IN THE HIGH COURT OF AUSTRALIA **No P21 of 2017**

PERTH REGISTRY

BETWEEN **POUYAN KALBASI**

Applicant

AND

THE STATE OF WESTERN AUSTRALIA

Respondent

RESPONDENT'S SUBMISSIONS

PART I – Publication

1. I certify that this submission is in a form suitable for publication on the internet.

PART II – Concise Statement of the Issues presented by this appeal

2. The appellant contends that the following issues are presented by this appeal:

   2.1. Did the Western Australian Court of Appeal err in applying the proviso in s 30(4) of the *Criminal Appeals Act 2004* (WA) to the appellant's appeal against conviction?

   2.2. Should the decision of ***Weiss v The Queen*** (2005) 224 CLR 300 be revisited and/or qualified and/or overruled?

   2.3. What is the correct test for the application of the proviso in s 30(4) of the *Criminal Appeals Act* and what considerations are relevant to the application of the proviso?

   2.4. To what extent is an appellate court required to consider the nature of the established error, irregularity or complaint when considering whether to apply the proviso in s 30(4)? In what way and at what point should this analysis be undertaken?

   2.5. Is it appropriate to divide consideration of the proviso into two distinct categories, one described as an 'outcome aspect' and the other a 'process aspect'?

Prepared by the Director of Public Prosecutions for Western Australia whose address for service is Level 1, 26 St Georges Terrace, Perth, WA 6000.
Reference No: DPP 11/261 Telephone No: 9425 3999 Facsimile No: 9425 3608
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3. The appellant effectively seeks to establish that the Court of Appeal applied the proviso in s 30(4) *Criminal Appeals Act* based only upon proof beyond reasonable doubt of the guilt of the appellant, and secondly, that the Court of Appeal failed to consider the possible effect of the wrong direction of law on the verdict.

PART III – Notice under s 78B of the *Judiciary Act 1903* (Cth)

4. It is certified that this appeal does not involve a matter arising under the Constitution or involving its interpretation. Accordingly, notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV – Narrative Statement of Material Facts or Chronology

5. The respondent accepts that the appellant's narrative of facts as outlined in Part V of the Appellant's Submissions is accurate. Further, no material fact in the Appellant's Chronology is contested.

PART V – Applicable Statutes and Regulations

6. The appellant's statement of applicable statutes and regulations is accepted.

PART VI – Succinct Statement of Argument

THE DECISION IN *WEISS v THE QUEEN* AND SUBSEQUENT AUTHORITIES

The decision in Weiss v The Queen

7. The appellant submits that the decision of ***Weiss v The Queen***[1] is flawed and must now be revisited and overruled.[2] The main thrust of the appellant's argument appears to be that ***Weiss*** is to be interpreted as espousing that an appellate Court's satisfaction of an accused's guilt beyond reasonable doubt is the sole criterion for application of the proviso (absent a significant denial of procedural fairness at trial).

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[1] ***Weiss v The Queen*** [2005] HCA 81; (2005) 224 CLR 300.
[2] *Appellant's submissions*, [56].

8. The appellant's arguments in respect of this question are premised upon a narrow reading of the decision in ***Weiss*** and those cases subsequently decided. Upon a proper analysis of the cases that post-date ***Weiss***, it is apparent that they do not invalidate or undermine the decision of ***Weiss***. Rather, the cases form part of a contiguous line of authority, both explaining and developing the fundamental legal principles set out in ***Weiss***.

9. The appellant relies on passages taken from ***Weiss***, including the Court's expression of the 'negative proposition', to establish that ***Weiss***, at least impliedly, contemplated satisfaction of an accused's guilt as singularly determinative in the application of the proviso.[3]

10. However, the appellant's purported invalidation of ***Weiss*** erroneously relies on excised judicial expositions of the proviso's application (both in ***Weiss*** and subsequent authorities) rather than focussing on the statutory text, which underpins the nuanced question of the proviso's application.[4] The Court's consideration of the application of the proviso properly reflects emphasis on the precise statutory language and a recognition that it is not possible, nor appropriate, to define a single universally applicable test for the application of the proviso.

11. As observed in ***Weiss***, the question of the proviso's application, whether generally or in a specific case, is underpinned by the proper construction and application of the language of the statute:[5]

> *This Court has repeatedly emphasised the need, when applying a statutory provision, to look to the language of the statute rather than secondary sources or materials. In* ***Fleming v The Queen****, the Court said that "[t]he fundamental point is that close attention must be paid to the language" of the relevant criminal appeal statute because "[t]here is no substitute for giving attention to the precise terms" in which the relevant provision is expressed.*

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3 *Appellant's submissions*, [36] – [37].
4 ***Weiss*** [32] – [33] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
5 ***Weiss*** [31] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ), (footnotes omitted).

