FORM 27A
(RULE 44.02.2)

IN THE HIGH COURT OF AUSTRALIA **No M 126 of 2011**
MELBOURNE OFFICE OF THE REGISTRY

Between: **BAIADA POULTRY PTY LTD** **Appellant**

-and-

THE QUEEN **Respondent**

APPELLANT'S SUBMISSIONS

PART I – SUITABILITY FOR PUBLICATION

1.1 The appellant certifies that this submission is in a form suitable for publication on the Internet.

PART II – CONCISE STATEMENT OF ISSUES PRESENTED

2.1 Issues presented by the appeal include:

- Does the application of the proviso found in the common form criminal appeal statutes[1] involve the exercise of a discretion?
- Does a misdirection that denies an accused the benefit of the jury's consideration of one of its two principal defences amount to such a fundamental irregularity as to oust the proviso?

[1] At the relevant time, the proviso was found in s. 568(1) of the *Crimes Act* 1958 (Vic.), which is set out in full below in Part VII.

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- What regard, if any, must an appellate court pay to a jury's verdict in deciding whether there has been a substantial miscarriage of justice, in circumstances where a defence effectively has been withdrawn from the jury's consideration?

- Do aspects of the Court's decision in *Weiss v The Queen* (2005) 224 CLR 300 require further elucidation?

PART III – NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT 1903

3.1 The appellant certifies that the question whether any notice should be given under section 78B of the *Judiciary Act* 1903 has been considered. There is not thought to be a need for such a notice.

PART IV – CITATION OF THE REASONS FOR JUDGMENT

4.1 The reasons for judgment are reported at: (2011) 203 IR 396. The medium neutral citation is [2011] VSCA 23.

PART V – NARRATIVE STATEMENT OF FACTS

5.1 On 29 May 2009, the appellant ('Baiada') was convicted in the County Court at Melbourne of one count of breaching s. 21(1) and s. 21(2)(a) of the *Occupational Health and Safety Act* 2004 ("OHSA') by failing to provide plant and systems of work for employees that were safe and without risks to health.

5.2 In reasons delivered 18 February 2011, each member of the Court of Appeal found ground 4 of the grounds of appeal[2] to that court to be made out. Nettle JA held that the proviso should not be applied. He thus would have granted leave to appeal, allowed the appeal, quashed the convictions and orders made and directed a retrial. In a joint

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[2] Ground 4 was:

4. The trial judge erred in that he failed to give any, or any sufficient, directions as to –
   (a) practicability;
   (b) the capacity of the Applicant to rely on the expertise of sub-contractors to meet its duties under the Act.

judgment, Neave JA and Kyrou AJA held that the proviso should be applied, and thus that the application for leave to appeal ought to be dismissed.

5.3 At the relevant time, December 2005, Baiada carried on the business of processing broiler chickens at a plant in Laverton North.

5.4 Chickens were grown by contract growers, Andrea and John Houben, at their growing farm in Bungower Road, Moorooduc.

5.5 The contract between Baiada and the Houbens required Baiada to supply the Houbens with chickens, chicken feed and technical assistance, and in turn the Houbens raised each lot of chickens for Baiada until they were about 32 days old. It was then Baiada's responsibility to collect the chickens and transport them for processing.

5.6 DMP Poultech Pty Ltd ("DMP") was an independent contractor in the business of "chicken catching". Baiada engaged DMP to catch chickens (which were housed in steel sheds) at the Houben farm and place them in steel cages, which were then loaded by forklift onto trucks for transport to the processing plant.

5.7 Azzopardi Haulage Pty Ltd ("Azzopardi Haulage") was an independent contractor engaged by Baiada to transport chickens from grower farms to the processing plant. It was a privately owned family company of which the deceased, Mario Azzopardi, was the director and driver. Under the *Heads of Agreement*, Exhibit B, between Azzopardi Haulage and Baiada, Azzopardi Haulage was bound to provide a prime mover and driver and Baiada to provide its own trailers loaded with empty chicken crates (or "modules"). Azzopardi Haulage was required to transport the empty crates to the farm; and, once they were filled with chickens, transport them back to the Laverton North plant.

5.8 Once the empty crates were at the farm, it was DMP's obligation to provide a forklift (and driver) to unload the crates from the semi-trailer, move the crates into a shed, fill the crates with chickens and then use the forklift to load them onto the trailer.

5.9 On the evening of 4 December 2005, Mario Azzopardi drove the Azzopardi Haulage prime mover and a Baiada trailer of empty crates to the farm. Earlier, a team of chicken catchers from DMP had gone to the farm to catch chickens. Among the team of six, Aaron Slocombe was the supervisor of the crew and the leading forklift driver. Slocombe moved the empty modules off the trailer with the DMP forklift and took them to the shed to be filled with chickens. When the modules were full of chickens, he placed them back on the trailer with the forklift.

