01/13; [2012] VSC 627

SUPREME COURT OF VICTORIA

TSOLACIS v McKINNON

Cavanough J

7, 8 November, 21 December 2012

MOTOR TRAFFIC – INFRINGEMENT NOTICE ALLEGING USE OF UNREGISTERED MOTOR VEHICLE – REFERRAL TO MAGISTRATES' COURT – DURING HEARING CERTIFICATE TENDERED TO THE COURT – CERTIFICATE DID NOT CONTAIN ALL PRESCRIBED PARTICULARS – WHETHER ABSOLUTE LIABILITY OFFENCE – WHETHER DEFENCE OF HONEST AND REASONABLE MISTAKE OF FACT AVAILABLE – CHARGE FOUND PROVED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986 SS7, 84; *ROAD SAFETY (GENERAL) REGULATIONS* 2009, R6; *INTERPRETATION OF LEGISLATION ACT* 1984, S53; *SENTENCING ACT* 1991, S76; *CRIMINAL PROCEDURE ACT* 2009, S272; *INFRINGEMENTS ACT* 2006.

T. was charged that contrary to s7(1)(a) of the *Road Safety Act* 1986 ('Act') he drove an unregistered motor vehicle on a highway. During the hearing a document was tendered by the Prosecutor pursuant to s84 of the Act purporting to certify that the vehicle was unregistered on the relevant day. By virtue of s84 of the Act and the Regulations thereunder, the document failed to contain one of the prescribed particulars it was required to contain namely a specification of the particular subsection of s84 under which the certificate was issued. The question of whether the offence under s7(1)(a) of the Act was one of absolute liability or whether the defence of honest and reasonable mistake applied was considered and rejected by the Magistrate. The Magistrate found the charge proved but deemed the matter to be trivial and dismissed the charge. Upon appeal—

HELD: Appeal allowed. Magistrate's order quashed and the charge dismissed.

1. As the language of s84(1) of the Act showed, the certificate in question could only have been properly issued under that subsection if, among other things, the matter certified "appear[ed] in or [could] be calculated from the records kept by the [Roads] Corporation or the Department of Transport or a delegate of the Corporation or the Department of Transport".

2. The certificate itself did not expressly assert that the alleged unregistered status of the vehicle on 22 July 2009 was a matter that appeared in or could have been calculated from any of the specified records. Nor, for that matter, was the author of the certificate an officer of the Roads Corporation or of the Department of Transport, although it was true that as Assistant Director of the Records Services Division of the Victoria Police the author was apparently not incapable of being authorised by the Roads Corporation for the purposes of s84.

3. The defect was not a mere failure to comply with obligations imposed only by subordinate legislation. Rather, the defect was a failure to comply with s84 of the Act itself. Each of subsections (1), (3) and (4A) of s84 referred to a certificate "containing the prescribed particulars". Where particulars had been prescribed, a certificate which could only be issued under subsection (1), (3) or (4A) that did not contain all of the prescribed particulars failed to comply with the Act itself.

4. So far as relevant, reg 6(1) of the *Road Safety (General) Regulations* 2009 provided that a certificate under s84(1), (3) or (4A) of the Act must, in addition to the matters referred to in s84(1), (3) or (4A), contain the expression "Certificate under section 84(1)", "Certificate under section 84(3)" or "Certificate under section 84(4A)", as the case may be. The very point of this requirement was to ensure that, where a certificate was to be issued under subsection (1), (3) or (4A) of s84, it expressly identified on its face which of those three subsections was claimed to be the source of the power to issue it. The present certificate did not do that. Nor did it do anything similar, or anything "to the like effect". It could not be safely assumed that the certificate was intended to be issued under s84(1), much less that it was proper to issue it under s84(1). The legislative command was that the necessary information be spelt out on the face of the document, and, in this case, that was not done. It mattered not that all the other requirements for an effective certificate may have been satisfied. The relevant requirement was additional and separate, and was not complied with at all.

5. Accordingly, the prosecutor's certificate was not "sufficient in law". It was not "in or to the like effect of the prescribed form". The defect was not trifling or *de minimis*. Hence the certificate was inadmissible and the charge should have been dismissed outright.

6. *Obiter:* In relation to the criteria for determining whether the defence of honest and reasonable mistake of fact is available, the first criterion is consideration of the words of the statute creating the offence; the second criterion is consideration of the subject matter of the statute. The third criterion is whether subjecting the defendant to absolute liability will assist in the promotion of observance of the relevant statute. The fourth criterion is that where a statute creates an offence for the purpose of regulating social conditions and public safety and where the penalty attached to a statutory offence is monetary and moderately sized, the statute is more easily regarded as imposing absolute liability.

***He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, applied.**

7. In relation to the first criterion, the language of s7 of the Act as a whole strongly indicated that an offence against s7(1)(a) was one of absolute liability.

8. In relation to the second criterion, the Act was concerned with road use, registration of vehicles and trailers and licensing. Issues of public safety will often arise which indicated that the subject matter of the offence was a matter of social seriousness but did not involve grave moral fault and was not criminal in any real sense.

9. The third criterion was whether absolute liability would assist in the observance of the statute. The fact that the legislature had chosen to penalise drivers who may not have owned the vehicle they were driving indicated a legislative intent to cast a wide and effective net. To penalise drivers as well as owners indicated that the purpose of s7(1) of the Act as a whole was to keep as many unregistered (and potentially unsafe) vehicles as possible off the roads. That purpose was furthered by an absolute liability offence for drivers as well as owners. The absence of an honest and reasonable mistake defence should have encouraged drivers who had doubts about the registration of a vehicle to refuse to drive the vehicle without some objective proof of its registration. On the other hand, if the defence were available, the prosecution of the offence could have become very difficult.

10. In relation to the fourth criterion, there was no doubt that the object which the Act was designed to achieve was to secure the public welfare and to promote the safety of the public. The legislature must have been taken to have subordinated the interests of individuals to the interests of the public and to have intended that any hardship resulting to an individual by the application of the ordinary rule of interpreting a statutory provision in accordance with its natural and literal meaning, and by the imposition of strict liability for infringement of the particular section, was to give way to the public interest. If no current registration label was affixed, the prudent course was not to drive the vehicle. Further, the monetary penalty was a moderate one and no stigma attached to a conviction for this regulatory offence. Finally, no prison sentence was prescribed for the offence.

11. Having regard to these matters, an offence against s7(1)(a) of the Act was an offence of absolute liability for which the defence of honest and reasonable mistake was not available.

***Pilkington v Elliott* MC 20/97, followed.**

CAVANOUGH J:

Introduction and overview

1. This is an appeal pursuant to s272 of the *Criminal Procedure Act* 2009 from a decision of the Magistrates' Court in a criminal proceeding. Such an appeal lies only on a question of law.

2. The proceeding in the Magistrates' Court was preceded by the issue by the respondent, Senior Constable McKinnon, of an infringement notice under the *Infringements Act* 2006 to the appellant, Mr George Tsolacis. The infringement notice alleged that Mr Tsolacis had on 22 July 2009 driven an unregistered motor vehicle on a highway contrary to s7(1)(a) of the *Road Safety Act* 1986 (RSA). Ultimately a charge to that effect was brought before the Magistrates' Court for a contested hearing. On 18 April 2011, his Honour Magistrate Garnett found the charge proven but, on the basis that there were extenuating circumstances, and with strong encouragement from the prosecutor, his Honour deemed the matter to be trivial and dismissed the charge under s76 of the *Sentencing Act* 1991. No penalty was imposed.

3. Mr Tsolacis is not satisfied with that result. He says that the charge should not have been found proven and should have been dismissed outright, not under s76. As recorded in the register of the Magistrates' Court, the order made was "DISMISSED UNDER SN 76 SENTENCING ACT". The reference in the order itself to s76 of the *Sentencing Act* 1991 shows that the Court was satisfied that Mr Tsolacis was guilty of the offence. The order was a final order of the Magistrates' Court. Mr Tsolacis is thus entitled to appeal against it under s272 of the *Criminal Procedure Act* 2009.

4. Mr Tsolacis has represented himself throughout, both here and below. He is not legally qualified, but he has some litigious experience. On the other hand, after it became apparent to me that this matter involved a fair degree of legal complexity, I suggested to Mr Tsolacis that he seek legal advice or assistance. He declined this suggestion. Nevertheless I have endeavoured to make all due allowance for his lack of legal representation.

5. Mr Tsolacis has raised a considerable number of points, most of which lack legal merit. In the end, I consider that there are only two issues of substance in the appeal.

6. The first issue of substance is whether it was open to the Magistrate to find that the motor vehicle driven by Mr Tsolacis was in fact unregistered on the day in question. That issue turns principally on the question whether a certain document tendered by the prosecutor purporting to certify that the vehicle was unregistered on that day was admissible in evidence under s84 of the RSA. That question, in turn, depends on whether or not it was fatal to the certificate that it failed to contain one of the prescribed particulars which, by virtue of s84 and the regulations thereunder, it was required to contain, namely a specification of the particular subsection of s84 under which the certificate was issued.

7. The second issue of substance in the case is purely a question of construction of the RSA. Is an offence under s7(1)(a) of the RSA an offence of absolute liability or is there room for a defence of honest and reasonable mistake?

8. For the reasons set out below, I consider that the purported certificate under s84 of the RSA was inadmissible because it failed to contain the required particular. In those circumstances, there was no admissible evidence that the vehicle was unregistered on the day in question and it was not open to the magistrate to find the charge under s7(1)(a) proven.

9. It follows that it is unnecessary to determine any of the other points raised in this case, but I will express, and in due course explain, my view on the second major issue. My view is that s7(1)(a) of the RSA creates an offence of absolute liability and hence that the defence of honest and reasonable mistake is not available. I will later deal briefly with the other points raised by Mr Tsolacis.

A preliminary question: should the Court entertain the s84 certificate point?

10. Mr Tsolacis did not object to the admissibility of the certificate during the hearing in the Magistrates' Court. In fact he tendered a comparable certificate which he had obtained from the Roads Corporation and which, he submitted, showed that the vehicle was in fact registered on the day in question. Ironically, that certificate suffers from the same defect as the prosecutor's certificate. However, as already mentioned, Mr Tsolacis was not legally represented. The prosecutor was a police prosecutor. The particular defect in the s84 certificate to which I have referred was not noticed by anyone in the Magistrates' Court, including the magistrate. The point was first picked up, by me, after the oral hearing of the appeal. At that time, the parties were due to make written post-hearing submissions on other matters. By a letter from the Court, their attention was drawn to the defect in the certificate. They were invited to include submissions on the point in their pending written submissions. The respondent's submissions were due first. He was being represented by an Associate Crown Prosecutor, Mr Roper. Mr Roper addressed the merits of the point without any objection based on non-objection below or lateness or at all. In reply, Mr Tsolacis adopted the point and submitted that the defect in the certificate was fatal to the respondent's case.

11. Nevertheless there is a question whether, notwithstanding the attitude of the Crown, the Court should entertain the point.