12. ***Weiss*** is authority for three propositions fundamental to the application of the proviso to the common form criminal appeal statute.[6] First, the appellate Court must itself decide whether a substantial miscarriage of justice has actually occurred. Second, the task is objective, and is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial. Third, the standard of proof of criminal guilt is proof beyond reasonable doubt.[7] These three fundamental principles form the foundation of the modern legal discourse on the application of the proviso as it has developed to the present day.

10 13. The appellant's criticism of ***Weiss*** effectively relies upon one excised sentence from the judgment,[8] which follows on from the initial statement of the three fundamental propositions, in which the Court stated:[9]

> *The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty.*

20 14. However, their Honours went on to qualify their remarks, noting:[10]

> *It is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself, beyond the three fundamental propositions mentioned earlier. (**The appellate court must itself decide whether a substantial miscarriage of justice has actually occurred**; the task is an objective task not materially different from other appellate tasks; the standard of proof is the criminal standard.) **It is not right to attempt to formulate other rules or tests in so far as they distract attention from the statutory test**. It is not useful to attempt that task because to do so would likely fail to take*

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6 ***AK v Western Australia*** [2008] HCA 8; (2008) 232 CLR 438 [52]; ***Cesan v The Queen*** [2008] HCA 52; (2008) 236 CLR 358 [123]; ***Baiada Poultry Pty Ltd v The Queen*** [2012] HCA 14; (2012) 86 ALJR 459 [21]-[29]; ***Cooper v The Queen*** [2012] HCA 50; [20].

7 ***Weiss*** [39] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

8 *Appellant's submissions*, [36].

9 ***Weiss*** [41] (footnotes omitted).

10 ***Weiss*** [42] (emphasis added).

proper account of the very wide diversity of circumstances in which the proviso falls for consideration.

15. The reiteration of the fundamental propositions reinforces the Court's proper emphasis upon the statutory language: the application of the proviso is governed by the question of whether a substantial miscarriage of justice has occurred, not whether the appellate court is satisfied of an appellant's guilt beyond reasonable doubt. Indeed, as the Court expressly stated:[11]

> *The fundamental task committed to the appellate court by the common form of criminal appeal statute is to decide the appeal. In so far as that task requires considering the proviso, it is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do.* ***Rather, in applying the proviso, the task is to decide whether a "substantial miscarriage of justice has actually occurred".***

16. Further, immediately before outlining the 'one negative proposition' that 'may safely be offered' as to the question of whether there has been no substantial miscarriage of justice, the Court again emphasised the statutory text as providing the fundamental question to be determined, cautioning that 'no single universally applicable description of what constitutes "no *substantial* miscarriage of justice" can be given'.[12] The Court went on to observe that:[13]

> *Likewise, no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt. What can be said, however, is that there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind.*

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[11] ***Weiss*** [35] (emphasis added).
[12] ***Weiss*** [44] (emphasis in the original).
[13] ***Weiss*** [45].

17. Relevantly, the Court did not confine the exclusion of the proviso to cases involving 'process' errors. Rather, the Court provided *but one* example of a type of situation in which the application of the proviso would be excluded; reflecting the repeated caution that it is neither possible nor appropriate to lay down absolute rules or singular tests for the proviso's application.

18. The Court's reasons in ***Weiss*** also contemplate the common sense proposition that an appellate court's statutory task, to determine whether there was 'no substantial miscarriage of justice', necessarily involves a qualitative assessment of the nature and effect of the error in the particular case under consideration;[14] an implicit rejection of the notion that satisfaction by an appeal court of an accused's guilt is singularly determinative in the application of the proviso.

Continuing development of legal authority

19. What the appellant describes as a departure from ***Weiss***,[15] is in fact, the respondent submits, a continuing development of legal authority which augments, rather than abandons, the fundamental foundation principles therein expressed. This is particularly the case when proper consideration is given to the Court's emphasis upon the statutory language throughout their judgment in ***Weiss***.

