HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: MDP
Appellant

and

THE KING
Respondent

INTERVENER'S SUBMISSIONS (DIRECTOR OF PUBLIC PROSECUTIONS (NSW))

Part I: Certification as to publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of the asserted basis of intervention

2. The Director of Public Prosecutions for NSW ("the Director") seeks leave to intervene in support of the respondent.
3. Leave to intervene is sought on a limited basis in respect of the issue raised in the appellant's written submissions ("AWS") from [28]-[64] and addressed in the respondent's written submissions ("RWS") from [48]-[60]. That is, leave to intervene is sought in respect of whether, in an appeal against conviction, an appellant must demonstrate that an error or irregularity was "material" in order to establish that a miscarriage of justice has occurred within the meaning of s 668E *Criminal Code 1989* (Qld), and, if so, what is the standard of any such requirement.

Part III: Statement as to why leave to intervene should be granted

4. The principles relating to non-party intervention in this Court were explained in *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37. There, the Court explained at [2]-[6] that leave to intervene required the demonstration of two matters: (i) a legal effect on the non-party, and (ii) that the submissions of the non-party were necessary to assist the Court to reach a correct determination on an issue. The Court explained for the purposes of

requirement (i) that the legal effect on the non-party must be direct and tangible, such as by the decision being binding on the non-party in ongoing litigation.

5. The Director has a direct legal interest in the Court's determination of the matter identified at [3] above. Section 668E *Criminal Code 1899* (Qld) is in near-identical terms to s 6 *Criminal Appeal Act 1912* (NSW) (as are criminal appeal provisions in other states which can collectively be referred to as the "common form" criminal appeal provision).[1] The Director is responsible for the conduct of appeals on behalf of the Crown in right of NSW in any court in respect of indictable prosecutions.[2] For that reason, the outcome of this appeal may impact on current and future appellate proceedings before the NSW Court of Criminal Appeal ("NSWCCA"), of which the Director has responsibility, including matters presently pending in the NSWCCA.
6. Further, there is a significant body of intermediate appellate court jurisprudence relevant to this issue, the large majority of which emanates from the NSWCCA, and submissions by the Director in relation to those authorities will be of assistance to this Court in determining the issue identified.

Part IV: Submissions

Overview

7. The appellant's primary contention appears to be that the proper approach to the determination of a miscarriage of justice ground under the third limb of the common form appeal provision involves a strict application of the formulation used to describe the Exchequer rule in *Weiss v The Queen* (2005) 224 CLR 300 ("*Weiss*") at [18] per the Court, namely that "*any* departure from trial according to law, regardless of the nature or importance" is a miscarriage of justice: AWS [29]-[31], [34], [36], [42], [49]-[56] and that any requirement or threshold to demonstrate "materiality" should be resolved within the proviso [62].
8. The appellant's secondary contention appears to take issue with the various verbal formulations which members of this Court have used in relation to miscarriage of justice in the recent decisions in *Hofer v The Queen* (2021) 274 CLR 351 ("*Hofer*"), *Edwards v The Queen* (2021) 273 CLR 585 ("*Edwards*"), *HCF v The Queen* (2023) 97 ALJR 978 ("*HCF*") and *Huxley v The Queen* [2023] HCA 40 ("*Huxley*") and argues for "a low materiality threshold in the miscarriage test" (AWS [58]-[61]) framed only in terms of a

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[1] See e.g. *Baini v The Queen* (2012) 246 CLR 469 at [15] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[2] *Director of Public Prosecutions Act 1986* (NSW) s 7.

"capacity to have affected the result of the trial *'whether the result might, or might not, have been different*'" (AWS [64]).

9. The Director seeks leave to intervene to assist the Court in the following five respects.

10. **First**, the primary contention, as to the strict application of the formulation in *Weiss* in relation to miscarriage of justice, should be rejected on the basis of Gageler J's reasoning from *Hofer*. The Director offers some brief additional observations in support of that approach and in response to the appellant's contentions to the contrary (below at [15]-[20]).

11. **Second**, contrary to the appellant's submissions, *Kalbasi v State of Western Australia* (2018) 264 CLR 62 ("*Kalbasi*") and *GBF v The Queen* (2020) 271 CLR 537 ("*GBF*") do not provide authoritative or unqualified support for the strict approach to *Weiss*.

12. **Third**, the Director identifies a number of post-*Weiss* decisions on third limb miscarriage which demonstrate that considerations of materiality – albeit often framed in terms of degree, impact, significance or consequence – have formed an inherent part of the assessment of whether there has been a miscarriage of justice in a particular case (and *Hofer*, *Edwards*, *HCF* and *Huxley* each accord with this Court's established approach to similar categories of asserted error), (cf AWS [29]-[31]).

13. **Fourth**, the Director identifies an establish a body of intermediate appellate decisions applying *Hofer*, *Edwards* and *HCF*, demonstrating that the different thresholds and onuses relating to third limb error and the proviso are being correctly applied and are generally consistent with established third limb jurisprudence. In this context the Director also addresses the appellant's concern that the approach of the plurality and Gageler J in *Hofer*, and majority in *HCF*, risks collapsing the test for the proviso into the test for miscarriage (AWS [44]-[45], [63]).

14. **Finally**, in relation to the appellant's secondary contention, the Director submits that there is no demonstrated need to reconcile the various verbal formulations (discussed by Edelman and Steward JJ in *HCF* at [76] to [84]) to a single universal verbal formulation (as suggested at AWS [64]). Indeed, as Gleeson CJ said in *Nudd v The Queen* (2006) 80 ALJR 614; 225 ALR 161 ("*Nudd"*), "[t]he concept of miscarriage of justice is as wide as the potential for error. Indeed, it is wider; for not all miscarriages involve error."[3] Having regard to the almost limitless types or errors or irregularities which might be invoked as giving rise to a miscarriage of justice and the myriad potential ways a trial may divert from the rules of evidence and procedure strictly applied, it is submitted that the search for a

[3] (2006) 162 A Crim R 301, 306.

single universal formulation, or threshold, applicable to all categories of third limb error, is neither practicable nor desirable.

