**IN THE HIGH COURT OF AUSTRALIA**
**BRISBANE REGISTRY**

No B24 of 2011

B E T W E E N:

**STOTEN**
Appellant

AND:

**THE QUEEN**
Respondent

No B26 of 2011

B E T W E E N:

**HANDLEN**
Appellant

AND:

**THE QUEEN**
Respondent

No B27 of 2011

B E T W E E N:

**PADDISON**
Appellant

AND:

**THE QUEEN**
Respondent

No B28 of 2011

B E T W E E N:

**HARGRAVES**
Appellant

AND:

**THE QUEEN**
Respondent

# SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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## PART I. PUBLICATION ON THE INTERNET

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

## PART II. BASIS OF INTERVENTION

2. The Attorney-General for the State of Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the respondents.

## PART III. APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

3. The applicable constitutional provisions, statutes and regulations include s.80 of the *Constitution* and s.668E of the *Criminal Code* (Qld): see paragraph 86 of the Appellant's Submissions in matter No. B24 of 2011 (Stoten v The Queen).

4. Other relevant statutes and regulations are set out in Annexure A to the Appellant's submissions in each matter.

## PART V. STATEMENT OF ISSUES

5. Each of these appeals raises for determination the following issues:

(1) whether the Court of Appeal erred in applying the proviso contained in s.668E(1A) of the *Criminal Code* (Qld) to dismiss the appeals against conviction, either:

(a) because the misdirection constituted 'a significant denial of procedural fairness at trial';[1] or

(b) because there was a substantial miscarriage of justice in that the jury were not directed to return a verdict on the essential elements of the offence;[2] and

(2) whether common form criminal appeal provisions containing a proviso in the terms of s.668E(1A) of the *Criminal Code* (Qld) are consistent with s.80 of the Constitution, and are made applicable by s.68(1) and (2) of

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1 Paragraph 2(a) of the Notices of Appeal in Nos. B24 of 2011 and B28 of 2011. See *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45].

2 Paragraph 2(a) and (c) of the Notices of Appeal in Nos. B26 of 2011 and B27 of 2011

the *Judiciary Act 1903* to an appeal arising out of the trial on indictment of a Commonwealth offence.

6. These submissions are directed to the second issue set out above. In other words, the Attorney-General for Victoria does not make submissions on the application of the proviso in s.668E(1A) of the *Criminal Code* (Qld) to the particular facts of each appeal.

## A. Summary of Intervener's Argument

7. In summary, the Attorney-General for Victoria makes the following submissions.

(1) The essential features of 'trial by jury' within the meaning of s.80 of the Constitution should be ascertained by reference to both historical considerations and a purposive or functional analysis.

(2) The position in relation to appeals from jury verdicts in the United Kingdom and the Australian colonies was neither uniform nor settled as at the time of Federation.

(3) It is not an essential feature of trial by jury that an accused is entitled to have a verdict set aside due to the wrongful admission or rejection of evidence, misdirection of the jury, or any other error or irregularity, regardless of the nature or effect of the error.

(4) The function of an appellate court in considering whether to apply the common form proviso contained in s.668E(1A) of the *Criminal Code* (Qld) is not inconsistent with the essential features of trial by jury within the meaning of s.80 of the Constitution.

(5) Accordingly, s.668E of the *Criminal Code* (Qld) is applied by s.68(1) and (2) of the *Judiciary Act 1903* to an appeal arising from the trial on indictment of an offence against a law of the Commonwealth.

## B. The constitutional requirement of trial by jury

8. Section 80 of the Constitution relevantly provides that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury'. Where it applies, the constitutional requirement adopts the common law institution of trial

by jury, and imports certain essential characteristics or features of the jury system.[3]

9. Nevertheless, while historical considerations may be relevant, the constitutional requirement of trial by jury within the meaning of s.80 is not fixed by reference to the incidents of jury procedure at the time of Federation.[4] The incidents of jury procedure have never been immutable.[5] As Gleeson CJ and McHugh J observed in *Brownlee v The Queen*, 'trial by jury, as a mode of criminal procedure, has changed substantially over the centuries, and continues to change.'[6] After a steady evolution in England, the institution of trial by jury was adopted and developed in the Australian colonies, and such development continued after Federation.[7]

