31/11; [2011] VSCA 275

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v PISCOPO

Ashley, Weinberg and Tate JJA

6 June, 9 September 2011 — (2011) 210 A Crim R 126; (2011) 59 MVR 200

MOTOR TRAFFIC – DRINK/DRIVING CHARGE – DISMISSAL OF CHARGE UNDER S49(1)(e), *ROAD SAFETY ACT* 1986 (VIC) OF REFUSING TO COMPLY WITH REQUIREMENT MADE UNDER S55(1) TO ACCOMPANY POLICE OFFICER TO A PLACE TO FURNISH A SAMPLE OF BREATH – NATURE OF REQUIREMENT UNDER S55(1) FOR THE PURPOSES OF S49(1)(e) – WHETHER TRIAL JUDGE ERRED IN HOLDING THAT REQUIREMENT TO ACCOMPANY AND REMAIN UNDER S55(1) INTEGRAL COMPONENTS OF A SINGLE COMPOSITE REQUIREMENT – WHETHER JUDGE ERRED IN HOLDING THAT MOTORIST MUST BE INFORMED THAT HE OR SHE IS REQUIRED TO ACCOMPANY POLICE OFFICER TO A PLACE AND TO REMAIN THERE UNTIL A SAMPLE OF BREATH IS FURNISHED AND CERTIFICATE IS GIVEN OR UNTIL 3 HOURS AFTER THE DRIVING, WHICHEVER IS SOONER – 'TO ACCOMPANY' AND 'TO REMAIN' TWO DISCRETE REQUIREMENTS WITH DIFFERENT CONTENT – APPEAL ALLOWED – MATTER REMITTED TO MAGISTRATES' COURT FOR A CONVICTION TO BE ENTERED, AND FOR DETERMINATION OF PENALTY: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(1).

P. was intercepted whilst driving a motor vehicle. A PBT was conducted which proved positive and the police officer asked P. to accompany him to a police station for the purpose of a breath test. The police officer did not inform P. of the period within which he would be required to remain at the police station. P. was charged with refusing a requirement under s55(1) of the *Road Safety Act* 1986 ('Act'). At the hearing, a 'no case' submission was made that the charge should be dismissed on the ground that the police officer had failed to establish all of the elements of the offence namely the temporal limitation. The Magistrate agreed and dismissed the charge. An appeal to a Judge of the Supreme Court was dismissed. Upon appeal—

HELD: Appeal allowed. Orders set aside. Matter remitted to the Magistrates' Court so that a conviction can be entered on that charge and for determination of penalty.
The power to require a person to accompany a police officer and remain conferred by s55(9A) of the Act is a statement of two component parts of a single requirement rather than a statement of two discrete powers. The making of a requirement to accompany does not require a statement of what can be called the three-hour period.

ASHLEY JA:

1. The respondent, Joseph Piscopo, was charged with two offences allegedly committed on 13 September 2008. The first charge, to which he pleaded guilty at the Sunshine Magistrates' Court on 13 July 2009, related to the respondent's driving of a motor vehicle on a highway whilst disqualified, contrary to s30(1) of the *Road Safety Act* 1986 ('the Act'). The second charge, to which he pleaded not guilty, was that –

> ... at Delahey on 13/09/2008 having been required to furnish a sample of breath pursuant to section 55(1) of the Road Safety Act 1986 and for that purpose a requirement was made for him to accompany a member of the police force to a place namely Keilor downs Police Station he did refuse to comply with such requirement to accompany the member of the police force prior to three hours elapsing since the driving of a motor vehicle.

2. On 13 July 2009, a Magistrate dismissed the second charge.

3. The Director appealed to the Supreme Court, pursuant to s92(1) of the *Magistrates' Court Act* 1989.

4. A judge of the Trial Division dismissed the appeal on 12 November 2010. Now the Director appeals by leave against that decision pursuant to s17A(3A) of the *Supreme Court Act* 1986.

Grounds of Appeal

5. The proposed grounds of appeal are as follows:

The learned judge erred in law in holding that the requirement to accompany and the requirement to remain are not separate requirements under s55(1) of the *Road Safety Act* 1986 (Vic) but are integral parts or components of a single composite requirement.

The learned judge erred in law in holding that a refusal to accompany a police officer to a place or vehicle for the purpose of furnishing a sample of breath, without more, would not constitute an offence under s49(1)(e) of the *Road Safety Act* 1986 (Vic) because the motorist has not been informed that he or she would be required to remain at the police station until a sample of breath has been furnished and a certificate has been given or until three hours had elapsed after the driving, whichever was the sooner.

Legislation

6. Part 5 of the *Road Safety Act* 1986 is concerned with offences involving alcohol or other drugs. I will refer to a number of provisions in these reasons; but presently it is only necessary to mention ss49(1)(e) and 55(1).

7. Under s49 of the Act –

(1) A person is guilty of an offence if he or she – ...
(e) refuses to comply with a requirement made under section 55(1), (2), (2AA), (2A) or (9A);

8. The 'person' with whom Part 5 is concerned may be the driver of a motor vehicle, or a person in charge of a vehicle, or an occupant of a vehicle. The respondent was the driver of a vehicle. In these reasons, I will not keep repeating the alternative persons who might be affected by the provisions of Part 5.

9. Section 55(1) of the Act provides that:

(1) If a person undergoes a preliminary breath test when required by a member of the police force ... under section 53 to do so and—
(a) the test in the opinion of the member ... in whose presence it is made indicates that the person's breath contains alcohol; or
(b) the person, in the opinion of the member ..., refuses or fails to carry out the test in the manner specified in section 53(3)—
any member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force ... to a place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath ... and been given the certificate referred to in subsection (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

Example
A person may be required to go to a police station, a public building, a booze bus or a police car to furnish a sample of breath.

10. The present appeal concerns the interpretation of s49(1)(e) and s55(1).

11. The latter sub-section empowers a police officer to require a driver to accompany a police officer to a place or vehicle ('the accompany requirement') for the purposes of furnishing a sample of breath for analysis by a breath analysing instrument.

12. The sub-section further empowers a police officer to require a driver to remain at the place or vehicle until a suitable sample of breath has been provided, or until 3 hours after the driving, whichever sooner occurs. In these reasons, again only for convenience, I will call this 'the remain requirement'.

13. Further for ease of reference, in these reasons I will refer to the period ending 3 hours after the driving, mentioned not only in s55(1) but also in many other provisions within Part 5, as 'the 3 hour limit'.

14. In this appeal, a central issue was whether the accompany and remain requirements were separate and independent or were components of a single, conjoint requirement. That issue

focussed upon the words 'a requirement made under section 55(1)' in s49(1)(e). It was not in debate that it was essential to prove refusal to comply with such a requirement if that s49(1)(e) offence was to be made out. Although, according to the charge, the refusal was a refusal to accompany, the argument which found favour below was that the relevant requirement was to accompany and remain. So, the requirement stated by the police officer having been only a requirement to accompany, an essential matter for proof had not been established. But according to the appellant's argument, below and in this Court, s55(1) provides for discrete requirements – to accompany, and to remain. For that reason, the police officer had imposed as a requirement all that was necessary to satisfy the words of s49(1)(e).