12. In *DPP v Kypri*,[1] Ashley JA observed that it has been said of words similar to those contained in s272 of the Criminal Procedure Act 2009 that the question of law must have arisen, as a matter of substance, in the court of first instance. His Honour went on to say that supervisory courts "have been, and should be, careful not to permit on appeal the agitation of questions of law which might have been, but were not, agitated at first instance".[2] However, in *Kypri* itself, all three members of the Court of Appeal (including Ashley JA) were prepared to entertain a complaint that a magistrate had erred in failing to amend a charge, even though no application

for amendment had been made. The magistrate had power to amend of his own motion but had not done so because he considered, wrongly, that the charge was a nullity and could not be amended. In those circumstances Ashley JA observed that the question whether the charge was susceptible of amendment was a question of law which arose, in substance, in the Magistrates' Court. The answer to the question was integral to the final order made in that Court. Hence it was a matter that could be agitated on appeal.[3]

13. Similarly, in the present case, the magistrate considered that the certificate in question, which bore the name of the Roads Corporation, established a proposition that was plainly in dispute, namely that the vehicle driven by Mr Tsolacis was unregistered on 22 July 2009. Moreover, as already mentioned, Mr Tsolacis had produced and tendered another certificate bearing the name of the Roads Corporation which, he said, established the opposite of the certificate relied upon by the prosecutor. Both certificates purported to be issued under s84 of the RSA. On first inspection, there does appear to be a conflict between the certificates.[4] This effectively put the magistrate on notice that the legal efficacy of the certificate relied upon by the prosecutor was a matter that needed to be duly investigated and considered. The defect was there to be noticed in the course of such a process. Hence, having regard to the fact that Mr Tsolacis was unrepresented, it seems to me that the relevant question of law did, in substance, arise before the magistrate and that it is appropriate for the Court to consider it. In those circumstances I need not consider whether or to what extent the restrictive observations made by Ashley JA in *Kypri* in relation to appeals under s272 of the *Criminal Procedure Act* 2009 are reconcilable with the very recent judgment of the Court of Appeal in *McVey v GJ and LJ Smith Pty Ltd and VWA*.[5]

Section 84, the regulations and the certificate

14. The RSA contains a number of sections relating to evidence and proof in criminal proceedings. Their main effect is to ease the task of the prosecutor by overcoming or modifying evidentiary requirements that would otherwise apply by virtue of statute or the common law. Most of these sections are confined to particular topics, such as drink-driving offences, road safety cameras or the like. Various safeguards for the accused are included in the provisions.

15. Section 84 of the RSA is headed "General evidentiary provisions". Despite the heading, it contains both general and specific evidentiary provisions. It is a lengthy section. It is divided into 11 subsections, numbered (1)-(4), (4A), (4B), (4C) and (5)-(8). The 11 subsections contain in turn a total of 26 lettered paragraphs. Section 84 has been amended or added to 10 times since it was first enacted in 1986.

16. Four subsections – namely (1), (3), (4A) and (4C) – make separate provision respectively for the issue by the Roads Corporation (among others) of evidentiary certificates. Of those, subsections (3), (4A) and (4C) (but, notably, not (1)) refer expressly to aspects of the registration of vehicles. Three other subsections – namely ss(2), (4) and (4B) – provide for evidentiary effect to be given in Victoria to certificates issued in other Australian jurisdictions concerning aspects of vehicle registration. Yet another subsection – (6) – provides for several separate cases where "the statement" of an officer of the Roads Corporation to a particular effect is to constitute admissible evidence of a specified matter. Such matters include the ownership of vehicles and the places from which vehicles normally operate. Subsection (7) facilitates the proof of matters such as the identification of vehicles (by reference to, among other things, their registration numbers), and the identification of drivers, by means of images or messages produced by prescribed road safety cameras and other processes. Subsection (8) contains a definition of "authorised person".

17. Subsections (1), (3) and (4A) of the RSA are the most important for present purposes. They read as follows:

> (1) A certificate containing the prescribed particulars purporting to be issued by the Corporation or the Department of Transport or an authorised person certifying as to any matter which appears in or can be calculated from the records kept by the Corporation or the Department of Transport or a delegate of the Corporation or the Department of Transport 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.
>
> (2) ...
>
> (3) A certificate containing the prescribed particulars purporting to be issued by the Corporation

> or the Department of Transport certifying that on a particular date a motor vehicle or trailer was registered in the name of a particular person is admissible in evidence in any proceedings and, in the absence of evidence to the contrary, is proof that on that date that person was, if that date is before 1 May 1999, the owner and in any other case the registered operator of that motor vehicle or trailer.
>
> (4) ...
>
> (4A) A certificate containing the prescribed particulars purporting to be issued by the Corporation or the Department of Transport or an authorised person certifying that on a particular date—
> (a) a particular registration number was assigned to a particular motor vehicle or trailer; or
>
> (b) a particular person was entitled to use or possess a number plate bearing a particular registration number—
> is admissible in evidence in any proceedings and, in the absence of evidence to the contrary, is proof that on that date that registration number was assigned to that motor vehicle or trailer or that person was entitled to use or possess that number plate, as the case requires.

18. Subsection 84(8) should also be set out. It provides:

> (8) In this section—
> ***authorised person*** means a person who is authorised or who is the holder of a position authorised for the purposes of this section by the Corporation.

19. The only kinds of certificates authorised by subsections (1), (3) and (4A) respectively are certificates "containing the prescribed particulars".[6]

20. At the relevant time, being the date of issue of the certificate in question (25 August 2010), the "prescribed particulars" for the purposes of ss84(1), (3) and (4A) were to be found in regulation 6(1) of the *Road Safety (General) Regulations* 2009. Regulation 6(1) provided:

> (1) A certificate under section 84(1), (3) or (4A) of the Act must, in addition to the matters referred to in section 84(1), (3) or (4A), contain the following particulars—
> (a) the expression "Road Safety Act 1986"; and
>
> (b) the expression "Certificate under section 84(1)", "Certificate under section 84(3)" or "Certificate under section 84(4A)", as the case may be; and
>
> (c) the name and official title of the person issuing the certificate; and
>
> (d) in the case of a certificate issued by an authorised person, a statement to that effect; and
>
> (e) the date on which the certificate is issued.

21. The certificate in question had a heading (set out in a box) as follows:

> ROADS CORPORATION
> CERTIFICATE AS TO WHETHER A VEHICLE IS REGISTERED.

Immediately beneath the heading, the following appeared:

> State of Victoria
> Road Safety Act 1986
> Certificate under Section 84.

Beneath that was another, larger box. It contained, first, the following statement:

> I certify that on the 22/7/2009 the vehicle whose details are listed below was NOT REGISTERED under the Road Safety Act 1986.

Details identifying the vehicle were then set out. Included was a statement which read:

> Registered in the name of:
> NEIL G MUIR.

An address for Mr Muir was then specified. Immediately below the vehicle identification details,

the following appeared:

> PAYMENT RECEIVED ON 25/07/2009, REGISTERED TILL 30/06/2010.

The certificate was signed by a person identified as follows:

> Zemeel Saba
> Assistant Director
> Records Services Division, Victoria Police
> An authorised person for the purposes of s84 of the Road Safety Act 1986.

The certificate was dated 25 August 2010.

The admissibility of the certificate: respondent's submissions

22. The respondent concedes that the certificate is defective in that it does not comply with the RSA and the regulations thereunder.

23. However, by his written submissions[7] the respondent submits that "strict compliance with the prescribed form is not necessary by virtue of s53 of the *Interpretation of Legislation Act* 1984 (ILA) which provides:

> Where a form is prescribed by an Act or subordinate instrument for any purpose, any form in or to the like effect of the prescribed form shall, unless the contrary intention appears, be sufficient in law."

24. The respondent contends that the certificate was "to the like effect of the prescribed form" and therefore "sufficient in law" and admissible as evidence; and that "any contrary intention connoted by the word 'must' must be viewed in the context of the true nature and effect of the irregularity".[8]

25. The respondent then turns to a number of cases relating to bankruptcy notices under Commonwealth law, albeit not in chronological order. The respondent refers first to *Bendigo Bank Ltd v Williams*[9], a decision of the Federal Court given in 2000. The facts of the case are not stated. However the respondent submits that the Court accepted that where a legislative scheme specifically and unambiguously requires particular matters to be included in a notice without any indication as to whether they were essential or not the court is not at liberty to hold that some are essential but others are not.[10] That proposition is hardly helpful to the respondent in this case. However, according to the respondent, in *Bendigo Bank* the Court allowed that in some circumstances of inaccurate or incomplete information in a notice "a question may arise whether the defect is merely formal".[11]

26. In that regard, the respondent submits:[12]

> 10. There is an equivalent provision[13] in the Commonwealth *Acts Interpretation Act* 1966 in s25C which provides as [sic] that "where an Act prescribes a form, then, unless the contrary intention appears, strict compliance with the form is not required and substantial compliance is sufficient".[14]

27. The respondent proceeds to say that this provision and the validity of prescribed forms have been considered in a number of decisions concerning bankruptcy notices. The respondent then says that in *Kleinwort Benson Australia Ltd v Crowl*[15], a decision of the High Court given in 1988, which the respondent describes as the leading authority on defective bankruptcy notices, the defect was an understatement in the notice of the amount of interest accrued. The respondent says that the majority in the High Court formulated the issues in the following terms:

> Three questions arise as to the validity of the bankruptcy notices in this case: [i] are they defective or irregular; if so, [ii] is the defect or irregularity substantive or formal; and [iii] if it is formal only, has it occasioned substantial and irremediable injustice? ... The authorities show that a bankruptcy notice is a nullity if it fails to meet a requirement made **essential** by the Act, or if it could reasonably mislead a debtor as to what is necessary to comply with the notice: *James v Federal Commissioner of Taxation* [1955] HCA 75; (1955) 93 CLR 631, at p644; [1956] ALR 79; 17 ABC 214, *Pillai v Comptroller of Income Tax* [1970] AC 1124 at 1135. In such cases the notice is a nullity whether or not the debtor in fact is misled: *In re a Judgment Debtor*, 530 of 1908 [1908] 2 KB 474, at p481. "... *Thus* **essentiality** of the requirement which the notice fails to meet and capacity of the notice to reasonably mislead a debtor are alternative ways in which a defect or irregularity may be found to be "substantive". It

> must logically follow that a notice which fails to meet a requirement made essential by the Act will contain a substantive defect even if the notice could not reasonably mislead a debtor as to what was necessary for compliance.[16]

28. The respondent refers next to the judgment of the Federal Court in *Australian Steel Company (Operations) Pty Ltd v Lewis*,[17] which was delivered in 2000, subsequent to Bendigo Bank. Again, the facts are not stated. However, according to the respondent, in *Australian Steel* the Federal Court, after considering various authorities dealing with the question of purpose, and the regard that must be had to the language of the relevant provision and the scope and purpose of the whole statute, said:

> Essentiality for the purpose of the *Kleinwort Benson* principle being determined by purpose, a provision as to substantial compliance, assuming it applies at all, cannot make unessential that which purpose reveals as essential. It can hardly be said that there has been substantial compliance with a prescribed form where the form fails to include information made essential by an enactment.[18]

29. Once again, at first glance this proposition seems unhelpful to the respondent in the present case. However, the respondent goes on to submit that the purpose of the evidentiary provisions in the RSA is to obviate the need to call witnesses as to certain matters of public record and to avoid the expense and inconvenience to the community that this would entail. The respondent submits that, adopting this "purposive approach", the omission of the "(1)" following the words "Certificate under Section 84"[19] is inessential and does not alter the character of the certificate nor could it have a tendency to mislead or confuse. In particular, the respondent submits, its omission cannot be said to thwart the purpose of s84 of the RSA or of the Act itself. The respondent submits that the omission is in truth merely a formal defect or irregularity. The respondent says that the form and the particulars given in the certificate make both their content and purposes plain and "to the like effect of the prescribed form".

30. Next the respondent refers briefly to three Victorian cases which the respondent describes as analogous in that they involve the omission of a digit or a letter or what the respondent calls "a purely technical point". The cases are *Shea v Judge Jones*[20], *Director of Public Prosecutions v Angell*[21] and *Sher v Director of Public Prosecutions*[22]. I will come back to each of these cases shortly.

31. Finally, on this part of the case, the respondent submits that the defect or irregularity in each certificate ought to be viewed as trifling and "not of the substantial kind considered in *Bendigo Bank v Williams* [and other cases]". Accordingly, the respondent submits, the defect ought not affect the validity of the certificate.

The certificate was inadmissible

32. For reasons I will in due course explain, the respondent was correct to concede that the certificate did not comply with the requirements of the RSA and the regulations. However, the defect in the certificate was misdescribed in the respondent's submissions, and it is worthwhile at the outset to identify the precise nature of the defect. This is particularly relevant to the question whether the certificate can be saved by s53 of the ILA.