20. The appellant describes the decision in ***AK v The State of Western Australia***[16] as the 'first elaboration of ***Weiss***' and as cautioning against the use of the 'negative proposition' in ***Weiss*** as determinative of the proviso's application.[17] However, it is relevant to note that the Court in ***Weiss*** expressly couched the 'negative proposition' as but one example where it was possible to exclude the proper application of the proviso.[18] Further, when the reasons of Gummow and Hayne JJ in ***AK*** are considered as a whole and in context, it is apparent that their Honours did not elaborate upon, nor caution against the application of the ***Weiss*** principles or the negative proposition. Rather, their Honours affirmed the

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[14] ***Weiss*** [43].
[15] *Appellant's submissions,* [44].
[16] ***AK v The State of Western Australia*** [2008] HCA 8; (2008) 232 CLR 438.
[17] *Appellant's submissions,* [45].
[18] ***Weiss*** [44].

Court's emphasis in ***Weiss*** upon the importance of the statutory language and the fact that the negative proposition was not expressed as defining when no substantial miscarriage of justice has occurred, but rather as an expression of one circumstance in which the proviso ***cannot*** be engaged, observing that:[19]

> *To treat the negative proposition in this way would be to commit the very same error which **Weiss** sought to correct, namely, taking judicial statements about aspects of the operation of statutory provisions as substitutes for the statutory language.*

21. Gummow and Hayne JJ went on to observe in ***AK*** that in ***every*** case it will be necessary to consider the application of the proviso taking proper account of the ground of appeal that has been made out and which, but for the appellate court being satisfied that there was no substantial miscarriage of justice, would require the appellate court to allow the appeal.[20]

22. Their Honours also went on to further explain the significance of the 'negative proposition' to the application of the proviso, including the question of the effect of the error on the jury's verdict, stating:[21]

> *When there has been a trial by jury, and an appellate court concludes that the trial judge made a wrong decision on a question of law or that there was some other miscarriage of justice, deciding whether there has been no substantial miscarriage of justice necessarily invites attention to whether the jury's verdict might have been different if the identified error had not occurred. That is why, if the appellate court is not persuaded beyond reasonable doubt of the appellant's guilt it cannot be said that there was no substantial miscarriage of justice.*

23. The appellant refers to a small excerpt of the above passage, submitting that it 'does not seem to be entirely clear exactly how satisfaction of the accused's guilt *necessarily* invites consideration of the effect of the error (or irregularity) on the jury's verdict in every case'.[22] It is not the question of 'satisfaction of the accused's guilt', but rather the statutory task of 'deciding whether there has been no substantial miscarriage of justice'

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[19] ***AK*** [53] (Gummow and Hayne JJ).
[20] ***AK*** [55] (Gummow and Hayne JJ).
[21] ***AK*** [59] (Gummow and Hayne JJ).
[22] *Appellant's submissions*, [48] (emphasis in original).

that 'necessarily invites attention to whether the jury's verdict might have been different if the identified error had not occurred'.[23]

24. Contrary to the appellant's assertions,[24] it is the Court's analysis in ***Weiss*** that, in part, provides the answer as how the effect of the error comprises a necessary and inseparable component of the question posed by the proviso as to whether there has been no substantial miscarriage of justice. The purpose of the proviso was to 'do away' with the old Exchequer rule such that the question of whether there was a '***substantial*** miscarriage of justice' was intended to require consideration of matters beyond the question of whether there had been ***any*** departure from applicable rules of evidence or procedure.[25] The qualitative assessment of whether the identified departure from applicable rules of evidence or procedure amounts to a ***substantial*** miscarriage of justice necessarily involves consideration of the nature and significance of that departure.

25. The appellant's contended 'implication' that there are 'some cases where satisfaction of guilt was sufficient to apply the proviso'[26] is not borne out by a proper, complete reading of Gummow and Hayne's reasons in ***AK***, nor of the cases in which reference to those reasons was subsequently made.[27]

26. The appellant's submission[28] that statements about the application of the proviso in ***AK***, ***Baiada Poultry Pty Ltd v The Queen*** and ***Castle v The Queen*** 'seem to be at odds' with the test for the proviso in ***Weiss*** relies on excised judicial expressions different from the precise statutory expression. As French CJ, Gummow, Hayne and Crennan JJ reiterated in ***Baiada***, the fundamental point made in ***Weiss*** is that the substitution of 'some taxonomy for the application of the proviso according to expressions – even judicially determined expressions – different from the relevant statutory expression invites error.'[29] The