15. Nothing which I have said at [11]-[12] above, in assigning labels of convenience, should be understood as involving a determination of the issue which I have just outlined.

Circumstances

16. It is not in dispute that at about 7.37 pm on 13 September 2008 a motor vehicle driven by the respondent along Kings Road, Delahey, was intercepted by a police officer ('the informant'). Checks revealed that the respondent was disqualified from driving at the time.

17. The informant gave *viva voce* evidence at the Sunshine Magistrates' Court on 13 July 2009. In cross-examination he said that, on the basis of the respondent's looks, movements, and a strong smell of beer on his breath, he formed the opinion that the respondent had consumed alcohol, for which reason he conducted a preliminary breath test.

18. The informant further gave evidence that, because the test result was positive, he asked the respondent to accompany him to a Police Station. The conversation between them, according to the witness's account, was in the following terms:

> I now require you to accompany me to the Keilor Downs Police Station for the purpose of a breath test.
> He said: nuh.
> I – my next line was: you said you don't want to come back for a breath test.
> Yes? - - - he said: yes, that's right.
> Yes? - - - I said: I require you to come back but you don't want to do that. I'll inform you that you could face a longer licence loss by not coming back. Do you understand that?
> Yes? - - - he said: yeh. I'm not coming back 'cos youse lock me up. Been there with that shit before. I know what youse do.'
> Yes? - - - I said: well, I have never met you before. I don't know you, don't know your history. Again, are you prepared to come back for a breath test?
> Yes? - - - he said: no 'cos you're going to lock me up anyway.'
> and
> That was the end of the direct conversation, your Honour.

19. In the course of cross-examination, the respondent's counsel asked the witness:

> Did you, at any time, tell [the respondent] that he would be required to remain at the police station only until a satisfactory sample of breath was provided or until three hours from his driving had elapsed?
> The witness replied:
> No, that didn't come out my mouth, no.

The judge's reasons

20. I should set out some of his Honour's careful analysis. He said this:

> 50. ... The first requirement is to furnish a sample of breath. The second requirement is to accompany a police officer to a police station where the sample of breath is to be furnished and to remain there until the sample is furnished and a certificate is given or until three hours have elapsed since the driving, whichever is sooner. The second requirement has both an 'accompany' component and a 'remain' component. These components, however, are not separate requirements; they are integral parts of a single composite requirement.
>
> 51. The interpretation of s55(1) that I have adopted accords with the plain meaning of the words of the section.
>
> 52. The verb 'require' (when preceded by the auxiliary verb 'may') is first used in s55(1) to describe the power of a police officer where one of the conditions set out in paragraph (a) or (b) is

satisfied. Where either condition is satisfied, the police officer 'may require the person to furnish a sample of breath for analysis by a breath analysing instrument'. The verb 'require' is used secondly to describe the power of a police officer to give effect to the first requirement, namely, by requiring the person to accompany the police officer to a place or vehicle where the sample of breath is to be furnished and to remain there until the sample is furnished and a certificate is given or until three hours after the driving, whichever is sooner.

53. The fact that the verb 'require' (when preceded by the auxiliary verb 'may') appears in s55(1) twice, rather than three times, clearly indicates that the section sets out only two requirements. Logically, the nature and scope of the two requirements must be governed by the words that follow each reference to the verb 'require'. If the Parliament had intended to set out three requirements in s55(1), one would expect it to have used the verb 'require' three times and to have separated the second and third requirements with the words 'may further require' in the same way that it has separated the first and second requirements. The fact that the Parliament did not do so reinforces the interpretation that arises from a plain reading of the section.

54. The interpretation that I have adopted also accords with common sense. The end that is sought to be achieved by the two requirements set out in s55(1) is for a motorist to furnish a sample of breath that can be analysed to determine his or her concentration of alcohol. A requirement to accompany, on its own, cannot achieve this end because it would be spent once the motorist steps inside the police station. The act of stepping inside the police station, however, does not, of itself, result in the furnishing of a sample of breath. In order for a sample of breath to be furnished, the motorist must also remain at the police station for a period of time.

21. His Honour continued:

57. My interpretation of s49(1)(e) is consistent with the proposition that the RS Act contemplates that a motorist who is subject to a 'requirement made under s55(1)' is presented with the choice of compliance or refusal, with the penalty for refusal being the risk that he or she will be convicted of an offence under s49(1)(e). In conferring such a choice, the Parliament must be taken to have intended that the motorist would be placed in a position to exercise his or her rights in an informed manner. Plainly, a motorist who is required to accompany a police officer to a police station for the purpose of furnishing a sample of breath without being told the maximum period for which he or she will be required to remain at the police station for that purpose would not be in a position to make an informed choice.

58. The nature of the second requirement that is set out in s55(1) should not be confused with the manner in which it may be communicated. The cases make it clear that the requirement need not take the form of a demand in imperative terms and that no particular verbal formula needs to be used; it is enough that the intent of the police officer to issue a requirement and the obligation of the motorist to comply with that requirement have been made clear. This means that the two components of the composite requirement can be communicated sequentially: a motorist can be required to accompany a police officer to a police station for the purpose of furnishing a sample of breath and, once he or she arrives there, he or she can be required to remain until a sample of breath is furnished and a certificate is given or until three hours have elapsed from the driving, whichever is sooner.

59. Further, the nature of the second requirement should not be confused with the various ways in which a motorist may be held to have refused to comply with it. There are at least three ways in which a refusal may be established. First, the motorist may refuse to accompany a police officer to a police station. Second, the motorist may accompany a police officer to a police station, but may refuse to remain there after his or her arrival. Third, the motorist may accompany a police officer to a police station, remain there for a period and then depart prior to the expiration of three hours from the driving without furnishing a sample of breath.

60. It is important to note, however, that based on my interpretation of s55(1), irrespective of the nature of the act which is alleged to constitute a refusal to comply with a requirement under s55(1), the refusal will not constitute an offence under s49(1)(e) unless all the components of the requirement have been communicated to him or her.

61. Thus, if the motorist is accused of refusing to accompany a police officer, he or she would need to have been required to accompany the police officer to a police station for the purpose of furnishing a sample of breath and to remain there until a sample of breath is furnished and a certificate is given or three hours have elapsed since the driving, whichever is sooner. If the motorist, after accompanying a police officer to a police station for the purpose of furnishing a sample of breath, is accused of refusing to remain there for that purpose, he or she would need to have been required to

> remain at the police station until a sample of breath is furnished and a certificate is given or three hours have elapsed since the driving, whichever is sooner.

