produce certificates establishing that the speed cameras had been verified in accordance with the requirements of Reg 18 of the Regulations.
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> 26. Although I was not taken to it by Mr Macdonald, I have had regard to the *National Measurement Act* as in force in April 2008, when the speed cameras photographed and recorded the speed of the vehicles in question. In these reasons, all references to the *National Measurement Act* 1960 (Cth) and the *National Measurement Regulations* 1999 (Cth) are references to Act and Regulations as in force in April 2008.

27. The *National Measurement Act* is concerned with the verification or approval of measuring instruments in limited circumstances only. It has a much broader ambit. Its objects are:

(a) to establish a national system of units and standards of measurement of physical quantities; and

(b) to provide for the uniform use of those uniform units and standards of measurement throughout Australia; and

(c) to coordinate the operation of a national system of measurement; and

(d) to bring about the use of the metric system of measurement in Australia as the sole system of measurement of physical quantities; and

(e) to provide for a system of verification of utility meters used for trade.

28. The system of verification of utility meters used for trade is contained in Part VA of the Act. Division 3 deals with the verification of utility meters, and Division 4 deals with verifying authorities (applications for appointment, appointment of verifying authorities, conditions on appointment, disciplinary action for breaches of conditions of appointment and so on). Division 5 deals with enforcement powers in respect of utility meters. However, it was common ground that a speed camera is not a utility meter for the purposes of Part VA. Rather, Mr Macdonald relied on Part VI, which contains the provisions that he referred to. These provisions – ss19A, 19AAA and 19AB – do not require the doing of anything. Rather, they provide for the making of regulations, specifically for or in relation to the examination, approval and verification of 'patterns' of measuring instruments, for the issuing of certificates in respect of the approval and verification of patterns of measuring instruments and for the reception in evidence of documents purporting to be such certificates. Section 19A provides for the making of regulations for the examination of patterns of measuring instruments. Section 19AAA provides for the making of regulations for certificates in respect of a pattern of a measuring instrument to specify tolerances. Section 19AAB provides for the making of regulations that are required to be satisfied before a measuring instrument with an approved pattern is taken to be in accordance with the pattern and the procedures to be followed to ascertain whether measuring instruments with an approved pattern are in accordance with the pattern.

... 31. The relevant regulations are therefore largely permissive in character. A person may apply for approval or certification of a pattern or of an individual measuring instrument, but it is not mandatory.

32. Having regard to the Regulations, I can find no requirement that speed camera types or individual speed cameras be certified, verified, calibrated or otherwise approved under the *National Measurement Act* or the Regulations. Mr Macdonald could not point to any specific requirement in the *National Measurement Act* or the Regulations that speed cameras be approved, verified or certified either individually or more generally as to pattern. He argued, instead, that it was the general 'tenor' of the *National Measurement Act* that they be approved, verified or certified.

33. I do not accept this submission. In my view, the County Court was not prevented from finding the charges proven in the absence of approval, verification or certification under the *National Measurement Act* of either the pattern of the speed cameras or the individual speed cameras, as there was no such requirement.

34. It follows that the constitutional issue raised by Mr Macdonald based on the alleged inconsistencies between the *Road Safety Act* and the *National Measurement Act* and Regulations does not arise.

... 39. His Honour was correct to point out that the *Magna Carta* is not some sort of 'constitution'. *The Imperial Acts Application Act* 1980 (Vic), contains a schedule of enactments which continue to have the effect in Victoria that they had at the commencement of that Act. The schedule includes [1297] 25 Edward 1 (*Magna Carta*) c. XXIX. This is relevantly set out in Division 3 of Part II as follows:

'[1297] 25 Edward I (*Magna Carta*) c. XXIX
No free man shall be taken or imprisoned, or be disseised of his freehold, or liberties or free customs, or be outlawed or exiled, or any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.'

40. It is not clear if or how Mr Macdonald seeks to avail himself of these protections or if or how he contends there was a failure to afford him these protections. The learned judge did not err in warning Mr Macdonald that the *Magna Carta* did not have the force or effect for which was sometimes contended. In this case, the County Court was bound to give effect to the provisions of the *Road Safety Act*. The express terms of the *Road Safety Act* enabled the County Court to find the charges

> against Mr Macdonald proven, based upon the certificates produced under ss83 and 83A of that Act. His Honour's refusal to countenance lengthy argument that would have required him, in essence, to ignore the express terms of the *Road Safety Act* does not, in my view, reflect any bias or prejudgment on his part or otherwise amount to a denial of procedural fairness. ...

Per Emerton J in *Macdonald v County Court of Victoria & Anor* [2013] VSC 109; MC 13/2013, 13 March 2013.

(b) Speeding charge – certificate produced to prove speed

M. was detected driving a motor vehicle at a speed exceeding the speed limit. The prosecution relied on a certificate of an authorised person to prove the rate of speed and that the images and messages were produced by a prescribed road safety camera tested, sealed and used in the prescribed manner. The charge was found proved and M. appealed to the County Court which also found the charge proved. M. submitted that the speed camera evidence provided no proof of any applicable requirement under the *National Measurement Act* (Cth). M. also issued sub-poenas to two persons requiring them to give evidence about the testing authority of the cameras. Upon appeal—

HELD: Appeal dismissed.

1. Whatever the definition of 'legal metrology' may be, and even if the *National Measurement Act* might be applicable to a road speed camera, there was nothing in the *National Measurement Regulations* to conclude that the certification of a road speed camera was mandatory under the legislation or regulations.

2. Accordingly, it did not follow that M.'s references to specific sections of the *National Measurement Act* to support his argument that there were applicable regulations (regs 36-44 and 55-8) containing obligations not fulfilled in relation to road safety cameras.

3. Further, the County Court did not lack jurisdiction to make a conviction under provisions of the *Road Safety Act* which were inconsistent with the Commonwealth legislation requiring such certification.

> *Macdonald v County Court of Victoria* [2013] VSC 109; MC 13/2013; and
> *Agar v Dolheguy* [2010] VSC 506; (2010) 246 FLR 179; MC 20/2010, followed.

Per Williams J:

> "... 7. Mr Macdonald's first ground for seeking an order in the nature of *certiorari* quashing the County Court decision is premised on the *National Measurement Act* 1960 (Cth) and *National Measurement Regulations* 1999 (Cth) applying. The first ground of appeal is stated in these terms in Mr Macdonald's originating motion:
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> > 1. ... The alleged conviction was secured under a Victorian Act of law that was clearly incapable of implementation at the time of the offence in as much as the Victorian Authorities had not complied with prerequisite requirements that were mandated in Commonwealth Legislation in order for them to use the methods and devices that they did to bring about the charge.
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> 8. In the course of the County Court hearing, the learned judge prevented Mr Macdonald from making further submissions challenging the speed camera evidence on the grounds that there was no proof of any applicable requirement under the *National Measurement Act*. The Court ruled that the submissions were irrelevant.
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> 9. Mr Macdonald raised the same argument, premised upon inconsistency between the *Road Safety Act* proof provisions and the *National Measurement Act*, in a very similar application for judicial review of a County Court conviction for speeding offences on 11 and 16 April 2008, which followed an appeal from the Magistrates' Court.
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> ... 11. Emerton J held that the regulations upon which Mr Macdonald relied were largely permissive in character and that neither they nor the *National Measurement Act* as it stood at the time of the offences required that speed camera types or individual speed cameras be certified, verified, calibrated or approved. In *Agar v Dolheguy* [2010] VSC 506, [55]; (2010) 246 FLR 179, Macaulay J had previously held that there was no regulation relating to a speed measuring device in the *National Measurement Regulations* as at 11 November 2010.
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> 13. Whatever the definition of 'legal metrology' may be, and even if the *National Measurement Act* might be applicable to a road speed camera, there is nothing in the *National Measurement Regulations* to persuade me that Emerton J was wrong and that that certification of a road speed camera is mandatory under the legislation or regulations.

14. It follows that I am not persuaded by any of Mr Macdonald's references to specific sections of the *National Measurements Act* to support his argument that there were applicable regulations (regs 36-44 and 55-8) containing obligations not fulfilled in relation to road safety cameras.

15. By ground 1, Mr Macdonald seeks to argue that the County Court lacked jurisdiction to make a conviction under provisions of the *Road Safety Act* which were inconsistent with the Commonwealth legislation requiring such certification. This ground must fail.

16. In so far as this challenge should be taken to be an allegation of error of law on the face of the record, it is also not made out. ..."

Per Williams J in *Macdonald v County Court of Victoria* [2013] VSC 605; MC 42/2013, 8 November 2013.

(c) Whether speedometer presumed to be accurate – whether presumption affected by provisions of the *National Measurement Act* 1960 (Cth.)

Where a measurement is made by a scientific or quasi-scientific instrument such as a speedometer, a court may presume, in the absence of evidence to the contrary, that the instrument and measurement are accurate. This presumption is not rebutted solely by evidence that a speedometer's accuracy had not been recently checked, nor is it affected or compromised by the provisions of the *National Measurement Act* 1960 (Cth.)

Thompson v Kovacs [1959] VicRp 40; [1959] VR 229; [1959] ALR 636, applied.

Re White 89 FLR 444; (1987) 9 NSWLR 427; 31 A Crim R 194; MC 26/1988, referred to.

Per Nathan J:

"... Brooks laid an information against Parente alleging a breach of the Regulations and it came on for hearing before a Magistrate at Moonee Ponds on the 20th October 1988. The magistrate dismissed the information. He accepted a no case submission from Parente's counsel which asserted there was no evidence that Brooks' speedometer was accurate and as its accuracy had been questioned, the burden of proving its accuracy shifted to the informant. Brooks was required to establish that its accuracy complied with the requirements of the *National Measurement Act* 1960 (Commonwealth) "the Act".

... The presumption of law that accuracy is to be presumed in respect of scientific and quasi scientific instruments unless there is evidence or material to challenge that accuracy, should have been applied. I concur the observations in *Thompson v Kovacs* [1959] VicRp 40; [1959] VR 229; [1959] ALR 636 made by Sholl J at 233:

> "The speedometer had not been tested but, in my opinion, the magistrate was entitled to regard a speedometer as a known type of technical, if not scientific, instrument, the accuracy of which might be presumed, in the absence of any evidence to the contrary."

That stated epitome of the law was approved in *Porter v Kolodzeij* [1962] VicRp 11; (1962) VR 75 and has been accepted in other jurisdictions viz. *Skalde v Evans* (1966) SASR 176 (a breath analysing instrument), *Barker v Fauser* (1962) SASR 176 (weighbridge scale), *Zappia v Webb* (1974) WAR 15; (1973) 29 LGRA 438 (an amphometer) and the more ancient authority of *Bond v Hall* [1938] SAStRp 23; (1938) SASR 59 which also concerned a speedometer.

In this case there was no evidence whatsoever which impugned the accuracy of the motorcycle policeman's speedometer. The only evidence which touched upon the point was the concession by Brooks that the speedometer on the cycle had not recently been checked. That concession, with nothing more, does not rebut the presumption of the accuracy of scientific instruments. To accept that it did would imply the acceptance of a further presumption namely, that scientific instruments necessarily become inaccurate unless checked. That conclusion is absurd and directly contrary to the legal presumption of accuracy, unless there is material or evidence to the contrary. In this case, a mere question as to its accuracy was raised; no material nor any evidence was put forward to challenge the reading of the speedometer.

... I turn to the *National Measurement Act* (the Act) and the second ground of the order nisi. In my view the operation of the presumption of accuracy is in no way affected or compromised by the provisions of the Act. The Act, which relates to weights and measures, recites as part of its objects:

> "s4(1)(d) To bring about the use of the metric system of measurement in Australia as the sole system of measurement of physical quantities; and (a) to establish a national system of units and standards of measurement of physical quantities".

Section 4(3) recites:

> "Without limiting the generality of sub-section (2), this Act and the regulations shall not be taken to apply to the exclusion of any law of a State or territory.
> (a)... (b)...
>
> (d) prohibiting or restricting the use of a unit of measurement of a physical quantity either generally or in respect of particular transactions..."

The Act sets up Australian Legal Units (ALU's) for the measurement of time, distance and velocity: *National Measurement Regulations* Schedules 7, 1 and 9 respectively. It was put the informant had to prove the speed as measured had been established by reference to the Act, see Act s10, which as appropriately edited reads:

> "When, for any legal purpose, it is necessary to ascertain whether a measurement of a physical quantity for which there are ALU's ... that fact shall be ascertained ... by reference to ... (the ALU) ... and not in any other manner".

... The Act is limited to establishing uniform multiplicands of measurement of physical quantities and in effecting the metrification of those measurements throughout Australia.

It has no application to the existing presumptions of law relating to the accuracy of quasi scientific instruments such as a speedometer. It could be used as a reference point if material or evidence were advanced to challenge that accuracy. It has no effect upon the onus of proof to be discharged by an informant. Section 10 in no way abrogates or diminishes the legal presumption relating to measuring devices; the fact is that the speedometer purported to operate in accordance with an ALU and thus it is presumed to accord with the ALU "by reference to it"...."

Per Nathan J in *Brooks v Parente* [1989] VicSC 157; MC 40/1989, 20 April 1989.

(d) Speed measured by speedometer – estimate of speed given – accuracy of speedometer – whether in conformity with *National Measurement Act* 1960 (Cth.) – whether estimate admissible

W. was charged with exceeding the speed limit. At the hearing the Police informant said that the vehicle's speed was ascertained by the speedometer of the police vehicle and also by the informant's estimation. It was submitted that the evidence of the speedometer reading ought not be accepted as there was no evidence that it conformed with the provisions of s10 of the *National Measurement Act* 1960 (Cth.) ('Act'). W. gave evidence that he was driving his son, a chronic asthmatic, to his treating physician. W. said that his son was suffering a florid asthmatic attack, his lips were blue and his breathing was rapid, laboured and shallow. W. was convicted. Upon appeal—

HELD: Appeal upheld. Conviction quashed.