10. Accordingly, the determination of the essential features of trial by jury for the purposes of s.80 is governed not solely by historical considerations, but requires a purposive or functional analysis, involving an appreciation of the objectives that the institution advances or achieves.[8] The question whether or not any particular characteristic or feature is essential 'should be approached in a spirit of open-mindedness, of readiness to accept changes which do not impair the fundamentals of trial by jury'.[9] As stated in *Ng v The Queen*:[10]

> *Brownlee* establishes that, whilst the requirement in s 80 of a trial "by jury" is referable to that institution as understood at common law at the time of federation[11], it is the essential features of that institution which have what might be called a constitutionally entrenched status. Further, *Brownlee* also indicates that those essential features are to be discerned with regard to the

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3 *Cheatle v The Queen* (1993) 177 CLR 541 at 549, 557-558 per the Court; *R v Snow* (1915) 20 CLR 315 at 323 per Griffith CJ.

4 *Brownlee v The Queen* (2001) 207 CLR 278 at 285 [7] per Gleeson CJ and McHugh J, 291-292 [33]-[34] per Gaudron, Gummow and Hayne JJ, *cf.* at 326 [137] per Kirby J.

5 *Brownlee v The Queen* (2001) 207 CLR 278 at 286 [12] per Gleeson CJ and McHugh J.

6 (2001) 207 CLR 278 at 284 [6], see also at 287 [17] per Gleeson CJ and McHugh J.

7 *Brownlee v The Queen* (2001) 207 CLR 278 at 291-292 [33]-[34] per Gaudron, Gummow and Hayne JJ.

8 *Ng v The Queen* (2003) 217 CLR 521 at 526 [9] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Brownlee v The Queen* (2001) 207 CLR 278 at 288-289 [21]-[22] per Gleeson CJ and McHugh J, 298 [54] per Gaudron, Gummow and Hayne JJ, 329-330 [146]-[147] per Kirby J; see also *Williams v Florida*, 399 US 78 (1970) at 99-101.

9 *Brownlee v The Queen* (2001) 207 CLR 278 at 298-99 [55] per Gaudron, Gummow and Hayne JJ, quoting from A W Scott, 'Trial by Jury and the Reform of Civil Procedure' (1918) 31 *Harvard Law Review* 669 at 671.

10 (2003) 217 CLR 521 at 526 [9] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

11 *Cheatle v The Queen* (1993) 177 CLR 541 at 549 per the Court.

purpose which s 80 was intended to serve[12] and to the constant evolution, before and since federation, of the characteristics and incidents of jury trial[13].

11. Section 68(1) and (2) of the *Judiciary Act 1903* confer jurisdiction on State courts with respect to the hearing and determination of appeals arising out of the trial and conviction of Commonwealth indictable offences, and provide that State laws respecting the procedure for the hearing and determination of appeals are applied 'so far as they are applicable'.[14] The jurisdiction conferred on State courts by s.68(2) is expressly subject to s.80 of the Constitution.[15]

10 12. The argument advanced by each appellant is that aspects of the common form criminal appeal provisions, and in particular the proviso enabling an appellate court to dismiss an appeal against conviction if it considers that no substantial miscarriage of justice has actually occurred, are incompatible with trial by jury within the meaning of s.80 of the Constitution. That argument rests largely on two premises:

(1) that criminal appeal provisions containing the proviso had not been generally adopted in the United Kingdom or in the Australian colonies as at the time of Federation, and that such provisions are not consistent with the essential features of trial by jury under the common law as at 1900;

20 and

(2) that the function performed by an appellate court in applying the proviso involves the appellate court in determining the guilt of the accused, thereby substituting trial by judge for trial by jury.

13. Each of these premises is explored further below.

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12 *Brownlee v The Queen* (2001) 207 CLR 278 at 284-285 [7], 288-289 [21]-[22], 298 [54].

13 *Brownlee v The Queen* (2001) 207 CLR 278 at 284-285 [6]-[7], 287 [17], 291-292 [33]-[34], 299-300 [58], 303 [71].

