

**SOLICITOR-GENERAL'S REFERENCE (NO 1 OF 2016)**  
**From CRI-2015-485-52, High Court at Christchurch**

Hearing: 28 March 2017

Coram: Elias CJ  
William Young J  
Glazebrook J  
O'Regan J  
Ellen France J

Appearances: U R Jagose QC and Z R Johnston for Referrer  
A N Isac and T Mijatov as Counsel Assisting

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**CRIMINAL APPEAL – HEARING**

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**SOLICITOR-GENERAL:**

E nga kaiwhakawa o Te Koti Mana Nui, tena koutou. Your Honours I appear with Ms Johnston.

**ELIAS CJ:**

Tena koutou.

**MR ISAC:**

May it please the Court I appear with my learned friend Mr Mijatov as counsel to assist.

**ELIAS CJ:**

Thank you Mr Isac, Mr Mijatov. Right yes, Madam Solicitor.

**SOLICITOR-GENERAL:**

Thank you Your Honour. Your Honours I'll make a brief outline of the argument I wish to make first, if I may. I'll start by outlining the facts in this matter which support my first proposition, that the process of giving and service of the notice of demerit point suspension is entirely consistent with what section 90 of the Land Transport Act 1998 requires. The agency fulfils its statutory obligation to suspend a driver who, for demerit point suspension, must be suspended from driving. If Your Honours are with me to that point as to the compliance with section 90 I don't need to go any further but if Your Honours consider that there is an element of non-compliance you will need, I submit respectfully, to determine what the consequence of that non-compliance is. Because of course not every failure to meet a legislative requirement sounds in the act being invalid or a nullity.

So my second proposition, if that is needed, is that at worst any non-compliance with section 90 is that the notice was incomplete when the agency gave the critical information to the police for service to the eligible driver. The Court of Appeal was wrong, in my respectful submission, to find that the police had usurped the agency's statutory duty or that the agency had failed to act at all when it concluded that the notice served was a nullity. The difference that I draw Your Honours' attention to here is the difference between non-compliance for a completeness or for a technical error reason or for a lack of power, lack of jurisdiction reason. If any non-compliance is found and if it is of the sort that I have just described as technical or incomplete then I urge Your Honours to find that the notice is partially compliant with section 90 and is not a nullity. I have to accept that if Your Honours find the notice is invalid for want of power or a jurisdictional or lack of power reason in the issuing entity –

**GLAZEBROOK J:**

Sorry.

**SOLICITOR-GENERAL:**

If there was a lack of power in the issuing entity I have –

**GLAZEBROOK J:**

Okay, thank you.

**SOLICITOR-GENERAL:**

– to accept that the crime of driving while suspended must fall away. Suspension only occurs on the service of a valid notice. If Your Honours find invalidity for want of power a reason, section 379 cannot operate to save the convictions but if Your Honours find that there is non-compliance and it is of the incomplete notice or technical kind, in my submission the notice need not be said to be invalid or a nullity. Section 379 should operate so that the convictions should not have been set aside. May I just say as an aside, on a Solicitor-General's reference, in fact what happens in the Courts before determination by this Court remains the case. The convictions have been set aside will not come back on – the determination of the appeal is important for the many other convictions that have followed drivers driving while suspended by this method.

So that's my final proposition, that if there is a technical non-compliance, section 379 can and should operate because there was no miscarriage in the two cases that began this reference in the District Court, the Amicus responsible accepts that is so. The evidence in the District Court was that those drivers knew they were suspended and knew they shouldn't drive while suspended, but later challenged the notice for driving while suspended when they were prosecuted. So that in short is my summary outline.

If I may then start with the facts. If Your Honours could open up a couple of things please. The Court of Appeal judgment, which is in the Supreme Court case on appeal at page 12, paragraph 19 of the Court of Appeal judgment. Then also in the additional materials is a document POL1006 which is the notice that was served on drivers, or that was served on drivers by the police. Finally if I could ask you to turn up –

**ELIAS CJ:**

Sorry what page was the notice at?

**SOLICITOR-GENERAL:**

The additional materials. It should just be a slim...

**ELIAS CJ:**

Yes.

**SOLICITOR-GENERAL:**

And then if Your Honours could also turn up the section at issue, section 90, which is the Solicitor-General's authorities at page 3. I've got a loose leaf of that section if that's easier.

**ELIAS CJ:**

No, that's fine.

**SOLICITOR-GENERAL:**

So if Your Honours have all those materials in front of you, if I start with the Court of Appeal rehearsal of the facts at paragraph 19 which really just takes the High Court's facts from the High Court's paragraph 7, and I want to emphasise the facts because in my submission understanding how this system operated is critical to my first proposition that it's in compliance with section 90. So as you see there at paragraph 7 from the High Court, "The Agency enters information in relation to demerit points," so that's the New Zealand Transport Agency, it enters the information relating to demerit points, "Accumulated by drivers into its database," in the Agency's database. Then it sets out that the agency maintains an interface between its data management system and the independently run police National Intelligence Application, the NIA database. It is through that interface that the police, the NIA database, receives automatic alerts for all drivers recorded in the Agency's database as having accumulated 100 or more demerit points. So those drivers show up in the police database only when there is an alert to the system that that driver is wanted for service of a demerit point notice,

suspension notice. One of the things that bothered the Court of Appeal and led to its finding that the matter of notice was a nullity was that they found that the police had, in fact, made the notice, given the notice. They said it had composed the notice – that the notice emanated from the police and not from the Agency. The reason I come to these facts is to emphasise that in fact all of the critical information that the police transcribe onto a hard copy notice, comes from the Agency. It is the Agency's –

**WILLIAM YOUNG J:**

Where is the notice, have we got it?