1. Section 10 of the Act only operates when it becomes necessary to ascertain whether a measurement of a physical quantity has been made in Australian legal units of measurement. Where the accuracy of a speed-measuring device is not challenged as to its capacity to measure in accordance with the Australian legal units of measurement, s10 of the Act does not apply and it is open to the Court to accept the evidence of the reading of the device and/or any estimate of speed given by a person suitably qualified.

2. The defence of necessity applies to the commission of motor traffic offences and involves the elements of commission to avoid irreparable harm, immediate peril and proportion.
R v Loughnan [1981] VicRp 43; (1981) VR 443, applied.

3. Where a speeding motorist was concerned only with getting his gravely-ill son to medical treatment as soon as possible, it was open to conclude that the breach was committed to avoid a real danger and a real possibility of death and that the public good was not so jeopardized as to deny the availability of the defence of necessity.

Per Shadbolt DCJ (NSW District Court):

> "... The appellant gave evidence that on that day he was carrying his sick son to his physician. His son, Robert White was suffering a florid asthmatic attack. He is a chronic asthmatic and on this occasion his lips were blue and his breathing was rapid, laboured and shallow. He was under the impression that the area had a speed limit of 80 kilometres per hour. He saw a metal sign with "80" painted on it as he approached the bridge and subsequently he saw a 60 kilometres sign painted on

the road. He remembered the conversation as follows: "Do you know that you are doing 85 in a 60 kilometres zone?" to which remark he replied: "I believe the speed limit is 80 kilometres per hour." He said that when he had last checked his speedometer he was doing 78 kilometres per hour.

... The *National Measurement Act* 1960 (Cth), s10, states:

> "When, for any legal purpose, it is necessary to ascertain whether a measurement of a physical quantity for which there are Australian legal units of measurement has been made or is being made in terms of those units, that fact shall be ascertained by means of, by reference to, by comparison with or by derivation from".

(and thereafter the section lists a number of appropriate and described standards) "and not in any other manner". It is contended by the appellant that as the *Motor Traffic Act* 1909 requires proof of speed beyond that permitted by the Act and regulations and as speed is a combination of two quantities, namely distance and time expressed as kilometres per hour, each quantity must be shown to have been made in terms of the Australian legal unit by reference to an appropriate Australian primary or secondary standard or a State primary or secondary standard in accordance with s10. Only by these means can the Crown prove its case and all other means are to be excluded.

The Crown must, according to Mr White's submissions, prove beyond reasonable doubt that this measurement of physical quantity has been made in terms of the Australian legal unit of measurement. Secondly, no other device for measurement, save those which can be demonstrated to subscribe with s10 may be used for this purpose.

In my view, the section only operates when it becomes necessary to ascertain whether or not a measurement of a physical quantity has been made in terms of those units, namely the Australian legal unit of measurement. Then and then only need it be ascertained by reference to comparison with or derivation from the appropriate standard. It does not preclude the acceptance by the Court of evidence of the reading of the speedometer unless and until that reading is challenged by virtue of a challenge to the accuracy of the instrument in regard to its capacity to measure in accordance with the Australian measures. It certainly does not preclude estimates of speed given by a person suitably qualified.

... The police officers observed 88 kilometres being recorded on their car's speedometer. One of them estimated 85 kilometres and the appellant can only say that before the measurement took place he was doing 78 kilometres per hour. The difference between a 40 per cent excess over the limit and a 30 per cent excess over the limit is not to the point. I am satisfied beyond reasonable doubt that he was exceeding the speed limit set for that part of the road at 60 kilometres per hour.

One further point remains. The appellant maintains that he was acting throughout to get his son to medical treatment as quickly as possible. Doctor Wilkins gave telling evidence of the need of his patient, Mr Robert White, to have proper and timely medical attention when Mr Robert White suffers an attack. He has been a chronic asthmatic all his life and Dr Wilkins maintained that it is a life-threatening condition. I accept all of his evidence.

... It would appear to be a defence in search of the perfect circumstances. They were, of course, to be found in *R v Bourne* [1939] 1 KB 687; [1938] 3 All ER 615 and in my view they are to be found here. That the appellant did not tell the police officer of his plight has, in my view, been satisfactorily explained. It might have caused further delay. I consider his only concern was to get his gravely ill son to hospital. I do not think that he concerned himself particularly with the speed. I do not think his breach was so gross as to create another danger together with the existing one. It was a choice to be made and he made it in order to avert, as he saw it, a real danger and a real possibility of death but I am not of the view that the public good and society's cohesion would be placed in such jeopardy by that choice, that the defence of necessity should not be available.

The Crown in my view failed to negate it and the appeal will be upheld. The formal orders I make is that the appeal is upheld and the conviction is quashed."

Per Shadbolt DCJ (NSW District Court) in *Re White* 89 FLR 444; (1987) 9 NSWLR 427; 31 A Crim R 194; MC 26/1988, 29 April 1987.

5. Speeding Cases

(a) No evidence of testing of device within previous 12 months – sufficiency of evidence – whether conviction should be quashed

HELD: Appeal allowed and conviction quashed.

1. The evidence relied on by the prosecution would have been admissible if there had also been

proof that the device been tested and sealed in the prescribed manner under r45 of the *Road Safety (General) Regulations* 2009, that is, within 12 months prior to its use.

2. The preliminary brief contained only a certificate to the effect that the device had been tested and sealed in accordance with the Regulations on 11 July 2012, one month after the date of the alleged offence on 15 June 2012.

3. In the circumstances the Magistrate could not have been satisfied beyond reasonable doubt that the appellant was travelling 45 kilometres per hour over the applicable 80 kilometres per hour speed limit on the Maroondah Highway at the point at which he was intercepted. The use of the summary procedure in the absence of the defendant did not entitle the prosecution to obtain a conviction without proper proof of the elements of the charge.

Hannon v Norman [2006] VSC 228; (2006) 45 MVR 520, applied.

Per Williams J:

"... 4. The evidence would have been admissible if there had also been proof that the device been tested and sealed in the prescribed manner under r45 of the *Road Safety (General) Regulations* 2009 ('the Regulations'), that is, within 12 months prior to its use. Regulation 45 is in these terms:

Use of laser devices

A laser device is used in the prescribed manner for the purposes of s79 of the Act if—

(a) whenever the operator connects the laser device to a source of electricity, the operator ensures that all elements of the speed display are illuminated; and

(b) the operator activates the device with the device aimed in the direction of a motor vehicle within the operator's field of vision and observes the reading displayed on the digital speed display; and

(c) the device has been tested in accordance with regulation 42 within 12 months before the occasion of its use; and

(d) the device has been sealed in accordance with regulation 43 at the time that it was last tested.

5. The preliminary brief contained only a certificate to the effect that the device had been tested and sealed in accordance with the Regulations on 11 July 2012, one month after the date of the alleged offence on 15 June 2012. That was not brought to the learned Magistrate's attention.

... 9. It has been pointed out by the respondent that I have the option of remitting the matter for further hearing in the Magistrates' Court in light of evidence by an affidavit filed today of Ms Stavroula Aridas, a senior solicitor of the Office of Public Prosecutions, to the effect that the device had in fact been sealed on 14 July 2011: that is, within a year before its use on 15 June 2012.

10. I am not persuaded to remit the matter. I see no reason why the prosecution should be allowed a second chance to gather evidence to prosecute the appellant whose conviction has been quashed on the grounds of the insufficiency of the evidence. ..."

Per Williams J in *Challis v Williams* [2013] VSC 490; MC 36/2013, 29 August 2013.

(b) Speeding in a school zone – charge failed to specify the time when the speed zone applied to drivers or when the alleged offence occurred

F. was charged with being the driver of a motor vehicle in a school zone at a speed over the limit applying to that zone. The charge did not specify the time when the speed zone applied to drivers or the time when the alleged offence occurred or that it occurred on a declared school day. The Certificate in relation to the speed measuring device was said not to have been signed by a person authorised to do so under the *Road Safety Act* 1986 ('Act'). The Magistrate found the charge proved. Upon appeal—

HELD: Appeal dismissed.

1. It had been established that the two essential ingredients of the charged offence to be included in the charge were the alleged facts that the vehicle was driven by F. and that she drove it over the speed-limit applicable to her on that particular section of the street. It was not necessary to include in the charge express reference to the factual basis on which the applicable speed-limit was to be determined, such as that she was driving on a declared school day or during the period referred to on the school zone sign. Such matters, and other relevant requirements of the *Road Safety Road Rules* might have been the subject of requests of particulars of the alleged applicability of the 40km/h speed-limit to F.

Ciorra v Cole [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547; MC 31/2004; and *DPP v Kirtley* [2012] VSC 78; MC 07/2012, applied.

2. There was no uncertainty as to the offence charged nor was the offence created by r20 of the *Road Safety Road Rules* 2009 ambulatory in nature. Accordingly, the Magistrate was not in error in finding the charge proved.

3. The certificate tendered to the Court was in the prescribed form and was signed and there was no ambiguity in the reference to Regulation 5 in the context of the certificate replete with references to the Regulations.

4. In relation to the argument that the description of T.M. Mulcare as a testing officer was conclusory as it did not state the basis for that description and did not indicate which paragraph of the definition of 'testing officer' in reg 5 of the Regulations applied, the certificate was in the prescribed form and the prescribed form did not include a reference to the signatory's qualification as a testing officer. Nevertheless, the description of T.M. Mulcare in the certificate established that (in the language of s83 of the Act) it was one 'purporting to be signed by a person authorised to do so by the Regulations', namely, a 'testing officer'.

5. Accordingly, the Magistrate was correct to accept the certificate as valid and as constituting proof of the requisite testing and sealing of the speed detector, in the absence of evidence to the contrary, as s83 permitted her to do.

Per Williams J:

"... 2. The charge was stated in these terms in the Charge-Sheet and Summons filed on 6 September 2011:

> The accused at Myrtleford at 9.9.10, being the driver of a vehicle on a length of road, named Prince St, in a school zone, to which a school zone sign indicating 40 kilometres per hour applied, did drive over the speed-limit applying to the driver for the length of road where the driver is driving, between O'Donnell Ave and William Street. Detected Speed 80 kph. Alleged Speed 78 kph.

Rule 20 was relevantly in these terms:

> **Obeying the speed-limit**
> (1) A driver must not drive at a speed over the speed-limit applying to the driver for the length of road where the driver is driving.
>
> In the case of drivers of heavy vehicles exceeding the speed-limit by less than 35 km per hour, 20 penalty units.
>
> In the case of drivers of vehicles other than heavy vehicles exceeding the speed-limit by 45 km per hour or more, 20 penalty units.
>
> In the case of drivers of vehicles other than heavy vehicles exceeding the speed-limit by 35 km per hour or more but less than 45 km per hour, 15 penalty units.
>
> In the case of drivers of vehicles other than heavy vehicles exceeding the speed-limit by less than 35 km per hour, 10 penalty units. ...
>
> **Notes**
> 1 The Road Rules about speed-limits are as follows—
> • rule 21—speed-limit where a *speed-limit sign* applies;
> • rule 22—speed-limit in a speed-limited area;
> • rule 24—speed-limit in a shared zone;
> • rule 25—speed-limit elsewhere.
>
> 2. ***Road*** includes a road related area—see rule 11(2).
>
> 3. ***Length***, of road, includes a marked lane, a part of a marked lane, or another part of a length of road—see the definition in the dictionary.
>
> 4. Part 20, Division 2 deals with the way in which a traffic sign applies to a length of road. Part 20, Division 3 deals with the way in which the traffic sign applies to drivers driving on the length of road.

5. *Heavy* ***vehicle*** and ***GCM*** are defined in the Act.

... 10. As Charles JA (with whom Winneke P and Chernov JA agreed) stated in *Director of Public Prosecutions Reference No 2 of 2001* [2001] VSCA 114; (2001) 4 VR 55, 54 [19]; (2001) 122 A Crim R 251; (2001) 34 MVR 164, it is necessary to distinguish between those essential factual ingredients of the alleged offence, which must appear in a charge, and other facts which must be proved by the prosecution, to which it is not necessary to refer in the charge. There is no technical verbal formula which can be used to determine what those essential ingredients are: *John L Pty Ltd v Attorney-General (NSW)* [1987] HCA 42; (1987) 163 CLR 508, 520; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228 (Mason CJ Deane and Dawson JJ).

11. In *Ciorra v Cole* [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547, Redlich J (as his Honour then was) reviewed a number of relevant authorities, including *DPP Reference No 2 of 2001*. In *Ciorra*, the appellant challenged the validity of a charge under r20 on the basis that it failed to specify essential ingredients of the alleged offence. The charge was in these terms:

> The defendant at McCrae on 6/4/2003 being the driver of a vehicle on a highway namely the Mornington Peninsula Freeway did exceed 100 kilometres per hour. Alleged speed was 145km/h.

The charge was said to be invalid for failing to state that the appellant had exceeded the speed-limit and for failing to specify the means by which that speed-limit was to be determined. These arguments failed.

12. Redlich J held that r20 was not ambulatory in nature, unlike its predecessor reg 1001(1) of the *Road Safety (Traffic) Regulations* 1988 which had created mutually exclusive offences by its sub-parts. It was r20 which created the charged offence and not the provisions in the Rules which established the applicable speed-limit: See *DPP v Kirtley* [2012] VSC 78, [6] (J Forrest J). Importantly, his Honour also held that the essence of the r20 offence was that the driver had driven at a speed over the speed-limit which applied to that driver.

13. Redlich J distinguished between the legal elements of the offence, the essential factual ingredients which must be stated and particulars required for its proof and for the preparation of the defence: Citing *Preston & Gordon v Donohoe* [1906] HCA 43; (1906) 3 CLR 1089, 1096; 12 ALR 426 and *Taylor v Environment Protection Authority* [2000] NSWCCA 71; (2000) 50 NSWLR 48, 56-57; (2000) 113 LGERA 116 (Sperling J (Meagher JA and James J agreeing)). His Honour concluded that the speed-limit exceeded was an essential factual ingredient of the offence under r20. Despite the absence of express reference in the subject charge to the speed-limit signs determining the applicable speed-limit, on the only reasonable interpretation of the charge it did identify that speed-limit as 100 km per hour. Redlich J held that the factual basis upon which the speed-limit was to be determined need not be set out in the charge as an essential ingredient for the identification of the offence under r20, even though it must be established by the prosecution.