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[23] ***AK*** [59] (Gummow and Hayne JJ).
[24] *Appellant's submissions*, [48].
[25] ***Weiss*** [18] – [19]; ***Lindsay v The Queen*** [2015] HCA 16; (2015) 255 CLR 272 [47] (French CJ, Kiefel, Bell and Keane JJ).
[26] *Appellant's submissions*, [45].
[27] ***Cesan*** [124]; ***Gassy v The Queen*** [2008] HCA 18;(2008) 236 CLR 293 [18], ***Baiada Poultry*** [29]; ***Reeves v The Queen*** [2013] HCA 57; (2013) 88 ALJR 215 [50]; ***Castle v The Queen*** [2016] HCA 46; (2016) 91 ALJR 93 [64].
[28] *Appellant's submissions*, [46].
[29] ***Baiada*** [31] (French CJ, Gummow, Hayne and Crennan JJ).

importance of this fundamental point is affirmed in each of the other cases relied upon by the appellant as representing a departure from ***Weiss***.[30]

27. Similarly, the appellant's contention that 'on one view of ***Evans***,[31] the application of the negative proposition might be seen as sufficient in cases not involving a 'radical departure from the requirements of a fair trial'[32] falls into the error identified by Gummow and Hayne JJ in ***Gassy***: that 'to approach the application of the proviso as if its operation is sufficiently described by describing when it is *not* engaged would commit the very same error the decision in ***Weiss*** sought to identify'.[33]

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28. The respondent submits that the Court's analysis of the application of the proviso in ***Baiada*** does not represent 'a return to the tests of inevitable conviction and lost chance of acquittal' in conflict with ***Weiss***.[34] In ***Baiada***, French CJ, Gummow, Hayne and Crennan JJ indeed affirmed the fundamental proposition in ***Weiss*** that the application of the proviso is to be determined by reference to the statutory language, that is, whether there has been a substantial miscarriage of justice.[35] The task of determining whether no substantial miscarriage of justice has actually occurred must be undertaken on the whole of the trial record including the jury's verdict of guilty, the significance of which is to be assessed with proper regard to the issues the jury were directed to decide in order to arrive
20 at a verdict of guilty.[36]

29. The relevance of the 'inevitability of conviction' or conversely a 'lost chance of acquittal' is this: if there is insufficient certainty as to an accused's guilt it will not be possible for an appellate court to conclude that the accused's guilt was proved beyond reasonable doubt and that there was no substantial miscarriage of justice. What emerges from the decisions in ***Pollock v The Queen***,[37] ***Baini v The Queen***,[38] ***Filippou v The Queen***[39] and ***Castle***[40] is

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[30] ***Reeves*** [51] (French CJ, Crennan, Bell and Keane JJ); ***Gassy*** [16], [18] (Gummow and Hayne JJ).
[31] ***Evans v The Queen*** (2007) 235 CLR 521 at 534 [42].
[32] *Appellant's submissions*, [50].
[33] ***Gassy*** [18] (Gummow and Hayne JJ).
[34] *Appellant's submissions*, [51] – [52].
[35] ***Baiada*** [31] (French CJ, Gummow, Hayne and Crennan JJ).
[36] ***Baiada*** [27] (French CJ, Gummow, Hayne and Crennan JJ).
[37] ***Pollock v The Queen***[2010] HCA 35; (2010) 242 CLR 233 at 252 [70] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[38] ***Baini v The Queen*** [2012] HCA 59; (2012) 246 CLR 469.

that the question of the 'inevitability of conviction' is not a separate consideration in deciding whether to apply the proviso, but rather, is bound up in an essential emphasis upon the standard and onus of proof in criminal trials and the qualitative assessment required by the question of whether there has been a substantial miscarriage of justice.[41] This approach is not inconsistent with the Court's decision in ***Weiss***.[42]

30. In ***Filippou***, the plurality drew together the applicable legal principles relating to the application of the proviso as they have developed in a contiguous line of authority based upon the fundamental propositions in ***Weiss*** with an appropriate emphasis upon the statutory task: to determine the question of whether there has been a substantial miscarriage of justice.[43]

Outcome and process aspects of the proviso

31. The appellant submits that the Court below divided the application of the proviso into two aspects: "outcome" and "process", and in doing so distorted the correct application of the proviso.[44] However, it is critical to note that the majority's reasoning in respect of the application of the proviso was shaped by reference to the particular arguments that were put by the appellant at the appeal.[45]

32. Further, the respondent submits that the observations of Mazza and Mitchell JJA in respect of the application of the proviso plainly demonstrate that ***both*** of the aspects are to be considered as part of the overall consideration of the proviso:[46]