**SOLICITOR-GENERAL:**

It's at the additional materials.

**WILLIAM YOUNG J:**

Sorry, okay.

**O'REGAN J:**

So when you say all the information transcribed you mean filling in all the dots on the standard form?

**SOLICITOR-GENERAL:**

Yes Sir. That comes from the Agency's database to the police NIA database and, just returning to those facts, because what happens in the patrol car –

**WILLIAM YOUNG J:**

Sorry, what about the names?

**SOLICITOR-GENERAL:**

I beg your pardon Sir?

**WILLIAM YOUNG J:**

The top names, does that come from the database or from the police officer?

**SOLICITOR-GENERAL:**

Well the police officer literally writes it down but in my submission, well actually on the facts it comes from the Agency's database because the Agency, the interface alerts the police database about all drivers recorded as having accumulated 100 or more demerit points. So for that to make sense they need to say this driver, this driver's licence number, 100 or more demerit points in this time period.

**ELLEN FRANCE J:**

So when the driver is stopped the police officer sees the alert and transcribes the name, is that what you're saying, from that.

**SOLICITOR-GENERAL:**

Yes, and if you look at the Court of Appeal judgment, the next paragraph, which is from the High Court, paragraph 8, sets out another database issue. The police then have an automatic number plate recognition alert system, which operates from specialised vehicles. The two police databases are linked so the alert system for the recognition of the number plate and the database which is being advised by the Agency's database of eligible drivers, allows the police to automatically recognise the number plates of passing cars and to be alerted when a passing car is registered to the licence holder.

**GLAZEBROOK J:**

To that's two police – those are two police –

**SOLICITOR-GENERAL:**

Those two are two police databases.

**GLAZEBROOK J:**

So there's one Agency, two police and then two police ones, yes.

**SOLICITOR-GENERAL:**

So the Agency has the interface with the NIA, and the NIA and the police alert systems work on the police database.

**GLAZEBROOK J:**

Yes.

**SOLICITOR-GENERAL:**

And then as Your Honour Justice France has just asked me, the police use that notice, 1006 –

**ELIAS CJ:**

Which is a police generated notice?

**SOLICITOR-GENERAL:**

It is. And the evidence in the District Court was there's a pad of these notices in the police car so that when they find the eligible driver they take from their database the Agency's information, write it on the form and they give it to the driver. In my submission that is entirely consistent with what section 90 requires.

**ELIAS CJ:**

Sorry, we don't have any snapshots of what the police see on the database do we, there's nothing like that?

**SOLICITOR-GENERAL:**

No you don't and in fact in the evidence even in the District Court it was admitted by consent, there was no issue as to the evidence then.

**ELIAS CJ:**

No, no, I was just interested to see what, if we had it what the police officer sees.

**SOLICITOR-GENERAL:**

We have a police officer's, in the District Court the police officer's evidence. There is no physical –

**ELIAS CJ:**

No, illustration.

**SOLICITOR-GENERAL:**

Manifestation of what it looks like.

**ELIAS CJ:**

No, no.

**GLAZEBROOK J:**

So basically they just get an alert that there's 100 or more demerit points accumulated if they put in –

**SOLICITOR-GENERAL:**

For this driver.

**GLAZEBROOK J:**

If they put in the driver's name or maybe the licence number, I'm not sure which it would be.

**SOLICITOR-GENERAL:**

At paragraph 8 there on page 13 of the case on appeal the police have an automatic number plate recognition alert system which operates from specialised vehicles. They're linked to the police NIA database. These vehicles automatically recognise the number plates of passing cars, particularly those whose owners are liable to service of a demerit point suspension notice. Through this technology Mr Miller and Mr Haunui's vehicles were picked up as being owned by drivers liable to service of such notices.

**GLAZEBROOK J:**

Okay. I was thinking when they stopped someone they presumably get that, for an unrelated reasons they presumably get that alert as well.

**SOLICITOR-GENERAL:**

That might also be –



**GLAZEBROOK J:**

Yes.

**SOLICITOR-GENERAL:**

As I understand it that might also be how –

**GLAZEBROOK J:**

But this is a number plate recognition one, right.

**SOLICITOR-GENERAL:**

And actually in my submission it makes no difference whether it's because you've spotted the driver of the car or whether you stop them for a broken taillight and do a search on your database. If you find that they are to be served, they can be served. So one of the points I wish to emphasise from those facts is that, it is the Agency's information automatically alerting the police. It is automated, it is electronic, but the Agency, in my submission, do what they are required to do by statute, which is that they must, in the language of section 90, they must suspend that driver. So it isn't a passive process. It isn't the case where the police –

**ELIAS CJ:**

Well the Agency doesn't have a discretion about suspending.

**SOLICITOR-GENERAL:**

Yes, that's right Your Honour, they don't. They must suspend. So if we look at that notice, see the driver's name and the driver's licence number, New Zealand Transport Agency records indicate that you have accumulated 100 or more demerit points within a two year period and you're wanted for service of the notice. Under the provisions of section 19 and the police officers must tick the right box –

**ELIAS CJ:**

What does that mean, "You are wanted for service of a driver licence suspension notice"? Since it is a driver licence suspension notice, isn't it?

**SOLICITOR-GENERAL:**

Yes and I think that's just saying that you are the person on whom we are to serve this notice. You're wanted for service.

**WILLIAM YOUNG J:**

It's a preamble.

**ELIAS CJ:**

Yes. It's an attempt to bring it within the statutory language, is it?

**SOLICITOR-GENERAL:**

Or to explain what it is perhaps. Because in fact suspension only occurs on service of the notice.