... 18. It is clear from the statement of the charge before me that Ms Foster was alleged to have driven on 9 September 2010 in Prince Street, Myrtleford, at a speed greater than the speed-limit of 40 km per hour applicable to her, in contravention of r20. Unlike the situation in *Woolworths*, there is no uncertainty as to the offence charged. Nor is the offence created by r20 ambulatory in nature.

19. *Ciorra* and *Kirtley* establish that the two essential ingredients of the charged offence to be included in the charge are the alleged facts that the vehicle was driven by the appellant and that she drove it over the speed-limit applicable to her on that particular section of Prince Street. It was not necessary to include in the charge express reference to the factual basis on which the applicable speed-limit was to be determined, such as that she was driving on a declared school day or during the period referred to on the school zone sign. Such matters, and other relevant requirements of the Rules might have been the subject of requests of particulars of the alleged applicability of the 40 km per hour speed-limit to the appellant: For examples of rules governing the applicability of the speed-limit to the appellant for the length of road, see rr21(1) and (3), 315, 316, 317A, 318(1) and 342 of the Rules.

... 21. Under s79 of the *Road Safety Act* 1986, evidence of a measurement of speed obtained by use of a speed detector was admissible and, absent evidence to the contrary, could constitute proof of speed, provided that the speed detector had been tested and sealed within the previous twelve months.

... 28. The appellant argues that the certificate was ambiguous because it did not identify the Regulations. In my opinion, there is no ambiguity in the reference to Regulation 5 in the context of the certificate replete with references to the Regulations.

29. The appellant also contends that the description of T.M. Mulcare as a testing officer was conclusory, as it did not state the basis for that description. It did not indicate which paragraph

of the definition of 'testing officer' in reg 5 of the Regulations applied. I am not persuaded by this argument. The certificate was in the prescribed form. The prescribed form did not include a reference to the signatory's qualification as a testing officer. Nevertheless, the description of T.M. Mulcare in the certificate establishes that (in the language of s83) it is one 'purporting to be signed by a person authorised to do so by the Regulations', namely, a 'testing officer'.

30. I agree with the respondent that the learned Magistrate was correct to accept the certificate as valid and as constituting proof of the requisite testing and sealing of the speed detector, in the absence of evidence to the contrary, as s83 permitted her to do. ..."

Per Williams J in *Foster v Harris* [2012] VSC 637; MC 02/2013, 21 December 2012.

(c) Speed camera offences – summons for production of servicing records

L. was charged with five charges of speeding over a period of 19 days. The speeds were detected by three cameras on Eastlink at the same location. L. denied he was speeding and had no prior convictions. L. issued a summons for production of documents relating to the service history and calibration details of the three speed cameras that were fixed to the Dandenong Bypass Bridge on Eastlink together with documents relating to the certification of the accuracy of the cameras. The Magistrate concluded that there was a reasonable possibility that the production of the documents would materially assist L. in defending the charges and that he had a legitimate forensic purpose in seeking them. Accordingly, the magistrate refused to set aside items 1 and 2 of the Summons. Upon application for review—

HELD: Application for review dismissed.

1. The legal principles relevant to this proceeding were:

(a) Where an accused in a criminal proceeding seeks production of documents pursuant to a subpoena, the accused must satisfy the Court that he or she has a legitimate forensic purpose. That purpose must be identified expressly and with precision.

(b) In order to demonstrate a legitimate forensic purpose, the accused must show that 'it is on the cards' that the documents would materially assist the accused in his or her defence. The expression 'on the cards' means 'reasonable possibility'. Accordingly, the test for determining whether there is a legitimate forensic purpose is whether a reasonable possibility exists that the documents would materially assist the defence.

(c) The reasonable possibility test should be applied flexibly and with common sense in order to give the accused a fair opportunity to test the Crown's case and to take advantage of any applicable defences.

(d) Mere speculation that the documents might assist the accused's defence is insufficient to satisfy the reasonable possibility test. This is because mere speculation amounts to a fishing expedition which can never constitute a legitimate forensic purpose. Mere relevance to an issue in the proceeding is also not sufficient to establish a legitimate forensic purpose.

(e) Where the accused wishes to rely on a statutory defence, the absence of evidence from which an inference can be drawn that the documents sought will satisfy the requirements of the defence does not necessarily mean that the reasonable possibility test is not met. This is particularly so where there is only one statutory defence available to the accused and that defence involves technical information exclusively in the possession of the Crown; insistence by the court that the accused present evidence which provides a basis for a positive inference that the documents sought will satisfy the requirements of the defence may effectively 'eviscerate' the defence. It follows that the importance of the requested documents to an accused's ability to establish a defence can inform the application of the reasonable possibility test.

2. It was not in dispute that the Magistrate's Reasons demonstrated that her Honour was aware that a fishing expedition was insufficient to satisfy the reasonable possibility test. At para 34 of her Reasons, the Magistrate concluded that L.'s proposed evidence and the uncontested facts that the alleged offences occurred at the same location over a short period of 19 days in September 2009 provided 'some foundation' for 'Mr Lane's concern that the [cameras] were not operating properly'. On the basis of this material, her Honour found that there was a reasonable possibility that the Documents would materially assist Mr Lane's defence.

3. In the present case, there was material before the Magistrate which enabled her Honour to conclude that L. had a legitimate forensic purpose in seeking the Documents and that he was not engaging in a fishing expedition. Items 1 and 2 of the Summons were confined to documents relating to the three cameras that were relied upon to allege L.'s speeds.

Glare v Bolster [1993] VicSC; (1993) 18 MVR 53, distinguished.

4. L. did not rely on a mere assertion of belief that he was not travelling at the speed allegedly detected by the three cameras but relied on a number of matters which, in combination, enabled the Magistrate to conclude that he had demonstrated a legitimate forensic purpose. It followed that the outcome of the present case, as in all cases of this type, depended on its facts.

5. It was open to the Magistrate to find that L.'s proposed evidence gave rise to a reasonable possibility that the three speed cameras had inaccurately measured his speeds and that this provided a proper legal basis for disclosure of the Documents. Clearly, if the Documents revealed any flaws in the operation of the speed camera, they would have improved L.'s prospects of displacing the evidentiary effect of the certified speeds and of establishing his defence that he was not travelling at speeds exceeding the applicable limit.

Per Kyrou J:

> "... 2. Items 1 and 2 of the Summons sought production of documents relating to the service history and calibration details of three speed cameras that were fixed to the Dandenong Bypass Bridge on Eastlink, and documents relating to the certification of the accuracy of the cameras ('Documents').
>
> ... 4. The prosecution relied on certificates issued under ss81 and 83A of the *Road Safety Act* 1986 ('Act') to prove the alleged speed at which Mr Lane was travelling and that the speed cameras were tested, sealed and used in the prescribed manner.
>
> ... 6. The plaintiff applied to the Magistrate to set aside the Summons on the basis that Mr Lane did not have a legitimate forensic purpose in seeking documents relating to the three cameras. In opposing this application, counsel for Mr Lane submitted that his defence was that the cameras were malfunctioning and that he had a legitimate forensic purpose in obtaining the Documents so that he could pursue his defence.
>
> 7. The Magistrate concluded that there was a reasonable possibility that production of the Documents would materially assist Mr Lane in defending the charges and that, accordingly, he had a legitimate forensic purpose in seeking them. On this basis, the Magistrate refused to set aside items 1 and 2 of the Summons. Her Honour did, however, set aside items 3, 4 and 5 of the Summons. Those items are not relevant to this proceeding.
>
> ... **Relevant provisions of the *Road Safety Act***
> 14. Sections 81(1) and 83A(1) of the Act, as in force at the date of the alleged offences relevantly provided:
>
> > **81. Certain matters indicated by speed cameras are sufficient evidence**
> > (1) If in proceedings for an offence to which section 66 applies the speed at which a motor vehicle or trailer travelled on any occasion is relevant, evidence of the speed of the motor vehicle or trailer as indicated or determined on that occasion by—
> > (a) a detection device prescribed for the purposes of section 66 when tested, sealed and used in the prescribed manner; or
> > (b) an image or message produced by a detection device prescribed for the purposes of section 66 when tested, sealed and used in the prescribed manner; or
> > ...
> > is, without prejudice to any other mode of proof and in the absence of evidence to the contrary, proof of the speed of the motor vehicle or trailer on that occasion.
> >
> > **83A Evidence relating to prescribed detection devices**
> > (1) A certificate in the prescribed form purporting to be issued by an authorised person certifying—
> > (a) that a prescribed detection device for the purposes of section 66 was tested, sealed or used in the prescribed manner; or
> > (b) that an image or message described in the certificate was produced by a detection device prescribed for the purposes of section 66 or by a prescribed process; or
> > ...
> > is admissible in evidence in any proceedings and, in the absence of evidence to the contrary, is proof of the matters stated in the certificate.
>
> 15. Section 66 of the Act, to which ss81(1) and 83A(1) refer, provide (among other things) that a prescribed offence that is detected by a prescribed road safety camera is an 'operator onus offence' for the purposes of pt 6AA of the Act.
>
> 16. The parties were in agreement about the legal principles that were relevant to this proceeding. Those principles are briefly summarised below.

17. Where an accused in a criminal proceeding seeks production of documents pursuant to a subpoena, the accused must satisfy the Court that he or she has a legitimate forensic purpose. That purpose must be identified expressly and with precision.[3]

18. In order to demonstrate a legitimate forensic purpose, the accused must show that 'it is on the cards' that the documents would materially assist the accused in his or her defence.[4] The expression 'on the cards' means 'reasonable possibility'. Accordingly, the test for determining whether there is a legitimate forensic purpose is whether a reasonable possibility exists that the documents would materially assist the defence.[5]

19. The reasonable possibility test should be applied flexibly and with common sense in order to give the accused a fair opportunity to test the Crown's case and to take advantage of any applicable defences.[6]

20. Mere speculation that the documents might assist the accused's defence is insufficient to satisfy the reasonable possibility test.[7] This is because mere speculation amounts to a fishing expedition which can never constitute a legitimate forensic purpose.[8] Mere relevance to an issue in the proceeding is also not sufficient to establish a legitimate forensic purpose.[9]

21. Where the accused wishes to rely on a statutory defence, the absence of evidence from which an inference can be drawn that the documents sought will satisfy the requirements of the defence does not necessarily mean that the reasonable possibility test is not met.[10] This is particularly so where there is only one statutory defence available to the accused and that defence involves technical information exclusively in the possession of the Crown; insistence by the court that the accused present evidence which provides a basis for a positive inference that the documents sought will satisfy the requirements of the defence may effectively 'eviscerate' the defence.[11] It follows that the importance of the requested documents to an accused's ability to establish a defence can inform the application of the reasonable possibility test.[12]

... there was material before the Magistrate which enabled her Honour to conclude that Mr Lane had a legitimate forensic purpose in seeking the Documents and that he was not engaging in a fishing expedition. Items 1 and 2 of the Summons were confined to documents relating to the three cameras that were relied upon to allege Mr Lane's speeds.

... 34. It follows from what I have said that there is nothing in *Glare* that compelled the Magistrate to set aside items 1 and 2 of the Summons. The position might have been different if the only basis upon which Mr Lane sought the Documents was a mere assertion that he did not believe that he was travelling at the speed allegedly detected by the three cameras and that the Documents might demonstrate that he was not travelling at the alleged speeds. In such a situation, it might have been difficult for the Magistrate to reach any conclusion other than that Mr Lane was embarking on a fishing expedition and was seeking discovery in a criminal proceeding.

35. That situation, however, is far removed from the facts of the present case. Mr Lane did not rely on a mere assertion of belief that he was not travelling at the speed allegedly detected by the three cameras. Mr Lane relied on a number of matters which, in combination, enabled the Magistrate to conclude that he had demonstrated a legitimate forensic purpose. It follows that the outcome of the present case, as in all cases of this type, depends on its facts.

... 45. In the present case, it was open to the Magistrate to find that Mr Lane's proposed evidence gave rise to a reasonable possibility that the three speed cameras had inaccurately measured his speeds and that this provided a proper legal basis for disclosure of the Documents. Clearly, if the Documents reveal any flaws in the operation of the speed camera, they will improve Mr Lane's prospects of displacing the evidentiary effect of the certified speeds and of establishing his defence that he was not travelling at speeds exceeding the applicable limit. ..."

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[3] *R v Saleam* (1989) 16 NSWLR 14, 18; 39 A Crim R 406 ('*Saleam*'); *Commissioner of the Australian Federal Police v Magistrates' Court of Victoria* [2011] VSC 3 (11 February 2011) [28] ('*CAFP*').

[4] *Alister v R* [1984] HCA 85; (1984) 154 CLR 404, 414-15; (1983) 50 ALR 41; (1984) 58 ALJR 97 ('*Alister*'); *Saleam* (1989) 16 NSWLR 14, 18; 39 A Crim R 406; *Shaw v Yarranova Pty Ltd* [2011] VSCA 55 (3 March 2011) [26] ('*Shaw*').

[5] *DPP v Selway [No 2]* [2007] VSC 244; (2007) 16 VR 508, 510 [4], 514 [10]; (2007) 212 FLR 243; (2007) 172 A Crim R 359 ('*Selway*'); *Ragg v Magistrates' Court of Victoria* [2008] VSC 1; (2008) 18 VR 300, 323-4 [95]-[97]; (2008) 179 A Crim R 568; *Johnson v Poppeliers* [2008] VSC 461; (2008) 20 VR 92, 106 [42]; (2008) 190 A Crim R 23; (2008) 51 MVR 444 ('*Johnson*'), *CAFP* [2011] VSC 3 (11 February 2011) [28]. *Selway* and *Ragg* were cited with approval by the Court of Appeal in *Shaw* [2011] VSCA 55 (3 March 2011) [26] n 32. Accordingly, in my opinion, the Court of Appeal's use (in *obiter*) of the expression 'appear likely that the documents will materially assist the applicant' does not reflect a preference for a different test. See *Shaw* at [26].