Weiss and the description of the Exchequer Rule

15. The articulation of the concept of "miscarriage of justice" in *Weiss* must be understood by reference to the full content of the Exchequer Rule that prevailed in Australia and the United Kingdom: *Hofer* at [106]. Contrary to the appellant's submissions (at AWS [35]-[36]), it is not sufficient to note that the content of the rule operated differently elsewhere or was applied in a strict sense in some cases.
16. As Gageler J explained in *Hofer* at [106], the proper understanding of the Exchequer Rule in the UK and Australia prior to the introduction of the common form criminal appeal provision was that it required an order for a new trial where "any bit of evidence not legally admissible, which may have affected the verdict, had gone to the jury": *R v Gibson* (1887) 18 QBD 537 at 540-541 per Lord Coleridge CJ (emphasis added) ("*Gibson*"). This was the accepted understanding of the rule in Australia, as reflected in Griffiths CJ's remarks in *R v Grills* (1910) 11 CLR 400 at 410 ("*Grills*").
17. The Court in *Weiss* expressly referred with approval to the above passages from *Gibson* and *Grills* at [16] and [17] before making the statement at [18]. Placed within that context, the formulation used in *Weiss* should not be understood as "unequivocal" or "part of the essential reasoning of the case" as contended for by the appellant (AWS [34]). Gageler J's observation in *Hofer* at [110] that *Weiss* was not a case in which to "explore the metes and bounds of" third limb error, underscores this point.
18. Further, there is ample authority demonstrating that the understanding of the Exchequer Rule described by Gageler J in *Hofer* was the prevailing view. The comprehensive review of the Exchequer Rule conducted by this Court in *Conway v The Queen* (2002) 209 CLR 203 at [5]-[40] found to similar effect, including by reference to additional decisions contemporaneous to the enactment of the common form appeal provision: e.g. *R v Cowpe and Richardson* (1892) 9 WN (NSW) 50 at 51.
19. In any event, contrary to AWS [35]-[36], the Court in *Weiss* were undertaking a consideration of the common form appeal provision which was focused on the orientation of the proviso, and it should not be assumed that the Court's reference to the third limb in the terms it did so reflected an intention to constrain it in a restrictive manner inconsistent with the prevailing common law.
20. Thus, properly understood, and as explained by Gageler J in *Hofer*, *Weiss* does not mandate the approach for which the appellant advocates in his primary contention.

This Court's approach to third-limb error since *Weiss*

21. The appellant also seeks to support his primary contention by contending that the narrow approach used to describe miscarriage of justice in *Weiss* has been affirmed in both *Kalbasi* and *GBF* (and that *Hofer*, *Edwards*, *HCF* and *Huxley* represent departures from a well-established position): AWS [29]-[31] and [51]. Viewed in their proper context, *Kalbasi* and *GBF* offer little support for the appellant's contention.

22. There was no issue in *Kalbasi* that there had been a misdirection on a matter of law which was a departure from the requirements of a fair trial (at [57]). The decision related only to the availability of and approach to the proviso in those circumstances (cf AWS [30]).

23. *GBF* involved an impermissible judicial comment on the failure of the accused to give evidence (about which neither party made complaint nor sought any redirection). It was clear that the Court considered the impact of the comment as significantly more problematic in the context of the summing up as a whole than had the Queensland Court of Appeal. The Court (at [24]) found that the Court of Appeal's conclusion that the appellant had not been "*deprived of a real chance of acquittal*" was expressed in terms of the test formerly used in applying the proviso and confirmed that the proviso test must be distinguished from the antecedent question of whether there had been a miscarriage of justice within the third limb, repeating the narrow formulation from *Weiss* (at [24]).

24. The apparent breadth of the statement at [24] was qualified by the subsequent observations (at [25]) that the way the trial was conducted and the issues which were live for the jury's determination would shape the trial judge's charge to the jury, and that the conduct of defence counsel may support a conclusion either that a particular direction was not required or that a challenged statement does not bear the interpretation placed on it upon appeal. Those observations clearly acknowledge that matters of context and degree were relevant to the assessment of whether an impugned direction constituted a "miscarriage of justice". (It may be observed that the issue in *GBF* was very similar to that which arose in *Hargraves v The Queen* (2011) 245 CLR 257 ("*Hargraves*") (which is discussed below at [30])).

25. Further, it is of some importance to place *Kalbasi* and *GBF* in their proper contexts. They are but two decisions of this Court out of many in that period concerning appeals against conviction alleging third limb error.

Other post-*Weiss* decisions on third limb error

26. There are a substantial catalogue of authorities subsequent to *Weiss* (a number of which were identified by Gageler J in *Hofer* at [115]) which show that decisions of this Court

during that period did not approach the assessment of whether there has been a "miscarriage of justice" in the strict sense advocated by the appellant.

27. In *Nudd*, the issue was whether the appellant's trial counsel's conduct had been so incompetent as to amount to a miscarriage of justice. In dismissing the appeal, Gummow and Hayne JJ at [24] considered that the demonstration of a miscarriage of justice required "consideration of what did or did not occur at the trial, of whether there was a material irregularity in the trial" (emphasis added). Similarly, Gleeson CJ, also dismissing the appeal, made explicit reference to *Weiss* (at [6]) but nonetheless determined that "misfortune or error" amounted to "miscarriage" where it resulted in "unfairness", and applied *Teeluck v Trinidad* [2005] 1 WLR 2421 at 2433, requiring the appellate court to focus on "the impact which the errors of counsel have had on the trial and the verdict" (at [19]).