> *Consideration of the proviso requires consideration of two aspects: outcome* ***and*** *process. Bearing in mind that there is no rigid formula defining the scope of the*

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[39] ***Filippou v The Queen*** [2015] HCA 29; (2015) 256 CLR 47 [15] (French CJ, Bell, Keane and Nettle JJ).
[40] ***Castle*** [64] (Kiefel, Bell, Keane and Nettle JJ).
[41] ***Baini*** [30] – [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[42] ***Weiss*** [40].
[43] ***Filippou*** [16] (French CJ, Bell, Keane and Nettle J).
[44] *Appellant's submissions*, [68] – [71].
[45] ***Kalbasi v The State of Western Australia*** [2016] WASCA 144 [189] – [191] (Mazza and Mitchell JJA).
[46] ***Kalbasi*** [179] (Mazza and Mitchell JJA) [emphasis added].

> *process aspect, it is recognised that some process errors are of such a nature that the application of the proviso is excluded.*

33. The use of the conjunctive term 'and' indicates that both of the aspects of outcome and process are relevant in considering the application of the proviso, rather than each of those aspects being considered in exclusion to each other. Further, the use of the descriptive terms 'outcome' and 'process' merely serves to identify possible types of miscarriages of justice, consideration of which form part of the ultimate question for an appellate court as to whether a substantial miscarriage of justice has occurred. The order in which each of these aspects was approached is not suggestive, let alone determinative, of error on the part of the Court below.

34. The respondent submits that "the emphasis upon outcome and process as requirements of justice according to law is fundamental and familiar", as observed by Gleeson CJ in ***Nudd v The Queen***.[47] In ***Hughes v The State of Western Australia***,[48] the Court of Appeal (WA) observed that the statutory criterion of the proviso that no 'substantial miscarriage of justice' has occurred bears two aspects, outcome and process, referring to the cases of ***Nudd*** and ***Weiss***.[49] There is nothing in the plurality's characterisation of process and outcome as dual aspects of the proviso which indicates that Mazza and Mitchell JJA were erroneously deflected from the statutory language of the proviso.

35. It is important to note that the two aspects of outcome and process were recognised by the plurality in ***Filippou***:[50]

> *By "substantial miscarriage of justice" what is meant is that the possibility cannot be excluded beyond reasonable doubt that the appellant has been denied a chance of acquittal which was fairly open to him or her or that there was some other departure from a trial according to law that warrants that description.*

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[47] ***Nudd v The Queen*** [2006] HCA 9; (2006) 80 ALJR 614, 617 [5] (Gleeson CJ).
[48] ***Hughes v The State of Western Australia*** [2015] WASCA 164; (2015) 299 FLR 197.
[49] ***Hughes*** [60] – [61] (Judgment of the Court).
[50] ***Filippou*** [15] (French CJ, Bell, Keane and Nettle J) (footnotes omitted).

APPLICATION TO THE PRESENT CASE

The elements of the offence and applicable law

36. It is useful to first set out the elements of the offence in respect of which the appellant was convicted. Section 6(1)(a), read with s 33(1) of the *Misuse of Drugs Act 1981* (WA) ("*Misuse of Drugs Act*") defines the offence of attempted possession of a prohibited drug with intent to sell or supply. Relevantly, in the present case the element of attempt came into operation by reason of the police substitution of prohibited drugs. Other than identity, the offence comprises four elements, namely:[51]

    36.1. The accused had in his or her physical possession, or otherwise in his or her control or under his or her dominion, a substance or thing;

    36.2. At least where the substance or thing was not in the accused's immediate physical custody, an intention by the appellant 'to control' or 'have dominion over' the substance or thing within the extended definition of 'to possess' in s 3(1) of the *Misuse of Drugs Act*; and

    36.3. The substance or thing which the accused attempted to possess was, in fact, a 'prohibited drug' as defined in the *Misuse of Drugs Act*.

    36.4. Unless the presumption in s 11(a) of the *Misuse of Drugs Act* applies, that the accused intended to sell or supply to another at least some of the substance or thing. As the presumption in s 11(a) of the *Misuse of Drugs Act* does not apply to offences of *attempting* to possess a prohibited drug with intent to sell or supply it to another,[52] the prosecution must prove beyond reasonable doubt that the appellant intended to sell or supply at least some of the substance to another.