14 See, *e.g. Katsuno v The Queen* (1999) 199 CLR 40 at 63 [46] per Gaudron, Gummow and Callinan JJ.

15 See *R v LK* (2010) 241 CLR 177 at 187-191 [12]-[20], 193 [24]-[25] per French CJ, 215-216 [86] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

## C. Historical considerations: criminal appellate jurisdiction prior to 1900

14. The development of criminal appellate jurisdiction was not settled as at 1900. The evolution of appellate jurisdiction over the course of the nineteenth century, and in the decades immediately following Federation, stands in contrast to the requirement of unanimity upon which the common law had 'consistently and unequivocally' insisted since the fourteenth century.[16]

15. As was noted in *Conway v The Queen*, the procedures for setting aside jury verdicts at common law were 'far from satisfactory', and 'compare unfavourably with the rights that the criminal appeal statute now gives to convicted persons'.[17] Nevertheless, under those procedures, the King's Bench would not grant a venire de novo or a new trial 'if it was unreasonable to suppose that the wrong or error had affected the result.'[18]

16. In *Conway*, former s.28(1)(f) of the *Federal Court of Australia Act 1976* (Cth), which conferred power on the Federal Court to grant a new trial 'on any ground on which it is appropriate to grant a new trial', was construed by reference to the history of the common law concerning the grant of new trials. Against that background, the Court ultimately adopted a 'no substantial miscarriage of justice' test, dismissing the appeal on the basis that the case against the appellant was 'overwhelming' and that his conviction was 'inevitable'.[19] Gaudron A-CJ, McHugh, Hayne and Callinan JJ stated that:[20]

> To construe s 28(1)(f) as authorising the dismissal of appeal on the basis that no substantial miscarriage of justice has actually occurred gives effect to the long established rule of the common law that a new trial is not ordered where an error of law, fact, misdirection or other wrong has not resulted in any miscarriage of justice.

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16 *Cheatle v The Queen* (1993) 177 CLR 541 at 550 per the Court.

17 (2002) 209 CLR 203 at 209 [7] per Gaudron A-CJ, McHugh, Hayne and Callinan JJ.

18 *Conway v The Queen* (2002) 209 CLR 203 at 213 [16] per Gaudron A-CJ, McHugh, Hayne and Callinan JJ.

19 (2002) 209 CLR 203 at 220 [38]-[40], 226 [63] per Gaudron ACJ, McHugh, Hayne and Callinan JJ, 244 [114] per Kirby J (though his Honour arrived at that result via a different approach); see also *Chamberlain v The Queen [No.2]* (1984) 153 CLR 521 at 615 per Deane J. Compare *Nudd v The Queen* (2006) 225 ALR 161; 80 ALJR 614 at [20] per Gleeson CJ, [109] per Kirby J per Callinan and Heydon JJ, [159], where it was held that incompetent representation at trial did not give rise to a miscarriage of justice in circumstances where the case against the appellant was 'overwhelming' or 'effectively unanswerable'.

20 (2002) 209 CLR 203 at 208 [6].

While their Honours noted that there may have been an exception in the case of the admission of inadmissible evidence in a criminal trial, they considered that such an exception 'had little to recommend it in principle' and that it was 'hardly conducive to the proper administration of the criminal justice system to set aside a conviction where there has been no miscarriage of justice'.[21] On the contrary, 'there is nothing unjudicial, arbitrary or capricious in refusing to order a new trial when, although error has occurred, no miscarriage of justice has occurred'.[22]

17. After considering the history of the various common law remedies for setting aside a conviction and obtaining a new trial, Gaudron A-CJ, McHugh, Hayne and Callinan JJ noted in *Conway* that it was 'by no means clear that an accused person was entitled to a new trial as of right if evidence was wrongly admitted at the trial.'[23] In relation to a motion for a new trial, the King's Bench would not order a new trial 'if it was unreasonable to suppose that the wrong or error had affected the result',[24] and a conviction would not be set aside 'if the judges are of the opinion that there is ample evidence to support the indictment'.[25] In 1887, in *R v Gibson*,[26] this approach was not followed in relation to the admission of inadmissible evidence in a criminal trial. While the decision in *R v Gibson* was subsequently treated by some judges as a correct statement of the position at common law,[27] in the light of the discussion in *Conway*[28] and *Weiss*,[29] it should not be regarded as representing an absolute or settled rule or principle.