[6] *Johnson* [2008] VSC 461; (2008) 20 VR 92, 106-7 [42]; (2008) 190 A Crim R 23; (2008) 51 MVR 444.
[7] *A-G (NSW) v Chidgey* [2008] NSWCCA 65; (2008) 182 A Crim R 536, 550 [58], 552 [68] ('*Chidgey*'); *CAFP* [2011] VSC 3 (11 February 2011) [28]; *Shaw* [2011] VSCA 55 (3 March 2011) [26].
[8] *Alister* [1984] HCA 85; (1984) 154 CLR 404, 414-15, 456; (1983) 50 ALR 41; (1984) 58 ALJR 97; *Glare v Bolster* (1993) 18 MVR 53, 62 ('*Glare*'); *Johnson* [2008] VSC 461; (2008) 20 VR 92, 106 [42]; (2008) 190 A Crim R 23; (2008) 51 MVR 444; *CAFP* [2011] VSC 3 (11 February 2011) [28].
[9] *Chidgey* [2008] NSWCCA 65; (2008) 182 A Crim R 536, 550 [59]-[60]; *CAFP* [2011] VSC 3 (11 February 2011) [28].
[10] *Alister* [1984] HCA 85; (1984) 154 CLR 404, 414-15, 451; (1983) 50 ALR 41; (1984) 58 ALJR 97; *Johnson* [2008] VSC 461; (2008) 20 VR 92, 106-7 [42]; (2008) 190 A Crim R 23; (2008) 51 MVR 444
[11] *Alister* [1984] HCA 85; (1984) 154 CLR 404, 451; (1983) 50 ALR 41; (1984) 58 ALJR 97; *Johnson* [2008] VSC 461; (2008) 20 VR 92, 106-7 [42].
[12] *Johnson* [2008] VSC 461; (2008) 20 VR 92, 107-8 [47]; (2008) 190 A Crim R 23; (2008) 51 MVR 444.

Per Kyrou J in *State of Victoria v Lane* [2012] VSC 328; MC 29/2012, 7 August 2012.

(d) Radar device – expert evidence called that device can give inaccurate reading – whether court may read down and find specific reading

After accepting evidence from an expert in electronics that a speed measuring device on the occasion used produced an inaccurate reading, the magistrate was in error in finding that the motor vehicle travelled at a certain speed.

Per Nathan J:

> "... The appellant was a motor car driver who in the early hours of the morning was detected by a radar sensing device held by a policeman to have been travelling at a speed of 127 kph. At a contested hearing before the Magistrate, expert electronic evidence was given by a Dr Leigh-Jones, whose expertise and qualifications were not in question. He gave evidence of conducting similar tests with a similar radar device as that used by the police but, of course, on a separate day and occasion. More significantly, he gave evidence of the proximity of power lines which, he averred, rendered the taking of radar readings close by to be inaccurate or subject to wild fluctuation. He gave evidence that the various surges of power in the amount of current moving along the power lines could affect, by a phenomenon known as a "sideways effect", the accuracy of otherwise impeccable radar recording devices. His evidence was that at one such time he took a test, the device registered 74 kph when no vehicle at all was in sight and that on other tests, the device significantly under-recorded as well as over-recorded the speed of travelling vehicles.
>
> ... The Magistrate in accepting the findings of Dr Leigh-Jones adopted a curious path of reasoning, and I recite from the affidavit, as follows:
>
> > "He, that is, Dr Leigh-Jones, conducted his own tests and he went to the site. He indicated he got several readings, which demonstrated to him that there was outside interference likely to interfere with the integrity of the device. He gave a number of instances of reading; one was an error from 91 to 74 kph. Alarmingly, one recorded a reading when there was no vehicle. There were two occasions of over-reading. He said the device was inherently accurate as a measuring device, but that he had no doubt that the currents in power lines can cause inaccurate readings."
>
> The Magistrate then said,
>
> > "Given the number of occasions it occurred (that is, interference being disclosed) I cannot be satisfied that the radar device was not in some way interfered with. There were two over-readings in the tests by Dr Leigh-Jones. They were in the vicinity of 6 to 9 kph. I find that the radar may have over-read by some 9 kph."
>
> The Magistrate then imposed a penalty in accordance with the *Road Safety Act* which ascribed to the appellant's vehicle a speed 9 kilometres less than the 127 recorded, namely, 118 kph. Pursuant to the statute, this had the effect of attracting a four months period of licence suspension, whereas had his speed been 105 or less, the period of compulsory cancellation would have been one month.
>
> The recitation of the Magistrate's findings indicate that he came to conclude, and ascribed, an accurate reading to a device which he said was inherently inaccurate in these given circumstances. The paradox of that result reveals an error of law. One looks to the facts decided and their relative importance as to the conclusion arrived at as deciding whether or not the Magistrate could reasonably have arrived at such a conclusion. The tests conducted by Dr Leigh-Jones were upon a different occasion and time to that conducted by the policeman. More than that, the Magistrate had, on his own material, accepted evidence of wildly fluctuating speed reading, including one which reported

> an over-estimation of 19 kph as well as accepting evidence that the device under-reported by a similar figure.
>
> The finding, viz., "I find the radar may have over-read by some 9 kph" and then imposing a penalty as if it did, and the subject of the matter was certain. It is an error of law, to ascribe a penalty to given conduct which the Magistrate had concluded had not been accurately recorded. That is he could not on his own findings be sure of the excess speed in kph. ..."

Per Nathan J in *Gamser v Rhind* [1993] VicSC 470; (1993) 19 MVR 231; MC 32/1993, 8 September 1993.

(e) Speeding – pre-trial disclosure – request for details as to modification of speed measuring device

J. was charged with speeding. Prior to the mention date, J. sought from the prosecution details of the modifications or alterations between the US model of the speed measuring device and the model used by the Victoria Police. The request was denied. Upon application, a magistrate ordered that the prosecution provide to J. documentation to explain detail or describe any modification made to the device which were not already known. Upon application by originating motion to quash the order—

HELD: Application dismissed.

1. The inherent power of a court is to be exercised to achieve justice according to law in the particular case and extends, in the absence of any other power, to requiring an informant to produce documents.

2. In the present case, the relevant legislation and regulations, while drafted to facilitate proof of the speed of the driver, also leaves to the driver the right to challenge the alleged speed. The legislation envisages that it is open to a defendant to challenge the accuracy of the result recorded and one way in which this can be done is to lead evidence about the margin of error in any equipment or by pointing out some deficiency in the device which may have been overlooked by the authorities prescribing it. It would not be contrary to the intention of the statutory scheme for a magistrate to have power to require that documentary information be made available to a defendant for the purpose of that defendant's defence.

3. Accordingly, it would have been contrary to the interests of justice for the prosecuting authority to withhold relevant documentary information concerning relevant aspects of the radar device, its testing, sealing and its use.

Glare v Bolster [1993] VicSC; (1993) 18 MVR 53, distinguished.

Per Smith J:

> "... In light of these provisions counsel submitted that the order was made without power because it was contrary to the statutory scheme. I am not persuaded by the plaintiff's argument. It seems to me, that the legislation and regulations while drafted to facilitate proof of the speed of the driver also leaves to the driver the right to challenge the alleged speed. It would not be contrary to the intention of the statutory scheme for a magistrate to have the power to require documentary information to be made available to a defendant for the purpose of that defendant's defence. The plaintiff also places reliance on the reasons for decision of Beach J in the matter of *Glare v Bolster* [1993] VicSC; (1993) 18 MVR 53. In that case his Honour was considering an originating motion to quash a magistrate's decision refusing to set aside summonses served on the Chief Commissioner of Police, the Assistant Commissioner of Police and a company, seeking documents relating to an automatic detection device. The principal ground for allowing the application and quashing the summonses was that on proper analysis it was not shown that it was "on the cards" that production of the documents would materially assist the defence and his Honour relied on *Alister v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97; and *R v Saleam* (1989) 16 NSWLR 14; 39 A Crim R 406 to support that conclusion. He also held that the summonses constituted a fishing expedition. Particularly, relevant to this proceeding, however, is the following passage (at p65) on which the plaintiff relies in this case: ...
>
> ... Whatever may be the case with the Gatsometer MRC system under the Act, it cannot, in my view, with respect, be said that the legislature itself has approved the Kustom KR-10SP. The legislature delegated to the executive the task of prescribing radar devices and delegated to the executive the task of prescribing reliable testing procedures. The legislation also envisaged that it will be open to a defendant to challenge the accuracy of the result recorded and one way in which this can be done is to lead evidence about the margin of error in any equipment or by pointing out some deficiency in the device which may have been overlooked by the authorities in prescribing it. I am not persuaded, therefore, that his Honour's *dicta* assist me in this matter.

> ... The inherent power (or implied power) which a court possesses, including a Magistrates' Court, is concerned with adjectival law which includes pre-trial procedures and I do not have any difficulty with the proposition that the inherent power of the court would extend in the absence of any other power to requiring the informant to produce documents. That power is to be exercised to achieve justice according to law in the particular case. Thus, it seems to me that the Magistrates' Court had inherent power to make the order in question. It seems to me that the same consequence flows for the plaintiff in relation to the second basis advanced – s136 of the Act. The plaintiff does not submit that there is provision in this or any other Act to the contrary of s136. The power that is given by the legislation is to make orders which the court considers conducive to the "effective, complete, prompt and economical determination" of the particular proceeding. It seems to me that that power extends to a power to give a direction to an informant to supply documents.
>
> Ultimately, we are concerned with the due administration of justice in the criminal justice system. In prosecutions of the kind considered below, the legislature has given the prosecution significant assistance in proving its case and, as a result, a substantial forensic advantage. In the vast majority of cases the defendant will not contest the result of the radar test. In those cases where a defendant wishes to contest the result, however, it would, in my view, be contrary to the interests of justice for the prosecuting authority to withhold relevant documentary information concerning relevant aspects of the radar device, its testing, sealing and its use if that is sought by the accused.
>
> If it reveals nothing to detract from the evidence of the device's reading, no harm is done from the prosecution's point of view. If it reveals facts which do so detract, then the accused is entitled to know. To permit the withholding of such information would be to allow a situation to exist where, in most cases, the *prima facie* proof intended by Parliament would become conclusive. That was not Parliament's intention and the courts should not permit such a situation to exist without the plainest statutory direction. For the above reasons I have come to the conclusion that the plaintiff's application should fail."

Per Smith J in *Gaffee v Johnson & Anor* [1996] VicSC 604; (1996) 90 A Crim R 157; MC 16/1997, 23 December 1996.

(f) Order for demonstration by police informant of speed measuring device at scene – whether such order conducive to the effective determination of the proceeding

At a mention hearing of a charge of speeding, the magistrate made an order that the police informant and the defendant's expert witness visit the scene for the police officer to demonstrate how the speed measuring device was used to check the defendant's speed and how the police officer was positioned. Also, that the speed measuring device used on the particular occasion be available for testing. Upon appeal—

HELD: Orders quashed.
The magistrate had no power to make the orders. The orders were outside the process of the hearing of a contested charge. They were wide, oppressive and not in the interests of justice and did not fall within the orders permitted by s136 of the *Magistrates' Court Act* 1989 for the conduct of the proceedings.

Per Hampel J:

> "... The driver's speed was assessed by a hand held Kustom Falcon radar device at 148 kilometres per hour in a 100 kilometre per hour speed zone. The driver was asked his reasons for speeding and invited to inspect the radar reading. He replied, "No, I believe you. Can't you do something? I need my licence for work. I own a business."
>
> ... The solicitors for the driver complained that the particulars were inadequate and ultimately the matter was raised before the Magistrate at a mention. Counsel for the driver made an application for further and better particulars and there was some discussion about the provision of the same radar gun which had been used by the plaintiff. The defence called an expert, Mr Leigh-Jones, who suggested that he would like to go to the site and would be happy to have the police officer demonstrate where he was and how he used the radar gun, even if it were done with a different gun. The Magistrate suggested that the police officer could take the expert to the site and give a demonstration. The prosecutor objected to this course but finally asked what the officer would be required to do. The Magistrate said, "Once he's at the site he can do what he wants where he wants. He should show Mr Leigh-Jones how he was seated and which way he pointed the gun. If the prosecution can find the gun in question then O.K." Over the prosecutor's further objections the Magistrate made an order as follows:–
>
> > "That before the next mention date the informant and Dr Leigh-Jones meet at a mutually convenient time at the site where the informant states he checked the speed of the defendant's vehicle and for the informant to demonstrate to the best of his recollection how the device was

> used to check the defendant's speed including how the informant was positioned. This exercise should take no longer than five minutes. The prosecutor undertakes to use his best endeavours to ensure that the speed-measuring device, the subject of these proceedings, will be available for testing by the informant at the time mutually agreed as between him and Dr Leigh-Jones."
>
> The Magistrate made further orders about the records and testing history of the radar device which was used to assess the driver's speed. It was submitted on behalf of the plaintiff that the Magistrate erred in law in making the order for a number of reasons. Some of them were that the order is vague and oppressive, it is beyond power as it orders activities outside the court-room, that it would be ineffective because there would have to be evidence about what occurred at the demonstration in case of a dispute, that it would have no forensic benefit as it would not be a demonstration in the presence of the court and that it was contrary to the practice and procedure of a court hearing a summary prosecution in an adversary system.
>
> It was further submitted that although the court had power to regulate its own procedure and could give directions pursuant to s136 of the *Magistrates' Court Act* for the conduct of the proceedings which it thinks conducive to its "effective, complete, prompt and economical determination", the order made by the Magistrate was outside those powers and not conducive to a proper determination of the issues between the parties. It was also argued that the proper procedure, if the Magistrate thought that the particulars given were not sufficient, was to hold a view and perhaps even a demonstration in the presence of the court. Alternatively, the questions about which further particulars were sought could have been the subject of evidence and cross-examination as part of the hearing of the Information.
>
> I agree with those submissions and find that the Magistrate had no power to make the orders he did. Such orders are outside the process of the hearing of a contested Information. They are wide, oppressive and not in the interests of justice when ordered to be done not as part of the hearing by way of a view and/or evidence. Such orders do not fall within the orders permitted by s136 of the *Magistrates' Court Act* for the conduct of the proceedings. Rather they are orders for investigation and demonstration outside the proceedings. Although I can understand that the Magistrate was attempting to provide a practical solution, in my opinion, his method and the orders made to achieve that practical result were outside the adversary process and beyond power. They cannot be allowed to stand. I therefore make the orders sought in the Summons on the Originating Motion and quash the order of the Magistrates' Court."