33. The respondent's submissions assume that the certificate was intended to be issued under subsection (1) of s84 and that, in those circumstances, the defect was a failure to comply with reg 6(1)(b) of the *Road Safety (General) Regulations* 2009, constituted by the omission of the expression "(1)" after the expression "Section 84" in the heading. However, it should not simply be assumed that the certificate was intended to be issued under s84(1) or that it was proper to issue it under s84(1). It is true that a very close reading of the whole of s84 indicates that none of the other subsections of s84 was apt to authorise the issue of this particular certificate, even though several of those subsections deal specifically with matters of registration. On the other hand, subsection (1) itself makes no express reference to registration.

34. As the language of s84(1) shows, the certificate in question could only have been properly issued under that subsection if, among other things, the matter certified "appear[ed] in or [could] be calculated from the records kept by the [Roads] Corporation or the Department of Transport or a delegate of the Corporation or the Department of Transport". The certificate itself does not expressly assert that the alleged unregistered status of the vehicle on 22 July 2009 was a matter

that appeared in or could be calculated from any of the specified records. Nor, for that matter, was the author of the certificate an officer of the Roads Corporation or of the Department of Transport, although it is true that as Assistant Director of the Records Services Division of the Victoria Police the author was apparently not incapable of being authorised by the Roads Corporation for the purposes of s84. By contrast with the present case, in *Marijancevic v Ridsdale*[23], a case which arose before the introduction of the requirement presently contained in reg 6(1)(b) of the Regulations, the certificate then in issue contained in its heading not only the expression "Certificate Under Section 84" but also the expression "MATTERS WHICH APPEAR IN OR CAN BE CALCULATED FROM THE RECORDS KEPT BY THE ROADS CORPORATION".

35. In the present case, which concerns the admissibility of evidence in a criminal proceeding in relation to a central element of the offence (ie., that the vehicle was unregistered when driven), the presumption of regularity has little or no place.[24] It may be that the certificate presently in question was based on information contained in the records of the Roads Corporation; and it may be that if the author had stopped to consider which particular subsection of s84 was applicable, he would have chosen subsection (1). However, those matters are not stated in the certificate; they were not the subject of evidence; and they cannot simply be assumed. Therefore, strictly speaking, the defect in the certificate is that it did not contain any, as distinct from a particular one, of the three expressions referred to in reg 6(1)(b).

36. Further, the defect was not a mere failure to comply with obligations imposed only by subordinate legislation. Rather, the defect was a failure to comply with s84 of the Act itself. Each of subsections (1), (3) and (4A) of s84 refers to a certificate "containing the prescribed particulars". Where particulars have been prescribed, a certificate which may only be issued under subsection (1), (3) or (4A) that does not contain all of the prescribed particulars fails to comply with the Act itself.[25] Subject to the operation (if any) of s53 of the ILA, the respondent does not suggest that compliance with the requirement to include the prescribed particulars is anything less than a condition of admissibility of the certificate.[26]

37. The defect in the certificate is comparable to the defect in the charge and summons for an alleged offence under the RSA that was identified in *DPP v Kypri*[27]. In that case, a charge under s49(1)(e) of the RSA had been issued in the Magistrates' Court. It alleged that the defendant, "having been required to furnish a sample of breath for analysis under s55 of the *Road Safety Act* 1986", refused a consequential requirement to accompany a member of the police force to a police station. The problem was that the reference in the charge to s55 of the RSA was insufficiently specific. There were two subsections of s55, namely s55(1) and s55(2), under which the requirement to furnish a sample of breath for analysis might have been made. It was held that identification of the particular basis on which the requirement had been made was an essential element of the offence. Therefore, the failure to specify in the charge the particular basis relied upon (either by reference to the relevant subsection or otherwise) meant that the charge was defective.[28] I will return to *Kypri* in due course.

38. *DPP v Korybutiak*,[29] decided in 2004 by the Court of Appeal, is another instructive case, albeit a distinguishable one. In *Korybutiak*, the accused was charged with driving a vehicle while his licence to drive was suspended. The case against him was that his licence had been suspended by virtue of a prior traffic infringement notice. He contended that the traffic infringement notice had been invalid in that, contrary to s88(2) of the RSA (as that provision then stood), the notice allegedly did not contain "the prescribed particulars". At the relevant time, the relevant particulars were prescribed by reg 603 of the *Road Safety (General) Regulations* 1999. Reg 603 required, among other things, that the infringement notice state "the address of the person to whom a notice of objection may be sent". The infringement notice served on Mr Korybutiak was double-sided. It indicated clearly enough, on its reverse side, that any notice of objection was to be sent to "Civic Compliance Victoria". However, the only address stated for "Civic Compliance Victoria" was set out on the face side of the document, and it was set out in relation to the ways in which the infringement penalty might be paid, not in relation to the procedure for notices of objection. The trial judge had determined that the infringement notice did not comply with the statutory requirements and was invalid. In the Court of Appeal, Chernov JA gave the leading judgment. As his Honour said[30], the question was whether the impugned infringement notice satisfied the relevant statutory requirements. His Honour observed that, so far as relevant, the underlying purpose of the statutory requirements was to ensure that the recipient of the notice, who wanted to

challenge its allegations in the courts, knew from a sensible reading of the materials to whom, and to what address, he or she could direct the notice of objection so as to bring about the cancellation of the infringement notice and its replacement by a charge to be filed in the ordinary courts. In his Honour's view, a sensible reading of the whole of the notice in question met those statutory requirements and their underlying purpose. The form of the notice left much to be desired, but it was not so deficient that it could properly be said that it failed to comply with the relevant legislative directions.[31] Winneke P agreed with the reasons given by Chernov JA. Bongiorno AJA also agreed but added the following comments:[32]

> Our community contains a large number of people whose first language is not English or whose level of education is not high or both. The traffic infringement notice that forms the subject of this case is, in my opinion, far from satisfactory in a number of respects.
>
> Although it does comply with the statutory requirements, it barely does so, and it does not do so in a way which should be acceptable to a modern law enforcement system sensitive to the needs of those members of our community who do not enjoy easy facility with the written English language.
>
> The form should be seriously revised to ensure that there can be no doubt or confusion whatsoever as to what rights a citizen who receives a traffic infringement notice has and steps he or she must take to protect those rights.

39. The case of *Korybutiak* was taken to the Court of Appeal by the then Director of Public Prosecutions in circumstances where, as I recall, the decision at first instance was felt to have significant implications for many other cases. The Director had of course been unsuccessful in the Trial Division. Presumably he perceived some risk that he might fail to persuade the Court of Appeal that the relevant traffic infringement notice complied with the statutory requirements. Nevertheless, it seems that, unlike the respondent in the present case, the Director did not seek to rely on s53 of the ILA. That is to say, it seems that the Director did not argue, in the alternative or at all, that the traffic infringement notice was "a form in or to the like effect of the prescribed form" within the meaning of s53 of the ILA. That section was not mentioned at all in the judgment of the Court of Appeal. As mentioned above, s53 of the ILA provides that where a form is prescribed, "any form in or to the like effect of the prescribed form shall, unless the contrary intention appears, be sufficient in law". The Director's omission to rely upon s53 of the ILA in *Korybutiak* may well have been due to the fact that neither s88 of the RSA (as it then stood) nor the relevant regulations actually prescribed a "form" of traffic infringement notice. Rather, the legislation merely specified the information which was required to be included in such a notice.[33]

40. The situation is relevantly the same in the present case. Neither s84 of the RSA nor the regulations thereunder prescribe forms, as such. Rather, they provide for the effect of certificates which include specified information and which contain prescribed particulars. The format or manner of setting out of the certificate is not regulated by s84 or by the relevant regulations. Hence, in my view, it is extremely doubtful that s53 of the ILA could apply at all in the present case.

41. In any event, as I will explain, even if each of the certificates envisaged by subsections (1), (3) and (4A) of s84 is a "form" or a "prescribed form" for the purposes of s53 of the ILA, the certificate actually issued in this case was not "a form in or to the like effect of the prescribed form" within the meaning of s53. Further or alternatively, a certificate containing a defect of the present kind was not "sufficient in law" because the contrary intention appears in the relevant legislation. Nor was the defect trifling or *de minimis*.

42. As mentioned above, the respondent submits that the certificate was "to the like effect" of what was required. However, that submission flies in the face of s84 and reg 6(1), read together. So far as relevant, reg 6(1) provides that a certificate under s84(1), (3) or (4A) of the Act must, in addition to the matters referred to in s84(1), (3) or (4A), contain the expression "Certificate under section 84(1)", "Certificate under section 84(3)" or "Certificate under section 84(4A)", as the case may be. The very point of this requirement is to ensure that, where a certificate is to be issued under subsection (1), (3) or (4A) of s84, it expressly identifies on its face which of those three subsections is claimed to be the source of the power to issue it. The present certificate simply does not do that. Nor does it do anything similar, or anything "to the like effect". As mentioned above, it cannot even be safely assumed that the certificate was intended to be issued under s84(1), much

less that it was proper to issue it under s84(1). The contrast with the wording of the certificate in *Marijancevic* is worth noting again. The legislative command is that the necessary information be spelt out on the face of the document, and, in this case, that was just not done. It matters not that all the other requirements for an effective certificate may have been satisfied. The relevant requirement was additional and separate, and was not complied with at all.

43. The specific, detailed requirements of reg 6(1)(b) were carefully and deliberately imposed about one year before the certificate in question was issued. Until 9 September 2009, the corresponding regulations were the *Road Safety (General) Regulations* 1999 and the particular corresponding provision thereof was regulation 106. So far as immediately relevant, reg 106(1) provided:

> (1) A certificate under section 84 of the Act must, in addition to the matters referred to in section 84(1), (3) or (4A), contain the following prescribed particulars—
>
> (a) ...
>
> (b) the expression "Certificate under Section 84"; ... .

Comparing reg 106(1)(b) of the 1999 regulations with the current corresponding provision, it can be seen that the old, more basic requirement has been expanded and that the new specific requirement is spelt out in unmistakable detail. This appears to have been done carefully and deliberately. The new, specific requirement would be set at nought for all cases by the acceptance of the respondent's submissions in this case, given that the respondent does not identify any particular facts or features of this case that would distinguish it from any other case for present purposes.

44. As mentioned above, the respondent contends that the "purpose" of the evidentiary provisions in the RSA would not be thwarted by treating the defect in the certificate as immaterial. However, the respondent's description of the purpose of the provisions is one-sided and incomplete. Like most, if not all, of the other evidentiary provisions in the RSA, s84 represents a legislative compromise between the interests of convenience for the prosecution and for potential witnesses, on the one hand, and long-standing common law and statutory safeguards against wrongful conviction, including the requirements of a fair trial, on the other.

45. In enacting regulation 6(1)(b) of the *Road Safety (General) Regulations* 2009, the executive government must have considered that the imposition of a requirement to specify the relevant subsection of s84 was an appropriate addition to the safeguards for the accused. The regulation was not disallowed by the Parliament. That in itself may be enough for present purposes. In any event, it is not difficult to think of reasons why the imposition of the requirement was thought to be appropriate and why insistence on its observance is not to be regarded as pettifogging or unduly technical. As already mentioned, s84 has grown to be a lengthy and complex section. By the obligation to specify the relevant subsection in the certificate, the legislature has imposed a salutary discipline on the author of the certificate to check, before issuing it, that all of the requirements of the relevant subsection of s84 have been met. Further, the government may well have been of the view that neither the accused (even if legally represented) nor the court should be left to wonder which of the subsections of s84 was being relied upon as the source of power to issue the certificate. Certificates under s84 would typically be produced for the first time only on the hearing of the charge. Most charges under the RSA would be heard in the busy Magistrates' Court. The specification in the certificate of the relevant subsection of s84 enables the accused more readily to identify the requirements that the certificate must meet in order to be admissible. This may assist the accused to mount a challenge to the admissibility of the certificate, where appropriate.