5.10 Jacob Devent was one of the chicken catchers employed by DMP. He had been learning how to drive the forklift. He did not have a fork-lift licence, but was allowed to drive it under Slocombe's supervision. At some point towards the end of the evening, Devent began to load modules using the forklift. While Mario Azzopardi was strapping up the load on the side of the trailer from which Devent was loading, and after Devent had loaded a module onto the trailer, Mario Azzopardi asked Devent to move some of the empty and full modules on the trailer in order to even out the load. While doing this, Devent said that, when he got the fork-lift tines into one of the full modules, he found that the module was stuck. Mario Azzopardi helped him to get it unstuck. At about that time, Aaron Slocombe walked off to make a telephone call and check some paperwork.

5.11 Devent said that he asked Mario Azzopardi to move out of the way. He backed the fork-lift until the module was halfway out, and then stopped to make sure that there was no problem. Mario Azzopardi then told to him that he was right to keep going, and so he pulled out a little further. As he did, the module fell onto Mario Azzopardi, inflicting fatal injuries from which he died at the scene.

PART VI – ARGUMENT

Errors made by the majority

6.1 Two primary errors are manifest in the reasons of the majority of the Court of Appeal, Neave JA and Kyrou AJA. *First*, they approached the application of the proviso as if it involved the exercise of discretion. *Secondly*, despite one of the appellant's principal defences not being properly before the jury (as a result of misdirection or material non-

direction), in purported reliance on *Weiss* they held the fact that the jury had returned a guilty verdict was "a factor to be taken into account in deciding whether a substantial miscarriage of justice has occurred".

The application of the proviso does not involve the exercise of discretion: the terms of the statute

6.2 Three aspects of the structure of s 568(1) of the *Crimes Act* 1958 need to be noted at the outset. *First*, on an appeal against conviction, the appellate court *shall* allow the appeal if it thinks –

- 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
- the judgment of the court before which the appellant was convicted should be set aside on the ground of a *wrong decision of any question of law*; or
- that on any ground there was a *miscarriage of justice.*

Thus, one starts from the proposition that an appeal *shall* be allowed (in the sense that it *must* be allowed) if any one of the three limbs in the body of s. 568(1) is satisfied.

6.3 *Secondly*, if one of the second or third limbs is satisfied, the proviso then comes into play. Thus, if the court is of the opinion that the point raised in the appeal might be decided in favour of the appellant (on the ground that there was a *wrong decision of any question of law*, or *on any ground there was a miscarriage of justice*), it *may* dismiss the appeal if satisfied that *no substantial miscarriage of justice* has actually occurred.

6.4 *Thirdly,* as a matter of logic – if nothing else – the proviso can have no application to the first ground upon which an appeal *shall* be allowed, i.e. that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, since that is the statutory basis upon which jury verdicts are set aside as *unsafe and unsatisfactory.*[3] If a jury verdict falls into that category, obviously it cannot be saved by the proviso.

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[3] See *M v The Queen* (1994) 181 CLR 487 at 492; *MFA v The Queen* (2002) 213 CLR 606 at [25].

6.5 A question that is raised on this appeal is whether the use of the word *may* imports a true discretion into the application of the proviso. It is submitted that it does not. Properly construed, it is submitted that the use of the word *may* is permissive only in the sense that it permits the dismissal of appeal only in one circumstance – if the court considers that no substantial miscarriage of justice actually occurred.[4] It does not raise a discretion in the *House*[5] sense, where there may be several possible outcomes requiring the weighing of competing factors. There is no balancing exercise to be performed. There is no choice whether to exercise a power or not. The proviso permits of only one alternative. If justice has miscarried, the appeal *shall* be allowed; and it *may* only be dismissed if the appellate court is satisfied that the miscarriage is not substantial. Put another way, once one of the limbs in the main body of s. 568(1) is satisfied, the appellate court "shall allow the appeal". The only circumstance in which the appellate court shall *not* allow the appeal – "may … dismiss the appeal" – is if the court "considers that no substantial miscarriage of justice has actually occurred".

6.6 The only value judgment involved once justice is found to have miscarried is in determining whether the miscarriage of justice is *substantial*. It is only if the miscarriage of justice is not substantial that an appellate court is permitted to dismiss the appeal.

6.7 An analysis of the different ways in which *discretion* is understood in the law was performed by Spigelman CJ in *DAO v R*.[6] He described the word *discretion* as a "protean word … often deployed loosely in legal discourse". And he said:[7]

> "Labelling a particular statutory provision as involving either a 'judgment' or a 'discretion' carries with it the danger of applying the label, rather than conducting an analysis of the applicable statutory regime. As the High Court has emphasized on numerous occasions, in matters of this character it is always important to commence with the statute and not to substitute other words …"

6.8 It is clear from the language used by Neave JA and Kyrou AJA that they were of the view that they had a choice as to whether to apply the proviso or not. The language they used is emblematic of the exercise of discretion. Indeed, they explicitly said that, "The Court's

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

5 *House v The King* (1936) 55 CLR 499 at 504-505.