22. His Honour also considered an argument that s55(1) must be interpreted in accordance with s32 of the *Charter of Human Rights and Responsibilities Act* 2006 ('the Charter') in circumstances where, it was submitted, s21 of the Charter – the human right to liberty and security - was engaged. He concluded, in accordance with authority, that compliance with a s55(1) requirement does not involve detention, but does involve a deprivation of liberty. He continued –

> ... I have concluded that the interpretation of s55(1) of the RS Act which I have adopted is correct and that, so interpreted, s55(1) is compatible with the human right set out in s21(3) of the Charter. That interpretation requires that a motorist be informed of the temporal limitation in s55(1) and thereby ensures that any deprivation of liberty that is involved in complying with a requirement under s55(1) is in accordance with the procedures that are set out in that section. By being aware of the temporal limitation, a motorist can take steps to ensure that the deprivation of his or her liberty does not exceed the maximum period permitted by s55(1).

Submissions in this Court

Appellant's submissions

23. Counsel for the appellant submitted that the judge's interpretation of s55(1) – that is, his Honour's conclusion that the 'requirement to accompany and the requirement to remain are two components of a single composite requirement' – was erroneous. It could be equally argued, according to the appellant, that s55(1) twice uses the infinitive 'to' - preceding, respectively, the verbs 'accompany' and 'remain' - this indicating that there are separate and distinct requirements. Had the legislature intended to create a single, composite requirement, it would have used a single infinitive, preceding 'accompany'.

24. Counsel further submitted that his Honour also wrongly proceeded to treat the components as separate for the purposes of establishing the offence under s49(1)(e) ('refusing to comply with a requirement under s55(1)'), and yet treated the components as single and inseparable for the purpose of communication to the motorist. If they were components of a single composite requirement, then his Honour was obliged to apply his finding consistently to both the 'nature of the act which is alleged to constitute a refusal to comply with a requirement under s55(1)'[1] and to the contents of the communication to the motorist. If the requirement to accompany and the requirement to remain were only composite parts of the one requirement, then, argued the appellant, how could a motorist refuse to comply with only one of the composite parts and still be guilty of the offence under s49(1)(e).

25. According to the argument for the appellant, the two requirements are fundamentally different. They arise at different times. The requirement to accompany arises before the requirement to remain.

Respondent's submissions

26. Counsel for the respondent contended that the judge was correct to adopt a plain meaning of the words in s55(1), and to conclude that it sets two rather than three requirements. Even if it was the contrary, the temporal limitation would still need to be stated to the motorist. That was so because, commencing at the time when driving ended, a police officer was empowered in the circumstances specified in s55(1)(a) or (b) to require a motorist to accompany an officer to a place or vehicle, and there remain until (successfully) tested, but not beyond the 3 hour limit.

27. The respondent also filed a Notice of Contention as follows:

> 1. If the primary judge erred in concluding that the requirement in s55(1) of the Act to accompany and the requirement to remain are not separate requirements but are integral parts or components of a single composite requirement, then, alternatively, it was an element of the refusal offence under s49(1)(e) of the Act that at the time of making the requirement to the motorist to accompany, the police member must state the temporal limitation of three hours in order for the requirement to accompany to be valid.
>
> 2. The primary judge erroneously decided to reject the respondent's argument before his Honour that, in the circumstances, the requirement under s55(1) of the Act to accompany the police member for a breath test was objectively unreasonable due to the failure of the police member to

disabuse the motorist of the stated mistaken belief '... you're going to lock me up anyway' if he so accompanied and, therefore, was an invalid requirement.

28. Counsel submitted, in support of ground 1, that the respondent must at least have been informed of the temporal limitation at the time of the requirement to accompany, because that requirement itself might extend for so long a time. An example was given of a requirement to accompany imposed on a driver in the country, far from the nearest police station specified as the relevant place.

29. In support of this argument, counsel called in aid the *Charter of Human Rights and Responsibilities Act* 2006. He relied upon s21(1)-(4) and 38(1) of that Act. He argued that parliament did not give power to a police officer, under s55(1), to impose an open-ended requirement to accompany. For a police officer to impose such a requirement was effectively to impose a detention for an indeterminate period. He submitted further that any ambiguity in construing s49(1)(e) or s55(1) of the *Road Safety Act* should be interpreted to give effect to the human rights set out in ss 21(1)-(4) and 38.

30. In support of ground 2 of the Notice of Contention, counsel submitted that a requirement imposed under s55(1) must be objectively reasonable. Here, the respondent had expressed a fear of what might happen if he were to accompany the police officer to a police station. The police officer had done nothing to disabuse the respondent of his fear. That had the effect that the requirement itself was rendered objectively unreasonable.

Analysis

31. The relevant offence is created by s49(1)(e) of the Act, not s55(1).

32. The key concepts are 'refusal' and 'requirement made under s55(1)'.

33. There could not be 'refusal' of a requirement unless the latter had been communicated to the motorist.

34. The need for communication of the requirement in order for there to be an offence under s49(1)(e) is also implicit in the words 'requirement made'. It is true that 'made', by connection with 'under', might be read as simply identifying the statutory source of the requirement; and it might then be argued that s55(1) itself says nothing about communicating any requirement. But that would work a nonsense.

35. A 'requirement made' under s55(1) can effectively be confined to requirements to furnish a sample of breath and for that purpose to accompany and to remain.[2] It is true, if an initial sample of breath is for some reason unsatisfactory, that a further sample or samples may be required; and, if all else fails, that a blood test may be required. But requirements made under s55(2A) and (9A) are discrete, and refusals to comply with requirements made under those sub-sections are specifically addressed by s49(1)(e).

36. The appellant's submissions with respect to the content of 'a requirement made under s55(1)' did not deny that, as a matter of grammar, the sub-section could be read as the judge below concluded it should be. Rather, it was contended that another reading was grammatically available, and that the alternative reading should be preferred for reasons of context and consequences.

37. In my opinion, the judge's analysis of the subsection at [52]-[53] in his reasons, cited at [20] above, shows that the appellant's concession was rightly made. But I also consider that the reading advanced by the appellant is an available one.[3] So the question becomes, which of the possible readings, each of which is confronted by a grammatical hurdle, represents the correct interpretation in all the circumstances?

Aspects of the legislation and the authorities

38. In resolving the question, I turn first to consider aspects of the legislation, and the state of the authorities. I adhere to the following analysis:

(1) The policy of Part 5 is to deal with a major social problem: the presence of alcohol and drug-

affected motorists on the roads, and the consequences of such presence. See s47 of the Act.