46. The history of this very case makes the present point. As mentioned above, each side tendered to the magistrate a document purporting to be a certificate under s84. At first sight, the "certificates" appear to clash. Mr Tsolacis' certificate included a statement that "from 02/03/2000 to 18/08/2009" the vehicle "was registered in the name of Muir, Neil G ...". Of course, the period "02/03/2000 to 18/08/2009" includes the day in question, 22 July 2009. However, during a somewhat disjointed hearing, the magistrate apparently misread the dates stated on Mr Tsolacis' certificate and did not pick up this fact. He did not clearly explain how he reconciled the two

certificates. However, the potential for confusion would have been lessened if the two certificates had included the requisite endorsements. I will explain why. A careful study of the general provisions of the Act and the Regulations relating to the registration of vehicles discloses that the word "registered" is used in two senses in the Act and the Regulations. On the one hand, the word may be used to indicate that a particular vehicle is officially recorded as being within the responsibility of a specified person as owner or operator, without necessarily being a vehicle which can lawfully be driven on the highway at a particular time. In its other sense, the use of the word "registered" indicates that official records show that all current requirements to authorise the driving of the vehicle on the highway have been met, including, in particular, payment of the applicable registration fee. Once that dichotomy of meaning is understood, it becomes apparent that s84(3) of the Act is meant to authorise evidentiary certificates as to "registration" in the first sense only. It thus becomes likely that the certificate which Mr Tsolacis obtained was only meant to indicate that, during the period specified, the vehicle was the responsibility of Mr Neil Muir as owner or operator, not that all of the requirements to enable the vehicle to be driven on the road had been met. Had the authors of the two "certificates" obeyed the legislative direction to specify the subsection upon which they respectively relied, the two documents may have been more readily reconcilable.

47. In any event, and more importantly, the omission from the prosecutor's "certificate" of any specification of a subsection of s84 means that the document was neither in the form required nor "to the like effect". Even though, with considerable effort, it can be inferred that the document could not validly have been issued under any subsection of s84 except s84(1), for the reasons I have already given it cannot be assumed, nor can it be inferred from the document itself or otherwise, that the "certificate" truly was a "Certificate under section 84(1)". Nowhere in the document is there any express reference to s84(1) or to the proposition that the information in the certificate had come from records kept by the Roads Corporation, the Department of Transport or an authorised person.

48. In these respects, the present case is very similar to *Kypri*. In *Kypri*, the Director submitted that the charge was saved by s27(1) of the *Magistrates' Court Act* 1989, which provided that it was sufficient for a charge to describe an offence in the words of the Act or subordinate instrument by which it was created, or in "similar words". The submission was rejected. Nettle JA said:[34]

> To start with, the charge did not describe the offence in the terms of s49(1)(e). Section 49(1)(e) refers to the several sub-sections of s55 individually. The charge did not. It referred collectively or globally to s55 as a whole. Further, because s49(1)(e) operates in an ambulatory fashion, creating offences by reference to contraventions of obligations otherwise appearing in several different sub-sections of the Act, it is semantically inapt to speak of something as framed in terms 'similar' to s49(1)(e) unless it specifically identifies the particular obligation which is alleged to have been breached. Furthermore, and perhaps for that reason, it has been held that a provision like s27 has no application relation to an ambulatory provision like s49(1)(e).
>
> Similarly, regulation 6(1)(b) operates in an ambulatory fashion; and it is semantically inapt to say that the prosecutor's certificate was "to the like effect" of the required form of certificate. The prosecutor's certificate simply failed to identify which of the three subsections of s84 was relied upon.

49. On the other hand, the present case is distinguishable on the facts (as well as by reference to the differing statutory language) from cases like *Wesson v Jennings*[35], where a certificate of breath analysis was held admissible and effective, notwithstanding that the space in the form for stating the percentage of alcohol in the blood had been left blank. The percentage had, in effect, been stated elsewhere on the form. As already indicated, *Korybutiak* is similarly distinguishable on the facts.

50. I turn to the cases on bankruptcy notices referred to by the respondent, and related matters.

51. At the outset I note that, although bankruptcy notices can have very serious consequences for individuals, they operate in a civil rather than criminal context.

52. The earliest of the cases referred to by the respondent is the decision of the High Court in *Kleinwort Benson Australia Ltd v Crowl*[36]. The respondent appears to submit that, in *Kleinwort*,

s25C of the *Acts Interpretation Act* 1901 (Cth) was considered. It was not. The High Court did not refer to it at all. Rather, the High Court relevantly considered s306(1) of the *Bankruptcy Act* 1966 (Cth), which provided:

> Proceedings under this Act are not invalidated by a formal defect or an irregularity, unless ... the court is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of that court.

The critical expression was "formal defect or an irregularity". Contrary to the tenor of the respondent's submissions in the present case, neither the phrase "formal defect" nor the word "irregularity", nor the combined expression, nor anything close to it, appears in s53 of the ILA.

53. In *Kleinwort*, the bankruptcy notice understated the amount of interest due under a judgment by some $23,000. Nevertheless the High Court held the notice valid. The understatement of the interest due was held to be a formal defect or irregularity within s306(1). Certain other provisions of the *Bankruptcy Act* 1966 supported this view.[37] Interest could be claimed in a bankruptcy notice but was not required to be. If the amount of the judgment debt specified in a bankruptcy notice was in fact due and payment was claimed in accordance with the judgment, the essential requirements of the relevant provisions of the *Bankruptcy Act* were met. So the High Court held.

54. However, *Kleinwort* is distinguishable from the present case not only because of the civil context and not only because the language of s306(1) of the *Bankruptcy Act* 1966 (Cth) is quite different from that of s53 of the (Victorian) ILA, but also because, at the relevant time, the bankruptcy legislation did not require that the amount of the interest due be stated at all, much less that it be stated accurately.

55. In *Bendigo Bank*, it was held by the Full Court of the Federal Court (Moore and Lehane JJ; Keifel J dissenting) that the bankruptcy notice was invalid as it did not have attached to it a document stating the statutory provision under which the claim for interest was made. The requirement for such a statement had been introduced after *Kleinwort* was decided.

56. As the respondent's submissions indicate, the majority in *Bendigo Bank* saw the new legislative scheme as one which specifically and unambiguously required particular matters (including the relevant statutory interest provision) to be specified in the notice.[38] Section 25C of the *Acts Interpretation Act* 1901 was deemed to be of no significance in the case, on the basis that certain express provisions of the *Bankruptcy Act* 1966 and the regulations thereunder showed an intention to confine the operation of s25C to matters of the formatting, as distinct from the content, of the notice. As to s306(1) of the *Bankruptcy Act*, the majority were of the view that an entire failure to supply a piece of information required to be supplied in a bankruptcy notice was a defect that could never be treated as merely formal or as a mere irregularity, whereas the supply of incorrect information might, in some cases, answer such a description.[39] There seems to be nothing in the decision of the majority in *Bendigo Bank* that assists the respondent's position in the present case.

57. On the other hand, in *Bendigo Bank*, the majority had departed from previous Full Court authority.[40] As a result, later in 2000, a bench of five judges was assembled to hear *Australian Steel Company (Operations) Pty Ltd v Lewis*[41]. The errors in the relevant bankruptcy notices in *Australian Steel* were again related to statutory provisions concerning interest claimed. However, the notices had referred to the wrong statutory provision, rather than to no statutory provision at all. There was no error in the amount of interest claimed. The majority (Black CJ, Heerey and Sundberg JJ) held that the notices were invalid. By reference to *Kleinwort Benson*, their Honours held that a notice which failed to meet a requirement made essential by the Act contained a substantive defect and was a nullity, even if it could not reasonably mislead a debtor. The purpose of the requirement that the source of the creditor's entitlement to interest be stated was to enable the debtor to verify that the amount claimed was due. Having regard to that purpose, their Honours concluded that the requirement was made essential by the Act; that a notice not meeting that requirement was a nullity; and that such a notice could not be saved by s306(1) of the *Bankruptcy Act*. The majority made no reference to s25C of the *Acts Interpretation Act* 1901 (Cth). The dissenting judges, Lee J and Gyles J, delivered separate judgments. Both considered

that the bankruptcy notices could be and were saved by s306(1) of the *Bankruptcy Act*. Further, they were both of the view that s25C should be applied and that it confirmed that strict compliance with the prescribed form was not required and that substantial compliance was sufficient.[42]

58. Again, there seems to be little joy for the respondent in the reasoning of the majority in *Australian Steel*, especially in view of the nature of the defect involved in that case, namely the misstatement of the statutory provision under which interest was claimed.

59. However, in 2006, in *Adams v Lambert*[43], the conflicting decisions of the Federal Court were considered by the High Court, and the High Court unanimously overruled *Australian Steel*. Unfortunately, the respondent's submissions make no mention of *Adams v Lambert*. Nor is it mentioned in Mr Tsolacis' submissions.[44] I have considered relisting the hearing or inviting yet more written submissions from the parties to deal with *Adams v Lambert*, but in the end I have concluded that the parties have had sufficient opportunity to put their arguments.

60. In *Adams v Lambert*, the defect in the bankruptcy notice was similar to the defect in the notice in *Australian Steel*. The wrong section was specified as the source of the entitlement to the interest claimed. In particular, the notice wrongly nominated s83A of the *District Court Act* 1973 (NSW), which related to pre-judgment interest, instead of s85, which related to post-judgment interest. As in *Australian Steel*, it was common ground that the defect had caused no substantial injustice. On the other hand, the High Court accepted that an error of this kind was indeed a departure from the statutory requirements. It amounted to a defect or irregularity. But could it fall within s306 of the *Bankruptcy Act* 1966 as being merely "a formal defect or an irregularity"? Differing from the majority in *Australian Steel*, the High Court held that it could.

61. The High Court recognised that s41 of the *Bankruptcy Act* 1966 provided that a bankruptcy notice "must" be in accordance with the form prescribed by the regulations. Their Honours further recognised that the prescribed form included a note which stated that if interest was being claimed, details were to be set out in a document attached to the bankruptcy notice; and that the note further provided that the document "must" state the provision under which the interest was being claimed as well as details of the calculation of the interest. Their Honours also accepted that the evident purpose of the requirement to state the provision under which interest was claimed was to assist the debtor to check the claim. Nevertheless, they said, such information was normally incomplete, as Keifel J had pointed out in her dissenting judgment in *Bendigo Bank*. The information would tell a lawyer something the lawyer would, or should, already know. It would set an unrepresented debtor on a train of inquiry that, in most cases, would require further information in order to find the relevant rate of interest.[45] Further, one potential error in a bankruptcy notice, namely overstatement of the amount owed by the debtor, was expressly dealt with by s41(5) of the *Bankruptcy Act*, with the result that in certain circumstances the notice was not to be thereby invalidated. This was part of the legislative context and gave an indication of the legislative purpose. Further, in the particular bankruptcy notice in question, the calculation of the interest was correct. Moreover, the notice made it plain that the interest claimed was post-judgment interest only.

62. The High Court then analysed s306 of the *Bankruptcy Act* 1966, as follows.[46] The section excluded a defect that was not "a formal defect or an irregularity". What kind, or degree, of defect was to be regarded as having such a nature? The question was to be decided by reading s306 in the context of the whole Act, informed by the general purpose of the legislation, and the particular purpose of the provisions relating to bankruptcy notices. Taking that approach, if a misdescription of a statutory provision could reasonably mislead a debtor about what was necessary to comply with the notice, it was not merely a formal defect or irregularity. The same approach was to be taken to the additional question whether the requirement was made essential by the Act. The majority in *Australian Steel* had placed undue emphasis on the imperative terms of the Act and Regulations. The use of the word "must" was not conclusive. The word may in some statutory contexts require an imperative interpretation[47], but not in all. On the true construction of the *Bankruptcy Act* 1966, was it essential that there be no misdescription of the relevant section, regardless of how clear it might be from other parts of the bankruptcy notice that the claim was for post-judgment interest? Their Honours thought not. For the purposes of s306, the practical significance of an error or deficiency could vary according to the circumstances of each particular case. Questions of both degree and kind may be involved. Section 41(5) showed that even large overstatements of the

amount owing might not invalidate the notice. That threw light on the legislative purpose. Here, the debtor could not reasonably have been misled. In those circumstances, having regard to *Kleinwort Benson*, it was difficult to see how the respondent could succeed unless correct completion of the prescribed form in every respect was a requirement made essential by the Act. That was not the legislative purpose. The effect of the majority view of the Federal Court in *Australian Steel* had been to attribute to the legislature an overwhelming preference for form over substance. That should not be done. Given that s306 relieved against the invalidating consequences of some mistakes in the preparation of bankruptcy notices, the mistake that was made in this case (*Adams v Lambert*) fell within its terms.