28. A similar approach was taken in *Libke v The Queen* (2007) 230 CLR 559; [2007] HCA 30. The majority (Gleeson CJ, Hayne and Heydon JJ), who each wrote separately, concluded that the conduct of the prosecutor had been improper (see [2] per Gleeson CJ, [82] per Hayne J, and [134] per Heydon J). However, each weighed the significance of the prosecutor's impugned conduct on the fairness of the trial in order to determine whether there had been a 'miscarriage of justice' within the third limb. For example, Hayne J (with whom Gleeson CJ explicitly agreed), stated that while the conduct of the prosecutor departed from evidentiary and procedural rules, whether there had been a miscarriage turned upon whether the prosecutor's comments, either alone or together with other aspects, had made the trial unfair (at [82]). Similarly, Heydon J observed that "the breaches of exclusionary rules" by the prosecutor "generated neither unfairness nor a miscarriage of justice" (at [134]). Each recognized, as Gleeson CJ stated, that whether the departures resulted in a miscarriage was a "question of degree" (at [2]).

29. *Cesan v The Queen* (2008) 236 CLR 358 ("*Cesan*") concerned a trial judge having been observed falling asleep at various stages throughout the trial. The observations of Gummow and Hayne JJ in *Nudd* (above at [26]) were cited with approval by the plurality (Hayne, Crennan and Kiefel JJ). Their Honours, at [112], held that the finding of miscarriage turned on the "consequences" of the irregularity or departure from the proper conduct of the trial under consideration in that appeal, rather than the fact of the irregularity or departure itself (see also per French CJ at [64]-[96] considering the meaning of "miscarriage of justice"; while the Chief Justice appears to endorse a stricter view at [78]-[81], his Honour's assessment ultimately turns on the "substantial" failure to maintain the necessary supervision and control of the trial (at [96])).

30. *Hargraves* demonstrates the same approach. There, the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) criticised a direction by the trial judge to take into account a witness's interest in self-protection when assessing their credibility as it "*could* have been understood as capable of application to the evidence given by the appellants" (at [48]). However, their Honours found that there was no miscarriage of justice within the third limb, because the direction was unlikely to deflect the jury from their fundamental task when the directions and summing up were read as a whole (at [49]-[50]).

31. In *Filippou v The Queen* (2015) 256 CLR 47 ("*Filippou*"), the plurality (French CJ, Bell, Keane and Nettle JJ) made clear that the proper approach to the determination of whether there has been a miscarriage of justice in relation to an "error" requires the intermediate court of appeal to consider "three stages" (at [4]):

> As will appear, the Court of Criminal Appeal is required to deal with an appeal from judge alone in three stages. The first is to determine whether the judge has erred in fact or law. If there is such an error, the second stage is to decide whether the error, either alone or in conjunction with any other error or circumstance, is productive of a miscarriage of justice. If so, the third stage is to ascertain whether, notwithstanding that the error is productive of a miscarriage of justice, the Crown has established that the error was not productive of a substantial miscarriage of justice (emphasis added).

32. The approach in *Filippou* has also been understood to be the proper approach to establish "second limb" error in the common form appeal provision, contrary to the appellant's submission at AWS [56]-[57] (see also *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 ("*MZAPC*") at [161]-[162] per Edelman J, and as discussed in *Pandamooz v R* [2023] NSWCCA 221 at [60]-[65]).

33. *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 (delivered shortly before *Hofer*) at [42]-[48] provides another example of how the question of miscarriage can turn on an assessment of relative risk. The majority, Keifel CJ, Keane and Steward JJ, considered that a failure by the trial judge to give the jury an anti-tendency reasoning direction in respect of multiple complainants will not always constitute a miscarriage of justice, and did not do so in that case because, *inter alia*, the Crown was "scrupulous" and "invited the jury to follow an orthodox path of reasoning to conviction, which made the risk that the jury might instead detour into tendency reasoning distinctly remote". That is, the majority considered the capacity or materiality of the failure to direct the jury in the context of the trial in determining that no miscarriage of justice had occurred. The minority, Edelman and Gleeson JJ, approached the assessment of the risk in a similar manner (albeit but leading to the opposite result) at [68]-[77].

34. Against that background, the cases suggested by the appellant as introducing a "materiality" requirement – *Hofer*, *Edwards*, *HCF* and *Huxley* (AWS [32]-[42], [47]) – can be properly understood. It is not the case that *Hofer* was the first decision of this Court post- *Weiss* to approach third limb error as requiring more than a mere irregularity (cf AWS [32]). Rather, from as early as 2006 – a year after *Weiss* – this Court has consistently approached the question of a miscarriage of justice in terms which weighed or assessed the nature and impact, or potential impact, of the alleged transgression in the context of the trial which took place.

Edwards, HCF and Huxley

35. The Director makes the following observations in relation to the authorities subsequent to *Hofer* and some of the appellant's contentions in relation to them.

36. In *Edwards*, the appellant contended that he had lost the opportunity of a different outcome of the trial (at [27]) on the basis of a failure of disclosure (in relation to a Cellbrite download, the fact of which had been disclosed but no copy provided). Kiefel CJ, Keane and Gleeson JJ dismissed the appeal on the basis that the material about which complaint was made had not been demonstrated to have any particular relevance (or anything more than speculative). Edelman and Steward JJ held that the prosecution should have provided a copy of the download as part of its disclosure obligation but that the NSWCCA had been correct to find that there was no miscarriage of justice because Mr Edwards did not establish that there was any information in that data which was capable of providing the defence with any advantage at trial (at [35]). Their Honours' statement at [74] that a departure from a trial according to law requires some erroneous occurrence with "*the capacity for practical injustice*" or which is "*capable* of affecting the result of the trial" has been criticised by the appellant as "assuming the existence of a materiality threshold and as contrary to *Weiss*" (AWS [39]). Those criticisms should be rejected. There was no assumption, rather, the approach was based upon the authorities cited, namely *MZAPC*, *R v Matenga* [2009] 3 NZLR 145 (discussed by Gageler J in *Hofer* at [101]), and *Cesan* (which has been discussed above at [29]). At [75] their Honours also drew an analogy with a suggested failure by the prosecution to call a particular witness at trial and said that, as with that type of decision, the need for practical injustice will be assessed "against the conduct of the trial taken as a whole" (citing *R v Apostilides* (1984) 154 CLR 563 at 575).