18. The essential characteristics of 'trial by jury' in 1900 should not be regarded as including the automatic application of the 'Exchequer rule', as established in 1835

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21 (2002) 209 CLR 203 at 208 [6], see also at 217 [29], referring to *Driscoll v The Queen* (1977) 137 CLR 517 at 527.

22 (2002) 209 CLR 203 at 219 [36 per Gaudron A-CJ, McHugh, Hayne and Callinan JJ].

23 *Conway v The Queen* (2002) 209 CLR 203 at 216 [26] per Gaudron A-CJ, McHugh, Hayne and Callinan JJ.

24 *Conway v The Queen* (2002) 209 CLR 203 per Gaudron A-CJ, McHugh, Hayne and Callinan JJ. In this regard, '[i]t may be that at common law the onus was on the accused to show that the wrong or error affected the result': at 213 [16] and see *Balenzuela v De Gail* (1959) 101 CLR 226 at 234-235 per Dixon CJ.

25 Chitty, *A Practical Treatise on the Criminal Law*, 2nd ed (1826), vol 1 at 656a, quoted in *Conway v The Queen* (2002) 209 CLR 203 at 213 [16].

26 (1887) 18 QBD 537.

27 See *e.g. R v M'Leod* (1890) 11 LR(NSW) 218 at 231-232 per Windeyer J; *R v Hall* (1905) 1 Tas LR 21.

28 (2002) 209 CLR 203 at 214-217 [19]-[29] per Gaudron A-CJ, McHugh, Hayne and Callinan JJ.

29 (2005) 224 CLR 300 at 308 [17] per the Court.

in *Crease v Barrett*.[30] In that decision, which involved a civil appeal, Parke B did not accept a general rule that the court could refuse a new trial if it considered that improperly rejected evidence ought to have no effect and that there was 'enough to warrant the verdict'.[31] Nevertheless, Parke B acknowledged that the court could refuse a new trial in some cases, such as where a verdict in favour of the unsuccessful party 'would have been clearly and manifestly against the weight of the evidence'.[32] As this Court observed in *Weiss*,[33] while the language used by Parke B in *Crease v Barrett* did not suggest the creation of a new rule, subsequent cases regarded the decision as establishing a rule that was 'often expressed in absolute terms'.[34]

19. In the United Kingdom, the Exchequer rule was abolished in relation to civil cases by the *Supreme Court of Judicature Act 1873*.[35] In *Balenzuela v De Gail*, Dixon CJ observed that the difference between the common law position and the effect of the judicature provision 'can easily be exaggerated by over-estimating the operation of the judicature provision in widening the discretion of the court and by under-estimating the effect of the common law rule in allowing a discretion to the court.'[36] In the criminal jurisdiction, the Exchequer rule was abolished in the United Kingdom by s.4(1) of the *Criminal Appeal Act 1907* (UK),[37] which was subsequently adopted in each of the Australian States, thereby replacing 'the disparate and, to some extent, uncertain position that had existed in the Australian colonies' concerning the power to order new trials.[38]

20. In Australia, each of the colonies had enacted legislation during the nineteenth century dealing with criminal appeals. The position in the colonies prior to Federation was not uniform. The colonial legislation and judicial decisions

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30 (1835) 1 Cr M & R 919 [149 ER 1353].
31 (1835) 1 Cr M & R 919 at 933 [149 ER 1353 at 1359].
32 *Ibid.*
33 (2005) 224 CLR 300 at 306-307 [13] per the Court.
34 (2005) 224 CLR 300 at 306-307 [13], 308 [17] per the Court.
35 *Weiss v The Queen* (2005) 224 CLR 300 at 307 [14] per the Court.
36 *Balenzuela v De Gail* (1959) 101 CLR 226 at 232-233; see also *Holford v Melbourne Tramway and Omnibus Co Ltd* (1909) VLR 497 at 526.
37 The English provision has since been amended: see *TKWJ v The Queen* (2002) 212 CLR 124 at 142 [62] (fn 45); *R v Gallagher* [1998] 2 VR 671 at 673 per Brooking JA.
38 *Weiss v The Queen* (2005) 224 CLR 300 at 309 [21] per the Court.

indicate that the Exchequer rule, to the extent that it applied at all, did not have a uniform application in the Australian colonies as at 1900.