**ELIAS CJ:**

Yes.

**SOLICITOR-GENERAL:**

So I think it is at best, yes a preface to say we want you and we want to serve you this notice. The next bit under the provisions of section 90, the police officer must tick A or B. Now this was something that, in fact, in the High Court was a thing that led Justice Williams to conclude that the notice was incomplete, inadequate and that it was incomplete because the agency didn't determine which of the penalties applied but a police officer ticked the box.

**ELIAS CJ:**

But that just follows from whether you hold a driver's licence or not?

**SOLICITOR-GENERAL:**

Yes, quite so Your Honour. It is a matter of the law as in section 90 tells you the answer to that, again there's no discretion, there is no question. If the agency information says that this person has a licence then you tick A, if the information says they do not have a licence, you tick B.

**O'REGAN J:**

And that is in the information that the agency gives to the police, the fact that the person has or has not got a licence?

**SOLICITOR-GENERAL:**

Well the agency, in the District Court, the District Court Judge actually inferred that that was so and it must be so in my submission, although the evidence isn't before Your Honours and wasn't before the District Court, in that the agency must maintain a database of people, their driver's licence numbers and the details relating to their licence. So when they have an interface with the police saying this person and this driver's licence number, if they were unlicensed or their licence was, if they were disqualified from driving, that would also be on that database.

**ELIAS CJ:**

It was also acknowledged, wasn't it, didn't at least one of the drivers acknowledge he didn't have a – is that right, a licence, did I read that somewhere?

**SOLICITOR-GENERAL:**

Yes that's right, I think that was Mr Miller.

**O'REGAN J:**

But the question is, is the decision about whether A or B applies a decision made by the police officer at the time or is it obvious from the information that is on the database received from the agency?

**SOLICITOR-GENERAL:**

It is obvious from the information because they will say this is the person, this is their driver's licence number or, and I must say that we don't have this evidence but I assume it will say they have no licence, they're disqualified.

**O'REGAN J:**

Right.

**ELIAS CJ:**

Well they'd be able to get that from an acknowledgement too wouldn't they?

**SOLICITOR-GENERAL:**

From the driver?

**ELIAS CJ:**

Yes I understand that that doesn't meet the point as to whether it's generated by the agency but –

**SOLICITOR-GENERAL:**

Yes the driver presumably also would be able to give that information.

**GLAZEBROOK J:**

Well presumably the police have access at least to some database if they stop someone for a broken tail light to see whether they're licensed or not in any event, although there are requirements to bring your licence in I think if you don't have it on you?

**SOLICITOR-GENERAL:**

To have it with you, yes.

**GLAZEBROOK J:**

But one would still expect –

**ELIAS CJ:**

But that will be the agency's database that the police are accessing?

**GLAZEBROOK J:**

One would expect so.

**SOLICITOR-GENERAL:**

Through that interface that we saw from the judgment earlier ... transfers that information over. How do they describe it, "Enters information about demerit points accumulated by drivers, maintains an interface and the NIA receives automatic alerts for all drivers recorded as having accumulated 100 or more demerit points." The agency has a statutory duty to maintain that database of driver licences which includes all of that information, the name, their address, their date of birth, how – the status of their licence. Just continuing on that notice, sorry Your Honour the Chief Justice just asked didn't one of the drivers say they were driving without a licence, I think that was when they were stopped for driving in contravention of the suspension, they admitted that they shouldn't be driving.

**ELIAS CJ:**

Later, I see, yes I see, thank you.

**SOLICITOR-GENERAL:**

Just under those two tick boxes then, you are required under section 30 of the Land Transport Act to surrender your driver's licence to the officer serving this notice, then it gives some information about what happens during the three month period, you're not allowed to drive, you're not allowed to hold a driver licence, all this information that follows the tick boxes is not actually required by section 19. But it describes its effect. After suspension or disqualification you'll be unlicensed and you must not drive until you have reapplied and got your licence back. It gives some information about the serious offence for driving while suspended. It gives a service and date, the enforcement officer gives his or her identification and station that they come from ... that is the driver's copy that you have in front of you that is served on the driver.

My first proposition that this is consistent with section 90 entirely really relies on the fact that none of the critical information comes from police. It comes from the agency, it comes from the entity, the agency that Parliament imposed the duty to suspend the licence. And that was something that the Court of Appeal was particularly bothered by, that is why they concluded this

is a nullity, this cannot be saved by 379, this notice has been made, composed, given or emanated from the police. That's wrong in my submission, it's plainly coming from the agency and the police have simply transcribed the material.

**O'REGAN J:**

What do you say "give" means, I mean in various places in the lower Courts and in the submissions we're told that "give" means compose, generate, prepare, issue or cause to be generated and there are all those. None of which seem to me, perhaps with the exception of issue, seem to really be synonyms for the word "give"?

**SOLICITOR-GENERAL:**

Well the Land Transport Act tells us at section 210 which I don't think is in the authorities at all actually but I have copies here if Your Honours want to see the words of it.

**ELIAS CJ:**

Yes please.

**SOLICITOR-GENERAL:**

Section 210 is at the bottom of that page 298 from the Land Transport Act. "The notice required to be given for the purpose of this Act may be given or made by causing it to be delivered to the person, or left at that person's usual or last known place of residence," and so on. The section is about service of notices, so when section 90 requires that the agency must give notice in writing, section 210 tells us that the agency may give it or cause it to be given to that person.

**ELIAS CJ:**

So is section 210 not referred to in the Court of Appeal or referred to the Court of Appeal?

**SOLICITOR-GENERAL:**

It was my submission that causing it to be given was sufficient compliance but, and this, the Court of Appeal expressly rejects that argument in the judgment. I just might come back to Your Honours as to whether section 210 was ever specifically referenced.