(2) The offences created by the Part are set out in s49(1)(a)-(i). Paragraphs (a),(b),(ba),(bb),(f),(g),(h) and (i) all relate to a person driving or being in charge of a motor vehicle at a time when, in fact or by operation of a deeming provision, there is excess alcohol or illicit drug in the person's blood.
(3) The offences created by paragraphs (c),(ca),(d),(e), (ea) and (eb) are different in kind. They relate to refusals of different kinds, each of which may be said to frustrate the obtaining of a sample which will establish breach of one of what might be called – not quite accurately, but conveniently – the excess concentration offences.

(4) The offences referred to in (3) all relate to refusal to do something which may be required. The requirements are respectively specified in ss53, 55A, 54(3), 55, 55B, 55D and 55E. For the most part, a police officer must make the requirement.

(5) In the context of s55(1), the power to make requirements 'is invested by the legislature in the police in order to effectuate the purposes and policies of the legislation'.[4] The same statement is apt to describe the requirements which may be made pursuant to the other sections to which I have referred.

(6) *DPP v Foster*[5] concerned a charge brought under s49(1)(f).[6] Proof of the offence requires the prosecution to establish that a sample of breath was furnished under s55. That made it relevant to consider the requirements specified by s55(1). Winneke P held that it was erroneous to assume that the legislative intention which lies behind s55(1) was to protect the interests of motorists. He described the consequences of the erroneous assumption this way: –

This assumption has led the courts to construe more strictly the discretionary powers of 'requirement' and to convert them into obligations, as distinct from powers. Thus it is said that the legislative purpose behind s55(1) is not to invest the police with a power to facilitate the objects of the statute, but rather to impose a 'duty to inform' the motorist of the reason why his or her liberty is being curtailed ...[7]

(7) The true position, his Honour said, was that –
Not only are the requirements 'to accompany' and 'to remain' not elements of the offence created by s49(1)(f) but they are severable in the sense that each power need only be exercised where the circumstances dictate.[8]

(8) To the same effect –
... the powers given to the police under that paragraph are permissive. They do not have to require a person to furnish a sample of breath nor do they have to require the person to go to the police station or to stay there for three hours if that is not desired or if that is not necessary. I see nothing in the section which would require a recitation on all occasions of all requirements.[9]

(9) Notwithstanding the above, where a charge is laid under s49(1)(f), the consequence of the words 'under section 55' is that the prosecution must prove that the motorist was required to furnish a sample of breath under s55.[10] But it is not necessary to prove that the motorist, for that purpose, was required to accompany or to remain.[11] Indeed, there may have been no need to make any such requirement: 'They are powers which a police officer "may" exercise as and when circumstances dictate'.[12]

(10) Accepting that there is a discretion whether the powers to 'require' need be exercised in any particular case, if a refusal offence is charged under s49(1)(e), it is an essential element that the requirement alleged to have been refused was notified to the motorist, although a particular form of words is not necessary.[13] 'Waiver is irrelevant'.[14]

(11) There have been a number of refusal cases, subsequent to *Foster*, in which passing reference has been made to the number of requirements specified by s55(1).

In *DPP Reference No 2 of 2001*; *Collicoat v DPP*; *Bell v Dawson*,[15] the latter two appeals concerned an alleged defect in a refusal charge laid under s49(1)(e). One at least (*Bell*) was a refusal to accompany case. In that instance the requirement to accompany had not been stated in the

charge as first drawn; but the charge had been amended at the hearing. In neither case was the requirement itself stated as a requirement to accompany and remain. No point was taken that a requirement to accompany, without more, would be inadequate. The inadequacies which were suggested found no favour with the Court.

In *DPP v Greelish*,[16] it was decided that, in the context of ss49(1)(e) and 55(1), it is at least possible for a refusal to be constituted by either a refusal to furnish or a refusal to accompany. It was held that a charge of refusal to accompany was not susceptible of a defence under s55(9), which relates to a refusal to furnish a sample of breath.

Buchanan JA referred to there being 'several requirements found in s55(1).'[17] But to decide that appeal it was only necessary to focus upon there being at least two – requirement to furnish and requirement to accompany. That is, it was unnecessary to decide if requirement to accompany and requirement to remain was a conjoint requirement. The same observation may be made of the statement of O'Bryan AJA that there were possibly four separate requirements in s55(1).[18]

In *Hrysikos v Mansfield*,[19] a motorist was charged with refusal to remain. A requirement stated in the 'accompany and remain' form had been complied with. But then the motorist had stepped outside the 'booze bus' in order to have a cigarette. She had been told that if she left the bus, she might lose her licence for two years. The question was whether it had been open to find that she had in fact refused to remain. This Court upheld the finding of Smith J that it had not been so open.

In the course of his reasons, Ormiston JA referred to 'the requirement [being] not merely to accompany ... and to remain ... but to do so for [a particular purpose]'.[20] But he also stated that –

> ... in each case the requirement is extended only so far as is necessary to enable a sample of breath to be furnished which is to be carried out within three hours of the last moment of driving.[21]

It was not necessary in disposing of that appeal to decide whether the requirement to accompany and the requirement to remain are conjoint or independent.

In *DPP v Loftus*,[22] a motorist was charged with refusing to remain. He had been asked to accompany, and had done so. There was some delay. The motorist asked if he was obliged to stay. A second police officer told him that if he did not remain until the test was performed, he could lose his licence and incur a fine. He left. The question was whether it had been necessary for the one police officer to require the motorist both to accompany and to remain. Cummins J answered that question 'no'. He held that s55(1) specifies three requirements: to furnish, to accompany and to remain. They were discrete and 'need not be communicated holistically'.[23] By that, his Honour meant that they did not have to be communicated at the same time. It followed that the different requirements could be stated at different times.

Had his Honour held that there was a conjoint requirement to accompany and to remain, his reasoning would have been possible, but more difficult.

In *Sanzaro v County Court & anor*,[24] things were busy at a 'booze bus'. A police officer said to a motorist (who had willingly gone to the bus) that after he had completed checks he 'would require [the motorist] to accompany [him] on board the vehicle for the purpose of a breath test'; and that if the motorist refused to do so he might be charged with an offence. The motorist did leave, and he was charged with refusing to remain.

The issue was whether the policeman's statement, in the future tense, amounted to a requirement to remain. Nettle J, as his Honour then was, held that it did. It had provided the motorist with reasonably sufficient information.

In that case there had been an earlier-stated requirement to furnish and to accompany. The motorist had complied. So the requirement to remain could be characterised either as a statement of the second part of a conjoint requirement or as a statement of a discrete requirement. That issue did not have to be decided by Nettle J.

Blair v County Court of Victoria[25] was a case in which the motorist had been notified of all the

s55(1) requirements, and all of them were referred to in the charge. But the essence of the charge was a refusal to accompany. Mandie J held that there was surplus verbiage in the charge, but that it sufficiently communicated the substance of the matter.

As in most, at least, of the refusal cases to which I have referred, the issue joined in the present case did not arise.