63. I have dealt with *Adams v Lambert* at some length because, at first sight, it might be thought to support the submissions of the respondent in the present case. However, in fact it does not do so.

64. First of all, *Adams v Lambert* is, of course, another civil case, not a criminal case. It deals with a particular kind of document, namely a bankruptcy notice, which is different in nature from an evidentiary certificate. My research has not thrown up a single criminal case in which *Adams v Lambert* has ever been cited, much less applied.

65. *Adams v Lambert* might be thought to support the respondent's submission that a "purposive approach" is required. However, there is nothing new about the proposition that in construing statutory provisions the courts should give effect to the relevant legislative purpose as far as possible. Indeed, the same thing had been said by the majority in *Australian Steel*. In both cases, however, the court was seeking to determine the meaning and scope of s306 of the *Bankruptcy Act* in the context of that Act as a whole. By contrast, there is no provision in the RSA corresponding to s306 of the *Bankruptcy Act* 1966. The one and only provision on which the respondent seeks to rely in the present case in order to validate the certificate is s53 of the ILA. That section, of course, lies outside the RSA. *Adams v Lambert* gives no encouragement to the respondent in this respect. Quite the opposite. As already mentioned, the respondent submits that s53 of the ILA has an equivalent in s25C of the *Acts Interpretation Act* 1901 (Cth). In *Adams v Lambert* the appellant relied on s25C of the Acts Interpretation Act 1901 as well as s306 of the *Bankruptcy Act* 1966. However, the High Court determined that s25C did not assist the appellant. Their Honours said:[48]

> The difficulty is that in a case such as the present, where there is a specific requirement to state a provision, it is not substantial compliance to state a different provision. In such a case, the problem cannot be avoided by looking at the form as a whole and observing that, like the curate's egg, it is bad only in part.

Whereas in *Adams v Lambert* the High Court had endorsed the reasoning of Lee and Gyles JJ in relation to s306 of the *Bankruptcy* Act in their Honours' dissenting judgments in *Australian Steel*, it is plainly to be inferred that the High Court did not agree with their Honours in relation to s25C of the *Acts Interpretation Act* 1901. If, as the High Court said, it is not "substantial compliance" to state a different provision, then, *a fortiori*, it is not substantial compliance to state no provision at all.

66. In the present case, there was a legislative requirement to specify the relevant subsection of s84 of the RSA. The requirement was wholly unfulfilled. So, by analogy with the reasoning of the High Court in *Adams v Lambert* (insofar as it related to s25C of the *Acts Interpretation Act* 1901), there was no "substantial compliance" in the present case. Hence, to the extent that the bankruptcy notice cases are relevant at all, and even if s53 of the ILA be otherwise applicable, *Adams v Lambert* indicates that s53 cannot save the prosecutor's certificate.

67. I turn to the remaining cases relied on in the respondent's written submissions. In chronological order, they are *Shea*[49], *Sher*[50] and *Angell*[51]. Each of these cases is distinguishable.

68. In *Shea*, the accused submitted that a certificate under s84 of the RSA as it stood at the relevant time (1994) was invalid. It had been tendered against him on a charge of driving while his licence was suspended. It certified that on the day in question his licence was suspended "under Section 25(3)" of the RSA. In fact, s25(3) provided for a notice to be given, but not the power to suspend the licence. That power was contained in later subsections of s25. However, Beach J held

that the fact that the certificate wrongly identified the relevant subsection of s25 was not enough to invalidate the certificate. His Honour observed that the certificate was in the prescribed form[52] and established that Mr Shea's licence was suspended, the date of suspension and the period of suspension.

69. There is no inconsistency between *Shea* and the view I take in the present case. In *Shea*, it transpired that one of the assertions contained in the certificate was factually incorrect. It happened that the assertion was as to the particular subsection of s25 pursuant to which Mr Shea's licence had been suspended. But the certificate was in all respects in compliance with the requirements of s84 of the RSA as they stood at the relevant time. A certificate under that section is not necessarily invalid or inadmissible merely because it contains an error or misstatement.[53] *A fortiori*, an error or misstatement is not necessarily fatal where the question is whether a certificate or other document is "in or to the effect of" a statutory schedule. In *Houston v Harwood*[54] Gowans J said:

> In regard to this matter, it is with the nature of the matter set out and its form, and not the truth or accuracy of what is set out, that the requirement is concerned.

Indeed, s84 itself envisages that evidence to the contrary of the matter certified in the certificate may be adduced. Neither the adducing of evidence to the contrary nor even the acceptance of such evidence will render the certificate itself inadmissible. Rather, in those circumstances a finding may be made contrary to the assertion contained in the certificate. However, none of this helps the respondent. In the present case, the certificate was defective as to "the nature of the matter set out and its form".[55] It simply omitted to include the requisite matter.

70. In *Sher* the Court of Appeal expressed dissatisfaction about the extent to which technical objections had to that time been taken in drink driving cases. The present case is not a drink driving case. Moreover, the point taken in *Sher* was an obviously bad one. The argument was that a carbon copy summons which had nonetheless been signed by the informant personally was not an "original summons" within the meaning of the relevant Act of Parliament. *Sher* was subsequently considered by Eames JA in *Impagnatiello v Campbell*[56]. His Honour held that nothing said by the Court of Appeal in *Sher* as to the purpose of the legislation and the desirability of discouraging merely technical defences over-rode the continuing requirement that the prosecution was obliged to prove the elements of the offence.[57] Buchanan JA, who had been a member of the court in *Sher*, agreed with the judgment of Eames JA. Callaway JA agreed with the orders proposed by Eames JA "substantially for the reasons" given by Eames JA. In the present case, the s84 certificate was the only evidence adduced for the purpose of proving a central element of the offence, namely that the vehicle in question was unregistered on 22 July 2009. That element of the offence was squarely in contest.

71. In *Angell*, the charge was, once again, driving while the licence of the accused was suspended. Two certificates under s84 of the RSA were tendered against the accused. One of the certificates incorrectly spelt the name of the street in which the accused lived as "Thompson Street" (with a "p"), instead of Thomson Street. This certificate related to the service of a notice under the RSA at the home of the accused. There was a debate in the case about whether the certificate with the misspelt street name duly established that the document had been served. But, as in *Shea*, the debate was about what the certificate proved, if anything, not about the admissibility or validity of the certificate. Indeed, in *Angell*, Emerton J recorded that the certificates given under s84 were not challenged.[58]

72. It follows from the foregoing that, even if s53 of the ILA was potentially applicable, the prosecutor's certificate was not "sufficient in law". It was not "in or to the like effect of the prescribed form". Even if it was, the legislation displays an intention that a certificate with a defect like this one should not be sufficient in law. For corresponding reasons, the defect was not trifling or *de minimis*. Hence the certificate was inadmissible and the charge should have been dismissed outright.

Using unregistered vehicle: absolute liability offence

73. At the hearing below, it was common ground that when Mr Tsolacis was stopped by the respondent on 22 July 2009 he was driving a white Ford van on Beaconsfield Parade, St Kilda.

As already indicated, it was Mr Tsolacis' case before the Magistrates' Court that the van was either duly registered on that day or that he had an honest and reasonable belief that it was so registered.

74. Shortly after the hearing below commenced, Mr Tsolacis informed the magistrate that he wished to present evidence to the effect that, at the time of driving, the van belonged to his then employer, a company trading as Infinity Megastore. Mr Tsolacis told the magistrate from the bar table that, before he first drove the van, he had been assured by his employer that it was duly registered. Mr Tsolacis had subpoenaed two representatives of his former employer, a Mr Aziz and a Mr Oliver, with a view to supporting this aspect of his case. He had also subpoenaed Mr Neil Muir, the person who is referred to in the two above-mentioned "certificates" as having been a registered owner of the vehicle. Mr Tsolacis had further subpoenaed the proper officer of Civic Compliance Victoria in relation to a different argument. None of the four subpoenaed witnesses attended the court. Mr Tsolacis sought an adjournment in order to compel their attendance. The prosecutor opposed that course, submitting that an adjournment would be pointless because the offence was one of absolute liability. After retiring to consider the prosecutor's submission, the magistrate delivered a ruling accepting that the offence was one of absolute liability, ie an offence for which there is no *mens rea* requirement and in relation to which the defence of honest and reasonable mistake referred to in *Proudman v Dayman*[59] cannot apply. On that basis, the magistrate refused the adjournment and heard evidence from Senior Constable McKinnon about the circumstances of the alleged offence.

75. Mr Tsolacis was then invited to present his case. He gave sworn evidence as follows.[60] He had worked for Infinity Megastore on a casual basis, performing electronic repairs. Before driving the van on 22 July 2009, he had noticed that it was displaying an expired registration sticker. He raised this with the company manager, Mr Gregory Oliver. Mr Oliver told him that the registration had been paid. Mr Oliver then handed over the keys to Mr Tsolacis and asked him to make the delivery. Mr Tsolacis was later stopped by Senior Constable McKinnon and informed that the van was not registered. Had he known that the vehicle was not registered he would not have driven it.

76. Then, with some assistance from the prosecutor, Mr Tsolacis tendered the purported certificate under s84 of the RSA which, as mentioned above, Mr Tsolacis had obtained from the Roads Corporation. Mr Tsolacis asserted that this "certificate" indicated that the car was, in fact, registered on 22 July 2009. Finally, by way of cross-examination, the prosecutor put the prosecutor's "certificate" to Mr Tsolacis and obtained an acknowledgment from him that the last line of that "certificate" indicated that there had been late payment, after the date of the offence.

77. After hearing short submissions from the prosecutor and Mr Tsolacis, the magistrate indicated that he was satisfied that the vehicle was unregistered on the relevant day and that, since the offence was one of absolute liability, he was satisfied that the prosecution had proven its case. However, as already mentioned, the prosecutor himself then suggested that, in the circumstances, the matter should be regarded as trivial. The magistrate accepted that suggestion and dismissed the charge accordingly pursuant to s76 of the *Sentencing Act* 1991.

78. Before this Court, Mr Tsolacis submits that the magistrate erred by proceeding on the basis that s7(1)(a) of the RSA creates an offence of absolute liability.

79. It is desirable now to set out the provisions of s7 of the RSA in full:

> 7. **Offence if vehicle or trailer not registered**
> (1) A person must not—
> (a) use on a highway a motor vehicle or a trailer; or
> (b) own a motor vehicle or a trailer which is used on a highway—
> unless that motor vehicle or trailer is registered under this Part or exempted from registration under the regulations or is used as specified in a registration permit granted in accordance with the regulations.
>
> (2) A person must not—
> (a) use a motor vehicle or trailer in breach of any condition of its registration; or
> (b) being the registered operator of a motor vehicle or a trailer, permit or allow it to be so used or employ a person to so use it.

> (3) A person who contravenes subsection (1) or (2) is guilty of an offence and liable to a penalty not exceeding—
> (a) in the case of an individual—
> (i) 25 penalty units for a first offence;
> (ii) 50 penalty units for a second or subsequent offence;
> (b) in the case of a body corporate—
> (i) 125 penalty units for a first offence;
> (ii) 250 penalty units for a second or subsequent offence.
>
> ****
>
> (5) A person may not be convicted of more than one offence under subsection (1) or subsection (2) in respect of the same circumstances.