**WILLIAM YOUNG J:**

But it's – I would have thought with you really, that 'giving' someone something encompasses putting in train a process by which that something arrives for that person?

**SOLICITOR-GENERAL:**

It seems a terrifically, I submit this respectfully, literal interpretation of section 90 to say that the agency must itself make the notice, like actually make the notice and then give it to the police to serve. That I don't understand that to be a requirement of how section 90 is written, it says, "You must give notice in writing advising the person," and section 210 says, when we say that in this Act, you can give it to them but you can cause it to be given ... it to be given to them.

**O'REGAN J:**

But then that makes the next bit about serving it sort of redundant doesn't it?

**SOLICITOR-GENERAL:**

Well yes. Your Honour you're quite right about that. The amendments to this Act have been at least unhappy because in fact there was no need to say that it may be served and if I may submit from the –

**ELIAS CJ:**

But doesn't section 210 provide some sort of bridge because it runs the two together so it just makes it clear that read together you can give the notice by service by the Agency or by service by someone else authorised.

**SOLICITOR-GENERAL:**

Yes because what section 90 is saying in subsection (2), "The notice given may be served by the Agency, a person approved or an enforcement officer," is really not saying anything about service so much as who could serve it although absent subsection (2) I suspect the same thing would be quite proper for service to be done by process server or a police officer. The history of the –

**O'REGAN J:**

Well is there any difference between giving and service I guess is that, do you say that they're just the same thing?

**SOLICITOR-GENERAL:**

Yes.

**ELIAS CJ:**

Well 210 supports that.

**SOLICITOR-GENERAL:**

I think what the statute is saying when we, when the statute says, "Give notice in writing to a person," you've got to serve it or got to give it to them or cause it to be given to them. And the first proposition of my argument is that simple, that this process met it –

**ELIAS CJ:**

But you can't – sorry –

**SOLICITOR-GENERAL:**

– sorry Your Honour.

**ELIAS CJ:**

But you can't cause it to be given by just anybody, you either have to do it yourself –



**SOLICITOR-GENERAL:**

Quite so.

**ELIAS CJ:**

– or you have to do it through an enforcement –

**SOLICITOR-GENERAL:**

Or a person that Agency approves.

**ELIAS CJ:**

Yes.

**SOLICITOR-GENERAL:**

So it's quite broad.

**ELIAS CJ:**

Yes, I see.

**SOLICITOR-GENERAL:**

The history of these amendments shows us that the reason for the expression or the explicitness about police officers being able to serve was that the prior version, and if Your Honours have the Land Transport Act section 90 in the, in our authorities bundle at pages 3 and 4, you'll see the historic versions too which might be useful to this point. At page 4 is the earliest incarnation from it which simply says if in any two year period –

**GLAZEBROOK J:**

Page 4 sorry?

**SOLICITOR-GENERAL:**

Sorry Your Honour.

**ELIAS CJ:**

Yes you've got, that's what I was looking at, yes this one, it's got the earlier version.

**GLAZEBROOK J:**

The two, sorry.

**SOLICITOR-GENERAL:**

It's over the page where the Chief Justice was gesturing is the first version of it from '99 to 2005. "If in any 2-year period 100 or more demerit points are recorded the Director of the Land Transport Agency," as it was, "must by notice in writing given to that person either suspend their licence" and so on.

**ELIAS CJ:**

Well it can't be that the director himself or herself has to do it.

**SOLICITOR-GENERAL:**

No. So section 210 would have told, 210 which was in force then would have said, when we say the director has to give a notice in writing to that person, we just mean serve it on them. Then in 2005 the amendment, which is on page 3 at the bottom, was enacted. And the reason, as far as I can determine, and it isn't – there's only a reference in Hansard to using the police's roadside presence to make effective service of these notices. So that's why the police were included, as you can see there, but they still require the, the Act still required that the Agency must give the notices, so that's why the police were included as you can see there. But they still require that the Agency must give the notice and if they were unsuccessful then the police, the enforcement officer could do the same, by notice in writing given to the person, suspend. So in fact between 2005 and 2011 they both had the same power to give the notice in writing. And as the new or current enactment, the history to that makes clear there continued to be problems or inefficiencies with the Agency having to first try and serve it on the person and then only then been able to ask the police to do the same and so this amendment was made to the current version of section 19 which was said to be about making that process which had been bedevilled by technical challenges to the suspension notices to make that more straightforward, more efficient process of service. In section 210 still –

**GLAZEBROOK J:**

Well you'd say therefore that that supports your argument, one assumes, in terms of the history of the provision to make it easier rather than harder or beset by technical challenges?

**SOLICITOR-GENERAL:**

Yes well certainly the objective of avoiding technical challenges to suspension notices has not been successful because this challenge, in my submission, is utterly on a technicality, to say the Agency never gave me the notice, the police gave it, that just utterly confused giving and serving. Or perhaps another way to look at it is the Agency in section 90, the reference to, "Must give notice in writing," it's not that they must give a notice, it's not the noun that's being referred to in give notice, it's the act of notify, notify the person in writing and we do that by serving it on them. That is my first and main proposition.

**WILLIAM YOUNG J:**

Primary argument.

**SOLICITOR-GENERAL:**

And as I said in my opening summary if Your Honours are with me to that point actually we don't need to go any further because the next questions that arise are about if it is not compliant with section 90, then what? Which I'm happy to address Your Honours on.

**ELIAS CJ:**

I don't require it, do you want to have a –

**O'REGAN J:**

Perhaps we should hear from the counsel assisting on this argument and then decide whether we need to hear the next bit.