37. It is important to note that the prosecution was not required to prove beyond reasonable doubt that the appellant intended to sell or supply the ***whole*** of the methylamphetamine which he attempted to possess in order to establish that element of the offence.[53] This aspect is addressed further below in response to the appellant's submissions that the jury

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[51] As set out by Buss JA (as he then was) in ***Sgarlata v The State of Western Australia*** [2015] WASCA 215; (2015) 49 WAR 176, 208 [179].

[52] ***Krakouer v R*** [1998] HCA 43; (1998) 194 CLR 202.

[53] ***Langridge v The Queen*** (1996) 17 WAR 346, 367 (Kennedy J, Wallwork J agreeing).

may have somehow reasoned that he was in possession of a small amount (greater than 2g but far less than 4.891kg) and convicted on that basis.

38. The element of possession is informed by the non-exhaustive definition of '*to possess*' in s 3 of the *Misuse of Drugs Act* and the relevant authorities in relation to its proper construction.[54] It is well established that a prohibited drug may be possessed, within s 6(1)(a), solely by one person or jointly by two or more persons.[55]

The misdirection

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39. The trial judge erroneously directed the jury that the rebuttable presumption of an intention to sell or supply provided in s 11 of the *Misuse of Drugs Act* applied to the offence alleged against the appellant.[56]

The issues at trial

40. The appellant's defence case was, essentially, that the prosecution case against the appellant was pure speculation; at its highest establishing only that the appellant was present inside the house at 43A Falstaff Crescent. As Mazza and Mitchell JJA observed in
20 the Court below, the real issue at trial was whether the appellant exercised control of the 4.891kg of 'drug' in the cardboard box jointly with Mr Lothian.[57]

41. It was unsurprising that there was no issue at trial as to the intention of the appellant in relation to his alleged attempted possession of all of the 4.891kg of methylamphetamine.[58] The sole issue at trial was possession: whether or not the jury was satisfied beyond a reasonable doubt that the appellant had attempted to possess the whole of the quantity of the prohibited drug, within the meaning of the term ***possess*** as defined by the *Misuse of Drugs Act*. Indeed, the defence case was, in effect, that the appellant held no intention at

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[54] ***He Kaw Teh v R*** (1985) 157 CLR 523, 537 - 538; ***Lai v R*** (1989) 42 A Crim R 460; [1990] WAR 151, 155.

[55] ***Davies v The State of Western Australia*** [2005] WASCA 47; (2005) 30 WAR 31 [8], [10] (Steytler P), [38] (Roberts-Smith JA), [47] (McLure JA).

[56] ***Kalbasi*** [95] – [99].

[57] ***Kalbasi*** [81] – [83] (Mazza and Mitchell JJA); T 1025.5 – 1026.1.

[58] ***Kalbasi*** [26] – [28] (McLure P).

all in relation to the 'drug': the appellant's position being that he did not have any control (or intend to have any control) over the 'drug'.

42. A submission that the appellant had an intention to use even a small part of the drugs for something other than sale or supply would have undermined his position that he held no intention whatsoever in relation to the drugs. The appellant's position at trial that he did not possess the drugs precluded any positive argument in relation to his intention, if the jury were otherwise satisfied beyond a reasonable doubt as to his possession of the intended drugs.

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43. In the Court of Appeal the appellant submitted that it was suggested 'delphically' at trial that the appellant may have possessed a small quantity of the 'methylamphetamine' purely for the purpose of sampling it with a view to perhaps buying some of it. That is, that the appellant possessed a small amount of the 'drug' absent an intention to sell or supply some of it to another.[59]

44. The appellant now seeks to demonstrate that the jury might somehow have been satisfied that he possessed a small amount (greater than 2g, but much less than 4.891kg) but wrongly reasoned to guilt by reason of the misdirection and its purported effect on the
20 other directions.[60]

The decision of the Court of Appeal

45. In the Court below, the respondent conceded that the trial judge's misdirection constituted an error of law but invoked the application of the proviso in s 30(4) of the *Criminal Appeals Act*.

46. The way in which the Court of Appeal dealt with the question of whether the proviso should be applied to dismiss the appeal directly reflected the way in which the appellant
30 sought to resist its application. In their Honours' joint judgment, Mazza and Mitchell JJA first referred to the precise language of the statute, namely ss 30(3) and (4) of the

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[59] ***Kalbasi*** [182] (Mazza and Mitchell JJA).
[60] *Appellant's submissions*, [82].