Per Hampel J in *Knowles v Haritos & Anor* [1998] VicSC 193; MC 19/1998, 29 April 1998.

(g) Failure in charge to specify defendant was driving in a speed zone – defendant convicted

1. Regulation 1001(1) of the *Road Safety (Traffic) Regulations* 1988 sets out a number of separate and distinct speed regimes which apply depending on the circumstances. Each of the sub-paragraphs of Regulation 1001(1) should be regarded as creating and defining distinct offences.

2. The law is clear that an information must describe the offence and do so in a way in which the essential ingredients are spelt out. In the present case, the defendant and the court would not have been able to identify the essential elements to be proved from the charge and information but would have had to obtain the Regulations and analyse them to establish all the elements of the offence to be proved.

3. Where an information failed to specify what speed limit was applicable to the section of the highway referred to in the charge and alleged that the defendant breached Regulation 1001(1)(a) but the evidence disclosed a breach of Regulation 1001(1)(c), it was not open to the magistrate to find the defendant guilty of a breach of Regulation 1001(1)(a).

Per Smith J:

> "... 2. The "charge and summons" stated the charge in the following terms:
>
> > "the defendant at Loch on 09/04/1998 being the driver of a vehicle on a highway namely the South Gippsland Highway did exceed 60 KPH between the Loch fire station and Smith Street."
>
> ... 7. Counsel for the appellant submits that the charge was defective (question (a)) because it failed to allege an offence known to the law. Counsel argues that the elements of the criminal offence must be described with sufficient particularity for the essential elements of the offence to be identified. In this instance he argues that it failed to do so because it failed to state the additional fact on which the choice of speed limit depended — e.g., "in a built up area" or "in a speed zone" – and the relevant speed limit.

... 9. Critical to the resolution of both questions (a) and (b) is consideration of the question whether Regulation 1001(1) lists a series of mutually exclusive offences. Counsel for the appellant, Alwer, submits that it does and relies upon the expressions in sub para.(a) and (b) of Regulation 1001(1) together with the listing of the different types of locations and speeds as pointing to a decision by those responsible for the regulations to set up separate and distinct regimes for each situation described in each paragraph. Those situations are: a highway in a built up area that is not subject to a speed zone, local traffic precinct or a shared zone; a highway not subject to a speed zone or in a built up area; a speed zone, local traffic precinct areas and shared zones.

... 17. It was common ground that sec 27 of the *Magistrates' Court Act*, does not remove the obligation to identify the essential factual ingredients of the offence (see *John L Pty Ltd v Attorney General New South Wales*, above, at 519 and the cases there cited including *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467 at 486-487; [1938] ALR 104). In seeking to apply s27, however, the respondent is faced with a situation where the charge and summons did not describe the offence in the words of the regulations; for it omits words of the regulation that spell out an essential element. This was, in effect, recognised by counsel for the respondent who submits that, in any event, the missing ingredient was to be implied. He cites the case of *Bell v Dawson* [2000] VSC 169; (2000) 114 A Crim R 26; (2000) 31 MVR 111, 9 May 2000, Balmford J. It seems to me that more is required here than implication to deal with the omission (cf *Bell v Dawson*, above). It is true that the description of the offence in referring to it being committed "on a highway" draws attention to 1001(1)(a) but that is an expression that could be used in respect of other offences under Regulation 1001(1)(a) (see definition of "highway", Reg. 105). In my view s27 does not assist the respondent.

18. Counsel for the respondent also draws attention to the fact that Regulation 1001(1)(a) is referred to in the charge and summons in the section set aside for the description of the law under which the charge is brought. It is put that reference to those regulations made it clear to the accused and the magistrate what elements had to be proved and removed any uncertainty in establishing the essential ingredients of the offence to be proved.

19. While this reference provided information from which the elements could be identified and in that sense protects the accused and informs the court, it seems to me that the law is clear that the information must describe the offence and do so in a way in which the essential ingredients are spelt out. Considering the rationale behind the law, the accused and the court would not be able to identify the essential elements to be proved from the charge and information but would have to obtain the regulations and analyse them to establish all the elements of the offence to be proved. The law's requirements and the rationale underlying it prevent the respondent's above solution being adopted. I note that the strict approach of the law and the justification for that approach were discussed by Kirby J in *Walsh v Tattersall* [1996] HCA 26; (1996) 188 CLR 77; [1996] 139 ALR 27, 51, 52; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4. While in the circumstances of this case, a less strict approach may not have in fact caused an unfair trial, that is not the test. The law is of general application and must be applied.

... 22. I have already indicated that in my view Regulation 1001(1) attempted to set out mutually exclusive provisions for controlling speed.

23. Ultimately, the problem facing the respondent's argument is that it requires the addition of words to the statement of the offence in Regulation 1001(1)(a), words which a drafter could obviously have included if it was intended that it should have the meaning now alleged by the respondent.

24. Accepting that the appellant was driving in a speed zone, the relevant offence was breach of Regulation 1001(1)(c). Because he was driving in a speed zone he could not breach Regulation 1001(1)(a). Therefore it was not open to the learned magistrate to find him guilty of breach of that regulation. ..."

Per Smith J in *Alwer v McLean* [2000] VSC 396; (2000) 32 MVR 125; (2000) 116 A Crim R 364; MC 17/2001, 29 September 2000.

(h) Re-opening prosecution case – defendant charged with speeding – informant's written statement tendered by consent – no evidence given that signs complied with road rules or a description of such signs

K. was charged with an offence of driving a motor vehicle at a speed over the limit as indicated by the speed limit signs. Before the police informant commenced his evidence, defence counsel indicated he had no objection to the informant's written statement being tendered in evidence. At the close of the prosecution case, defence counsel called no evidence from K. or any witness but submitted that the informant had not given evidence that the speed limit signs complied with Road Rule 21 nor a description of such signs. The prosecutor applied to re-open his case. In granting the application the magistrate stated that in view of

the manner in which the informant had been invited to adopt his statement rather than give evidence in the normal manner sufficient grounds existed for the Court to exercise its discretion. K. was subsequently convicted. Upon appeal—

HELD: Appeal dismissed.

1. Leave to re-open should only be granted in very special or exceptional circumstances. There is a general prohibition with permissive exceptions. Very special or exceptional circumstances will not be constituted if the occasion for calling the further evidence ought reasonably to have been foreseen.

R v Chin [1985] HCA 35; (1985) 157 CLR 671; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495, applied.

2. In the present case, the events were unusual. The prosecution had been told before the hearing that strict proofs would be required but then after a contest about the admissibility of the certificate in relation to the speed detection device, defence counsel had invited use of the informant's statement. This conveyed the impression — whether intentionally or otherwise — that so much of the statement as was ultimately relied upon with respect to the speed limit signs was not in issue. It was open to the magistrate to conclude that in the circumstances of the hearing, the foreseeability that proof of the design and content of the speed limit signs was required had disappeared.

Per Ashley J:

"... 2. The question of law raised by this appeal, according to a Master's order made 2 August 2001, is whether the learned magistrate erred in allowing the prosecutor, after the defence had closed its case, to re-open the prosecution case to lead evidence as to the description of speed limit signs and as to whether the signs complied with the road rules.

... 5. The appellant, Johann Kurzbock, was charged that

> "at Bayswater on 4 January 2001, being the driver of a vehicle on a length of roadway namely the Mountain Highway, [he] did drive at a speed over the speed limit being 70 kph as indicated by the speed limit signs."

6. The charge and summons identified the law under which the appellant was charged as "Road Rule 20".

... 9. The transcript of the proceeding shows that when the respondent, as informant, was first called, challenge was raised to the tender of a certificate which purported to show that the laser speed detection device used by him had been tested and sealed as required by s79 of the *Road Safety Act* 1986. Proof of that matter was necessary in order that the reading made by the device constitute proof, in the absence of contrary evidence, of the speed of the appellant's vehicle at the relevant time.

10. That objection was eventually rejected. So also was a submission that the certificate was faulty because, although it referred to testing conducted before the date of the alleged offence, it bore a date subsequent to the date of the alleged offence.

11. Following that skirmish the respondent was recalled. Before he could be asked a full question counsel for the appellant said this:

> "... sorry to interrupt my learned friend your worship but just to save your worship a lot of writing and a lot of speaking by the Informant I have no objection if the Informant simply wishes to tender his statement which I have received under the prehearing disclosure rules and speak to the accuracy of that on his oath. If that suits the Prosecution."

... 26. That takes me to the circumstances in which, on the authorities, the prosecution may be given leave to re-open its case. It was contended for the appellant and accepted by the respondent that leave should only be granted in very special or exceptional circumstances. There is a general prohibition with permissive exceptions. See *Shaw v R* [1952] HCA 18; (1952) 85 CLR 365; [1952] ALR 257; *Killick v R* [1981] HCA 63; (1981) 147 CLR 565; 37 ALR 407; 56 ALJR 35; *Lawrence v R* (1981) 38 ALR 1; and *R v Chin* [1985] HCA 35; (1985) 157 CLR 671; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495.

... **Resolution of the Appeal**

32. In my opinion the appellant has not shown that the learned magistrate's discretion miscarried. His Worship evidently and correctly recognised that exceptional circumstances were required before he should permit re-opening. In substance he decided that the course of the hearing which led to the occasion for calling the evidence was not such as should reasonably have been foreseen – whatever

might have been the position before the hearing commenced. That was the application, in particular circumstances, of a recognised exception to the general prohibition against re-opening. Individual cases have stretched the conception of what should reasonably be foreseen very far. Something may be reasonably foreseen, it has been said, although it is unexpected. Even so, it is the particular circumstances of the individual case which must be considered. More than that, this court is called upon to consider the exercise of a judicial discretion in those particular circumstances.

33. Further, his Worship said nothing about fairness. It is very unlikely that he did not consider it, for it provides a rationale for the very special circumstances test. But assume that he gave it no discrete consideration. Even so, I consider that it assists the appellant not at all. In my opinion there was much to commend the pertinent submission of counsel for the respondent. Moreover, the submissions made by counsel for the appellant to the learned Magistrate as to prejudice focussed upon particular considerations; and in that connection should reasonably have been regarded as entirely unconvincing.

34. So, counsel did not suggest that in other circumstances he would have called evidence concerning the signs. He did submit that "it (*sic*) could instruct my solicitor to call an expert in the laser device". But, as he told the Magistrate, he had earlier informed the prosecutor that the appellant was not calling an expert. I add, though the Magistrate was not so informed, that counsel told me that no expert was on hand at the Magistrates' Court on 13 July. He also submitted to the Magistrate, referring (as he claimed) to the appellant, that he could have called the appellant to give evidence. But about what? He did not suggest to the magistrate that such evidence would have related to the speed limit signs. Before me, he made it clear that the signs would not have been a topic addressed by the foreshadowed evidence; but rather the speed of the vehicle. That evidence could have been adduced regardless of the state of the evidence concerning the signs. But it was not. Having regard to the attacks made on the laser gun evidence, one of which ultimately proved to be successful, there was good reason why the appellant would have been kept away from the witness box. The learned magistrate was entitled to treat the submission that, had the presumed necessary evidence been adduced from the respondent concerning the speed limit signs, the appellant might have given evidence, as fanciful. Indeed, I do not think he could sensibly have done otherwise.

35. It is unnecessary, in the circumstances, to make anything but passing mention of the further submissions advanced for the respondent. I say nothing as to whether the exercise of a judicial discretion could be supported, in a s92 appeal, by recourse to a consideration which (let it be assumed) was not in fact brought to account by the decision-maker. That said, there was, I think, substance to the submission of counsel for the respondent that the evidence not called was relevant to an essentially formal proof."

Per Ashley J in *Kurzbock v Hallett* [2001] VSC 459; (2001) 126 A Crim R 125; MC 30/2001, 3 December 2001.

(i) Certificate produced as to the prescribed detection device and photographs showing details including the vehicle involved, the speed limit and the speed – dismissal of charge

1. The question to be determined in the present case was whether s81(2) of the *Road Safety Act* 1986 ('Act') meant that a certificate under s83A of the Act that stated the speed limit without also stating the basis upon which the speed limit was determined was sufficient to prove the speed limit.

2. Section 81(2) of the Act provides that “evidence of the speed limit at [the relevant] time and place as indicated or determined on that occasion by an image or message produced by a prescribed process when used in the prescribed manner is … proof of the speed limit on that occasion”. It is clear from these words that Parliament intended that the speed limit can be proved by the relevant image or message. Such evidence is not necessarily conclusive. However, in the absence of evidence to the contrary, it establishes the speed limit. That section operates according to its own terms. Where its requirements are satisfied, the speed limit shown on the image or message must be accepted as being sufficient proof of the speed limit in the absence of evidence to the contrary.

Ciorra v Cole [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547; MC 31/2004, distinguished.

3. Accordingly, where a certificate pursuant to s83A of the Act was tendered in evidence which showed the speed limit on an image, a magistrate was in error in dismissing a charge of speeding on the ground that there was no evidence of the speed limit at the time and place of the alleged offence.

Per Kyrou J:

"... 2. The learned Magistrate dismissed the charge on the ground that the basis upon which the applicable speed limit is to be determined is a fact which must be proved by the prosecution and that that fact had not been proved.

... 4. Ms Juchnowski was charged with a contravention of rule 20 of the *Victorian Road Rules*, which relevantly provides as follows: "A driver must not drive at a speed over the speed-limit applying to the driver for the length of road where the driver is driving". Rules 21 to 25 of the Road Rules set out the basis upon which the speed limit for a length of road is determined. For example, rule 21(1) provides that the speed limit applying for a length of road to which a speed limit sign applies is the number of kilometres per hour indicated by the number on the sign. Rule 22 deals with speed-limited areas, rule 23 deals with school zones, rule 24 deals with shared zones and rule 25 deals with default speed limits.