In *Mastwyk v DPP*,[26] the motorist had been required to furnish and for that purpose to accompany. She refused to accompany by being placed in the lockable rear section of a police van. She was charged with refusal to accompany. The point of the appeal was whether reasonableness has any part to play in deciding whether there has been a s49(1)(e) refusal. The Court held, by majority, that it did. The precise form of the requirement did not fall for consideration.

Uren v Neale[27] was a refusal case in which the requirement which is relevant for present purposes had been imposed under s55(9A). The motorist had been asked to accompany a police officer to a police station for the purposes of a breath test, and he had agreed to do so. At the police station, he had not provided a satisfactory sample. Then the police officer had requested him to remain at the police station so that a blood sample could be taken. But he had refused to remain. Thus the charge under s55(9A), the pertinent language of which is that a police officer –

> May further require that person to accompany a member of the police force to a place where the sample is to be taken and to remain there until the sample has been taken or until 3 hours after the driving...

The point taken was that the police officer had said nothing about remaining until the sooner of a sample being taken or the 3 hour limit (although the charge itself described both aspects of the requirement).

J Forrest J held that the key question was whether the motorist had been given sufficient information to know what was required of him. His Honour, though accepting that nowadays most motorists have a general understanding of the breath analysis system, said that –

> I doubt very much whether anyone, unless highly familiar with the provisions of the RSA, is aware that of the temporal requirements as to remaining at 'a place' for the taking of a blood sample. No doubt the sunset provision of three hours as a maximum period was inserted to ensure that what would otherwise be an unlawful detention was limited to a reasonable time.

and

> In my view the Magistrate misinterpreted s55(9A) in relation to charge four. It was incumbent upon the prosecution to prove at least in a basic sense that the terms of the requirement were communicated to [the appellant]: critical to this is that three hours 'after the driving' was the maximum period over by which he could be detained.

and

> What he was not told was the most basic proposition required by the section, namely that he did not have to stay at the station once the three hour period after the subject driving had expired. He was not given reasonably sufficient information to know what was required of him — indeed, he could have been detained interminably on the basis of [the respondent's] requirement.[28]

The case was not one in which the requirement to accompany arose in the context of the desired blood test. It was to be conducted at the place where the motorist then was. The decision stands for the proposition that when a requirement to remain is stated, the statement of requirement must mention the 3 hour limit. His Honour's reference to 'detention' was inapt. That aside, the decision says nothing as to whether the requirements to accompany and remain are discrete, or are aspects of a conjoint requirement.

(12) 'Detention' is not an apt word to describe the situation in which a motorist accedes to a requirement to accompany or to remain. That is so because the requirement must in the first place be reasonable – or else there will be no refusal; and second, because there is always the right to refuse. But because refusal itself is an offence which carries substantial penalties,[29] it has been recognised that accompanying and remaining involve some degree of restraint on liberty.

In *Hrysikos*, Ormiston JA spoke of there being–
a deprivation of liberty implicit in the whole of the relevant provisions ...[30]

Again, in *Mastwyk*, Nettle JA described the power conferred by s55(1) as being limited to restricting the liberty of the subject to the extent that is necessary and reasonable[31] and in the same case Redlich JA referred to 'the right to liberty' being – the most elementary and important aspect of all common law rights.[32]

(13) *Coco v R*[33] stands for the proposition that the courts should not impute to the legislature an intention to abrogate or curtail basic rights, freedoms or immunities except if –

Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.[34]

In the present case, the parliament *has* made it apparent that the right to liberty is to be curtailed to an extent. *Hrysikos* and *Mastwyk* show the way in which the legislation has been interpreted so as to confine the curtailment of that right to what is reasonable.

(14) The same may be said of the interpretation adopted by J Forrest J in *Uren*, because what I have called the 3 hour limit is a recurring and important feature of Part 5 of the Act. Thus –

(a) In the case of the offences created by s49(1)(f)(g)(h) and (i) it is an element (sometimes called a 'necessary condition') of the offence that the sample of breath, blood or bodily fluid was taken from the alleged offender 'within 3 hours after driving or being in charge of a motor vehicle'.

(b) In some circumstances, a sample taken within the 3 hour period has presumptive consequences: see s48(1)(a), (ab) and (ac), which relate to the offences created by s49(1)(a), (b), (ba) and (bb). In essence, not less than the concentration of alcohol or drug which is detected by testing within that period is to be presumed, until the contrary is proved, to be the concentration present at time of commission of the alleged offence.

(c) Under s53(1)(c)(d), a person may be required to undergo a preliminary breath test if a police officer believes on reasonable grounds that the person has 'within the last preceding 3 hours' either driven or been in charge of a motor vehicle when it was involved in an accident.[35] A like requirement may be made under s55A(1)(c)(d) with respect to the making of an assessment of drug impairment; and a like requirement again made with respect to the taking of a preliminary oral fluid test under s55D(1)(c)(d). See also s55E(3).

(d) By s53(4), a person is not obliged to undergo a preliminary breath test if more than 3 hours have passed since the person last drove, was an occupant of or was in charge of a motor vehicle.

(e) By s55(2), (2A), (9A) and s55A(1) a like or similar requirement may be made as is provided for in s55(1).

(f) Section 55(6) is in the same language, relevantly, as s53(4). It relates only to a breath test. Section 55A(2), which relates to a drug assessment, is to similar effect. So are s55D(8), which relates to undergoing a preliminary oral fluid test, and s55E(10) which pertains to oral fluid testing.

(g) The admissibility of evidence of the results of a blood sample, see s57, is also affected by the 3 hour limit. Cross-examination of certain persons is, in substance, permitted (see sub-s (7A)(b)(iiia)) if there is a reasonable possibility that the sample was not taken within 3 hours after the person who provided the sample drove or was in charge of a motor vehicle.

(h) By s 57(9), except if a sample of blood has been taken as provided for in ss55(9A), 55B, 55E(13) and 56, the result of an analysis of blood must not be tendered unless the person from whom it has been taken has expressed consent to the blood being collected; and the onus of proving consent lies on the prosecution. See also, as to consent, s57(10).

(i) It thus follows that the results of a sample of blood purportedly taken pursuant to s55(9A) will

be inadmissible unless the sample is taken within the 3 hour period, or unless the prosecution establishes consent.[36]

(j) I should mention also the evidentiary impact of urine and oral fluid tests. Concerning the former, s57A(9)(b)(iia) is the mirror of s57(7A)(b)(iiia). But there is no equivalent of s57(9) and (10) in s57A. So also, with respect to oral fluid tests, s57B(9)(b)(iii) mirrors s57(7A)(b)(iiia). But again there is no counterpart of s57(9) and (10). These provisions may be compared with s58, which deals with the evidentiary impact of breath test analysis. That section is notable for the absence of any counterpart of s57(7A)(b)(iiia) or (9) or (10). The difference is emphasised by s58(1), which permits evidence to be given of the concentration of alcohol in the breath, the same to be evidence of the concentration at the time of analysis.