Criminal Appeals Act.[61] Their Honours then gave detailed consideration to the applicable legal principles as to the proviso's application in determining that there had been no substantial miscarriage of justice.[62]

47. Their Honours referred to the propositions outlined in ***Hughes***,[63] including the requirement that an appellate court consider the effect of the error on the verdict of the jury:[64]

> *Generally, the appellate court's task must be undertaken on a whole of the record of*
> *the trial, including the fact that the jury returned a guilty verdict. In that event, the issue is whether the error in question would, or at least should, have had no significance in determining the verdict that was returned by the trial jury.*

The above statement effectively imports the reasoning of French CJ, Crennan, Bell and Keane J in ***Reeves***,[65] albeit in non-identical terms, that where the legal error at trial was a wrong direction relating to an element of liability, the significance of the verdict is to be assessed in light of the capacity of the misdirection to have led the jury to wrongly reason to guilt.[66]

48. Their Honours set out the State's submissions in relation to the proviso,[67] and the appellant's response which effectively sought to establish that there was a chain of reasoning available consistent with innocence in relation to the element of an intention to sell or supply, namely that the appellant might have possessed a small amount of the 'drug' for the purpose of sampling it with a view to buying some of it later.[68] Mazza and Mitchell JJA later expressly rejected this 'delphic' suggestion.[69]

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[61] ***Kalbasi*** [176] (Mazza and Mitchell JJA).
[62] ***Kalbasi*** [176] – [216] (Mazza and Mitchell JJA).
[63] ***Kalbasi*** [179] – [180] (Mazza and Mitchell JJA); ***Hughes*** [63] – [65].
[64] ***Hughes*** [43].
[65] ***Reeves*** [50] (French CJ, Crennan, Bell and Keane JJ).
[66] ***Reeves*** [50] (French CJ, Crennan, Bell and Keane JJ).
[67] ***Kalbasi*** [181] (Mazza and Mitchell JJA).
[68] ***Kalbasi*** [182] (Mazza and Mitchell JJA).
[69] ***Kalbasi*** [192] – [193] (Mazza and Mitchell JJA); also see [26] – [28] (McLure P).

49. Relevantly, the appellant's submissions in relation to the application of the proviso were framed in terms that the error in relation to the misdirection was (in substance) a 'process' error of such a nature that the application of the proviso was excluded, and further, the 'outcome' aspect of the proviso was not satisfied because 'in substance, this Court could not be satisfied beyond reasonable doubt of the appellant's guilt'.[70] No issue has been raised in the current proceedings as to the accuracy of the Court of Appeal's summary of the appellant's arguments on the appeal against conviction.

50. Against that background, Mazza and Mitchell JJA engaged in a detailed analysis of the whole of the evidence at trial,[71] by which their Honours found themselves satisfied beyond a reasonable doubt that the appellant exercised control over the entirety of the intended drugs, and due to the quantity and value of the intended drugs, it was inconceivable that the appellant would possess them absent an intention to sell or supply them to another.[72] Notwithstanding the appellant's assertions, there is no error evident in the reasoning or determination of the Court below in relation to the aspect of process as it related to the central question of whether no substantial miscarriage of justice had occurred.

51. As Mazza and Mitchell JJA observed,[73] in ***Krakouer v R***, this Court considered the application of the proviso to a case where the trial judge had misdirected on the element of intention in relation to two offences; an offence of conspiring to possess a prohibited drug with intent to sell or supply and an offence of attempting to possess a prohibited drug with intent to sell or supply. The plurality[74] rejected the argument that the proceedings were necessarily fundamentally flawed and did not exclude the proper application of the proviso in relation to a misdirection as to the element of intent, even though the effect of the misdirection was to reverse the onus of proof with respect to that element.[75]

52. Many of the points considered by the plurality in ***Krakouer*** regarding the context of the trial as a whole are relevant to the present case. Notably, their Honours observed that, had

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[70] ***Kalbasi*** [189] – [190] (Mazza and Mitchell JJA).
[71] ***Kalbasi*** [192] - [206]; see also [53] – [83] (Mazza and Mitchell JJA).
[72] ***Kalbasi*** [206] (Mazza and Mitchell JJA).
[73] ***Kalbasi*** [209] – [213] (Mazza and Mitchell JJA).
[74] Gaudron, Gummow, Kirby and Hayne JJ.
[75] ***Krakouer*** [23] – [24] (Gaudron, Gummow, Kirby and Hayne JJ).

the offence of attempt stood alone, (as it did in this case) and had the jury been satisfied beyond a reasonable doubt that Krakouer had attempted to possess the drugs, it might have been possible to say that the evidence at the trial was consistent only with an attempt to possess with intent to sell or supply.[76]

53. The respondent submits that the decision of the Court below that the evidence at trial was consistent only with an attempt to possess the 4.891kg of methylamphetamine with the intention to sell or supply it to another[77] is sound and, relevantly, addressed a particular argument that was made by the appellant on the application of the proviso.

