

MOTOR TRAFFIC (ALCOHOL AND DRUGS) (AMENDMENT) ORDINANCE 1985

MOTOR TRAFFIC (AMENDMENT) ORDINANCE (NO. 6) 1985

EXPLANATORY STATEMENT

No. 51 of 1985

The Motor Traffic (Alcohol and Drugs) Ordinance 1977 (the Principal Ordinance) establishes a framework for the breath analysis of persons suspected of driving with more than the prescribed concentration of alcohol in their blood. The Motor Traffic (Alcohol and Drugs) (Amendment) Ordinance 1985 corrects a number of technical defects to which attention has been drawn by decisions of the Canberra Court of Petty Sessions and the ACT Supreme Court. In particular the amendments -

- . redefine 'drug' so as to include prescription drugs such as tranquilizers as well as narcotic drugs;
- . provide for proof of the approval of breathalyzing instruments by certificate rather than by production of the particular machine used in each case;
- . clarify the operation of provisions designed to lessen the likelihood of an unmeritorious acquittal because of some technical defect in the procedures followed by the breathalyzer operator or analyst;
- . permit the approved operators to use their breath rather than room air in carrying out the prescribed test sequences using the 'Model 1000' breathalyzer instrument.

The Motor Traffic (Amendment) Ordinance (No. 6) 1985 makes an amendment to the Motor Traffic Ordinance 1936 consequential upon the Motor Traffic (Alcohol and Drugs) (Amendment) Ordinance 1985.

The effect of each of the provisions in the Ordinances is outlined in the Attachments.

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Sections 1 and 2 are interpretation sections.

Section 3 inserts a new definition of 'drug' in section 4 of the Principal Ordinance. Previously this term was defined in sub-section 4(1) of the Motor Traffic Ordinance 1936 (which is read together with the Motor Traffic (Alcohol and Drugs) Ordinance 1977 by virtue of section 3 of that Ordinance) by reference to prohibited and narcotic drugs under the Public Health (Prohibited Drugs) Ordinance 1957, the Poisons and Dangerous Drugs Ordinance 1933 and the Poisons and Narcotic Drugs Ordinance 1978. In the Supreme Court case of O'Brien v Heathcote Mr Justice Kelly held that this definition did not include a tranquilizer known as 'Serepax' which potentiates the effect of alcohol. Accordingly the new definition refers to a Schedule which is added to the Ordinance which sets out substances such as barbiturates, benzodiazepines and phenothiazines which, together with their structural derivatives, cover most commonly used prescription drugs likely to affect driving either on their own or in combination with alcohol. Reference is still made to Schedules 8 and 12 of the Poisons and Narcotic Drugs Ordinance 1978 which contain narcotic and psychotropic drugs and an omnibus category has also been added to cover new formulations and the structural bases of which may not yet have been added to the Schedule. Consequential upon the inclusion of this new definition in the Principal Ordinance, the Motor Traffic (Amendment) Ordinance (No. 6) 1985 omits the definition of 'drug' in sub-section 4(1) of the Motor Traffic Ordinance 1936.

Section 4 amends section 5 of the Principal Ordinance to take account of the fact that the previous Schedule will now become 'Schedule 2' to the Ordinance following the addition of the Schedule of drugs.

Section 5 omits sub-section 6(2) of the Principal Ordinance which defined 'the Minister' for the purpose of sub-section 6(1). Interpretation of this term is now provided for in the Interpretation Ordinance 1967.

Section 6 amends paragraph 12(3)(a) of the Principal Ordinance which stated that the regulations may make provision for procedures to be followed before, during and after the carrying out of a breath analysis 'by means of an approved breath analysing instrument of a specified type' by omitting the words 'of a specified type'. The section adds a new sub-section 12(3A) stating that the regulations may prescribe different procedures in respect of different types of approved breath analysing instruments. The Federal Court held in Gosden v Billerwell that a description of an instrument by reference to words such as 'Model 1000' and 'U.S. Patent No. 2, 824, 789' appearing on a label affixed to it was not a sufficient description of a type of instrument. Regulations 3 and 6, which identified the procedures to be followed before, during and after the carrying out of a breath analysis by means of the Model 1000 and Model 900 instruments respectively, were amended in 1980 to delete

references to the expressions 'Model 1000' or 'Model 900' and 'U.S. Patent No. 2, 824, 789' which appear only on labels affixed to the instruments and it has been argued that references to such expressions do not; in light of the decision in Gosden v Billerwell, amount to a sufficient specification of a type of instrument for the purposes of paragraph 12(3)(a). Accordingly section 6 removes the words 'of a specific type' from that paragraph while sub-section 12(3A) nevertheless permits the regulations to prescribe different procedures for the 'Model 1000' and 'Model 900' instruments.