80. Mr Tsolacis relies on *Pilkington v Elliot*[61], which concerned a charge under s7(1)(b) of the RSA of owning an unregistered vehicle used on a highway. Mr Tsolacis relies particularly on the following passage in the judgment of Coldrey J:

> The words of s7 simply prohibit a person owning a motor vehicle or trailer which is used on a highway and is unregistered. On its face the clear and concise language in which the provision is couched, together with its objective form, clearly indicate, in my view, a legislative intention to impose strict liability upon the owner of an unregistered vehicle used on a highway.[62]

81. Mr Tsolacis submits that Coldrey J found that an offence under s7(1)(b) is a "strict liability offence" and that, therefore, the defence of honest and reasonable mistake of fact is available. He submits that, by analogy, the defence is also available for an offence of using an unregistered vehicle contrary to s7(1)(a).[63]

82. Mr Tsolacis' submission is plainly misconceived. As Coldrey J himself noted, the terms "strict liability" and "absolute liability" are often used interchangeably.[64] In the passage quoted above, Coldrey J was saying, in effect, that the offence created by s7(1)(b) was one of absolute liability. This is obvious, because Coldrey J went on to say that 'honest and reasonable mistake is not a defence to a charge under s7(1)(b)'[65]; and because it was common ground that there was no requirement to prove *mens rea* in the ordinary sense of intent or guilty knowledge.[66]

83. Coldrey J referred to the principles for determining whether an offence is one of absolute liability stated by Dixon J in *Proudman v Dayman:*[67]

> As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.
>
> The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one.
>
> Indeed, there has been a marked and growing tendency to treat the *prima facie* rule as excluded or rebutted in the case of summary offences created by modern statutes, particularly those dealing with social and industrial regulation.

84. Coldrey J also set out the following well known passage in the judgment of Dawson J in *He Kaw Teh v R*:[68]

> Attempts have been made to categorize those offences which have been regarded as absolute, but the result is only helpful in a broad sense and the recognized categories cannot be regarded as exhaustive. It is generally accepted that statutes which create offences for the purpose of regulating social or industrial conditions or to protect the revenue, particularly if the penalty is monetary and not too large, may more easily be regarded as imposing absolute liability. This approach may

> be displaced if to regard an offence as one of absolute liability could not promote the object of the legislation by making people govern their behaviour accordingly. See *Lim Chin Aik v R* (1963) AC 160; [1963] 1 All ER 223; (1963) 2 WLR 42. Conduct prohibited by legislation which is of a regulatory nature is sometimes said not to be criminal in any real sense, the prohibition being imposed in the public interest rather than as a condemnation of individual behaviour. On the other hand, if a prohibition is directed at a grave social evil, the absolute nature of the offence may more readily be seen, particularly if proof of intent would be difficult and would represent a real impediment to the successful prosecution of offenders.

85. In finding that the offence of owning an unregistered vehicle used on a highway was not subject to the defence of honest and reasonable mistake, Coldrey J referred to certain additional authorities[69] and took into account several factors. His Honour observed that it was beyond argument that the RSA is concerned with public safety.[70] This weakened the presumption that the defence was available. Coldrey J also found the offence in s7(1)(b) to be a 'regulatory offence', punishable by a monetary penalty.[71] His Honour noted that no stigma attached to a conviction; that a defendant was able to comply with the subsection with relative ease; and that the owner of a vehicle is in a unique position to ensure that it is registered.[72] His Honour also observed that absolute liability would assist enforcement of the subsection, as car owners would usually be in a position to ensure that their practices promoted the observance of the subsection.[73]

86. Although Coldrey J acknowledged that the imposition of absolute liability could create hardship in some cases (for example, if an unregistered vehicle was stolen and driven on a highway), such injustices could be avoided by the sensible exercise of prosecutorial discretion and by the court's ability to dismiss any charge as trifling.[74]

87. Mr Tsolacis has not submitted in terms that the judgment of Coldrey J in *Pilkington v Elliot* was wrong. However, having regard to Mr Tsolacis' unrepresented status, I have considered that question. I would only be justified in declining to treat *Pilkington v Elliot* as correctly decided if I was satisfied that it was "clearly wrong".[75] I am far from being so satisfied. Indeed, in my view, his Honour's conclusion was correct, for the reasons his Honour gave. I note that the judgment has stood unchallenged for some 20 years now.

88. Mr Tsolacis refers to *Kidd v Reeves*[76]. In that case, Menhennitt J held that the defence of "honest and reasonable belief" was available in relation to a charge of driving a motor vehicle while the person's licence to drive was suspended, contrary to s28(1) of the *Motor Car Act* 1958[77]. However, in *Pilkington v Elliot* Coldrey J expressly distinguished *Kidd v Reeves*. Applying an observation made by Marks J in *Cumming v Melbourne Towing Service Pty Ltd*[78] to the effect that "each statutory provision had to be considered on its own and interpreted according to such common sense and intuition as the judicial mind can bring to bear on it", Coldrey J determined that a different conclusion was to be drawn in relation to s7(1)(b) of the RSA, noting in particular that the penalty was monetary only. By contrast, imprisonment could be imposed for a second offence of driving while suspended or disqualified.

89. Coldrey J analysed carefully various other authorities which had been cited to him. One was *Welsh v Donnelly*,[79] a decision of the Full Court of this Court handed down in 1982. This was, of course, subsequent to *Kidd v Reeves*, although that case was not referred to in *Welsh v Donnelly*. The Full Court held that an offence of driving a vehicle of excessive weight contrary to s33(1)(h) of the *Motor Car Act* 1958 was an offence of absolute liability. As Coldrey J later noted,[80] in *Welsh v Donnelly* Southwell J expressed agreement with the approach taken by the South Australian Full Court in 1981 in *Franklin v Stacey*,[81] in which it was held that the relevant South Australian legislation imposed absolute liability for driving an unregistered and uninsured vehicle.[82] Coldrey J was pressed with the subsequent (1983) decision of the South Australian Full Court in *Burnett v LF Jeffries Nominees Pty Ltd*,[83] a case relating to the offence of driving or owning an overloaded vehicle, contrary to the *Road Traffic Act* 1961-1981 (SA). In *Burnett*,[84] the South Australian Full Court held that *Franklin v Stacey* was distinguishable because of the existence of a statutory "special reasons" defence in relation to the offence of driving an uninsured vehicle. However, in *Pilkington v Elliot*,[85] Coldrey J pointed out that the "so called distinction referred to in Burnett's case could relate only to the driving of an uninsured vehicle, since no 'special reasons' defence existed in relation to driving an unregistered vehicle"; and Coldrey J commented that the distinction was therefore "more apparent than real".

90. Since *Pilkington v Elliot*, there have been one or two decisions in other States in which, it might be said, the *Proudman v Dayman* defence has been given greater scope for application in road traffic matters than Coldrey J was prepared to allow it in *Pilkington v Elliot*. For example, in *DPP (NSW) v Bone*,[86] a decision of Adams J of the Supreme Court of New South Wales, it was held that the drink driving offence in question was not an offence of absolute liability. However, the only Victorian case to which his Honour referred was *Kidd v Reeves*. His Honour made no mention of *Skase v Holmes*,[87] in which Vincent J held that the corresponding drink driving offence in Victoria was an offence of absolute liability. In *Skase v Holmes*, Vincent J observed that, at least since *Welsh v Donnelly*, the relevant Victorian drink driving offence "has been regarded as one of strict liability". Clearly, Vincent J meant absolute liability, because his Honour held that the defence of honest and reasonable mistake was not available.[88] Importantly for present purposes, Vincent J referred with apparent approval to *Pilkington v Elliot* as a case in the same line as *Welsh v Donnelly*. Another Victorian case in that same line, as Vincent J also noted, was *Kearon v Grant*[89]. In *Kearon v Grant*, the Appeal Division of this Court held that the offence of exceeding 60 kilometres per hour contrary to the regulations under the RSA was an offence of absolute liability. The leading judgment was delivered by Brooking J, who referred with approval[90] to the above-mentioned part of the judgment of Southwell J in *Welsh v Donnelly*, wherein Southwell J cited a passage from *Franklin v Stacey* "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".[91] As Macaulay J said more recently in *Agar v Dolheguy*[92], the force of the reasoning of Brooking J in *Kearon v Grant* still applies, and so does the authority of the decision.

91. In my view, the overwhelming weight of authority in this Court compels me to hold that the decision of Coldrey J in *Pilkington v Elliot* was and remains correct in law. I propose to follow it.

92. The question before me, therefore, becomes whether, on the proper construction of s7 of the RSA, there is a relevant difference between driving an unregistered vehicle and owning an unregistered vehicle driven on a highway, such that the *Proudman v Dayman* defence is available for the former offence despite being unavailable for the latter.

93. Mr Tsolacis submits that a key difference between the two offences is that a driver who does not own a vehicle has no real ability to verify its registration status.[93] He submits that a driver cannot be reasonably expected to do more than ask the owner to confirm that a vehicle is registered and must rely on the owner to give an accurate answer.[94] Mr Tsolacis submits that it is therefore unreasonable to penalise a driver for a situation which the driver could not reasonably be expected to guard against. He submits that it could not have been Parliament's intention to penalise a person who not only did not intend to commit an offence but who, by making enquiries of the owner of the vehicle, took positive steps to avoid it.

94. Mr Tsolacis also notes that, under the *Interstate Road Transport Act* 1985 (Cth), driving an unregistered interstate road transport vehicle on a road is an offence of strict liability (as distinct from absolute liability), for which the defence of honest and reasonable mistake of fact is available.[95] He submits that, whilst not binding, this is a relevant consideration in considering the Victorian provisions.

95. Although some of Mr Tsolacis' submissions have some force, in the end I am not satisfied that they lead to the conclusion that the defence of honest and reasonable mistake is available for an offence against s7(1)(a) of the RSA.

96. The fact that Commonwealth legislation expressly characterises the above-mentioned Commonwealth offence as one of (merely) strict liability is, at best for Mr Tsolacis, neutral. Section 7(1) of the RSA must be construed in its own legislative context and by reference to its own words.[96]

97. The High Court's ruling in *He Kaw Teh* regarding the criteria for determining whether the presumption of a mental element (and, by implication, the defence of honest and reasonable mistake of fact) has been displaced was summarised by Warren J, as her Honour the Chief Justice then was, in *Wilson v Gahan*:[97]

> In *He Kaw Teh* the High Court referred to the fact that the courts have set down criteria to be applied in determining whether the presumption of mens rea has been displaced. The first criterion is consideration of the words of the statute creating the offence (see Gibbs CJ and Mason J 529; Brennan J 567; Dawson, J 594). The second criterion is consideration of the subject matter of the statute (see Gibbs CJ and Mason J 529; Dawson J 594). The third criterion is whether subjecting the defendant to absolute liability will assist in the promotion of observance of the relevant statute (see Gibbs CJ and Mason J 530; Brennan J 567). The fourth criterion is that where a statute creates an offence for the purpose of regulating social conditions and public safety and where the penalty attached to a statutory offence is monetary and moderately sized, the statute is more easily regarded as imposing absolute liability (see Brennan J 567; Dawson J 595).

98. I will apply each of these criteria in turn.

99. Especially on the assumption that s7(1)(b) creates an offence of absolute liability, the language of s7 as a whole strongly indicates that an offence against s7(1)(a) is one of absolute liability. As the respondent submits, the words of the RSA make no relevant distinction between the offences in ss7(1)(a) and (b).[98] The offences are contained in the same subsection and are subject to the same penalty. There is nothing to indicate that the legislature intended the two offences to have different requirements regarding any mental element. The offences in s7(1) are to be contrasted with the offences in s7(2) which refer to a registered operator 'permitting' or 'allowing' a motor vehicle to be used in breach of a condition of its registration. The notions of permitting or allowing were noted by Coldrey J in *Pilkington v Elliot* to 'arguably import a defence of honest and reasonable mistake'.[99]

100. The RSA also contains a 'reasonable steps' defence in relation to other offences, but not in respect of the offences set out in s7(1). Under s179 of the RSA, that defence is established where:

> (a) the person did not know, and could not reasonably be expected to have known, of the conduct that constituted the commission of the offence; and
>
> (b) either—
> (i) the person had taken all reasonable steps to prevent that conduct from occurring; or
> (ii) there were no steps that the person could reasonably be expected to have taken to prevent the conduct from occurring.