(1) In New South Wales, s.423 of the *Criminal Law Amendment Act 1898* (NSW) contained a proviso that 'no conviction or judgment thereon shall be reversed arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice'.

(a) In *R v M'Leod*,[39] a majority of the Supreme Court relied on s.423 to uphold a verdict notwithstanding the reception of inadmissible evidence. The Chief Justice interpreted s.423 consistently with the similarly worded judicature provisions in relation to civil cases in the United Kingdom.[40] Innes J concluded that erroneous reception of evidence would not vitiate the verdict where the admissible evidence was 'so conclusive' or 'all one way' that the jury could not have found to the contrary.[41] The first Windeyer J, in dissent, considered that the reception of inadmissible evidence vitiated the verdict and that the court had no power to decide whether there was sufficient evidence to sustain a conviction.[42]

(b) In *Makin v Attorney-General*,[43] the Privy Council concluded that s.423 did not allow an appellate court to affirm a judgment on the basis that it was of the opinion there was sufficient evidence to support a conviction independently of the evidence improperly admitted.[44] However, the proviso could operate 'in cases where it is impossible to suppose that the evidence improperly admitted can have had any influence in the verdict of the jury'.[45]

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39 (1890) 11 NSWR 218.
40 (1890) 11 NSWR 218 at 229-231.
41 (1890) 11 NSWR 218 at 240.
42 (1890) 11 NSWR 218 at 234.
43 [1894] 1 AC 57.
44 [1894] 1 AC 57 at 69-70.
45 [1894] 1 AC 57 at 70-71.

(2) In Queensland, s.671 of the *Criminal Code Act 1899* (Qld) relevantly provided that a conviction could not be set aside on the ground of improper admission of evidence 'if it appears to the Court that the evidence was merely of a formal character and not material'.

(3) In Victoria, legislation was enacted in 1852 which enabled cases to be stated to the Supreme Court and conferred power on the Court to hear and determine questions of law reserved.[46] This jurisdiction was analogous to that conferred on the Court of Crown Cases Reserved in the United Kingdom, with the distinction that in Victoria the Supreme Court had an express power to order a new trial. Under such legislation, which was re-enacted in 1864 and 1890,[47] the judges of the Supreme Court had power to affirm, amend or reverse the judgment, to order that the accused ought not to have been convicted, or to direct a venire de novo or a new trial. The powers were interpreted and applied so as to allow the Court to refuse to set aside a conviction where inadmissible evidence 'could not have had any effect whatever upon the verdict'.[48] In *Peacock v The King*,[49] which was an appeal from a case stated under s.482 of the *Crimes Act 1890* (Vic), a new trial was ordered as the result of a misdirection to the jury. In quashing the conviction, Barton J stated (in terms similar to the question arising under the common form proviso) that the misdirection was 'of such a nature that it cannot be said that it was not likely to lead to a substantial miscarriage of justice.'[50]

21. Similarly, in several other common law jurisdictions such as India and New Zealand, as at 1900 the Exchequer rule either was not applied or had been abrogated by statute.[51]

22. Accordingly, the historical position in relation to the development of criminal appellate jurisdiction indicates that it is consistent with the common law

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46 *An Act for Improving the Administration of Criminal Justice 1852*, 16 Vict No 7.
47 See, *e.g. Crimes Act 1890* (Vic), s.482.
48 *R v Ludlow* (1898) 24 VLR 93 at 99 per Holroyd J; see also *R v Ainsworth* (1875) 1 VLR 26 (L); *R v Kenny* (1886) 12 VLR 816.
49 (1911) 13 CLR 619.
50 (1911) 13 CLR 619 at 650, *cf.* at 655-656, 658.
51 *Weiss v The Queen* (2005) 224 CLR 300 at 310 [24]; *R v Taylor* (1885) 3 NZLR 125 at 128-129.

institution of trial by jury for a verdict to be upheld where the appellate court is satisfied that there has been no substantial miscarriage of justice. It was not an essential feature of trial by jury in 1900 that an accused had an unqualified right to have the verdict set aside on the ground of any error or irregularity in the trial.