Section 7 amends section 41 of the Principal Ordinance which sets out the contents of evidentiary certificates. Paragraphs 7(a), (b) and (d) amend paragraphs 41(aa), (a) and (b) so that a copy of a notice signed by the Minister or his delegate and affixed to an approved breath analysing instrument will, if authenticated as prescribed in proposed sub-sections 41(3) and (4), afford prima facie evidence of the Minister's approval of the instrument used to carry out a breath analysis. Following Gosden v Billerwell the Ordinance was amended to substitute for the previous system of approving types of breath analysing instrument by notice in the Gazette a system whereby the Minister approves each instrument by a notice in a form set out in Schedule 2 to the Ordinance affixed to the instrument. Problems have arisen because the Magistrates have required that the particular instrument used, with the notice affixed to it, be tendered in each case. The new provision is designed to avoid this.

Paragraph 7(c) adds a new sub-paragraph 41(a) (via) enabling an approved operator to certify as to compliance with section 13 of the Ordinance which requires the approved operator carrying out a breath analysis to take all steps that are reasonably practicable to ensure that it is not readily apparent to members of the public that the breath analysis is being carried out. Paragraph 7(e) adds a new paragraph 41(ca) enabling a medical practitioner to give an evidentiary certificate as to his opinion of a person's medical condition for the purposes of paragraph 14(2)(b) of the Ordinance. That paragraph provides that a person shall not be required to undergo a screening test or breath analysis if the person is in hospital and a medical practitioner attending the person certifies his opinion that compliance with the requirement would be detrimental to the person's medical condition.

Paragraph 7(f), in addition to inserting the new sub-sections 41(3) and (4) referred to above, inserts a new sub-section 41(2) which ensures the validity of an evidentiary certificate given for the purposes of that section notwithstanding that it omits to refer to one or more of the matters set out in the paragraph authorising the giving of that certificate. Thus, for example, paragraph 41(a) authorises the approved operator to state a number of matters about the instrument used in carrying out the breath analysis and the procedures followed in so doing. Sub-paragraph 41(a)(iii) requires that the certificate state 'the instrument used in the analysis' and it was held in a number of cases following Gosden v Billerwell that the certificates then used, which identified the instrument by reference to the expressions 'Model 1000' and 'U.S. Patent 2, 824, 789' appearing on a label affixed to it, did not

identify 'the instrument used'. Because all the sub-paragraphs in paragraph 41(a) are linked by the word 'and' it was held that a certificate which failed to state one of the matters was not prima facie evidence of the matters stated. The new sub-section 41(2) is intended to overcome this problem.

Section 8 replaces section 42 of the Principal Ordinance with new sections 42, 42A and 42B. The previous section 42 was a saving provision designed to lessen the likelihood of an unmeritorious acquittal where there has not been compliance with every provision of the Ordinance or the regulations but where it could be said that the result of the breath analysis would have been the same had there been compliance. In Webb v Harris (1983) in the ACT Supreme Court the Chief Justice, Sir Richard Blackburn, criticised the wording of sub-section 41(2) saying that the draftsman had failed to allow for the imprecision inherent in every breath analysis result in requiring the Court to be satisfied that the result had there been compliance 'would have been not less than' the result in fact obtained rather than requiring it to be satisfied merely that the non-compliance did not affect the result. The new sub-section 42(2) has been redrafted to overcome this problem.

Although the previous section 42 purported to apply to cases involving the analysis of a body sample - employed in cases where the presence of a drug other than alcohol is suspected - its practical operation in such cases was uncertain. Section 42A will save cases where there has been non-compliance with provisions relating to the taking and analysis of body samples in the same manner as section 42 does for cases involving breath analysis or the analysis of a sample of blood. In Forace v Van Akker in the ACT Supreme Court Mr Justice Kelly held that the previous section 42 did not apply in cases where the subject refused or failed to undergo a breath test. As the regulations require the approved operator to carry out a test cycle on the instrument prior to requiring a person to provide a sample of breath for breath analysis it is considered that cases where there has been a failure to comply with those procedures should be saved in the same way as cases where a breath analysis in fact takes place.

Section 9 adds the new Schedule of drugs referred to above and section 10 renames the existing Schedule as 'Schedule 2'.

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