This appears to subsume any honest and reasonable mistake defence. A person who could make out paragraph (a) of the statutory reasonable steps defence would also ordinarily be able to establish honest and reasonable mistake as a defence at common law. The fact that the statute expressly includes this defence for certain offences under the RSA but not for s7(1) suggests to me that no such defence is to be available in the case of offences against s7(1).[100]

101. I now turn to the second broad criterion extracted from *He Kaw Teh*, namely the subject matter of the statute. The RSA is concerned with road use, registration of vehicles and trailers and licensing.[101] Issues of public safety will often arise, which indicates that the subject matter of the offence is 'a matter of social seriousness', to borrow the language of Warren J in *Wilson v Gahan*.[102] However, unlike the importation or possession for sale of heroin[103], the offence of driving an unregistered vehicle does not involve grave moral fault. Driving an unregistered vehicle is not 'criminal in any real sense'.[104] The RSA is principally concerned with matters of public safety and regulation of road use, which are of public concern regardless of the intention or other mental state of the accused. The second criterion further weakens the presumption that the defence of honest and reasonable mistake of fact applies to s7(1)(a).

102. The third criterion to be considered is whether absolute liability will assist in the observance of the statute. This will often be the case where the law seeks to compel a person to actively change their practices to avoid the possibility that the external elements of the offence might occur, regardless of the person's intent.[105] The fact that the legislature has chosen to penalise drivers who may not own the vehicle they are driving indicates a legislative intent to cast a wide and effective net. To penalise drivers as well as owners indicates that the purpose of s7(1) as a whole is to keep as many unregistered (and potentially unsafe) vehicles as possible off the roads. That purpose is furthered by an absolute liability offence for drivers as well as owners. The absence of an honest and reasonable mistake defence should encourage drivers who have doubts about the registration of a vehicle to refuse to drive the vehicle without some objective proof of its registration.

On the other hand, if the defence were available, the prosecution of the offence may become very difficult.

103. The fourth criterion is that, where the statute creates an offence for the purpose of regulating social conditions and public safety, and where the penalty attached is monetary and moderately sized, it is more easily viewed as imposing absolute liability. As noted above, in *Pilkington v Elliot*, Coldrey J held that it is beyond argument that the RSA is concerned with public safety.[106] If anything, this is even more true of s7(1)(a)'s prohibition of the driving of an unregistered vehicle than it is of s7(1)(b)'s prohibition of the owning of an unregistered vehicle which is driven on a highway. In the second reading speech for the RSA, the Minister stated that the purposes of the provisions of the RSA concerning registration (ie Part 2, which include s7(1)(a)) are:

> to ensure that the design, construction and equipment of motor vehicles and trailers which are used on a highway meet safety and environmental standards; to enable the use of motor vehicles and trailers on highways to be regulated for reasons of safety, protection of the environment and law enforcement, and to provide a method of establishing the identity of each motor vehicle or trailer which is used on a highway and of the person who is responsible for it.[107]

104. The Minister went on to state that:

> If there is to be safe, efficient and equitable road use, it is necessary that drivers and vehicles comply with the standards set by the legislation. The Government is particularly concerned with the number of unlicensed drivers and unregistered vehicles on the road. This anti-social behaviour must be eliminated as far as possible and the Bill does this in a number of ways.[108]

105. The Minister's comments highlight the regulatory nature of s7(1)(a) and Part 2 in general. In 1986, when the RSA was enacted, and for many years before, it was a matter of common knowledge that a vehicle could not be registered or transferred to a new owner or operator in Victoria without a roadworthy certificate. The relevant legislative requirements were clearly aimed at ensuring that vehicles on Victorian highways met safety and environmental standards with a view to maintaining or improving road safety.[109]

106. The importance of the public safety purpose of prohibiting the driving of an unregistered motor vehicle was highlighted by Walters J in the above-mentioned case of *Franklin v Stacey*.[110] The facts of that case are very similar to those of the present case. Mr Stacey borrowed a motorcycle from his friend Mr Jones. Before borrowing it, Mr Stacey noticed that the motorcycle had no registration label affixed. He asked Mr Jones whether the motorcycle was registered and insured, and Mr Jones told him that it was. The motorcycle was in fact neither registered nor insured. Mr Stacey was prosecuted for driving an unregistered vehicle and for driving an uninsured vehicle.

107. As I have said, the Full Court of the Supreme Court of South Australia found that driving an unregistered vehicle was an absolute liability offence under the relevant South Australian legislation. Walters J (with whom Wells and Jacobs JJ agreed) said:

> There can be no doubt that the object which the *Motor Vehicles Act*, read as a whole, is designed to achieve is to secure the public welfare and to promote the safety of the public. In the case of s9 [which prohibited the driving of an unregistered vehicle], the manifest purpose of the legislature is to ensure that save in certain excepted cases, a motor vehicle shall not be used on our public roads unless (*inter alia*) the vehicle has been registered...
> ...
>
> I think, therefore, that in enacting ss9 and 102 of the Act [the latter of which prohibited the driving of an uninsured vehicle], the legislature must be taken to have subordinated the interests of individuals to the interests of the public and to have intended that any hardship resulting to an individual by the application of the ordinary rule of interpreting a statutory provision in accordance with its natural and literal meaning, and by the imposition of strict liability for infringement of the particular section, is to give way to the public interest.[111]

108. Section 7(1)(a)'s monetary penalty of up to 25 penalty units (totalling $2920.50 at the date of the offence) for a first offence by an individual is a moderate one. There is no stigma attached to a conviction under s7(1)(a) which, as noted above, is a regulatory offence. Nor is a prison

sentence prescribed for the offence. The fourth criterion also leans towards characterising s7(1)(a) as imposing absolute liability .

109. It has always been relatively easy to comply with s7(1)(a) (and its predecessors). For decades it has been compulsory in Victoria that a registered vehicle display a registration label.[112] A driver has always been able to determine easily whether or not a vehicle is registered. If no current label is affixed, the prudent course is not to drive the vehicle. This is yet another indication that weakens the presumption that the honest and reasonable mistake defence is available.[113]

110. I recognise, as did Coldrey J in *Pilkington v Elliot* and Walters J in *Franklin v Stacey*, that any offence of absolute liability may give rise to an unjust situation in some cases. Nevertheless, I concur with the comments of Walters J that, in matters of public safety, and particularly road safety, it is not surprising that the legislature would choose to subordinate the interests of individuals to the public interest. I also echo the comment of Coldrey J that any injustice can be avoided by the sensible exercise of either prosecutorial or sentencing discretion. In the absence of the defect in the certificate, this very case would have presented an example.

111. For all of those reasons, it is my view that an offence against s7(1)(a) of the RSA is an offence of absolute liability for which the defence of honest and reasonable mistake is not available.

Remaining grounds of appeal

112. As mentioned at the outset of this judgment, the remaining grounds of appeal lack substance and they need not be determined in any event. I will refer to them only briefly.

113. Mr Tsolacis submitted for a time that the magistrate had erred by not upholding or giving effect to a complaint by Mr Tsolacis that the police had failed to comply with a written request from him to refer the matter to the Magistrates' Court for a hearing at an early stage. The amended notice of appeal referred to the *Infringements Act* 2006 in this regard.[114] The point was mentioned only briefly in the Magistrates' Court but was discussed at some length during the hearing before me.[115] However, Mr Tsolacis ultimately abandoned the point after acknowledging that he had provided insufficient evidence to support it.[116]

114. Next, Mr Tsolacis asserted that the Magistrates' Court had had no jurisdiction to hear the matter because the informant was not a legal entity. Mr Tsolacis pointed out that in a document entitled "Notice of Order Made" extracted from the records of the Magistrates' Court, in which the result of the proceeding is recorded, there is a box for "Informant, plaintiff, complainant or applicant", and that in that box there appears the expression "VICTORIA POLICE INFRINGEMENT,". As a related complaint, Mr Tsolacis submitted that the order made by Associate Justice Zammit in this proceeding on 7 June 2011 amending the name of the respondent from "Victoria Police Infringement" to "Senior Constable Callum McKinnon" was impermissible and contravened s272(5) and 392 of the *Criminal Procedure Act* 2009.

115. Mr Tsolacis' submissions in these respects are misconceived. The "Notice of Order Made" states that the matter came before the Court by way of "infringement revocation". The *Infringements Act* 2006 contains an elaborate regime for dealing with infringement notices, their withdrawal, their revocation, their enforcement and the determination by the Court of matters alleged in infringement notices. Matters may be referred to the Magistrates' Court for hearing at various stages of the process. In the present case, neither party was able to enlighten me about the procedural history prior to the hearing before Magistrate Garnett. The inability of Mr Tsolacis to do so led to his decision to abandon the ground based on the *Infringements Act* to which I have referred above. In any event, it is clear that Senior Constable McKinnon was the "issuing officer" within the meaning of the *Infringements Act* 2006. I must assume that the matter was duly referred to the Court, as the magistrate himself concluded.[117] In any event, Senior Constable McKinnon was there in person to "inform" the Court about the circumstances of the alleged offence. In my view, the way in which the Magistrates' Court filled in the box for "Informant, plaintiff, complainant or applicant" is of no consequence.[118] The order actually made by the Court was either good or bad regardless of the entry later made in that box.

116. As to the order made in this Court by Associate Justice Zammit, Mr Tsolacis cannot be heard to complain about it. It rectified a defect in his own Court documents. He did not appeal against it within time, and any appeal would have failed.

117. Next, Mr Tsolacis submitted that the prosecutor's purported certificate under s84 was proof of nothing, because the certificate obtained by Mr Tsolacis himself was "evidence to the contrary" within the meaning of whichever subsection of s84 applied. This submission falls away because Mr Tsolacis' certificate suffered from the same fatal defect as the prosecutor's certificate. Hence it is unnecessary for me to consider the questions of construction that might otherwise have been raised by Mr Tsolacis' submission.[119]

118. The notice of appeal included a complaint about the failure of the magistrate to adjourn the hearing so as to facilitate the attendance of the witnesses whom Mr Tsolacis had subpoenaed. Of course, this complaint now becomes entirely hypothetical. In any event, insofar as the complaint relates to the subpoena to "Civil Compliance Victoria" it relates only to the argument concerning the *Infringements Act* 2006 which Mr Tsolacis later abandoned. Insofar as the complaint relates to Mr Aziz, Mr Oliver and Mr Muir, their attendance would only have been useful to Mr Tsolacis if their evidence would have been to the effect that the vehicle was in fact registered on the day in question. At no stage did Mr Tsolacis say clearly and expressly to the magistrate that one or other of those individuals would have given such evidence. Rather, Mr Tsolacis' case appeared to be that those witnesses were required in order to support his defence of honest and reasonable mistake, only. Nor did Mr Tsolacis say in his submissions before me that any of the three individuals would have actually given evidence to the effect that the vehicle was registered on the relevant day. In these circumstances, I would not uphold the appeal on this ground in any event.

119. Finally, in his further written submissions filed after the hearing, Mr Tsolacis raised yet another point. He submitted that, under the definition of "registered vehicle" in the *Road Safety (Vehicles) Regulations* 2009, a vehicle remains registered for three months after the expiration of the registration. He submitted that, as the date of the alleged offence fell within three months of the expiry of the registration of the van, the van was registered on that day. This submission travels beyond the leave that was granted to Mr Tsolacis to make further written submissions. To entertain it would be unfair to the respondent. In any event, it appears to be plainly misconceived. On the date of the alleged offence, 22 July 2009, the *Road Safety (Vehicles) Regulations* 2009 were not in force. Those regulations were made on 7 October 2009 and came into operation on 9 November 2009. The previous regulations, which were in operation at the time of the alleged offence, do not contain the same definition. Moreover, it is clear that under the 1999 regulations the registration of a vehicle does not persist, for the purposes of a charge under s7 of the RSA, beyond the expiration date of the registration.[120]

Conclusion

120. The appeal will be allowed on the point relating to the evidentiary certificate only.

121. I will order that the order made by the Magistrates' Court of Victoria in case number A118 10067 be set aside and that, in lieu thereof, it be ordered that the charge against George Tsolacis be dismissed.