37. *HCF* concerned irregularities in the conduct of the jury which were only discovered subsequent to the verdict. The majority adopted and approved the statement of Beech-Jones CJ at CL from *Zhou v R* [2021] NSWCCA 278 ("*Zhou*") at [22] which collected the

verbal formulations from *Hofer* and *Edwards* in relation to third limb miscarriage (see below at [43]-[45]). Of some significance to the manner in which the majority approached the issue was that the appellant had not put its case on the basis that the jury irregularity in and of itself was a miscarriage of justice but relied upon the "apprehension" which followed from the misconduct. Ultimately, identifying that the test from *Webb v The Queen* (1994) 181 CLR 41 reflected the appropriate standard (at [13]), the majority was not satisfied on the evidence available that miscarriage was made out. Justices Edelman and Steward regarded the conduct of the jury itself as constituting a miscarriage of justice and would have remitted the matter to Court of Appeal to consider the proviso.

38. In that context, their Honours discussed the concept of miscarriage of justice and raised a number of issues with the decision in *Hofer* (at least with that of the plurality and Gageler J), and explained that the approach their Honours had jointly taken in *Edwards* accorded with that taken by Gordon J in *Hofer*. Their Honours then made the four observations (at [79]-[84]) which appear to provide the context for a number of the appellant's contentions in this appeal.

39. *Huxley* involved an asserted misdirection in relation to a key witness, with the appellant asserting that, while the direction was appropriately given in relation to his co-accused, the exculpatory nature of the witness's evidence as it related to the appellant meant that the direction operated unfairly against him. The majority (Gordon, Steward and Gleeson JJ) drew on the principles and approach from *Hargraves* (referred to above at [30]) in relation to the question of miscarriage of justice due to instructions to the jury, emphasizing that the ultimate question concerned whether the jury were "deflected" from their fundamental task of deciding whether the elements of the charged offence were proved beyond reasonable doubt and that that analysis required consideration of the whole of the judge's charge to the jury (at [40]-[41]). The majority decision placed significant emphasis on the summing up taken as a whole (at [68]-[91]) and the significance of the lack of request for a redirection (at [92]-[99]) in coming to the conclusion that there was no miscarriage.

Approach by intermediate courts of appeal

40. Intermediate courts of appeal have applied the verbal formulations used in *Hofer*, *Edwards* and *HCF* (and in one instance *Huxley*). A review of 33 such decisions identified by the Director reveals that, contrary to the applicant's concerns that the prevailing approach "collapses the approach to the proviso into the test for miscarriage of justice" (AWS [45]), the approaches taken overwhelmingly accord with established principles in relation to various categories of third limb error, and show that the proviso is to be applied as a

separate consideration with a higher threshold and burden on the Crown. Moreover, it reveals that the different verbal formulations utilized by members of this Court (in particular in *Hofer* and *Edwards*) are capable of being applied harmoniously and consistently with established third limb jurisprudence.

41. The decisions relate to alleged miscarriages of justice in the following categories:

    a. **misconduct by Crown Prosecutors** - *Dries v R* [2022] NSWCCA 33 at [38] (where the Crown Prosecutor retracted impugned submissions and the trial judge gave ameliorating directions, there was no "practical injustice or absence of a trial according to law to the prejudice of the accused"); *Crockford v R* [2022] NSWCCA 115 at [129] (where the prosecutor's closing address contained statements that breached prosecutorial standards, but the appellate court concluded that, in context, the impugned statements would not have distracted or misled the jury in respect of their task, there was no miscarriage of justice); *Al-Salmani v R* [2023] NSWCCA 83 at [30] (in which, inter alia, the appellant complained that the prosecutor had not lead all evidence from all relevant witnesses, but the Court concluded that there was no miscarriage as the issue about which evidence was not lead was not a live issue in the trial, and was only raised by a single "loose" question by defence counsel); *Xu v R* [2023] NSWCCA 93 at [101] (where there was no miscarriage where the Crown opened a trial for sexual offences on a possible basis that the complainant was substantially intoxicated and could not consent, but this was not established on the evidence and so did not go to the jury for consideration in closing); *TS v R* [2022] NSWCCA 222 at [111] (where it was held that had it been wrong to permit the Crown to address the jury in a trial in which the appellant represented himself, that the Crown did so did not result in an unfair trial in a practical way); *Day v Rex (No 2)* [2023] NSWCCA 312 at [75]-[77] (where a miscarriage of justice was established by the prosecutor, in their summing up, commenting on the appellant's failure to give evidence, and inviting impermissible reasoning, the prejudicial effect of which was not sufficiently ameliorated by the robust corrective judicial directions); and *Biljuh v R* [2023] NSWCCA 193 at [80]-[85] (where the appellant relied on the separate and cumulative effect of various aspects of the conduct of the Crown [including alleged non-disclosure, withdrawal of Crown counsel, and the tenor of the way the Crown puts its case], the appellate court found the trial was not unfair and there was no miscarriage of justice).