(15) Focussing upon s55(1), the scheme so far as it concerns the requirement to remain is as follows:
(a) A person may be required to remain at a place for no longer than 3 hours after the driving etc of a motor vehicle.

(b) A person is not obliged to furnish a sample of breath if more than 3 hours have passed since the person last drove etc.[37]

(c) A sample, if proved to have been taken within the 3 hour period, will be proof of an offence (assuming that an excess concentration is revealed) against s49(1)(f).

(d) The excess concentration revealed by such a sample, if taken within 3 hours, will be presumptive of an offence against s49(1)(a) or (b).

(e) Excess concentration revealed by a breath sample taken outside the 3 hour period will be irrelevant to a charge under s49(1)(f), but is apparently admissible – though not carrying presumptive force – in respect of an offence charged under s49(1)(a) or (b). That is because s55(6) simply removes the obligation of providing a sample within the 3 hour period which is implicit in s55(1).[38]

(16) In my view, the multiple references to the 3 hour limit in Part 5 strongly support a conclusion that a police officer must convey that limit to a motorist when a relevant s55(1) requirement is made. But the questions which remain are when, and whether as part of a conjoint requirement, or as a free-standing requirement, that temporal limit must be conveyed.

(17) For sake of completeness, I should refer to the very recent decision of this Court in *DPP v Kypri*.[39] There, the charge laid under s49(1)(e) referred to a requirement to furnish a sample of breath 'under s55 of the *Road Safety Act* 1986'. The Court held that identification of the applicable sub-section of s55 is an essential ingredient of an offence under s49(1)(e) of the Act, and thus that the charge as framed was defective. The Court nonetheless remitted the matter to the Magistrates' Court for consideration whether amendment should be permitted. Although the charge referred to a requirement to accompany, and said nothing about a requirement to remain, the Court did not need to address the question whether the charge was on that account defective.

Extrinsic Materials, Similar legislation

39. I have considered the predecessor legislation, the relevant Second Reading Speech and the parliamentary debates to see whether any light is shed on the correct answer to the question which I framed at [37] above; that is, light additional to that which emerges from the authorities and legislation review already undertaken. I have also considered the text of similar legislation in other States and Territories for the same purpose. The enquiry has been of limited assistance. But some matters should be mentioned.

40. First, the predecessor of Part 5 of the Act was Division 2 of Part VI of the *Motor Car Act* 1958. Sections 80D-80G were inserted by Act 8143 of 1971.

41. As originally introduced, there was no explicit provision enabling imposition of a requirement to accompany or to remain. On the other hand, the legislation provided that a person required to furnish a breath sample was not obliged to do so more than two hours after driving[40] a motor vehicle; and provided also that there was no requirement to furnish a breath sample except, in

substance, at the place of the driving, or at a police station.

42. Whether or not it was implicit in the legislation as thus enacted that a police officer had some power to get an alleged offender to go to a police station in order to obtain a breath sample, the position was clarified by Act 9477 of 1980. Provision was there made that a person might be required to accompany a member of the police force 'to a police station or the grounds or precincts thereof' for the purposes of providing a breath sample. The two hour limit remained.

43. That remained the position until the *Road Safety Act* 1986 was enacted. The Minister, in the Second Reading Speech, stated that 'the Bill essentially re-enacts the provisions of the *Motor Car Act* 1958'. That said, s55(1) – the old s80F(6)(a) of the *Motor Car Act* – now contained reference to requirement to accompany and to remain. But the legislature seems not to have thought that the requirement to remain in substance added anything. Such an understanding is compatible with a perception that the requirement to accompany, the purpose for such requirement, and the then two hour limit meant in combination that the requirement to accompany was not spent the moment that the alleged offender arrived at the police station. The explanatory memorandum said this about clause 55:

> Clause 55 provides for a person who has had a positive reading on a preliminary test, or who fails to carry out the test properly to provide a sample of breath … and for that purpose to accompany a member of the police force … to a police station.

44. Second, in only one jurisdiction is there legislation approximating s55(1).[41] There, the requirements to accompany and remain are each introduced by the verb 'require'. That is what the judge of the Trial Division said was missing in the Victorian legislation, if it was to be interpreted as conveying discrete requirements.

45. Third, in several jurisdictions there is a power of arrest, as contrasted with the 'implicit restriction of liberty' in this State. All things being equal, that would likely favour a stricter approach to interpretation of the prerequisites for exercise of the power of arrest.

Conclusions

46. I have earlier expressed the opinion that each of the competing interpretations of s55(1) is grammatically available. For the reasons which follow, I consider that the appellant's interpretation is to be preferred.

47. First, as I have attempted to explain, the answer to the question, which of the interpretations is the correct one, is not squarely answered by any of the authorities to which I have referred. But I consider that the reasons of Winneke P in *Foster* are of importance to the resolution of that question. That is so despite the offences there charged not being refusal offences, and despite there being reason, in my respectful opinion, to qualify one aspect of his Honour's analysis.[42]

48. In *Foster*, the two respondents had been charged, respectively, with offences against s49(1)(b) and s49(1)(f) of the Act. In each instance, a police officer had requested the respondent to accompany him to a police station, and the respondent had done so. In each instance, the respondent had furnished a breath sample whilst at the police station which was in excess of the legal limit. In neither case had the respondent been required to remain at the police station for up to 3 hours. The respondents had successfully argued before a magistrate, and again before a judge of the Trial Division, that to prove the commission of the offences it had been necessary for the prosecution to prove that the respondent had been so required. This Court rejected that argument.

49. Winneke P, who gave the leading judgment, characterised the requirements to accompany and to remain as he did in the passages cited at [38](6)-(8) above. To those passages may be added his Honour's preliminary view that –

> The power to make the requirements of which s55(1) speaks is obviously a power which is invested by the legislature in the police in order to effectuate the purpose and policies of the legislation. Without such powers, that purpose and those policies would be frustrated because police have no authority, from other sources, to require motorists to furnish samples of breath or blood. Because they are facilitative powers, I would have thought that it is not obligatory for the police officer to

> exercise them, let alone in the manner of a ritual incantation of the type which counsel for the respondents suggests. Rather, as I see it, they are powers which a police officer 'may' exercise as and when circumstances dictate. If the motorist refuses to accompany the police officer to a police station for the purposes of a breath test, the police officer may require him or her to do so; if he or she refuses to furnish a sample of breath into the instrument, then he or she may be required to do so; if he or she refuses to remain at the police station before the test has been administered, the police officer may require him or her to remain — at least until the relevant time has elapsed. If the motorist persists in the refusal, in the face of any such requirement, he or she is at risk of being charged with the offence under s49(1)(e), in which case proof of the relevant requirement will become an essential element of that offence.[43]

50. Two points may be made about his Honour's reasons: (1) they involved rejection of single judge decisions upon which counsel for the respondents had relied, those decisions focusing upon there being a duty to inform motorists of the content of the various requirements; and (2), it is clear that his Honour treated the requirements to accompany and to remain as discrete.