5. It is alleged that on 7 October 2006 at 3.58 pm, Ms Juchnowski was the driver of a vehicle travelling west on Flinders Street and that, at the intersection with William Street, she drove over the 50 kilometres per hour speed limit applicable to that length of road. The detected speed of the vehicle allegedly driven by Ms Juchnowski was 63 km/h, and the alleged speed was 61 km/h.

... 7. The charge was heard on 15 October 2007. A certificate pursuant to s83A of the *Road Safety Act* 1986 (Vic) ("RS Act") was tendered in evidence. The certificate stated the following:

> (a) On 07/10/2006 the REDFLEXred-speed HDX system was a prescribed detection device for the purposes of Section 66 of the *Road Safety Act* 1986 and was tested, sealed and used in the prescribed manner and produced the images produced in printed form in paragraph (c)
>
> (b) The printed images and messages, set out in paragraph (c) were produced by a process prescribed for the purposes of Sections 81(1) and 81(2) of the *Road Safety Act* 1986
>
> (c) Printed Images and Messages: ...

... 17. I was informed by the parties that there was no dispute on the facts. In particular, the respondent did not dispute that s66 of the RS Act applied to a contravention of rule 20 of the Road Rules and that the s83A certificate complied with all applicable requirements. It was common ground before me that the only issue to be determined in this appeal is whether s81(2) of the RS Act meant that a s83A certificate that stated the speed limit, without also stating the basis upon which the speed limit was determined, was sufficient to prove the speed limit.

... 29. Section 81(2) provides that "evidence of the speed limit at [the relevant] time and place as indicated or determined on that occasion by an image or message produced by a prescribed process when used in the prescribed manner is ... proof of the speed limit on that occasion". It is clear from these words that Parliament intended that the speed limit can be proved by the relevant image or message. Such evidence is not necessarily conclusive. However, in the absence of evidence to the contrary, it establishes the speed limit.

30. Section 81(2) provides that it does not affect any other mode of proof. Accordingly, the prosecution can choose to prove the speed limit by other means. If the mode of proof selected is oral evidence, then in accordance with *Ciorra*, the evidence must establish the speed limit and the basis upon which it was determined. However, the requirement that the basis upon which the speed limit is determined must be the subject of evidence where proof is provided through oral evidence, does not apply to proof under s81(2). That section operates according to its own terms. Where its requirements are satisfied, the speed limit shown on the image or message must be accepted as being sufficient proof of the speed limit in the absence of evidence to the contrary.

31. The structure of s81 of the RS Act, and its nature as a facilitative provision (as described above), strongly suggests a legislative intention that s81(2) provide a complete means of proving an applicable speed limit, without the need to prove the basis upon which the speed limit is determined. Section 81(1) of the RS Act provides a mechanism for proving the speed, while s81(2) provides a mechanism for proving the speed limit. Collectively, those sub-sections in s81 provide means by which two of the essential elements of the offence in rule 20 of the Road Rules can be proved. It would be odd if, despite the legislative intention that appears from this drafting, it were necessary for a prosecutor to additionally prove the basis upon which a speed limit was determined where s81(2) provides a *prima facie* means of proving the speed limit itself. In my opinion, on a proper construction of s81(2), this additional proof is not required.

32. In forming the views expressed above, I have had regard to the principle that, in interpreting a penal statute, "the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject":

Beckwith v R [1976] HCA 55; (1976) 135 CLR 569, 576; (1976) 12 ALR 333; 51 ALJR 247; 28 ALT 39 (Gibbs J). This statement was endorsed by the High Court in *Deming No 456 Pty Ltd v Brisbane Unit Development Corp Pty Ltd* [1983] HCA 44; (1983) 155 CLR 129, 145; (1983) 50 ALR 1; 58 ALJR 1 and *Waugh v Kippen* [1986] HCA 12; (1986) 160 CLR 156, 164; (1986) 64 ALR 195; 60 ALJR 250; [1986] Aust Torts Reports 80-004. This is not a case where, following the application of the ordinary rules of construction, there is any ambiguity or doubt about the meaning of s81(2) of the RS Act.

33. It follows from what I have said above that my answer to each of the three questions of law posed in the notice of appeal is "yes". ..."

Per Kyrou J in *DPP v Juchnowski* [2008] VSC 181; [2008] VSC 181; MC 30/2008, 3 June 2008.

(j) Failure to use the words "speed limit" in charge – whether necessary to designate the means by which speed to be determined

The defendant was charged that being the driver of a vehicle on a highway namely the Mornington Peninsula Freeway did exceed 100 kilometres per hour (alleged speed 145km/h). The charge specified that the offence was in breach of the *Road Safety (Traffic Regulations)* 1988, r1001(1)(b). At the time of the alleged offence, these Regulations had been revoked by the *Road Safety (Road Rules) Regulations* 1999 ('Road Rules'). At the hearing in the defendant's absence the prosecutor applied to amend the charge by substituting Road Rule 20 of the Road Rules for the reference to the revoked Regulations. This amendment was allowed by the magistrate and after hearing evidence convicted the defendant. Upon appeal—

HELD: Appeal allowed. Remitted to the magistrate for further hearing according to law.
1. The source of the power to amend contained in s50 of the *Magistrates' Court Act* directs the court not to allow an objection to the form or substance of the charge. The power must be exercised judicially and is subject to limitations. But compliance with the rules of criminal practice that the charge set out the essential ingredients of the offence, or that the offence be alleged with sufficient particularity to reveal the manner in which it is said to have been committed, is not a pre-condition to the power's proper exercise. Where a charge is deficient in either of these respects, the circumstances may justify the amendment of the charge. The power to amend enables the court to see that these common law requirements are met if the charge is not to be dismissed. The reference to the repealed regulation in the present charge was not an incurable defect if the description of the offence in the charge disclosed the nature of the offence. The nature and substance of the offence under the repealed and current regulation was essentially the same. The appellant would have been in no doubt that he was charged with the offence of driving in excess of the speed limit. It was open to the Magistrate to make the amendment to substitute Road Rule 20 for the repealed regulation.

2. It is sufficient that a charge alleging a breach of Road Rule 20 employ the words, or words similar to, the words used in Road Rule 20. Though the words "the speed limit of" did not precede the words "100 kilometres per hour" in the charge that is the only reasonable meaning that could be given to the words used. Interpreting the charge in the manner in which "a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context" left no doubt as to what the draftsman intended.

3. The essence of an offence under Road Rule 20 is that a driver has driven at a speed over the speed limit. An essential factual ingredient of the offence is the speed limit which the driver is said to have exceeded. The speed limit which applies to the driver will depend upon which of Road Rules 21 to 25 apply. As the evidence disclosed that it was speed limit signs which determined the speed limit referable to the appellant's driving, it would have been preferable that the charge specified that 100 kilometre per hour speed limit signs applied. The defence would be entitled to particulars of such a matter if it was not referred to in the charge. There is a distinction between legal elements of the offence, essential factual ingredients and particulars required by the defendant to prepare his or her defence which bear upon the validity of the charge as expressed. It was not necessary that the charge specify that 100 kilometre per hour speed limit signs applied. The basis upon which the speed limit is to be determined need not be set out in the charge. Though it be a fact necessary to be proved by the prosecution, it is not an essential ingredient for the purpose of identifying the offence. The submission that the charge was a nullity because of the absence of these words cannot be sustained. The offence and its essential elements were sufficiently identified in the charge.

4. Whether or not the amendment should be viewed as resulting in a new or different charge, justice required that it should have been served upon the defendant in its amended form. Until the prosecutor applied for an amendment the defendant was entitled to assume that the case which would be presented by the prosecution and which he had to answer was that as specifically pleaded.

The defendant was entitled to an opportunity to be heard on the charge as amended. Accordingly, the magistrate was in error convicting the defendant in circumstances where the defendant had not been served with the amended charge.

Per Redlich J:

"1. The appellant appeals against an order made by the Magistrates' Court at Frankston on 5 February 2004 whereby the Court convicted the appellant of driving in excess of the speed limit and imposed a fine of $300 with $35 costs and suspended the appellant's driver's licence for a period of six months.

2. The charge stated that the appellant's driving was in breach of the *Road Safety (Traffic) Regulations* 1988. These regulations had been repealed before the date of the alleged offence. At the commencement of the hearing, the prosecution was permitted to amend the charge to refer to the relevant current regulation which had been allegedly contravened. The Magistrate proceeded to hear the charge and convict the appellant in his absence.

3. This appeal raises for consideration the questions whether the charge was void *ab initio* because it contained a reference to the repealed regulation; whether it was an improper use of the power to amend to substitute the current regulation for the repealed regulation; whether the details of the charge sufficiently referred to the ingredients of the offence and whether the amended charge should have been served on the Appellant.

6. The charge laid against the appellant was said to be a nullity or void *ab initio* on two grounds. First, it was said that the charge did not allege an offence known to the law as the regulation referred to in the charge no longer existed. Second, it was submitted that the details of the charge failed to expressly state that the appellant had exceeded the speed limit and did not specify by what means the applicable speed limit was to be determined.

... 36. The authorities extensively referred to in *Nash on Victorian Courts* Vol. 3, para 3.1480-1492 indicate that where a charge sufficiently discloses the offence and where no injustice will be done to the defendant through amendment and the matter proceeding, the Court's obligation is to hear and determine the matter: *Martin v Purnell* [1999] FCA 872; (1999) 93 FCR 181 [29]. Where, as a matter of substance and ordinary language, the offence with which the defendant is charged is clear, the complaint will not be bad. It may be otherwise, if the omission misleads the defendant as to the offence with which he is charged. But amendments to a charge have been refused where to do so would raise an entirely new case for the defendant to answer: *Burvett v Moody* [1909] VicLawRp 23; [1909] VLR 126; 15 ALR 91; 30 ALT 160; *R v Templeton; Ex parte England* [1877] VicLawRp 149; [1877] 3 VLR (L) 305; *Warner v Sunnybrook Icecream Pty Ltd* [1968] VicRp 11; [1968] VR 102 at 105; (1967) 15 LGRA 135; *Meeking v Crisp* (1988) 8 MVR 170 per Crockett J at 177.

... 60. The authorities to which I have referred have in common that, where the details of the charge are sufficient in that the defendant is not left uncertain as to the nature of the offence charged, an amendment to substitute the correct statutory provision will be permitted where no injustice would otherwise be done to the defendant. That is to say an amendment could be made where the charge sufficiently discloses the nature of the offence so that it can be identified as an offence known to the law: *Wickham v Cole* [1957] TASStRp 10; [1957] Tas SR 111, Footnote 16 at 114, notwithstanding that the charge either referred to the wrong provision or referred to none. In such cases the description of the offence sufficiently apprised the defendant of the nature of the offence.

61. If, upon a reasonable reading of the description of the offence, an offence known to the law is disclosed which enables the defendant to identify the nature of the charge, the exercise of the discretion to amend would not have miscarried to correct an error as to the relevant statutory provision or subordinate instrument. The belief of the informant as to the legal basis upon which the charge is laid, as reflected in the provision inserted in the charge, will not affect such a conclusion.

62. It seems, both as a matter of principle and by reference to authority, that the charge suffering from such a defect should not be viewed as a legal nullity or as void *ab initio* because it omits or mis-states the applicable law which creates the offence. (cf New South Wales where a charge is treated as void because there is no power to amend). Such a defect may be cured by amendment. The Court's jurisdiction to entertain the charge is not derived from the correct identification in the charge of the law alleged to be contravened.

63. The reference to the repealed regulation in the charge was not an incurable defect if the description of the offence in the charge disclosed the nature of the offence. The nature and substance of the offence under the repealed and current regulation was essentially the same. The appellant would have been in no doubt that he was charged with the offence of driving in excess of the speed limit. It was open to the Magistrate to make the amendment to substitute Road Rule 20 for the repealed regulation.

... 67. Counsel for the appellant submitted that the charge as amended failed to describe an offence under Road Rule 20. He submitted that the charge failed to specify essential ingredients of the offence in that it did not allege that the appellant drove over any speed limit nor did it state what speed limit was applicable and how it was to be determined. He submitted that no offence known to the law was disclosed by the charge.

... 71. Though the words "the speed limit of" did not precede the words "100 kilometres per hour" that is the only reasonable meaning that could be given to the words used. The respondent further relies on the fact that the charge then specifies the speed at which the appellant is alleged to have travelled, namely 145 kilometres per hour. There is considerable force in the submission of the respondent that an allegation that an offence has been committed by driving in excess of a particular nominated speed implies that the nominated speed is the speed limit applicable. Interpreting the charge in the manner in which "a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context" leaves no doubt as to what the draftsman intended.

... 77. In my opinion, unlike Regulation 1001(1) which by its sub-parts created a series of mutually exclusive offences, Road Rule 20 creates the relevant offence. It is sufficient that a charge alleging a breach of Road Rule 20 employ the words, or words similar to, the words used in Road Rule 20.

78. The essence of an offence under Road Rule 20 is that a driver has driven at a speed over the speed limit. An essential factual ingredient of the offence is the speed limit which the driver is said to have exceeded. The speed limit which applies to the driver will depend upon which of Road Rules 21 to 25 apply. As the evidence disclosed that it was speed limit signs which determined the speed limit referable to the appellant's driving, it would have been preferable that the charge specified that 100 kilometre per hour speed limit signs applied. The defence would be entitled to particulars of such a matter if it was not referred to in the charge.

... 80. There is a distinction between legal elements of the offence, essential factual ingredients and particulars required by the defendant to prepare his or her defence which bear upon the validity of the charge as expressed: *Preston & Gordon v Donohoe* [1906] HCA 43; (1906) 3 CLR 1089; 12 ALR 426, Footnote 65 at 1096; *Taylor v The Environment Protection Authority* [2000] NSWCCA 71; (2000) 50 NSWLR 48, Footnote 14 at 56-57. I do not accept the contention of the appellant that it was necessary that the charge specify that 100 kilometre per hour speed limit signs applied. The basis upon which the speed limit is to be determined need not be set out in the charge. Though it be a fact necessary to be proved by the prosecution, it is not an essential ingredient for the purpose of identifying the offence. The submission that the charge was a nullity because of the absence of these words cannot be sustained.