    b. **Incorrect or incomplete directions by the trial judge** - *Zhou v R* [2021] NSWCCA 278 at [22] (where the trial judge did not provide oral directions to the jury on live

issues, notwithstanding the provision of written directions as 'question trails', there was a miscarriage of justice); *Buck v Tasmania* [2022] TASCCA 6 at [17]-[18], [45] and [54] (where the trial judge gave an incomplete *Liberato* direction but otherwise correctly and repeatedly directed the jury as to the proper approach to the Crown evidence, there was no "material irregularity" or "significant possibility that the identified error may have affected the outcome of the trial" such to occasion a miscarriage of justice); *Sita v R* [2022] NSWCCA 90 at [42] (where the trial judge gave an inaccurate *Markuleski* direction and the jury had acquitted the accused of counts on indictment relating to a child who was also a witness on the count for which the appellant was found guilty, there was a "real chance" of affecting the jury's verdict as evidence by the acquittals on the other counts, and a miscarriage of justice was found); *Addo v The Queen* (2022) 108 NSWLR 522 at [100] (where coincidence evidence was admitted about similar unlawful acts against another witness, but no sensible directions were given to the jury as to how to permissibly use the evidence, there was a miscarriage as there was a "real chance" the jury's consideration affected, or it "realistically could have affected verdict", or "had the capacity for practical injustice" or was "capable of affecting the trial"); *R v Saunders* [2022] NSWCCA 273 at [93] (in which the trial judge, when directing the jury about agreed facts constituting tendency evidence, erroneously said the prior offending had occurred while intoxicated; however, the appellate court concluded that the factual error had no prejudicial effect); *R v MKO* [2022] QCA 272 at [74] (where there was no miscarriage of justice due to the trial judge not instructing the jury properly in respect of circumstances of aggravation averred on the indictment but that were no longer available at law and did not constitute elements of the offence actually charged); *AW v R* [2023] NSWCCA 92 at [55] (where the trial judge had given four inconsistent directions on the element of recklessness, two of which operated to the prejudice of the accused, there was a miscarriage of justice); *Morrison v R* [2022] NSWCCA 158 at [49] and [53] (where erroneous directions by the trial judge, in a manner favourable to the appellant, foreclosed a pathway towards guilt on issues that were remote from the central issues in dispute, there was not a miscarriage as it could not be shown that the error affected the outcome of the trial); *McCosker v R* [2023] NSWCCA 131 at [96] and [118] (where the appellant's case denied that any sexual activity occurred, a misdirection by the trial judge that left open a basis of knowledge of non-consent that was not relied upon by the Crown presented no "real risk" that the verdict was affected and so no miscarriage was established); *AB v R* [2023] NSWCCA 165 at [52] (where

the Crown appealed to consciousness of guilt reasoning in rebutting doli incapax and no directions were given to the jury warning of the proper assessment and use of consciousness of guilt reasoning, there was a "real chance" the jury's verdict was affected or could have been affected); *MK v R; RB v R* (2023) 112 NSWLR 96 at [109] (where a direction erroneously required the jury to be satisfied of a superfluous element, there was no "real chance" the directions operated to the prejudice of the accused or a capacity for practical injustice and no miscarriage of justice); *LF v R* [2023] NSWCCA 232 at [29]-[30] and [126] (where a direction was sought pursuant to s 165 *Evidence Act 1995* regarding the unreliability of the complainant's evidence but a general warning was given about unreliability and features were touched on, there was no miscarriage as the balance of the warnings and summing up avoided "any perceptible risk of miscarriage"); *Smith v R* [2023] NSWCCA 254 at [26] (where a direction regarding a joint criminal enterprise was correct at law, but still operated unfairly against one co-accused so as to constitute a miscarriage); *MacDonald, Ian v R; Edward Obeid v R; Moses Obeid v R* [2023] NSWCCA 250 at [129] (where a *Mahmood* direction was not given, there was "no practical injustice" as there was no basis to infer that the witnesses could give evidence detracting from the conclusions already reached by the trial judge that the offences had been committed beyond reasonable doubt; *Marco v R* [2023] NSWCCA 307 at [63]-[64] (where an identification direction was given but on appeal it was contended a recognition direction should have been given, there was no miscarriage because in the context of all the evidence given by the complainant – including that the appellant was one of only three men present who could have been her assailant, and the only one she didn't know well - there was no "meaningful potential or tendency to have affected the result"); *Walters v The King* [2023] SASCA 133 at [48] (where no miscarriage of justice was established in the trial judge's directions on a statutory defence as the direction was not unbalanced and reflected the uncontroversial evidence, inviting the jury to resolve factual disputes); and *R v Tracey* [2024] QCA 19 at [116] and [132] (where defence counsel put on the record that the accused had instructed that she did not rely on a partial defence of 'killing for preservation in an abusive domestic relationship' there was no miscarriage of justice in the trial judge not directing themself on the defence, as there was no "real chance that it affected the [judge's] verdict" nor "realistically affected the verdict of guilt", nor "had the capacity for practical injustice".

c. **Inadmissible or prejudicial evidence admitted** - *Thomlinson v R* (2022) 107 NSWLR 239 at [60] and [120]-[139] (where a witness incidentally gave evidence that the accused had been in gaol, there was no miscarriage of justice due to the ameliorating effect of the directions to the jury); *Cox* v *R* [2022] NSWCCA 66 at [47] (where a jury discharge application was refused following a witness saying to the accused in the dock in presence of the jury, "don't worry, we'll get you off", the judicial warnings to ignore anything said by the witness after concluding his evidence were "more than sufficient to address any potential prejudice"); and *Ilievski v R; Nolan v R (No 2)* [2023] NSWCCA 248 at [89](1)-(4) (where prejudicial evidence that an accused had "robbed a bank before" was incidentally adduced in a context of evidence that the police had valid surveillance warrants regarding the accused at the time, there was a miscarriage occasioned by the receipt of that evidence, notwithstanding the careful judicial directions given to minimise the prejudice).