51. In the present case, the judge stated that the interpretation which he placed on s55(1), as a matter of grammar, was consistent with a motorist being provided with a choice of compliance or refusal. But Parliament must have intended that a motorist would be placed in a position to exercise his or her rights in an informed manner. If a motorist was not required to both accompany and remain, an informed choice could not be made.[44]

52. With respect, that seems to me to have gone very close to reviving an approach to s55(1) which Winneke P rejected in *Foster*. So I consider that the particular reasoning was incapable of supporting the judge's interpretation of s55(1).

53. There is another problem with the notion of informed choice in the present context. Once accepted, as his Honour did – see [57] below – that the obligation to remain need not be stated until the motorist is at the specified place or vehicle, then informed choice becomes entirely dependent upon the police officer choosing to make, at the outset, requirement both to accompany and to remain.

54. Second, the judge reasoned that the requirement to accompany will be spent once a motorist steps inside a police station.[45] For that reason, a requirement to accompany and remain must be made at the outset – this supporting an interpretation that the requirement to accompany and remain was conjoint.

55. Some matters suggest that a requirement to accompany will not be spent once a person arrives at a specified place or vehicle. The requirement to accompany does not stand alone. It is for a purpose – that is, so that a sample of breath can be furnished. Again, for six years, the predecessor to s55(1) only conferred a power to accompany. That, together with the purpose of the requirement to accompany, and also the then two hour limit, seems to have been sufficient – at least, factually – to keep persons at or in the vicinity of a police station until a breath test was performed.

56. On the other hand, s55(1) now specifically confers powers to require a person to accompany and remain. Whatever the legislature understood to be the situation when it enacted s55(1) – see [43] above – two concepts are now expressed when once there was one. Each should be given a meaning. In the event, I agree with the judge that a requirement to accompany is spent once the person arrives at the specified place or vehicle – which is not to say at the very moment of arrival. But in my view that is a neutral circumstance so far as the issue of interpretation of s55(1) is concerned. It neither favours not denies the interpretation put upon the provision by the judge.

57. Third, the judge held[46] that what he described as 'the two components of the composite requirement' could be communicated sequentially – the 'accompany component' at the outset, and the 'remain component' on arrival at the specified place or vehicle. Putting to one side nomenclature, I agree with his Honour's conclusion. But again, that is a neutral circumstance.

58. Fourth, the judge stated that 'the refusal will not constitute an offence under s49(1)(e) unless all the components of the requirement have been communicated'. That was irrespective of the act alleged to constitute the refusal. Thus, if a motorist was to be charged with refusal to accompany, he or she must have been required to accompany and remain; whilst if a motorist,

after accompanying a police officer to a specified place or vehicle, was charged with refusal to remain, he or she must have been required to remain.[47]

59. The language of his Honour's second example is perhaps not quite clear. But I take him to have been saying that a charge founded on refusal to remain could not be made out except if there had been an earlier stated requirement both to accompany and remain. So, if there had been no requirement to accompany, because in the circumstances it was unnecessary – for instance, in the probably unlikely event that a breathalyser was available at the place of apprehension – a charge founded on refusal to remain must fail even if a requirement to remain (for example, whilst the breathalyser was being set up) had been made and disobeyed. I cannot accept that this would be a sensible understanding of s55(1).

60. Fifth, in my view there is force to the submission for the appellant, noted at [23] above, that a reading of s55(1) which recognises separate accompany and remain requirements best correlates with offences constituted by refusal to accompany on the one hand and refusal to remain on the other.

61. Sixth, the requirements to accompany and remain do involve some degree of interference with liberty in the event that a person complies with any such requirement. So I have considered whether the interpretation favoured by the judge could be supported by application of the principle stated in *Coco*[48] to which I referred at [38](13) above. I do not think that it can, so long as it is understood that the power to make a requirement to remain mandates mention of the 3 hour limit – as to which see [64]-[67] below.

62. Seventh, I have considered also the respondent's submission that, because s55(1) of the *Road Safety Act* must be interpreted, so far as possible, compatibly with the human rights enshrined in s21 of the Charter, the interpretation adopted by the judge below was correct. The judge concluded, in accordance with authority, that compliance with a requirement made under s55(1) involves a deprivation of liberty. He then held that his favoured interpretation of the sub-section was compatible with the right set out in s21(3) of the Charter because a driver will be put on notice of the 3 hour limit and so can ensure that his or her deprivation of liberty does not exceed that limit.

63. A motorist has the right of refusal of a requirement made under s55(1), albeit that refusal will trigger, in most cases, commission of a s49(1)(e) offence. Whether it is right to treat 'deprivation of liberty', for the purposes of s21(3) of the Charter, as encompassing a deprivation which results from a choice exercised by the person so deprived is a matter that need not be decided. What I do think is clear is that, assuming the judge was correct in holding that his interpretation was compatible with the right set out in s21(3) of the Charter, the competing interpretation is no less compatible. The judge held that what he concluded were the two components of one requirement could be communicated sequentially, the second after the component of accompanying was spent. So the temporal limitation might not be communicated until the latter time. It is not inconsistent with the power to require a person to remain being discrete that the temporal limit should be disclosed when that power is exercised.

64. Eighth, for reasons discussed at [38](14) and (15) above, the 3 hour limit is of great importance to the operation of Part 5 of the Act. In short – (1) the power to require a person to remain at a place or vehicle is not temporally unlimited; (2) the power to require a person to provide a sample of breath, blood, urine or oral fluid is in each case subject to a temporal limit. There is no obligation to provide any such sample outside that limited period; (3) the results of samples taken within the 3 hour period in some instances are elements of Part 5 offences, and in other instances have presumptive evidentiary status; (4) samples taken outside the 3 hour period are, or in some cases may, be admissible in proof of Part 5 (and other) offences. The result is that a person might unwittingly provide self-incriminating evidence if unaware of the temporal limit.

65. In the circumstances just described, it would be wrong, in my opinion, to interpret s55(1) as leaving it to chance whether a person might unwittingly remain at a specified place or vehicle, and so submit to a degree of deprivation of liberty, for a period exceeding the 3 hour limit; or unwittingly provide self-incriminating evidence outside that period. By 'chance', I mean the prospect that a police officer might or might not inform the person of the temporal limit.

66. I consider, in the event, that s55(1) should be interpreted as meaning that, in every case where a requirement to remain must be stated – and in practical terms that will mean every case, because there will always be some time elapse between arrival at the specified place or vehicle and the furnishing of the (initial) sample – the requirement must specify its purpose and the temporal limit. So to conclude is consistent with Coco and, assuming its application, s21(3) of the Charter. Such an obligation should not be confused with a general duty to inform – which was the notion rejected by Winneke P in *Foster*. Rather, it must be understood as a statement of relevant limitation upon the power conferred by s55(1). Insofar as *Uren* stands for the proposition that when a requirement to remain is stated, the statement of requirement must mention the 3 hour limit, I agree. But *Uren* should not be read as reviving more generally a duty to inform.