**ELIAS CJ:**

I think that's a good idea, yes thank you. Yes Mr Isac.

**MR ISAC:**

Thank you Your Honour. I have proposed to speak generally, obviously I've had the benefit of hearing the discussion that the Court has had with the Solicitor so I'll be interrupted as needed but perhaps if I can just begin with a general submission which is less about the interpretation or how the problem has ended up in this jurisdiction and in my respectful submission the case has arisen really from a problem about process rather than a problem about statutory interpretation. And that in my submission is because as the Court of Appeal found, the Agency could and indeed has now delegated the duty it holds under section 90(1) to police. The problem is that it tried to do so but wasn't able to effectively at the time material to the reference so what appears to have happened –

**ELIAS CJ:**

But what has it delegated, I'd be quite interested to see the terms of the delegation, do we have that?

**MR ISAC:**

Unhelpfully they're not in the materials but I'm sure we can make them available.

**ELIAS CJ:**

No, no, no perhaps it's totally irrelevant really but it would be interesting to see if it's a delegation of 'giving' I suppose.

**MR ISAC:**

One of the slight ironies is if the, if the Agency's interpretation is correct, it need not have endeavoured to delegate as I understand the position, there is now a valid delegation in place and it doesn't deal with the fundamental –

**ELIAS CJ:**

But it may be belt and braces, it may be a sensible thing to have done particularly given the challenge.

**MR ISAC:**

Yes. That doesn't answer the issue but ultimately the problem which has arisen has arisen through that context and it would appear, at least, that the Agency and police have developed a system in practice which they created with the understanding that the delegation was effective. What since happened is it's been realised that there is a problem with the delegation and so practically the question now that arises is whether the practice that evolved can be shoe-horned might be a fair term, they put it too highly in terms of section 90, but can be accommodated at least.

**ELIAS CJ:**

It comes within section 90?

**MR ISAC:**

Yes. Turning then really to the heart of the issue, what does section 90 mean, perhaps I can take Your Honours to it, it's in the bundle of counsel assisting, it's in both bundles I think under tab 1. But on its face it seems significant that the language that Parliament use clearly contemplates two different ideas, two different concepts. One is in subsection (1) the duty to give notice – what does that mean? It's not perhaps the most, it's a broad term, I can see why there have been different synonyms which have been applied at different levels. So the duty in subsection (1) the Agency must give notice in writing to the driver but then in my submission what is significant is that subsection (2) goes on both to repeat, reiterate the concept that given, given notice, and then identifying what the police role in the process is, is being serviced, served by, notice given under subsection (1), by the Agency, may be served by. So my submission, it seems reasonably plain firstly that there are two different ideas contemplated by Parliament there. One is giving notice, whatever that is, and service is a separate conception, or idea. The role of police under subsection (2) is limited to service. Giving the notice is the duty or responsibility of the Agency and if that's accepted that they are separate ideas, then it would seem that, with respect to the Agency's position, it cannot effectively, informally delegate the duty of giving notice by what, in my submission, is the passive sharing of information on a database.

Perhaps that's a good point to turn in reply to the Solicitor's submissions on the facts of the case because as I understand the submission that's been put it's all the critical information that's needed to fill in the form is provided by the Agency to police through the NIA database so a police officer at the roadside is simply transcribing, it's mechanical, that they have no discretion. It may be useful, helpful to look at the issue perhaps from the perspective, what's the Agency actually doing in terms of its duty under section 90(1) to give notice in writing, and in my submission other than running the database, which it then shares with police, the police NIA database, it does nothing else. It doesn't find the driver for service of a notice. It doesn't –

**GLAZEBROOK J:**

Does it need to in terms of giving a notice? Because if service and giving are two different things, do they have – I understand your point about it, the only thing it does is passively, well passively maintain a database and share that, but I'm not sure that the next part of your proposition follows that they have to find the driver, because I would have thought service might indicate that it's the police that find the driver, at least.

**MR ISAC:**

I accept that Your Honour. There is a problem in that practically the way it would seem that the system should operate is that when the driver is stopped by a police officer, they can be served immediately on the roadside, so I agree. So in that sense there must be a degree of overlap I suppose.

**WILLIAM YOUNG J:**

The statute is designed to facilitate that isn't it? The evolution of the statute.

**MR ISAC:**

In my submission, Sir, it might go beyond quite what the regulatory impact statement had in mind. The problem, the specific problem that was to be corrected at that time, under the previous drafting of section 90(1) and (2), was that there is a refinement that the Agency had to first attempt to serve,

and only if it hadn't been successful did police then have any power, which obviously invited a whole lot of technical challenges, so when you actually review the scope of the regulatory impact statement, I can take Your Honour to it, it does seem very much specifically focused on that problem, and correcting that issue –

**WILLIAM YOUNG J:**

But wasn't that because they wanted the police to serve the notices on the side of the road?

**MR ISAC:**

Yes, that is, I think certainly that would be part and parcel of it but in terms of whether, that would have been achieved through the fact of the delegation as well Sir. I don't think – put it this way, if the Agency needed to have the problem addressed in the way that it has been, Parliament need only have said in section 90(1) the Agency or police must give and that would have include it.

**ELIAS CJ:**

Well except that if the, well they're run together, if they're read together which is really the argument so that there is no difference, it's just that the manner of giving is either delivery by the police or by the Agency itself or by someone authorised by the Agency. If you read it like that there is no separation?

**MR ISAC:**

I accept that. The, although contextually in my submission, given that there is a distinction drawn within the section itself between giving and serving, that's material.