d. **Alleged incompetence of trial counsel** - *Dedeoglu v R* [2023] NSWCCA 126 at [242]-[244] (where there was no miscarriage occasioned by trial counsel not cross-examining the complainant, on instruction, that the reason for her complaint to her friends and family was regret at engaging in sexual activity, as that explanation in the circumstances of the evidence could have "no realistic possibility of a causal connection" to the verdicts).

e. **Irregular judicial conduct** - *R v Clancy* (2022) 11 QR 582; [2022] QCA 162 at [48] (where judicial intervention in cross-examination of the complainant regarding the live issue of consent foreclosed a line of questioning that on any view was "readily capable of having realistically affected the jury's verdict") and; *R v Barker* [2023] QCA 117 at [30] (where a miscarriage of justice was occasioned due to the trial judge's intervention which resulted in the Crown Prosecutor erroneously reading a witness's statement in re-examination, leaving the jury with a possible impression that defence counsel had acted unfairly by not reading the statement to the witness).

f. **Fresh evidence** - *EC (a pseudonym) v R* [2023] NSWCCA 66 at [62] (where objective fresh evidence had come to light which undermined a significant detail of the complainant's evidence and it was held that there was a "real chance" that the absence of the evidence could have affected the verdict).

g. **Other irregularities** - *Askarou v R* [2023] NSWCCA 246 at [25] (where a central witness's evidence that the accused made a direct admission to him was not transcribed, and the Crown relied on the non-disclosure of any direct admissions as a matter supporting the witness's credit generally, there was a miscarriage of justice as

the non-transcription misled the jury on a fundamental issue and there was a "real chance" that it affected the jury's verdict).

42. Some of those cases warrant further analysis.

43. **First**, in *Zhou*, which concerned the failure of the trial judge to read or give oral directions in relation to a written question trail document (which was provided to the jury to read themselves), Beech-Jones CJ at CL (as his Honour then was), with whom Davies and Wilson JJ agreed, observed that if the error was properly characterised as a "failure to observe the requirements of the criminal process in a fundamental respect" then it would follow that the conviction would not stand, regardless of any assessment of its potential effect on the trial (*Hofer* at [123]). However, if it were not so, it was at least an "irregularity" and would constitute a miscarriage of justice where it is demonstrated to be:

> "prejudicial in the sense that there was a 'real chance' that it affected the jury's verdict (*Hofer* at [41] and [47] per Kiefel CJ, Keane and Gleeson J; at [118] per Gageler J) or 'realistically [could] have affected the verdict of guilt' (at [123] per Gageler J) or 'had the capacity for practical injustice' or was 'capable of affecting the result of the trial' *(Edwards* at [74] per Edelman and Steward JJ)." (*Zhou* at [22], citations omitted)

44. In the context of that case, while the Crown had conceded the ground alleging miscarriage, it was still of some importance for the Court to identify that the jury's verdict was not being set aside on the basis of a mere irregularity, rather, in the context of a trial where the jury did not receive any oral directions or explanation on the parts of the question trail concerning intention or the drawing of inferences which were live issues in the trial, a miscarriage had occurred. The Court noted that the Crown did not seek to rely on the proviso.

45. The formulation and approach of the NSWCCA in *Zhou* was affirmed by a majority in this Court in *HCF* at [2] (Gageler CJ, Gleeson and Jagot JJ), and has been relied upon in a substantial body of decisions in intermediate courts of appeal.[4]

46. **Second**, in *AK v R* (2022) 300 A Crim R 559, which concerned a ground alleging that the absence of evidence from two character witnesses by reason of a failure by appellant's solicitor to brief trial counsel with their statements gave rise to a miscarriage of justice.

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[4] *Thomlinson v R* (2022) 107 NSWLR 239 at [60] and [139] (which itself has been cited with approval by intermediate courts of appeal in 13 cases); *Crockford v The Queen* [2022] NSWCCA 115 at [129]; *Harper v The King* [2022] NSWCCA 211 at [181]; *Saunders v R* [2022] NSWCCA 273 at [92]-[93] (which itself has been approved of in intermediate courts of appeal in 13 matters identified by the Director) ; *EC (a pseudonym) v The King* [2023] NSWCCA 66 at [62]; *Al-Samani v The King* [2023] NSWCCA 83 at [30]; *Xu v The King* [2023] NSWCCA 93 at [101]; *Mcosker v The King* [2023] NSWCCA 131 at [96]; *Dedeoglu v The King* [2023] NSWCCA 126 at [58]; *Biljuh* [2023] NSWCCA 193 at [83]; *Day v Rex (No 2)* [2023] NSWCCA 312 at [77]; *Marco v The Queen* [2023] NSWCCA 307 at [64]; *R v Baggaley* [2023] QCA 249 at [46]; and *Walters v The King* [2023] SASCA 133 at [48].

The Crown contested that the appellant had established there had been a miscarriage of justice and relied on the approach of this Court in *TKWJ v R* (2002) 212 CLR 124 ("*TKWJ*"). Justice Price gave the leading judgment and noted that while the approach in *TKWJ* was helpful, the Court in that decision did not appear to drawn a distinction between a miscarriage of justice and the proviso and so the decision did not limit the approach the NSWCCA should take. His Honour also considered the various formulations of miscarriage of justice from the decisions in *Hofer* and concluded that on any of those a miscarriage of justice was established by the failure to call the witnesses. Beech-Jones CJ at CL (as his Honour then was) while agreeing with Price J, additionally observed that what was required by *Hofer* and *Edwards* was the "demonstrate[ion of] some connection between the relevant defect or irregularity in a trial and the outcome, before it can be found that a miscarriage of justice has occurred" (at [2], emphasis added). His Honour cited Gageler J's remarks in *Hofer* at [123] that miscarriage required the error or irregularity to be realistically capable of affecting the jury's verdict, and found that Gageler J's formulation was consistent with the plurality in *Hofer* requiring "prejudice" to the accused (at [4]-[5]). Further, his Honour found that the requirement in *Edwards* of a "capacity of practical injustice" or capacity "of affecting the result of the trial" was to "the same effect" (at [5]).