**D. The function of an appellate court in applying the common form proviso**

23. Provisions in the form of s.668E(1) and (1A) of the *Criminal Code* (Qld) involve a two-stage exercise.[52] The appellate court must determine whether a ground of appeal is established, namely, that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the trial court involved a wrong decision of any question of law, or that on any ground whatsoever there was miscarriage of justice. If a ground of appeal is established, the Court may nevertheless dismiss the appeal 'if it considers that no substantial miscarriage of justice has actually occurred'.[53]

24. The proviso contained in s.668(1A) can be seen as an inherent qualification of the right of appeal conferred by s.668E(1). In *Weiss v The Queen*, it was recognised that 'the conduct of jury trials has always been subject to the direction, control and correction both of the trial judge and the appellate courts', and that 'the so-called "right" to the verdict of a jury rather than an appellate court is qualified by the possibility of appellate intervention.'[54] The Attorney-General for Victoria submits that the entitlement of an accused is to have indictable offences decided *in the first instance* by a jury as the 'constitutional judge of fact', under the supervision and control of a judge.[55]

25. In applying the proviso, the task of the appellate court is different to that of the jury at trial. The appellate court does not determine the guilt of the accused. The

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52 *Cf.* s.276 of the *Criminal Procedure Act 2009* (Vic), which applies to appeals where the sentence was imposed on or after 1 January 2010. The Victorian provision replaces the 'two-tiered' test under the common form criminal appeal provisions with a 'single-tiered' test.

53 The applicability of the proviso may be no more than a theoretical possibility where it is established that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence. In such circumstances, it is difficult to conceive that the appellate court would consider that no substantial miscarriage of justice has actually occurred: see *e.g. R v Gallagher* [1998] 2 VR 671 at 675 per Brooking JA.

54 (2005) 224 CLR 300 at 312 [30] per the Court.

55 *Weiss v The Queen* (2005) 224 CLR 300 at 315 [38], referring to *Hocking v Bell* (1945) 71 CLR 430 at 440; *Cesan v The Queen* (2008) 236 CLR 358 at 381 [74] per French CJ; see also *R v LK* (2010) 241 CLR 177 at 195-196 [29]-[31] per French CJ.

question for the court is whether or not a 'substantial miscarriage of justice has actually occurred'. The court must apply the words of the statute, as opposed to any judicial exposition of the operation of the proviso, to the 'wide diversity of circumstances in which the proviso falls for consideration'.[56] There is no 'single universally applicable description' of what constitutes 'no substantial miscarriage of justice'.[57] In particular, the task of the appellate court does not involve an attempt to predict whether the trial jury or a reasonable jury would or might have returned a verdict of guilty if properly directed.[58]

26. In *Weiss*, the Court identified three 'fundamental propositions' in relation to the application of the proviso:[59]

> First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Secondly, the task of the appellate court is an objective task not materially different from other appellate tasks. It is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction. Thirdly, the standard of proof of criminal guilt is beyond reasonable doubt.

27. It was held in *Weiss* that one aspect of the task in applying the proviso involves an examination by the appellate court of the record of evidence at the trial. This is because the decision whether there has been no substantial miscarriage of justice 'invites attention to whether the jury's verdict might have been different if the identified error had not occurred'.[60] The court is required to make its own independent assessment of the evidence and to determine 'whether, making due allowance for the "natural limitations" that exist in the case of an appellate court

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56 *Weiss v The Queen* (2005) 224 CLR 300 at 361 [42] and see 305 [9], 313 [33]; *AK v Western Australia* (2008) 232 CLR 438 at 456 [54] per Gummow and Hayne JJ; compare, in relation to miscarriage of justice, *Nudd v The Queen* (2006) 225 ALR 161; 80 ALJR 614 at [24] per Gummow and Hayne JJ.