67. I say nothing about the form of words which should be used to convey the requirement to remain. But they must address, as a matter of substance, the two matters to which I have just referred.

68. The conclusion which I have expressed does not mean that the interpretation favoured by the judge should prevail. The potential vices of the Part 5 regime, which I have identified, are addressed satisfactorily by the reading of s55(1) which I prefer.

69. Ninth, I have not ignored, in reaching my conclusion as to the proper interpretation of s55(1), the fact that the refusal was said to be non-compliance with a requirement 'to accompany the member of the police force prior to 3 hours elapsing since the driving of the motor vehicle'. The fact that the refusal was so alleged could not influence determination of what was, for the purposes of s49(1)(e), the 'requirement made under section 55(1)'.

70. I must refer to the two grounds raised by the Notice of Contention. I will do so without addressing a technical argument raised by counsel for the Director.

71. I reject each ground. The first, noted at [28]-[29] above, has no textual support at all. Section 49(1)(e) required proof that a requirement was made under s55(1). Relevantly, there was either one requirement, embodying two components, or two discrete requirements. I have concluded that it was the latter. The relevant requirement was that the respondent accompany the police officer to a specified place for the purpose of furnishing a sample of breath. There is no warrant for grafting onto that requirement a temporal limitation particularly attaching to the discrete requirement to remain.

72. The second ground, noted at [30] above, is in my opinion without merit, essentially for the reasons discussed by the judge below at [94]-[96] in his reasons.

Order

73. I would allow the appeal and set aside the orders made below on 12 November 2010, and in the Magistrates' Court on 13 July 2009 so far as the charge alleging breach of s49(1)(e) of the Road Safety Act 1986 is concerned. I would remit the matter to the Magistrates' Court so that a conviction can be entered on that charge, and for determination of penalty.

WEINBERG JA:

74. I agree with Ashley JA.

TATE JA:

75. I have had the advantage of reading in draft form the reasons of Ashley JA, with which I respectfully agree.

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[1] His Honour's reasons, [60].

[2] Compare *DPP v Greelish* [2002] VSCA 49; (2002) 4 VR 220, 226 [25]; (2002) 128 A Crim R 144; (2002) 35 MVR 466 (O'Bryan AJA). Again, I make it clear that the above formulation does not involve determination of the critical question in this case.

[3] It does not involve reading additional words into s55(1)(b), a course which should not be taken 'in the absence of clear necessity': *Thompson v Goold & Co* [1910] AC 409, 420 (Lord Mersey). See Pearce & Geddes, *Statutory Interpretation in Australia*, (3rd ed), paragraph 2.13.

[4] *DPP v Foster* [1999] VSCA 73; [1999} 2 VR 643, 652 [29]; (1999) 104 A Crim R 426; (1999) 29 MVR 365 (Winneke P, with whom Batt JA agreed 'in all respects' and with whom Ormiston JA agreed, with one reservation).

[5] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[6] Section 49(1)(f) reads as follows: '(1) A person is guilty of an offence if he or she— within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under s55 and—
(i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; and
(ii) the concentration of alcohol indicated by the analysis to be present in his or her breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle;'
[7] [1999] VSCA 73; [1999] 2 VR 643, 658 [52]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[8] Ibid 659 [56] (Winneke P).
[9] Ibid 664 [76] (Ormiston JA).
[10] It is a necessary pre-condition of proof of the offence, though not an essential ingredient. This was the effect of the judgment of Winneke P in *Foster*, as described by Charles JA in *DPP Reference No 2 of 2001* [2001] VSCA 114; (2001) 4 VR 55, 62 [19]; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[11] [1999] VSCA 73; [1999] 2 VR 643, 657 [49]; (1999) 104 A Crim R 426; (1999) 29 MVR 365 (Winneke P). See also *Walker v DPP* (1993) 17 MVR 194, 199 (Brooking J).
[12] *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643, 652 [29]; (1999) 104 A Crim R 426; (1999) 29 MVR 365. Winneke P also spoke of 'the panoply of discretionary requirements' to which s55(1) referred. *Ibid*, 652, [28].
[13] *Sanzaro v County Court of Victoria* [2004] VSC 48; (2004) 42 MVR 279, 283 [11] (Nettle J, as his Honour then was).
[14] Ibid 287 [24]. His Honour explained *Walker* and *Foster*, s49(1)(f) cases, as instances of waiver – which was available under that provision.
[15] [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[16] [2002] VSCA 49; (2002) 4 VR 220; (2002) 128 A Crim R 144; (2002) 35 MVR 466.
[17] Ibid 224 [17].
[18] Ibid 225 [25].
[19] [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[20] Ibid 488 [4].
[21] Ibid 488, [4].
[22] [2004] VSC 39; (2004) 40 MVR 415.
[23] Ibid 425-426 [38].
[24] [2004] VSC 48; (2004) 42 MVR 279.
[25] [2005] VSC 213.
[26] [2010] VSCA 111.
[27] [2009] VSC 267; (2009) 53 MVR 57; (2009) 196 A Crim R 415.
[28] *Uren v Neale* [2009] VSC 267; (2009) 53 MVR 57, [125]-[126]; (2009) 196 A Crim R 415.
[29] The heavy penalty (with respect to loss of licence) mandated for a refusal offence should be considered to have a very powerful coercive effect.
[30] *Hrysikos v Mansfield* [2002] VSCA 175; (2002) 5 VR 485, 488 [5]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[31] *Mastwyk v DPP* [2010] VSCA 111, [50].
[32] Ibid [61].
[33] [1994] HCA 15; (1994) 179 CLR 427, 437; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270.
[34] Ibid 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). See also 446 (Deane and Dawson JJ).
[35] Or was an occupant in such a vehicle, if the identity of the driver has not been established to the satisfaction of the officer.
[36] The text of ss55(9A) and 57(2) has changed since Smith J decided *Day v County Court of Victoria & anor* [2002] VSC 426. But the result is the same.
[37] Section 55(6).
[38] In the case of a breath sample, there are no equivalent provisions to s57(9) and (10), which relate to blood samples.
[39] [2011] VSCA 257.
[40] Or being in charge of.
[41] *Road Traffic Act* 1974 (WA), s66(2).
[42] See [65]-[68] below.
[43] *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643, 652 [29]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[44] His Honour's reasons [57], cited at [21] above.
[45] His Honour's reasons [54], cited at [20] above.
[46] His Honour's reasons [59], cited at [21] above.
[47] His Honour's reasons [61], cited at [21] above.
[48] *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270.

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