47. His Honour related those requirements to the seminal cases on the conduct of trial counsel being productive of a miscarriage of justice – namely, *Nudd* and *TKWJ* all of which require a "significant possibility" for the acts or omissions of trial counsel to have affected the outcome of the trial (at [9]), and ultimately found that the failure of trial counsel to call the two witnesses did have the significant possibility of having affected the verdict (at [12]). Even though the Crown did not seek to rely on the proviso, the Court was of the opinion that the error was of the kind that prevented the negative proposition of the proviso from being able to be satisfied and upheld the appeal.

48. **Third**, the decision of *Thomlinson v R* (2022) 107 NSWLR 239 ("*Thomlinson*") also involved the application of this Court's decisions in *Hofer* and *Edwards*. In *Thomlinson,* the first ground of appeal concerned whether a miscarriage of justice had occurred by the failure of the trial judge to discharge the jury following evidence given by a witness that the accused had previously been in gaol. In disposing of that ground of appeal, Brereton JA at [60] observed that "not every inadvertent and potentially prejudicial effect that occurs during a trial requires the jury to be discharged", citing *Crofts v The Queen* (1996) 186 CLR 427 at 440-441. Instead, his Honour found that what was required was an examination of whether there was a "significant possibility that but for the irregularity, the

jury acting reasonably would have acquitted". In support of that analysis, in addition to *Crofts*, his Honour relied on *Hofer* and *Zhou*.

49. Justice N Adams also gave reasons touching on the requirements of "miscarriage of justice" within the third limb in *Thomlinson*. There, from [120]-[139], her Honour undertook a survey of the seminal authorities of this Court on the meaning of "miscarriage of justice". While describing the strict approach set out in *Weiss* and contended for by the applicant in this case, her Honour remarked:

> Although the High Court in *Weiss* described a "miscarriage of justice" at [18], by reference to the Exchequer rule, as any departure from a trial according to law, since that decision was delivered not all decisions of the High Court, or this Court for that matter, have approached the assessment of whether there has been a "miscarriage of justice" in the same way. I recently made observations to this effect in *Caleo v R* [2021] NSWCCA 179 at [156] and provided examples at [156]-[159]. In *Hofer* Gageler J acknowledged (at [102]) the different ways in which *Weiss* (at [18]) has been read and applied over the years and went on to state that Hofer was "an opportunity for clarification".

50. Her Honour then described the various steps of reasoning employed by Gageler J in *Hofer*, noting that his Honour's understanding of "miscarriage" was one that the plurality in *Hofer* did not take issue with, and understood the plurality reference to an irregularity or departure "to the prejudice of the accused" to conform with the understanding of Gageler J in *Hofer*, concluding (as her Honour had in *Caleo*) that what the law required was the demonstration that the irregularity or departure had a "real chance" of affecting the verdict. To this end, it is also notable that her Honour cited Beech-Jones CJ at CL in *Zhou*.

51. **Fourth**, *EC (a pseudonym) v R* [2023] NSWCCA 66 concerned a referral to the NSWCCA from an administrative inquiry into the conviction of a child for sexual acts against another child. The basis for the referral was that fresh evidence had become available which cast a new light on the credibility or reliability of the complainant. Justice Mitchelmore (Button and Wright JJ agreeing) applied orthodox authorities concerning cases of fresh evidence (e.g. *Mickelberg v The Queen* (1989) 167 CLR 259) which require a consideration of whether the fresh evidence, had it been available to the jury at the time, carries with it a significant possibility of affecting the verdict (see [9]-[10]). In upholding the appeal, the Court observed as a necessary step in its reasoning that "the absence of the evidence from the appellant's trial […] could have influenced the verdict of the tribunal of fact" (at [62]) citing *Thomlinson*, *Zhou*, *Hofer* and *Edwards*.

52. **Fifth**, Mitchelmore JA demonstrated the distinction between the assessments to be made under the approach to miscarriage from *Hofer* and *Edwards* and the distinct assessment undertaken on the proviso in *AW v R* [2023] NSWCCA 92. There, the appellant was

convicted of recklessly causing grievous bodily harm, but the trial judge had given 4 inconsistent directions on the element of "recklessness" to the jury, 2 of which were unfavourable to the accused. Her Honour concluded that the directions were departures to the prejudice of the accused, and could have affected the outcome of the trial, citing *Hofer* and *Edwards* (at [55]). However, notwithstanding that conclusion, her Honour considered the proviso in accordance with the approach demanded by *Weiss*, *Kalbasi* and *Orreal v The Queen* (2021) 274 CLR 630 (at [58]). Her Honour concluded that the nature of the error meant it was not an appropriate case to apply the proviso, despite acknowledging that there was "significant force" in the Crown's submissions on appeal that the appellate court's review of the evidence properly admitted would prove the appellant's guilt beyond reasonable doubt (at [60]-[63]). The reasoning of Mitchelmore JA demonstrates that the approach in *Hofer* and *Edwards* is capable of application while maintaining the distinct role of the proviso. The first stage considered the potential impact of the irregularity on the verdict ('capacity'), whereas the determinative consideration at the proviso stage was the seriousness of the nature of the error (notwithstanding that Mitchelmore JA suggested that the appellate court might have had no reasonable doubt as to the appellant's guilt). The relevant onuses and considerations were not collapsed. To the contrary, the reasoning of Mitchelmore JA identifies how each operates separately.