57 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]-[45] per the Court.

58 *Weiss v The Queen* (2005) 224 CLR 300 at 314 [35]-[36], 315-316 [40] per the Court. Prior to *Weiss*, courts had applied the proviso by reference to the loss of a 'real chance of acquittal' or whether 'an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted the accused': see *Wilde v The Queen* (1988) 164 CLR 365 at 371-372; *Mraz v The Queen* (1955) 93 CLR 493 at 506, 514-515; *The Queen v Storey* (1978) 140 CLR 364 at 376-377; *Krakoeur v The Queen* (1998) 194 CLR 202 at 216-217 [36]-[37]; *Festa v The Queen* (2001) 208 CLR 593 at 627-631 [110]-[120]; *TKWJ v The Queen* (2002) 212 CLR 124 at 144-145 [65]-[68].

59 *Weiss v The Queen* (2005) 224 CLR 300 at 315 [39], see also at 316 [42]; *Cesan v The Queen* (2008) 236 CLR 358 at 393-394 [123] per Hayne, Crennan and Kiefel JJ.

60 *AK v Western Australia* (2008) 232 CLR 438 at 457 [59] per Gummow and Hayne JJ.

proceeding wholly or substantially on the record,[61] the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty.'[62] If not, the proviso cannot be applied.

28. However, the task involved in considering whether to apply the proviso involves neither an usurpation of the role of the jury nor a substitution of the verdict of the appellate court for that of the jury. The task is analogous to that involved in a decision whether the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or whether there was a miscarriage of justice – each task is undertaken 'in the same way'.[63] It has been accepted that, in performing such a task, 'the court is not substituting trial by a court of appeal for trial by jury'.[64]

29. As the Federal Court observed in *Duff v The Queen*,[65] 'the qualifying rule and the proviso in the common form statute have a similar operation'.[66] In applying the proviso, the appellate court is required to make due allowance for its natural limitations in examining the record compared to the advantages of the jury in having heard the evidence. Such limitations may be particularly acute where questions of credibility and demeanour are involved.[67]

30. Further, the appellate court's examination of the record is not determinative of the application of the proviso. Rather, it is a 'negative proposition'[68] which precludes

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61 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23] per Gleeson CJ, Gummow and Kirby JJ.

62 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41].

63 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41]; *Darkan v The Queen* (2006) 227 CLR 373 at 399 [84] per Gleeson CJ, Gummow, Heydon and Crennan JJ; cf. *TKWJ v The Queen* (2002) 212 CLR 124 at 143 [63] per McHugh J. See also *M v The Queen* (1994) 181 CLR 487 at 494-495; *Festa v The Queen* (2001) 208 CLR 593 at 632 [122]-[123] pre McHugh J; *MFA v The Queen* (2002) 213 CLR 606 at 614-615 [25]-[26] per Gleeson CJ, Hayne and Callinan JJ, 623-624 [55]-[59] per McHugh, Gummow and Kirby JJ; *SKA v The Queen* (2011) 276 ALR 423; (2011) 85 ALJR 571; [2011] HCA 13 at [11]-[14] per French CJ, Gummow and Kiefel JJ, [80] per Crennan J; Odgers, 'The Criminal Proviso: A Case for Reform?' in Corns & Urbas (eds), *Criminal Appeals 1907-2007: Issues and Perspectives* (2008) 103 at 110-114; Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940), 369-370.

64 *M v The Queen* (1994) 181 CLR 487 at 494 per Mason CJ, Deane, Dawson and Toohey JJ.

65 (1979) 28 ALR 663.

66 (1979) 28 ALR 663 at 674, quoted in *Conway v The Queen* (2002) 209 CLR 203 at 219-220 [37].