81. In my view the offence and its essential elements are sufficiently identified in the charge. Had either of the matters raised by question (b) been considered to be of significance, the Magistrate's power to amend under s50 of the Act was available.

... 85. The learned Magistrate had correctly refused to allow the prosecution to proceed on the second charge which had not been served. He should have followed the same course in relation to the amended charge. In *Wickham v Cole* [1957] TASStRp 10; [1957] Tas SR 111 at 118, Burbury CJ stated:

> "... An amendment of substance either to the legal nature of the offence or to the material facts relied upon as the foundation to the charge could not properly be allowed without giving the defendant full opportunity to answer the newly framed charge ..."

86. Whether or not the amendment should be viewed as resulting in a new or different charge, justice required that it should have been served upon the appellant in its amended form. Until the prosecutor applied for an amendment the appellant was entitled to assume that the case which would be presented by the prosecution and which he had to answer was that as specifically pleaded. The appellant was entitled to an opportunity to be heard on the charge as amended: *Parkinson; Ex parte* [1909] NSWStRp 4; 9 SR (NSW) 174; (1909) 26 WN (NSW) 7; *Lovell, Ex parte; Re Buckley* [1938] NSWStRp 12; 55 WN (NSW) 63; (1938) 38 SR (NSW) 153; *Willing v Hollobone (No. 2)* (1975) 11 SASR 118; (1975) 34 LGRA 236; *Garfield v Maddocks* [1974] QB 7.

87. As the answer to question (c) is in the affirmative, the appeal must be allowed and the conviction of the Magistrates' Court at Frankston made on 4 February 2004 quashed. Having heard further from the parties, I order that the matter should be remitted to the Magistrates' Court at Frankston for further hearing according to law."

Per Redlich J in *Ciorra v Cole* [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547; MC 31/2004, 20 October 2004.

(k) A charge identifying an offence under rule 20(1) of the *Road Rules - Victoria* 1999 was defective – whether the magistrate erred in determining that the charge was defective

K. was charged with exceeding the speed limit by driving at a speed of 156km/h in a 100km/h zone. At the hearing before the Magistrates' Court, K. submitted that the charge did not disclose an offence in that it did not stipulate the speed limit applicable to the driver in regard to that length of the road. The Magistrate accepted the submission and dismissed the charge. The Magistrate said that the charge stated that K. drove at a speed over the speed limit applying to the length of road but there was no mention of the speed limit applicable to K. Upon appeal—

HELD: Appeal allowed. Dismissal quashed. Remitted for hearing and determination according to law.

1. The common law requirement of a charge is that it should identify sufficiently the essential ingredients. Notwithstanding the rule of strictness required of prosecutors in drafting criminal charges, a charge should be interpreted in the manner a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context.

DPP Reference No 2 of 2001 [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164, applied.

2. In relation to a charge under r20 of the *Road Rules – Victoria*, the two essential ingredients of a charge are (a) the driving of a motor vehicle and (b) in excess of the speed limit.

Ciorra v Cole [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547; MC 31/2004, applied;

Alwer v McLean [2000] VSC 396; (2000) 116 A Crim R 364; (2000) 32 MVR 125; MC 17/2002, distinguished.

3. It is clear from the charge in the present case that K. would have known that the offence involved:

(a) his driving of a motor vehicle;

(b) on 15 June 2009, on the Wimmera Highway, between Marnoo and Rupanyup, his vehicle was driven at a speed over the speed limit, which was alleged to be 100km/h;

(c) an allegation by the informant that he drove at 156km/h on that occasion; and

(d) an alleged breach of r20 of the Road Rules.

4. It is patent that the essential ingredients of his driving of a vehicle over the prescribed speed limit were contained in the charge and the other details set out in the charge informed K. satisfactorily of the circumstances of the offence.

5. Accordingly, the charge was good in law and the essential ingredients and the relevant facts and circumstances adequately set out. Whilst the reference in the charge to 100km/h being applicable to the road rather than the driver was unfortunate, it could not be doubted that K. was aware that he was being charged in relation to his driving of the motor vehicle, it being alleged that he exceeded the relevant speed limit of 100km/h by driving at 56km/h in excess of the prescribed speed.

Obiter:

(a) Whilst the charge was not in the words of the Road Rules, it was described in similar words so as to be sufficient for the purpose of s27)1) of the *Magistrates' Court Act.*

(b) A charge which lacks an essential element of the alleged offence is defective and, at common law, may be described as a nullity. If, however, the true nature of the offence is apparent from the face of the charge, and the defendant has not been misled or otherwise prejudiced by the omission, the charge may be amended under s50 of the *Magistrates' Court Act* (even out of time) to include the missing element on the basis that such an amendment does no more than clarify what is already apparent from the face of the charge.

DPP v Kypri [2011] VSCA 257; (2011) 207 A Crim R 566; MC 27/2011, applied.

The nature of the offence was, or should have been, apparent to K.; he was not misled or prejudiced by the notion of the speed limit being applicable to the roadway. The essential elements of the offence were contained in the charge – accordingly it was capable of amendment.

Per J Forrest J:

"3. The police case was simple. Early on Monday 15 June 2009, Senior Constable Mellington detected

a vehicle being driven by Mr Kirtley travelling at a speed of 158kph on the Wimmera Highway between Marnoo and Rupanyup – said to be a 100kph zone. The speed was alleged to have been monitored by the Senior Constable utilising a "moving mode radar speed measuring device".

The charge

4. The charge and summons was in the form prescribed by the *Magistrates' Court (Criminal Procedure) Rules* 2006, Schedule 3 Form 7. It set out Mr Kirtley's address, date of birth, the registration number of the vehicle and his licence number. Under the heading "Details of the charge against you", the description in relation to "what is the charge" read as follows:

> The defendant at Rupanyup on 15/06/09 being the driver of vehicle on the length named Wimmera Highway did drive at speed over the speed limit applying for the length of road to which a speed limit sign of 100km/h applied between Marnoo and Rupanyup. Detected speed 158km/h. Alleged speed 156km/h kph.

In the section of the charge entitled "Details of the charge against you", the answer to the question "under what law?" was "State Regulation P2(28/10/99) Road Rules – Victoria", and then r20 was identified as the relevant "section/clause".

... 8. ... At the commencement of the hearing, counsel made a submission to the Magistrate that the charge did not disclose an offence of law. In a nutshell, his point was:

> As specified, that charge does not disclose the offence under the law. It doesn't stipulate the speed limit applicable to the driver in regard to that length of road.

He elaborated, marginally, by asserting that the charge does not specify the essential element said to be that of the speed limit applying to the driver as opposed to the speed limit applying to the roadway – the wording employed on the charge.

... 14. It was not in issue that the appropriate test for determining the validity of the charge is that laid down by the common law; it was not argued by the Director that s27 of the *Magistrates' Court Act* 1989 removed or affected the prosecutor's common law obligations in relation to the essential ingredients of a charge.

... 20. In my opinion, the submission made on behalf of the Director – that the two essential ingredients to a charge under r20 are (a) the driving of a motor vehicle (b) in excess of the speed limit – should be accepted.

... 25. It is clear from the Charge on its face that Mr Kirtley must have known that the offence involved:

> (a) his driving of a motor vehicle;
> (b) on 15 June 2009, on the Wimmera Highway, between Marnoo and Rupanyup, his vehicle was driven at a speed over the speed limit, which was alleged to be 100 km/h;
> (c) an allegation by the informant that he drove at 156 km/h on that occasion; and
> (d) an alleged breach of r20 of the *Road Rules*.

26. It is patent that the essential ingredients of his driving of a vehicle over the prescribed speed limit were contained in the charge and the other details set out in the charge informed him satisfactorily of the circumstances of the offence.

27. I should add that even if Mr Kirtley's submission was accepted as to the essential elements of the offence, on any sensible interpretation the charge gave him sufficient information to know that it was his driving in relation to an applicable speed limit which constituted breach of the Rule. The inelegant drafting of the charge did not, in my view, obscure the core elements of the offence.

28. Finally I should mention, with respect to the Magistrate, that his Honour's reliance upon *Alwer* was misplaced for the reasons set out by Redlich J in *Ciorra v Cole* [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547. The distinguishing feature is the difference between the terms of the earlier *Road Safety (Traffic) Regulations* 1988, the subject of *Alwer* and the *Road Rules*, applicable in *Ciorra* and in this case. It suffices to note that reg 1001(1), the relevant regulation in *Alwer v Mclean* [2000] VSC 396; (2000) 116 A Crim R 364; (2000) 32 MVR 125, created by its sub-parts a series of mutually exclusive offences. To the contrary, r20 of the *Road Rules* creates one relevant offence with the relevant speed limit being identified by reference to rr21, 22, 24 and 25.

29. I have read the submissions put to the Magistrate and his decision carefully; it is a pity that his Honour was referred to *Alwer* which was essentially irrelevant to this debate and that *Ciorra*, which had been provided to his Honour and which dealt specifically with r20, was not identified as providing

the answer to Mr Kirtley's submissions. Part, if not the whole of this problem, arose as a result of this point being taken at the last moment in a busy traffic court. It should have been identified earlier (at one of the contest mentions) thus allowing the Magistrate and the prosecutor time to research the point, not debate it in an *ad hoc* fashion with all the attendant pressures encountered in a rural magistrates' court dealing with a large case load.

30. In summary, the charge was good in law and the essential ingredients and the relevant facts and circumstances adequately set out. True it is that the reference to 100km/h being applicable to the road rather than the driver was unfortunate, but it cannot be doubted that Mr Kirtley was aware that he was being charged in relation to his driving of the motor vehicle, it being alleged that he exceeded the relevant speed limit of 100km/h by driving at 56km/h in excess of the prescribed speed.

... 38. In my opinion the nature of the offence was, or should have been, apparent to Mr Kirtley; he was not misled or prejudiced by the notion of the speed limit being applicable to the roadway. The essential elements of the offence were, as I have concluded, contained in the charge – accordingly it was capable of amendment. ...":

Per J Forrest J in *DPP v Kirtley* [2012] VSC 78; MC 07/2012, 9 March 2012.

(l) Speeding motor cycle – 147km/h in a 100km/h zone – speeding admitted by motor cyclist – charge found proved – motor cycle licence suspended – no order made in relation to motor car licence – obligation to suspend all driver licences – whether magistrate in error in limiting suspension order to motor cycle licence

Section 28(1)(a) of the *Road Safety Act* 1986 ('Act') provides:

"(1) If a court convicts a person of, or is satisfied that a person is guilty of, an offence against this Act ..., the court—
(a) in the case of an offence of driving a motor vehicle at a speed—
(i) of 130 kilometres per hour or more; ...
must suspend for such times as the court thinks fit ... all driver licences and permits held by that person ...."

D'A. admitted to riding his motor cycle on a road at a speed of 147km/h in a 100km/h zone. The magistrate suspended D'A. from driving for a period of 4 months but limited the order to a motor cycle and purported not to suspend D'A.'s motor car licence. Upon appeal—

HELD: Appeal allowed. Decision set aside. All driver licences and permits held by D'A. suspended for four months.

1. Having regard to the provisions of s28(1)(a) of the Act, there was no power for the magistrate to suspend only the motor cycle licence. Subsection 1(a) required that all licences be suspended.

2. The definition of "Motor vehicle" in s3 of the Act is sufficiently broad as to include "motor cycle". The expanded definition in the *Road Rules (Victoria)* 1999, Rule 19 of "driver" to include "rider" may be taken to apply to s28(1) of the Act.

Per Eames J:

"... 2. ... The respondent was unrepresented before the magistrate. He submitted to the magistrate that were he to lose all licences, his job would be in jeopardy. The respondent, who appeared in person before me, seems a sensible young man, notwithstanding this offence, and he obviously impressed the magistrate. The learned magistrate convicted the respondent and ordered that his licence to ride a motorcycle in the state of Victoria be suspended for a period of four months, effective from 25 May 2001.

... 5. This appeal is brought by the Director of Public Prosecutions to address what is said to be an error in the interpretation of the relevant legislation by the magistrate, specifically in his interpretation of the terms of s28 of the *Road Safety Act* 1986. The Director contends that having regard to the admitted speed of 147 kph, the court's power as to suspension of licences was governed by the terms of s28(1)(a) of the Act, and that provision made it mandatory that all licences be suspended for a period of at least four months. The period of suspension of four months is the minimum applicable period specified under Schedule 5 of the Act, having regard to the fact that the speed was between 40 to 50 kph in excess of the relevant speed limit.

... 9. The relevant provisions of the Act for the purposes of the present appeal are s28(1)(a) and (b).

"(1) If a court convicts a person of, or is satisfied that a person is guilty of, an offence against this Act or of any other offence in connection with the driving of a motor vehicle, the court—

(a) in the case of an offence of driving a motor vehicle at a speed—
(i) of 130 kilometres per hour or more ;
or
(ii) of 30 kilometres per hour or more in excess of that permitted, whether generally or in relation to the particular vehicle or circumstances—
must suspend for such times as the court thinks fit (not being less than the period specified in Column 2 of Schedule 5 ascertained by reference to the speed at which the vehicle was driven as specified in Column 1 of that Schedule), all driver licences and permits held by that person; and

b) in any case but subject to paragraph (a), may suspend for such time as it thinks fit or cancel all driver licences and permits held by that person and, whether or not that person holds a driver licence, disqualify him or her from obtaining one for such time (if any) as the court thinks fit."

There is a discretion given to the magistrate under s28(2):

"(2) If the court is satisfied that the circumstance of the case are so unusual as to warrant it, an order made under sub-section (1)(b) may be limited in its application to a category or categories of motor vehicles and such an order has effect according to its terms and this section applies to such an order with such modifications as are necessary."