**ELIAS CJ:**

But if this had been expressed in the passive so that if it had been a person has accumulated, if and any – a person must be given notice in writing and then it went on to say the manner of service, there'd be no problem. It's the personalisation but that can't be right if you look at the first emanation of

section 90 because it can't have been contemplated that the director would have to personally give the notice. So ...

**MR ISAC:**

Yes. And that I think Ma'am is where 210 probably comes into play because 210 was part of the original enactment in '98 and so it's not a complete answer because of the ambulatory interpretation to section 90 as amended but if you actually look at what Parliament had in mind when it enacted 210 it related to a world where only the director should serve or could serve a notice under, give a notice under section 90 and what's changed is that progressively police have been given a specific task or role within that process. One of the issues in the Court of Appeal and if it's of assistance, is the fact that the drafting of section 90 prior to amendment in 2011 suggested that the word "give" probably did mean service and that was a matter of some discussion between counsel and the bench. And one view of that might be to say, well that's a helpful aid to say give, now in the current version must overlap with service but I think the Court was more drawn to a converse view that if in the previous version of 90 give meant service, the fact that the 2011 amendment changed the two different concepts or introduced two different concepts, tended to accentuate that they aren't coterminous ideas.

**WILLIAM YOUNG J:**

Is there any good reason why we should read the statute in the way that you say we should?

**MR ISAC:**

In a nutshell Sir I think –

**WILLIAM YOUNG J:**

I mean it's – just accept it for a moment there's an ambiguity, what's the one, what would be the interpretation that's most consistent with the policy of the statute as perhaps exemplified although it's really obvious, by the legislative history material you've taken us to?



**MR ISAC:**

Mmm, probably two points I think Sir. Firstly, if you look at the LTA and the LTMA, the Land Transport Management Act 2003, the Agency has been established as a specific Crown entity with particular functions and responsibilities and driver licensing which is the realm that, in my submission, we're in, is its sole function, there are principles of independence, transparency, and so in balancing what the intent of section 90 might be, one has to have regard to that responsibility, having been given by Parliament to the Agency exclusively.

**ELIAS CJ:**

But the responsibility remains with the Agency because nobody can serve notice that hasn't, without an Agency go ahead.

**MR ISAC:**

Yes.

**ELIAS CJ:**

It's not something the police can initiate without that.

**MR ISAC:**

Yes. I accept that Ma'am.

**WILLIAM YOUNG J:**

What's your other, and hopefully better point.

**MR ISAC:**

My second point...

**GLAZEBROOK J:**

And also if there's no discretion of this aspect then I'm not sure that transparency, or independence actually has much effect, does it?

**MR ISAC:**

Yes.

**GLAZEBROOK J:**

Because it's an automatic suspension. I mean it's really a record-keeping role that sees whether there should be –

**MR ISAC:**

Yes. Perhaps if I deal with that point very quickly first. If you look at section 90(6) there is one element of discretion that I think the Solicitor acknowledges, which is that the notice doesn't take effect until the date specified in the notice, and that's of course it's going to be the date that it's served, that's what the police officer is doing, I accept that, but ultimately in terms of if you like discretion or room for error, a police officer still has to get, tick option A or B correct, and secondly, they have the power effectively at the roadside to determine whether the suspension will take effect. It's not entirely the case though police aren't performing the role of making a decision relevant to the effect of giving of a notice –

**ELIAS CJ:**

Is that really a decision though. It's a matter of fact, isn't it. If the police get it wrong, and the person has a licence or whatever the choice is doesn't have a licence, the only two options, well the notice may be defective and there may be an argument about that, but that error might have been made by the Agency or by the – I'm not sure why –

**GLAZEBROOK J:**

Well I think the point under subsection (6) though is that, I mean presumably the police officer might sort of say well you're in between Hamilton and Auckland, I'll put the suspension notice as happening from tomorrow because I'm going to let you drive home and put your car in the garage.

**MR ISAC:**

Yes.

**GLAZEBROOK J:**

Is that the sort of discretion you're talking about, which would be a police discretion presumably –

**MR ISAC:**

I mean it's unlikely that they might but –

**GLAZEBROOK J:**

– rather than something that comes through from the Agency?

**MR ISAC:**

Yes Your Honour. That's –

**GLAZEBROOK J:**

I mean I have no idea whether that's what they do do but –

**ELLEN FRANCE J:**

What I was going to say is that we don't know whether that is what they...

**GLAZEBROOK J:**

No, no, sorry, I have no idea whether they do do that or not, or whether they say, right, hand me the keys.

**MR ISAC:**

No, but if we asked, is it open to the police officer to do that, and I think the answer must be yes, in theory.

**WILLIAM YOUNG J:**

Well the statute, the scheme of the statute I think is that where the notice is served by a police officer it would have to be the police officer who fills in the date, wouldn't it? There's no other...

**MR ISAC:**

Yes.

**WILLIAM YOUNG J:**

Obvious way you could do it. So what was your second point?

**MR ISAC:**

It may be no better than the first Sir, and it probably overlaps with the second question which is perhaps not really meant to be, but putting it, I suppose, bluntly what I think the tension in this case, it may not be much of a tension depending on the Court's views between, from a merits perspective the fact that these people should be suspended, I don't think there's any doubt about that, there's no argument about prejudice about, you know, the process that's followed, but ultimately if the Court accepts that Parliament has drawn a distinction between giving notice, being an Agency obligation, and a more limited role for police being service of it, then there's a more important constitutional issue at play which is what the Court of Appeal recognised in relation to the section 379 question, which is that ultimately where Parliament has conferred the responsibility or duty on a particular agency, then the letter of the law ought to be followed regardless of administrative inconvenience that might arise. These aren't insoluble problems for the Agency, they're kind of dealing, if you like with a large (inaudible) problem if you like, of a transitional period while the delegations were being resolved. So from a –

**GLAZEBROOK J:**

But why would you say it's been conferred on one agency when you've got a power of delegation? I mean normally those cases that say it's conferred on one agency, there are powers of delegation but they're usually down through the particular agency so that, for instance, I don't know under the Resource Management Act, they can't delegate to the Transport Agency, their powers. There are delegations down through the Agency.