67 Compare *Cesan v The Queen* (2008) 236 CLR 358 at 384 -385 [83], referring to cases where, as a result of a failure of process, the appellate court is deprived of the capacity justly to assess the strength of the prosecution case. See also *Gassy v The Queen* (2008) 236 CLR 293 at 323-324 [100] per Kirby J; *Grey v R* (2001) 184 ALR 593; 75 ALJR 1708 at [55] per Kirby J; *Driscoll v The Queen* (1977) 137 CLR 517 at 542-543 per Gibbs J.

68 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].

the appellate court from applying the proviso *unless* it is persuaded that the evidence properly admitted at trial proved beyond reasonable doubt the accused's guilt of the offence on which the jury returned its verdict of guilty. This negative proposition should not be treated as a substitute for the statutory language or as a complete and sufficient paraphrase of the words of the statute.[69] Expressed positively, the effect is that an appeal must be allowed (*i.e.* the proviso cannot be applied) if the appellate court, after considering for itself the record of evidence at the trial, has a reasonable doubt about the guilt of the accused. Even if the court has no reasonable doubt, there are still cases in which it would not apply the proviso to dismiss the appeal, because it could not be satisfied that there was no substantial miscarriage of justice.[70]

31. Such cases may include where there has been a significant denial of procedural fairness at trial, or where errors or irregularities occurring during the trial 'amount to such a serious breach of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso.'[71] However, any such formulation is 'not to be taken as if it were a judicially determined exception grafted upon the otherwise general words of the statute'.[72] The language of the statute governs. The appellate court is required to determine whether it considers that no substantial miscarriage of justice has actually occurred, having regard to the nature of the error (or the ground of appeal made out) and the possible effect that it may have had on the outcome of the trial.[73]

32. Accordingly, when an appellate court considers whether or not a substantial miscarriage of justice has actually occurred, it performs a task which is distinct from the functions of the jury and does not substitute its own assessment of the

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69 *Gassy v The Queen* (2008) 236 CLR 293 at 301 [18], 307 [33] per Gummow and Hayne JJ; *AK v Western Australia* (2008) 232 CLR 438 at [42], [52]-[53] per Gummow and Hayne JJ.

70 *Weiss v The Queen* (2005) 224 CLR 300 at 317-318 [45]-[46]; *Cesan v The Queen* (2008) 236 CLR 358 at 383-384 [81] per French CJ; *AK v Western Australia* (2008) 232 CLR 438 at 447-448 [23] per Gleeson CJ and Kiefel J, 457 [59] per Gummow and Hayne JJ; *Wilde v The Queen* (1988) 164 CLR 365 at 372-373 per Brennan, Dawson and Toohey JJ, 375 per Deane J.

71 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [46]; see also *Wilde v The Queen* (1988) 164 CLR 365 at 373; *Darkan v The Queen* (2006) 227 CLR 373 at 401-402 [94] per Gleeson CJ, Gummow, Heydon and Crennan JJ; *Cesan v The Queen* (2008) 236 CLR 358 at 385-386 [87]-[89] per French CJ, 394 [124]-[126] per Hayne, Crennan and Kiefel JJ.

72 *AK v Western Australia* (2008) 232 CLR 438 at 455-456 [54] per Gummow and Hayne JJ.

73 *Gassy v The Queen* (2008) 236 CLR 293 at 307 [34] per Gummow and Hayne JJ; *AK v Western Australia* (2008) 232 CLR 438 at 456 [55] per Gummow and Hayne JJ.

appellant's guilt for the verdict of the jury. Such consideration is an incident of criminal appellate jurisdiction, which has long accepted that a conviction should not be set aside for immaterial error which had no effect on either the outcome or the fairness of the trial.

33. In the light of the above principles, the function of an appellate court in considering whether to apply the common form proviso (such as s.668E(1A) of the *Criminal Code* (Qld)) to dismiss an appeal against conviction does not infringe or derogate from any essential feature or characteristic of trial by jury, and is not incompatible with the constitutional requirement of trial by jury in s.80 of the Constitution. Accordingly, the criminal appeal provisions contained in s.668E of the *Criminal Code* (Qld) may be picked up and applied by s.68(1) and (2) of the *Judiciary Act 1903* to an appeal arising from the trial on indictment of an offence against a law of the Commonwealth.

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