53. **Finally**, and most recently, the approach of Dhanji J in *Ilievski v R; Nolan v R (No 2)* [2023] NSWCCA 248 demonstrates the distinction between an assessment of whether there has been a miscarriage of justice under the approach in *Hofer* and *Edwards*, and whether the negative proposition of the proviso has been satisfied. In *Ilievski* prejudicial evidence was incidentally adduced which disclosed that a witness understood that one of the accused had "robbed a bank before". Further, other evidence in the trial disclosed that the police had valid surveillance warrants regarding that accused at the time of the alleged offence.

54. Justice Dhanji, with whom Lonergan J agreed (Beech-Jones CJ at CL dissenting in the result) at [89](1)-(4) set out the steps to be taken by an appellate court following *Hofer* and *Edwards* in determining whether there had been a miscarriage of justice, with particular regard at [89](6)-(9) to how those matters are approached where a miscarriage of justice is said to arise from a failure to discharge the jury. In particular, Dhanji J commenced with the need to demonstrate "the capacity for practical injustice" or that an error was "capable of affecting the result of a trial", citing *Edwards* and *Hofer*, observing the cases presented "functionally equivalent tests". His Honour further observed that the question of the "capacity" to affect the verdict will "focus on the nature and potential impact of the impugned evidence or irregularity" and that this was "a distinct, anterior, question to that

posed by the proviso". His Honour also noted the need to consider the impact of the impugned material in the context of the entirety of the trial, including directions given.

55. Applying those principles, his Honour found that the prejudicial evidence in combination was capable of affecting the jury's consideration of guilt notwithstanding the careful directions given by the trial judge; a miscarriage of justice was established ([104] and [105]) However, his Honour reasoned that the proviso fell for consideration in the manner prescribed in *Weiss* (see [108]). His Honour concluded that while there was a strong circumstantial case against the accused, the prejudice to the accused was significant such that the negative proposition could not be satisfied, or, as otherwise put, the error was such to "render the proviso inapplicable" (at [110]-[111]). That is, like Mitchelmore JA in *AW*, Dhanji J carefully delineated and applied the distinct role and onus of the proviso without collapsing that consideration into the assessment of whether there had been a miscarriage of justice.

56. What the foregoing NSWCCA decisions reveal is that – contrary to the submissions of the appellant at AWS [42]-[45] – the "materiality threshold" articulated in *Hofer, Edwards* and *HCF* does not result in the reintroduction of disavowed notions of a "lost chance of acquittal", nor does it collapse the questions of third limb error and the proviso together. Rather, what the experience of the NSWCCA demonstrates is that the verbal formulations from *Hofer*, *Edwards* and *HCF* are capable of being applied with relative harmony, and in a manner consistent with retaining the proper role and onus of the proviso, as it has been understood since *Weiss*.

Verbal formulations of "materiality requirement" miscarriage

57. As noted above, the statement by Beech-Jones CJ at CL in *Zhou* at [22], which compiled the alternative verbal formulations of the threshold for miscarriage from *Hofer* and *Edwards*, has been approved by a majority of this Court in *HCF* and applied in a significant number of intermediate appellate decisions. None of the intermediate appellate decisions identified have raised the need for clarification or reconciliation between those formulations. It is submitted that the differences between the formulations identified are unlikely to be of practical significance (and are not in the present matter). Further, to the extent it is accepted that the formulation used by Edelman and Steward JJ in *Edwards* at [74] (which is similar to that used by Gordon J in *Hofer* at [130]) represents a lower threshold, it is included in the alternative and is available to be applied.

58. The search for a universal formulation which informs a bare minimum standard which is to apply to all categories of miscarriage of justice is unnecessary and may be elusive. As Deane J said in *Jago v District Court (NSW)* (1989) 168 CLR 23 at [57]:

> …the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience.

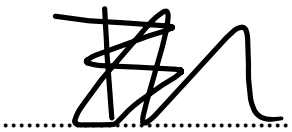
59. That passage was referred to by Gageler J in *Hofer* at [112] and is as relevant to miscarriages of justice as it is to stays for abuse of process. The authorities of this Court discussed above at [26]-[34], and the intermediate appellate authorities post-*Hofer*, show that while the circumstances giving rise to miscarriages of justice can be varied, there are recognised categories of error that have significant and established bodies of jurisprudence from which appellate courts can draw in their assessments of whether the irregularity or departure confronting them amounts to a miscarriage of justice.

60. The verbal formulations in *Hofer* may be regarded as being informed by the question of miscarriage before the Court in that case. An assessment of conduct by a prosecutor is necessarily a matter of degree to be assessed in the context of all of the issues at trial. Similarly, *Edwards* concerned alleged non-disclosure and the potential significance of that to a fair trial. Other species of miscarriage may require assessments which warrant alternative formulations of the language; indeed, *Huxley* represents such an example where the gravamen of the majority decision landed on the formulation which focused on whether the jury had been "*deflected*" from the fundamental task (at [45]). The present matter does not appear to raise any practical need to reconsider the formulations used in *Hofer* as the appellant puts his complaint essentially within the *Edwards* formulation (AWS [64]).

Part V: Estimate of time required for the presentation of oral argument

61. The Director estimates 45 minutes would be required for the presentation of oral argument.

Dated 28 March 2024



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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

MDP
Appellant

and

THE KING
Respondent

ANNEXURE TO INTERVENER'S SUBMISSIONS (DIRECTOR OF PUBLIC PROSECUTIONS (NSW))

Pursuant to Practice Direction No. 1 of 2019, the Director sets out below a list of the statutes referred to in the above written submissions.

No.	Description	Version	Provisions
1.	*Criminal Code 1899* (Qld)	Reprint current from 1 February 2024	s 668E
2.	*Criminal Appeal Act 1912* (NSW)	Reprint current from 19 February 2024	s 6(1)
3.	*Director of Public Prosecutions Act 1986* (NSW)	Reprint current from 18 October 2022	s 7