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54. The appellant submits that 'the erroneous directions given on the intention element of the offence expressly contemplated a finding of possession of only part of the drug',[78] and that the directions to the jury 'left open the possibility that the jury could convict even if the appellant attempted to possess part of the drug'.[79]

55. However, the position taken by the appellant, which is said to preclude the proper application of the proviso, is not supported by a proper analysis of the trial judge's directions or the context of the State and defence cases at trial. The directions were consistent only with a case based on possession of the entire 4.891kg of 'intended
20 drugs'.[80] The trial judge directed the jury in terms of findings about the appellant exercising 'control and dominion over the intended drugs', 'being in possession of the intended drugs', having an 'intention to exercise control or dominion over the intended drugs'.[81] The effect of the directions was evidently that the jury were to consider whether they were satisfied beyond reasonable doubt that the appellant had control or dominion, and intended to have such control or dominion, over the whole of the intended drugs.

56. The respondent submits that the analysis of those parts of the trial Judge's directions that the appellant relies on as leaving open the possibility of the jury convicting the appellant even if they found he was in possession of some of the intended drug that was carried out
30 by McLure P at [21] – [25] is correct. The effect of the directions, read as a whole, is that

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[76] ***Krakouer*** [32].
[77] ***Kalbasi*** [214] (Mazza and Mitchell JJA).
[78] *Appellant's submissions*, [80].
[79] *Appellant's submissions*, [81].
[80] See, for example, T 1046, 1052, 1053, 1054, 1055, 1056, 1057.
[81] T 1055 – 1057.

the jury would have been in no doubt that the only live issue between the parties was whether the appellant was in control of the whole 4.891kg of the intended drug at the relevant time.

57. In that light the jury's verdict is consistent only with a conclusion that it was satisfied beyond reasonable doubt that the appellant possessed all of the intended drug at the relevant time. A finding that the appellant intended to sell or supply (bearing in mind the extended statutory definition of 'supply' in s 3 of the *Misuse of Drugs Act*) at least some of the 4.891kg of the intended drug was therefore inevitable, as the Court below correctly concluded. It is inconceivable that the appellant, having been found to have intentionally controlled all of the intended drug, intended to use all of it for himself.

58. Contrary to the appellant's submissions,[82] the case of ***Handlen and Paddison v R***[83] can be readily distinguished from the present appeal. In ***Handlen***, the appellants were convicted following a trial at which the prosecution case was left to the jury on the basis of criminal responsibility by way of joint criminal enterprise, for which the *Criminal Code 1995* (Cth) did not provide.[84] The prosecution of the appellants on a basis that was *not known to law* was a departure from the proper conduct of the trial. The departure was fundamental and denied the application of the proviso.[85]

59. By contrast, the misdirection in the present case concerned an element of the offence, rather than the foundational platform of criminal responsibility in ***Handlen***. Further, the element of the offence the subject of the misdirection was not, unsurprisingly, an element in issue at the trial, due to the way in which the State and defence cases were conducted. The conduct of the defence case is relevant in considering whether there was no substantial miscarriage of justice by reason of the error: in the context of the evidence as a whole, the appellant's defence case demonstrates an appreciation of the insurmountable challenge to the inherently implausible suggestion that the appellant, if found to be in control of the 'drugs', did not hold an intention to sell or supply at least some part of them.

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[82] *Appellant's submissions*, [74].
[83] ***Handlen and Paddison v R*** [2011] HCA 51; (2011) 245 CLR 282.
[84] ***Handlen*** [47] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[85] Ibid [3].

60. In conclusion, the respondent reiterates that the analysis of the Court below was consistent with the line of authority in relation to the application of the proviso. The Court below properly discharged the necessary task of excluding any real likelihood that the jury was misled by the misdirection in reasoning to guilt. The appellant has not demonstrated that the Court of Appeal's analysis and determination of the application of the proviso was erroneous, nor that this Court should now revisit, qualify and/or overrule the decision of ***Weiss*** so as to compel a conclusion that a substantial miscarriage of justice has been occasioned.

10 **PART VIII – Estimate of length of oral argument**

61. The respondent estimates it will require 1.5 hours for the presentation of the respondent's oral argument.

Dated: 7 July 2017

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FOR

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