122. I will hear the parties on the question of costs.

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[1] (2011) 207 A Crim R 566; [2011] VSCA 257 at [53]. See also at [54]-[64].
[2] At [63].
[3] At [63].
[4] With due investigation, the conflict is resolvable. See below.
[5] [2012] VSCA 312, esp at [11]-[35] (Maxwell P and Tate JA) and [50]-[54] (Davies J).
[6] By contrast, there is no corresponding provision in subsection (4C), being the other subsection of s84 which provides for the issue of an evidentiary certificate by the Corporation.
[7] Respondent's further written submissions filed 21 November 2011 ("submissions"), [7].
[8] Ibid, [8].
[9] Cited as [2000] FCA 482; (2000) 173 ALR 175. The authorised report is [2000] FCA 482; (2000) 98 FCR 377.
[10] [2000] FCA 482; (2000) 173 ALR 175 at [31].
[11] At [36].
[12] Submissions, [10].
[13] Meaning, presumably, equivalent to s53 of the ILA.
[14] With respect, the correct year for the title to the *Acts Interpretation Act* of the Commonwealth is 1901, not 1966. Further, s25C of that Act no longer contains the expression "unless the contrary intention appears". Perhaps the respondent had the *Bankruptcy Act* 1966 (Cth) in mind. See further below.
[15] Cited as [1988] HCA 34; (1988) 79 ALR 161; 62 ALJR 383. The authorised report is [1988] HCA 34; (1988)

165 CLR 71.
[16] [1988] HCA 34; (1988) 79 ALR 161 at 164; 62 ALJR 383.
[17] No citation given, but the authorised report is [2000] FCA 1915; (2000) 109 FCR 33; 199 ALR 68.
[18] Ibid at [43].
[19] The respondent assumes that this is the proper description of the defect in the certificate, but see below.
[20] (1995) 21 MVR 392 at 395.
[21] [2011] VSC 76.
[22] [2001] VSCA 110 at [4]- [5]; (2001) 120 A Crim R 585; (2001) 34 MVR 153.
[23] [2008] VSC 125; 183 A Crim R 574.
[24] *Impagantiello v Campbell* [2003] VSCA 154; (2003) 6 VR 416, 425-426 [22]-[29], esp [27]-[29]; (2003) 39 MVR 486.
[25] *Willingale v Norris* [1909] 1 KB 57 at 64, 66; *Sunarso v Minister for Immigration and Multicultural Affairs* [2000] FCA 57; (2009) 99 FCR 125 at 134-135 [54]-[58].
[26] See *Ross v Smith* [1969] VicRp 51; [1969] VR 411; *Hanlon v Lynch* [1968] VicRp 80; [1968] VR 613; *Venezia v Marshall* [2001] VSC 87 (Gillard J) at [70]-[75]; (2001) 33 MVR 269; cf *Forester v Nicholas* [2012] NTSC 61 at [19]- [40] and cases there cited. See also *Police v Short* [2012] SASCFC 27, esp the dissenting judgment of Peek J at [73]-[97].
[27] (2011) 207 A Crim R 566; [2011] VSCA 257. Neither side cited *Kypri*.
[28] At [12], [16]-[18] (Nettle JA); [52] (Ashley JA); [67], [77], [83] (Tate JA).
[29] [2004] VSCA 29. Neither side cited *Korybutiak*.
[30] At [9].
[31] At [11].
[32] At [19]-[21].
[33] Indeed, the very fact that the prescribed information was not required to be set out in any particular order or format seems to have assisted the Court of Appeal to come to its conclusion that the notice did (albeit barely) comply with the statutory requirements.
[34] (2011) 207 A Crim R 566; [2011] VSCA 257 at [15]. See also at [16]-[18].
[35] [1971] VicRp 9; [1971] VR 83.
[36] [1988] HCA 34; (1988) 165 CLR 71; (1988) 79 ALR 161; 62 ALJR 383.
[37] In particular, ss41(5) and (6).
[38] [2000] FCA 482; (2000) 98 FCR 377 at 389 [31]; (2000) 98 FCR 377; (2000) 173 ALR 175.
[39] At 395-396 [35]-[36].
[40] Namely, *Kirk v Ashdown* [1999] FCA 1664.
[41] [2000] FCA 1915; (2000) 109 FCR 33; 199 ALR 68.
[42] [2000] FCA 1915; (2000) 109 FCR 33 at 65 [88] (Lee J); 73-76 [118], [120], [125] (Gyles J); 199 ALR 68.
[43] [2006] HCA 10; (2006) 228 CLR 409; (2006) 225 ALR 396; (2006) 80 ALJR 679.
[44] I do not suggest for a moment that either party was aware of *Adams v Lambert*.
[45] [2006] HCA 10; (2006) 228 CLR 409 at 414 [13]; (2006) 225 ALR 396; (2006) 80 ALJR 679.
[46] At 418-422, [23]-[34].
[47] At 420 [29], footnote (40), the High Court gave as an example *SAAP v Minister for Immigration & Multicultural and Indigenous Affairs* [2005] HCA 24; (2005) 228 CLR 294 at [16], [70], [136], [173], and [208]; (2005) 79 ALJR 1009; 83 ALD 545; (2005) 215 ALR 162. Earlier in the judgment (at [14]), the High Court had made a similar point, which was later picked up in *QUYD Pty Ltd v Marvass Pty Ltd* (2008) QCA 257 at [24]; [2009] 1 Qd R 41; [2009] Q Conv R 54-709. For comparable observations concerning 'must', see *Classic Heights Pty Ltd v Black Hole Enterprises* (1994) V Conv. R 54-506 (Batt J); *Halwood v Roads Corporation* (1998) 2 VR 439 at 445-446 (per Tadgell JA).
[48] [2006] HCA 10; (2006) 228 CLR 409 at 418 [22]; (2006) 225 ALR 396; (2006) 80 ALJR 679.
[49] (1995) 21 MVR 392.
[50] [2001] VSCA 110 at [4]- [5]; (2001) 120 A Crim R 585; (2001) 34 MVR 153.
[51] [2011] VSC 76.
[52] I have not checked whether or not the regulations in force at the relevant time (1994) actually prescribed a form for a certificate under s84. Even if they did not, I would not attach any great significance for present purposes to the use by Beach J of the phrase "prescribed form" for present purposes. His Honour was not invited to consider whether s53 of the ILA (which, as mentioned above, refers to a "prescribed form") or any corresponding or similar provision, was applicable.
[53] See also *Venezia v Marshall* [2001] VSC 87 (Gillard J) at [45]-[46]; (2001) 33 MVR 269.
[54] [1975] VicRp 69; [1975] VR 698 at 702.
[55] *Houston v Harwood* [1975] VicRp 69; [1975] VR 698 at 702.
[56] [2003] VSCA 154; (2003) 6 VR 416 at 422; (2003) 39 MVR 486.
[57] At 422-423 [13].
[58] At [26].
[59] [1941] HCA 28; (1941) 67 CLR 536.
[60] Transcript pp58-62.
[61] Unreported, Supreme Court of Victoria, Coldrey J, 27 September 1991.
[62] Ibid, 15.
[63] SC transcript, 20-22.
[64] *Pilkington v Elliot*, 6.

[65] Ibid, 17.
[66] Ibid, 7.
[67] [1941] HCA 28; (1941) 67 CLR 536, 540.
[68] [1985] HCA 43; (1985) 157 CLR 523, [13]; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[69] See further below.
[70] *Pilkington v Elliot*, 8–10.
[71] Ibid, 15.
[72] Ibid, 15.
[73] Ibid, 16.
[74] Ibid, 16–17. The corresponding power is now contained in s76 of the *Sentencing Act* 1991.
[75] *Tomasevic v Travaglini* [2007] VSC 337; [2007] 17 VR 100 (Bell J) at 105 [21]-[24] and cases there cited; *Engbretson v Bartlett* [2007] VSC 163 (Bell J) at [63]; (2007) 16 VR 417; (2007) 172 A Crim R 304.
[76] [1972] VicRp 64; [1972] VR 563.
[77] The predecessor of the RSA.
[78] (1984) 2 MVR 157.
[79] [1983] VicRp 79; [1983] 2 VR 173.
[80] *Pilkington v Elliot*, 13.
[81] (1981) 27 SASR 490.
[82] See further below.
[83] (1983) 33 SASR 124.
[84] At 133.
[85] At 13.
[86] [2005] NSWSC 1239; (2005) 64 NSWLR 735; (2005) 158 A Crim R 215; (2005) 44 MVR 354; followed in *Maher v Carpenter* [2012] ACTSC 38.
[87] Unreported, Supreme Court of Victoria, Vincent J, 11 October 1995 BC 9508019.
[88] Ibid, page 8.
[89] [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377.
[90] At 323.
[91] Ibid.
[92] [2010] VSC 506 at [71]; (2010) 246 FLR 179.
[93] SC transcript, 44.
[94] Ibid.
[95] *Interstate Road Transport Act* 1985 (Cth), s8; *Criminal Code* (Cth), s6.1.
[96] *Pilkington v Elliot*, 11-12.
[97] [1999] VSC 72 at [9].
[98] SC transcript, 108.
[99] *Pilkington v Elliot* , 14 – 15. See also *Collette v Bennett* (1986) 21 A Crim R 410; (1986) 3 MVR 141.
[100] Compare *Burnett v LF Jeffries Nominees Pty Ltd* (1983) 33 SASR 124; and compare *Pilkington v Elliot*, 13-14.
[101] As set out in RSA, s1.
[102] [1999] VSC 72 at [17].
[103] See *He Kaw Teh*[1985] HCA 43; (1985) 157 CLR 523 at 529; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[104] *Sherras v De Rutzen* (1895) 1 QB 918, 922; 11 TLR 369; *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523, per Gibbs CJ at [6] and [13]; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[105] *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523, per Brennan J at 567; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[106] *Pilkington v Elliot*, 8–10.
[107] Victoria, *Parliamentary Debates*, Legislative Assembly, 11 September 1986, 227 – 228 (Thomas Roper, Minister for Transport)
[108] Ibid, 228.
[109] The corresponding requirements as at 22 July 2009 were contained in RS(V)R 1999 r202(1)(a), r211(f) and Schedule 8 to those regulations.
[110] (1981) 27 SASR 490.
[111] Ibid, 493. It is clear from the rest of the decision that when using the word 'strict liability', his Honour was intending to convey that the defence of honest and reasonable mistake was not open.
[112] For provisions to this effect in force as at the day of the alleged offence, see Regulations 223(3), (4) and (7) *Road Safety (Vehicles) Regulations* 1999; rr52 and 55 *Road Safety (Vehicles) Regulations* 2009.
[113] *Pilkington v Elliot*, 15; *Kain & Shelton Pty Ltd v McDonald* (1971) 1 SASR 39, 43.
[114] Ground 3.
[115] SC Transcript 52-55.
[116] SC Transcript, 73.
[117] See, in particular, ss68, 70, 71 and 72 of the *Infringements Act*.
[118] Cf *DPP v Korybutiak* [2004] VSCA 29 at [13].
[119] Compare *DPP v Cummings* [2006] VSC 327, at [32]-[45]; (2006) 46 MVR 84; *Roads and Traffic Authority of New South Wales v Baldock* [2007] NSWCCA 35 at [36]; (2007) 168 A Crim R 566; (2007) 47 MVR 306.

[120] See reg 227 of *Road Safety (Vehicles) Regulations* 1999 (as in force on 22 July 2009). I say nothing about the position under the 2009 regulations, save to refer again to the fact that that "registration" has two meanings in the RSA and the regulations, as explained above.

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