Given that the admitted speed here exceeded 130 kph, subsection (1)(a) applied, and thus subsection (2) did not apply. Accordingly, there was no power for the magistrate to suspend only the motorcycle licence. Subsection 1(a) required that all licences be suspended, and the decision of the magistrate was therefore in error.

10. I considered whether s28(1) might not have applied to motorcycle licences at all. The words "driving of a motor vehicle" which appear in that section might suggest that it was not intended that that section apply to the riding of a motorcycle rather than the driving of a motor car. "Motor vehicle" is defined in s3 of the Act, as is "motorcycle", but the definition of "motor vehicle", in my opinion, is sufficiently broad as to include "motorcycle". The use of the word "driving" rather than "riding" must be read in the context of the terms of Rule 19 of the *Road Rules (Victoria)* 1999, which provide:

"Unless otherwise expressly stated in the Road Rules, each reference in the *Road Rules* (except in this Division) to a 'driver' includes a reference to a 'rider', and each reference in the *Road Rules* (except in this Division) to 'driving' includes a reference to 'riding'."

11. The *Road Rules* are incorporated into the Regulations under the Act, by virtue of Regulation 201 of the *Road Safety (Road Rules) Regulations* 1999. The Regulations themselves are authorised by s95 of the Act. Thus, the expanded definition of "driver" to include "rider" may be taken to apply to s28(1) of the Act. It seems to me that the decision of the magistrate was therefore in error and it is apparent that that error should be corrected. ..."

Per Eames J in *DPP v D'Amico* [2001] VSC 434; (2001) 34 MVR 573; (2001) 128 A Crim R 301; MC 02/2002, 8 November 2001.

(m) (i) Medical practitioner attending patient with severe chest pains – possibility of patient dying before hospitalisation – defence of necessity

W., a medical practitioner, who was charged with driving at 91 km/h in a 60 km/h zone, said that he was attending an elderly patient who had complained of chest pains and was unwell. W. formed the opinion that there was a significant risk that the patient might die from coronary problems before hospitalisation and drove accordingly "with a degree of urgency". The magistrate rejected W's defence of necessity. Upon order nisi to review—

HELD: Order discharged.
1. The defence of necessity is available in law as a defence to a *Road Safety (Traffic) Regulations* offence, and the onus of negating such a defence rests on the prosecution.

2. One of the elements of the defence is proportionality, that is, the act done to avoid the imminent peril must not be out of proportion to the peril to be avoided. In the present case, it was open to the magistrate to determine that W's speeding in the circumstances was out of proportion to the peril to be avoided.

Per O'Bryan J:

"... During the hearing, Dr Woodward raised in his defence that he drove his vehicle in excess of the speed limit out of necessity. The circumstances relied upon by way of defence of necessity were

as follows. Whilst performing locum duties, the doctor received a call to attend an elderly patient who had complained of chest pain and was unwell. The patient had declined to use an ambulance. Because the patient had chest pain the doctor formed the opinion that he should proceed "with a degree of urgency" because there was a significant risk that the patient might die from coronary problems. The doctor proceeded "in great haste but at a safe speed". The road conditions were good and there were few other cars on Camp Road. Lighting was good and the road surface was good, it having recently been resealed. The doctor did not pass any other car.

... These grounds may be reduced to two main issues. Firstly, whether the defence of necessity was available in law. Secondly, whether on a consideration of the whole of the evidence the informant negated the defence of necessity.

... One may proceed in the present case upon the basis that the defence of necessity was available in law and that the evidence of the doctor fairly raised as an issue for determination by the court the defence. The onus of proving the offence rested on the informant. It was for the informant to prove all the elements of the offence and to negate the defence of necessity. Mr Hurley, who appeared for the informant, accepted that the onus of negating one or more of the elements of the defence of necessity, rested upon the informant.

... It can be seen that a 'proportionality' test, viewed objectively, is a relevant element which must be negated by the informant. The learned magistrate determined that the informant had negated the third element enunciated in the majority judgment in *R v Loughnan* [1981] VicRp 43; (1981) VR 433 'because the use of excessive speed was not warranted in the circumstances'. In other words, the learned magistrate found that for the doctor to drive at 91 kilometres per hour in all the circumstances was out of proportion to the urgent situation created by the patient's apparent condition as known to the doctor.

Ground (d) is the principal ground upon which Mr Macaulay based his argument. He submitted that the learned magistrate fell into error in determining, as she did, that the act of the doctor in driving at 91 kilometres per hour in all the circumstances was out of proportion to the peril to be avoided. The learned magistrate had the advantage which I do not enjoy of seeing and hearing the witnesses. After carefully perusing the evidence disclosed in the affidavit in support of the order nisi, I am not persuaded that the finding made by the learned magistrate was not open to her.

Whilst the reasons offered to support the decision are convoluted and proceeded perhaps upon an erroneous premise, namely that the defence of necessity was not available because the offence was one of strict liability, the alternative line of reasoning adopted by the learned magistrate really cannot be challenged in this court on the facts. In other words, the finding on the facts was open, in my opinion, to the learned magistrate. She was entitled therefore to reject the defence of necessity. In my view the grounds of the order nisi have not been made out and the order nisi will be discharged with costs."

Per O'Bryan J in *Woodward v Morgan* [1990] VicSC 11; (1990) 10 MVR 474; MC 08/1990, 19 January 1990.

(m) (ii) Speeding due to existence of immediate peril – whether defence of necessity available

W. was charged with exceeding the speed limit. At the hearing the Police informant said that the vehicle's speed was ascertained by the speedometer of the police vehicle and also by the informant's estimation. It was submitted that the evidence of the speedometer reading ought not be accepted as there was no evidence that it conformed with the provisions of s10 of the *National Measurement Act* 1960 (Cth.) ('Act'). W. gave evidence that he was driving his son, a chronic asthmatic, to his treating physician. W. said that his son was suffering a florid asthmatic attack, his lips were blue and his breathing was rapid, laboured and shallow. W. was convicted. Upon appeal—

HELD: Appeal upheld. Conviction quashed.

1. Section 10 of the Act only operates when it becomes necessary to ascertain whether a measurement of a physical quantity has been made in Australian legal units of measurement. Where the accuracy of a speed-measuring device is not challenged as to its capacity to measure in accordance with the Australian legal units of measurement, s10 of the Act does not apply and it is open to the Court to accept the evidence of the reading of the device and/or any estimate of speed given by a person suitably qualified.

2. The defence of necessity applies to the commission of motor traffic offences and involves the elements of commission to avoid irreparable harm, immediate peril and proportion.

R v Loughnan [1981] VicRp 43; (1981) VR 443, applied.

3. Where a speeding motorist was concerned only with getting his gravely-ill son to medical treatment as soon as possible, it was open to conclude that the breach was committed to avoid a real danger and a real possibility of death and that the public good was not so jeopardized as to deny the availability of the defence of necessity.

Per Shadbolt DCJ (NSW District Court):

"... The appellant gave evidence that on that day he was carrying his sick son to his physician. His son, Robert White was suffering a florid asthmatic attack. He is a chronic asthmatic and on this occasion his lips were blue and his breathing was rapid, laboured and shallow. He was under the impression that the area had a speed limit of 80 kilometres per hour. He saw a metal sign with "80" painted on it as he approached the bridge and subsequently he saw a 60 kilometres sign painted on the road. He remembered the conversation as follows: "Do you know that you are doing 85 in a 60 kilometres zone?" to which remark he replied: "I believe the speed limit is 80 kilometres per hour." He said that when he had last checked his speedometer he was doing. 78 kilometres per hour.

... The *National Measurement Act* 1960 (Cth), s10, states:

> "When, for any legal purpose, it is necessary to ascertain whether a measurement of a physical quantity for which there are Australian legal units of measurement has been made or is being made in terms of those units, that fact shall be ascertained by means of, by reference to, by comparison with or by derivation from".

(and thereafter the section lists a number of appropriate and described standards) "and not in any other manner". It is contended by the appellant that as the *Motor Traffic Act* 1909 requires proof of speed beyond that permitted by the Act and regulations and as speed is a combination of two quantities, namely distance and time expressed as kilometres per hour, each quantity must be shown to have been made in terms of the Australian legal unit by reference to an appropriate Australian primary or secondary standard or a State primary or secondary standard in accordance with s10. Only by these means can the Crown prove its case and all other means are to be excluded.

The Crown must, according to Mr White's submissions, prove beyond reasonable doubt that this measurement of physical quantity has been made in terms of the Australian legal unit of measurement. Secondly, no other device for measurement, save those which can be demonstrated to subscribe with s10 may be used for this purpose.

In my view, the section only operates when it becomes necessary to ascertain whether or not a measurement of a physical quantity has been made in terms of those units, namely the Australian legal unit of measurement. Then and then only need it be ascertained by reference to comparison with or derivation from the appropriate standard. It does not preclude the acceptance by the Court of evidence of the reading of the speedometer unless and until that reading is challenged by virtue of a challenge to the accuracy of the instrument in regard to its capacity to measure in accordance with the Australian measures. It certainly does not preclude estimates of speed given by a person suitably qualified.

... The police officers observed 88 kilometres being recorded on their car's speedometer. One of them estimated 85 kilometres and the appellant can only say that before the measurement took place he was doing 78 kilometres per hour. The difference between a 40 per cent excess over the limit and a 30 per cent excess over the limit is not to the point. I am satisfied beyond reasonable doubt that he was exceeding the speed limit set for that part of the road at 60 kilometres per hour.

One further point remains. The appellant maintains that he was acting throughout to get his son to medical treatment as quickly as possible. Doctor Wilkins gave telling evidence of the need of his patient, Mr Robert White, to have proper and timely medical attention when Mr Robert White suffers an attack. He has been a chronic asthmatic all his life and Dr Wilkins maintained that it is a life-threatening condition. I accept all of his evidence.

... It would appear to be a defence in search of the perfect circumstances. They were, of course, to be found in *R v Bourne* [1939] 1 KB 687; [1938] 3 All ER 615 and in my view they are to be found here. That the appellant did not tell the police officer of his plight has, in my view, been satisfactorily explained. It might have caused further delay. I consider his only concern was to get his gravely ill son to hospital. I do not think that he concerned himself particularly with the speed. I do not think his breach was so gross as to create another danger together with the existing one. It was a choice to be made and he made it in order to avert, as he saw it, a real danger and a real possibility of death but I am not of the view that the public good and society's cohesion would be placed in such jeopardy by that choice, that the defence of necessity should not be available.

The Crown in my view failed to negate it and the appeal will be upheld. The formal orders I make is

that the appeal is upheld and the conviction is quashed."

Per Shadbolt DCJ (NSW District Court) in *Re White* 89 FLR 444; (1987) 9 NSWLR 427; 31 A Crim R 194; MC 26/1988, 29 April 1987.

(n) Certificate tendered that amphometer tested dated two months after commission of offence – whether certificate *prima facie* evidence

V. was charged with exceeding the speed limit. At the hearing, the informant gave evidence that V's speed was checked by an amphometer, and he produced a certificate which indicated that the amphometer had been tested one week before the date of the alleged offence. However, the certificate was dated some 2 months after the commission of the offence. Upon a submission of 'no case', the magistrate dismissed the charge. Upon order nisi to review—

HELD: Order nisi absolute.

There is no requirement that the certificate of the testing of the amphometer be brought into existence before the commission of the offence. Accordingly, the certificate represented *prima facie* evidence of the findings made at the test, and should have been acted upon in the absence of any evidence to the contrary.

Per Gray J:

"... The only point taken before the Magistrates' Court concerned the fact that the certificate of testing was dated subsequently to the time of the offence. No other criticism was made of the informant's proof. There was evidence from the informant that the amphometer had been set up as required by Regulation 108(1)(a) of the Regulations. There was evidence that the reading disclosed 89 kilometres per hour as the defendant's speed and that the seal on the amphometer was intact. The certificate which was tendered in evidence, apart from certifying to the testing of the machine, also recited that, following the test, the amphometer had been sealed. The certificate related to amphometer No. SM 6, which was the instrument which was used on the relevant occasion.

There appears to be no requirement in the *Motor Car Act* or any of the regulations which require that the certificate under Regulation 187(1) should be brought into existence before the commission of the offence. It seems to me that the certificate is a document which is intended to be used as part of the prosecution proofs when the matter comes before the Court. There is nothing in the context of the Act or regulations which requires it to be read in a way which makes the certificate ineffective if it is not brought into existence before the commission of the offence. Regulation 187(1) sets out the matters which have to be checked in the course of a test. Section 187A requires that the technical officer shall seal the amphometer if the test confirms the matters required to be satisfied in Regulation 187(1)(i). Regulation 188 provides for the manner in which the amphometer shall be used by police, and there was evidence that those requirements were satisfied on this occasion. Regulation 180(1)(b) provides that the amphometer may he used only if it has been tested in accordance with Regulation 187(1) within a period of six months prior to such occasion. This amphometer had been tested approximately a week prior to the commission of the offence.

Regulation 189 requires that the certificate shall be to the effect of the form, contained in the 70th Schedule of the Act, and the 70th Schedule form is set out at the foot of the Regulations. The certificate in this case conforms to its requirements. The persons who signed the certificate, likewise, are persons who are authorised by s91B(b) of the Act. I feel satisfied that all the procedural requirements were satisfied to enable the certificate to be admitted in evidence. Furthermore, as I have already said, I can find nothing in the Act or Regulations which makes it a requirement that the certificate be given prior to the commission of the offence. As long as a certificate is given which certifies to the testing of the amphometer at a time not more than six months prior to the offence, the requirements are satisfied.

It is not altogether clear from the affidavits what it was which led the Magistrates' Court to be other than satisfied with the certificate. It may be that the Court was influenced by the failure of the prosecuting officer to advance any argument in relation to this issue. Nevertheless, I feel quite satisfied that the Magistrates' Court was in error in dismissing the information on the basis of some lack of satisfaction with the certificate. The certificate was rightly admitted into evidence. It represented *prima facie* evidence of the findings made at the test and should have been acted upon in the absence of any evidence to the contrary."

Per Gray J in *Petersen v Varszeghy* [1983] VicSC 342; MC 50/1983, 29 August 1983.