**MR ISAC:**

Yes.

**GLAZEBROOK J:**

But in terms of a constitutional issue to say that has Parliament specifically chosen this when it basically says you can delegate it to all sorts of people. It does seem a bit of an odd constitutional argument to say well there's a really important constitutional principle that it goes by this agency when actually they can delegate to whole piles of people.

**MR ISAC:**

And I accept that Your Honour although the Crown Entities Act 2004 –

**ELIAS CJ:**

Where's the delegation part?

**MR ISAC:**

I'm sorry?

**ELIAS CJ:**

The delegation part you're referring to?

**MR ISAC:**

Under the Crown Entities Act.

**ELIAS CJ:**

Well from my own part –

**GLAZEBROOK J:**

I understand –

**ELIAS CJ:**

– from my own part I would have thought that was a very odd source of power for penalty provisions but a very odd source – it would be very odd to use a general delegatory power for penal provisions. I haven't looked at the provision.

**MR ISAC:**

I believe the Court of Appeal touch on it briefly but perhaps just to come back to Justice Glazebrook's point –

**ELIAS CJ:**

Yes I think they do.

**MR ISAC:**

– I accept that ultimately, you know, if it can be delegated where's the big constitutional issue at play here and I think perhaps the –

**ELIAS CJ:**

Well I'm just flagging that I'm not convinced –

**GLAZEBROOK J:**

Yes but it might be –

**ELIAS CJ:**

– that there really is a power to delegate in that sort of way.

**MR ISAC:**

Yes and even if there were the Crown Entities Act is designed to create specific protections for citizens around the delegation processes protecting that. So while eventually it might be delegated, if you haven't done it properly then there is still a constitution issue at play in my submission.

Perhaps just a final point on this first question. Perhaps another way into the question of interpretation is rather than by looking at the term "give notice" because we're looking at the Agency there, is focus on the word "serve" because that's the only role that the police have in the section so if we reach how it drives the issue, does section –

**ELIAS CJ:**

What isn't notice not given by service?

**MR ISAC:**

I agree that normally the concepts run together and clearly they are intended to in the previous version of the section.

**ELIAS CJ:**

Yes. But you say that the change –

**O'REGAN J:**

But the previous version which uses the word “give” or “given” is describing exactly the same role for the police officer as this section does in relation to serve doesn't it?

**MR ISAC:**

It is Sir and so I mean what, one view –

**O'REGAN J:**

Is there any reason for us to think that there was something more limited about it, I mean the – it's hard to see how the police have any less power under the current section 90(2) than they had under the 2005 one which talks about given?

**MR ISAC:**

Yes. I certainly accept Sir that one view of the previous drafting would suggest that although two different words are used, really the draft is simply part of the same process. Conversely though the fact that the word “serve” and “give” has been used and maintained, could be taken to suggest that the drafter intended to keep a distinction between the duty to give the notice and a more limited role of service only for police. It would be for the Court obviously to determine which is the more coherent interpretation I suppose. And certainly the Solicitor's reference to section 210, there is reference to give notice by serving it which would tend to support that interpretation if it –

**O'REGAN J:**

Well is there any other way of giving it, could it be posted or I mean does the Act provide for that?

**MR ISAC:**

Effectively yes under 201.

**O'REGAN J:**

Right, I see that's just that general wording about causing it to be, right.

**MR ISAC:**

And then runs on specifically to talk about modes of service effectively.

**O'REGAN J:**

I see.

**MR ISAC:**

If we're looking at 210 perhaps one point that can be made about it, it's very much focused on the question to service to a person whereas I think the issue engaged here is service by a person or giving notice by a person and it doesn't really address that issue, there's still left I think with the terms of 90(1) and 2.

**O'REGAN J:**

So you're saying a police officer can serve it but the police officer couldn't post it because only the Agency can do that, is that the argument?

**MR ISAC:**

Yes well essentially Sir, section 210 provides for modes of service for the Agency. Perhaps a related point and this may not take matters terribly far but we're dealing with facts where the data issuing is with another state agency, police, who fill in the form but under section 90(2) the service role can be performed also by a person approved for the purpose by the Agency for doing so, so one corollary I suppose of the interpretation that the Agency is



advancing is that process server who has the same access to the NIA database or information that's held on it would be able to perform the same role as a police officer. They may not have powers of stopping obviously but essentially that level of involvement and responsibility for transcribing information and determining the date on which the notice is to take effect from, would be divulged to that person.

**GLAZEBROOK J:**

As I understand it, in terms of the database and it's just an automated process but let's assume it's not an automated process, if it wasn't an automated process would there be anything wrong in the Agency emailing just as an indication, this information, here's this driver, here's the suspension, will you please serve a notice and the person then just transcribing it onto a form and serving it?

**MR ISAC:**

No, I think that would be fine.

**GLAZEBROOK J:**

Well why because it's passive and automated does that make a difference?

**MR ISAC:**

Because depending on what do you take if, to give, the obligation to give notice –

**GLAZEBROOK J:**

Well you, well so you're saying an automated process that provides the information and says you draft it under a protocol that presumably says that's what happens is not a giving of notice but if they emailed exactly the same information then that would be a giving of notice? It's a relatively subtle distinction which –

**ELIAS CJ:**

I think to support the Court of Appeal decision you have to say that it doesn't comply with section, it wouldn't comply with section 90 because the Agency wouldn't be giving the notice. It has to be a fairly formal argument that the Agency has to generate the "notice"?

**MR ISAC:**

Yes.

**ELIAS CJ:**

And not just supply the information to be put in the notice?

**MR ISAC:**

Yes, I agree Ma'am. And that is certainly the view that the Court of Appeal took.

**ELIAS CJ:**

Yes.

**MR ISAC:**

It must emanate from them, it must be composed by the Agency. I may have misunderstood Justice Glazebrook but what I had understood was the suggestion that the notice is composed by the Agency, possibly automatically, there'd be no reason why that can't happen but it would emanate from –

**ELIAS CJ:**

If they'd emailed through a "notice" –

**GLAZEBROOK J:**

Yes that's, which wasn't my, which wasn't what I was suggesting.

**MR ISAC:**

Yes.

**GLAZEBROOK J:**

It was really just a physical person doing it rather than the Agency doing it I was suggesting?

**O'REGAN J:**

Well equally presumably if the police car had in it a printer and the information automatically generated the notice from the LTA information, you'd accept that the LTA had prepared it those circumstances?

**MR ISAC:**

Exactly Sir and in fact I think one of the District Court decisions there's reference to the possibility of the electronic transmission with the police officer showing the electronic writing, if you like, of the notice to a driver. I think there's some issues about whether that would be effective under the Electronic Transactions Act 2002 but it's essentially the same point Sir.

I think that's, other than probably reiterating the interpolative arguments in the written submissions and taking you to relevant passages of the Court of Appeal, those are, I think, the submissions I can make on section 90.

**ELIAS CJ:**

Yes thank you. We'll take a few minutes. All right we'll retire for a few minutes thank you.

**COURT ADJOURNS: 11.01 AM**

**COURT RESUMES: 11.05 AM**

**ELIAS CJ:**

Yes, we don't need to hear you on the second point thank you Madam Solicitor. Was there anything that you wished to say?

**SOLICITOR-GENERAL:**

Two things if I may.

**ELIAS CJ:**

Yes.

**SOLICITOR-GENERAL:**

Your Honours were wondering whether the Court of Appeal had been directed to section 210 of the Land Transport Act and I regret to say that I did not refer to that section. The argument was caused to be delivered as sufficient but it hadn't been tagged expressly in the materials so they didn't see 210.

The only other point that came up, Your Honour the Chief Justice was asking about what has been delegated, and I'm happy to file the notice of delegation if that helps Your Honours.

**ELIAS CJ:**

No. I think perhaps we shouldn't go there.

**SOLICITOR-GENERAL:**

It's just the power under section 90 is simply, I've just looked at the delegation it just says, "The functions and powers under section 90(1) are delegated," and then sub delegated.

**ELIAS CJ:**

Right.

**SOLICITOR-GENERAL:**

It just refers to the section.

**ELIAS CJ:**

I think it's much better that we don't go there at all.

**SOLICITOR-GENERAL:**

I anticipate, I don't need to raise any other point. Might I just confer with my friend Mr Isac because from the gallery he was told a detail which was said to be critical but I'm not sure that it is.

**ELIAS CJ:**

Yes.

**SOLICITOR-GENERAL:**

We'll talk after this matter. If this matter is critical we'll raise it with Your Honours.

**ELIAS CJ:**

Sorry, there's another, there's a matter to be raised?

**SOLICITOR-GENERAL:**

We've just been told from the public gallery a detail, and I'll tell it to Your Honours, I don't think it's critical. But because I've only just heard it, I haven't worked that out yet. Which is that prior to the 2005 amendment Mr Ewan from behind at the Bar has told me that the Agency, Land Transport Agency as it was, delegated the function direct to the police to serve, to give and serve the notice – sorry, to give the notice, and then the 2005 amendment was made. But even as I'm saying that to Your Honours I cannot see how that is actually relevant to where we're up to. It might historically interesting but...

**GLAZEBROOK J:**

Sorry, did you say that was under the pre-years manifestation, before 2005?

**SOLICITOR-GENERAL:**

Prior to 2005, yes.

**GLAZEBROOK J:**

Which, what would be the power of delegation there, would that just have been the general power of delegation?

**SOLICITOR-GENERAL:**

Actually back in those days it would have been in the substantive legislation, wouldn't it, sorry, I didn't mean to ask you the question –

**GLAZEBROOK J:**

Yes, that's what I would have thought, yes.

**SOLICITOR-GENERAL:**

– but it would have been in the substantive legislation not in the Crown Entities Act. That would have been probably in the Land Transport Act. It would have had its own separate power to delegate. May I look at it? If I think the matter is critical, file something with Your Honours –

**ELIAS CJ:**

Well you can –

**GLAZEBROOK J:**

I wouldn't have thought it was.

**ELIAS CJ:**

I wouldn't have thought it was because –

**GLAZEBROOK J:**

Although historically interesting if there was actually a delegation –

**SOLICITOR-GENERAL:**

May be only historically interesting.

**GLAZEBROOK J:**

Well if it was causing to be delivered, given or made by – ah well I'm not sure.

**ELIAS CJ:**

If it affects the legislative history I'm not sure to what extent it will be necessary for us to get into that. But if it does perhaps –

**SOLICITOR-GENERAL:**

Might I come back to Your Honours this week –

**ELIAS CJ:**

– you might file a memorandum on that.

**SOLICITOR-GENERAL:**

Thank you.

**ELIAS CJ:**

Yes, thank you. We'll reserve our decision.

**COURT ADJOURNS: 11.08 AM**