6 (2011) 278 ALR 765 at 772 [46]–774 [52].

7 Ibid. at 773 [51].

discretion to apply the proviso to s 568(1) of the *Crimes Act 1958* can be *exercised* where the trial judge has failed to direct a jury on all elements or has misdirected the jury in part."[8] Those words betray error.

The application of the proviso does not involve the exercise of discretion: the decided cases

6.9 Until *Weiss v The Queen*,[9] the analysis of Fullagar J in *Mraz v The Queen*[10] generally was regarded as the classic exposition of the operation of the proviso. He said:

> It is very well established that the proviso to s 6(1) [of the *Criminal Appeal Act* 1912 (NSW)] does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant *may thereby have lost a chance which was fairly open to him of being acquitted*, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried. [Emphasis added.]

6.10 Few of the cases in the High Court post-*Mraz*, and none of the cases post-*Weiss*, speak of the application of the proviso as discretionary. (*Appendix 1* contains those cases decided in the High Court after *Mraz* where it is cited; and *Appendix 2* is a list of criminal cases in the High Court following *Weiss* in which it is applied.)

6.11 The allusions to discretion concomitantly with references to the proviso post-*Mraz* are:

- In *Wilde v The Queen*,[11] Gaudron J, having cited Fullagar J's formulation in *Mraz*, said:

  > "Recourse to this fundamental precept in interpreting the proviso places limitations on what a court of criminal appeal is entitled to do in *exercising its discretion to utilize the proviso*."

- Mason CJ, Brennan and Toohey JJ, remarked in *Glennon v The Queen*:[12]

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8 (2011) 203 IR 396 at 408 [57].

9 (2005) 224 CLR 300.

10 (1955) 93 CLR 493 at 514.

11 (1988) 164 CLR 365 at 383-384.

12 (1994) 179 CLR 1 at 3.

"On appeal, the Court of Criminal Appeal held that the trial judge's direction [on the accused's right to silence] was erroneous. However, *the Court exercised its discretion* under s. 568(1) of the *Crimes Act 1958* (Vict.) and held that, as there had been no miscarriage of justice, the applicant's convictions should not be quashed."

- The Crown in *Green v The Queen*[13] urged that the application of the proviso was discretionary. Brennan CJ observed:[14]

"The High Court is not a Court of Criminal Appeal. However, in addition to the exposition, application and development of the law, it has a function as the ultimate curial guardian against legal error and injustice. If it reaches the conclusion that a trial has not been held according to law it may uphold the appeal and direct that such a trial be had. If it concludes that an accused has lost a real chance of being acquitted, it may find a miscarriage of justice and grant appropriate relief. Only if, at a trial which sufficiently complies with the law, *any miscarriage of justice is insubstantial and such as convinces the Court that it should exercise its discretion to withhold relief*, will an established error of law or procedure in the course of the trial justify the application of the proviso."

- Kirby J in *KBT v The Queen*[15] spoke of "the exercise of the discretion" provided for in the proviso (found in s. 668E(1A) of the *Criminal Code* (Qld.)).

- Again, in *Gipp v The Queen*,[16] when speaking of the Queensland provision, Kirby remarked that, "The exercise of the power to provide relief against insubstantial error under s 668E(1A) is discretionary".

- Kirby J in *Festa v The Queen*[17] said that "the postulate of provisions such as that invoked by the prosecution in this appeal is that *a discretion is retained by the appellate court to dismiss an appeal*, notwithstanding demonstration of such a wrong decision, if the appellate court considers that no substantial miscarriage has actually occurred".

- *Conway v The Queen*[18] concerned the interpretation of criminal appellate provisions in s. 28 of the *Federal Court of Australia Act 1976* (Cth), which did not contain a

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[13] (1997) 191 CLR 334.

[14] Ibid. at 397, citations omitted.

[15] (1997) 191 CLR 417 at 435.

[16] (1998) 194 CLR 106 at 147.

[17] (2001) 208 CLR 593 at 653 [199].

[18] (2002) 209 CLR 203.

common form "proviso". Kirby J said of those provisions[19] that, "Within broad discretions, it is possible to incorporate some of the considerations taken into account under the 'proviso', where it exists".

- Finally, in *Libke v The Queen*,[20] Kirby and Callinan JJ observed:[21]

> "Although it is the duty of an appellate court to decide, that is to say, satisfy itself that a substantial miscarriage of justice has occurred before allowing an appeal, *it must do that against the background of the much broader discretion that it enjoys than a jury does*, for they may only acquit or convict. An appellate court is not bound to decide the case finally. In weighing the possible impact of an irregularity, an appellate court will often be unable to determine whether there has been no substantial miscarriage of justice ..."

6.12 None of these cases, however, should be understood as determining that consideration of whether or not the proviso is to be applied involves the exercise of a discretion in the *House*[22] sense. None of these cases suggests that there is a balancing exercise to be performed or a choice whether to exercise a power or not. So much is clear from Kirby and Callinan JJ's use of the word "discretion" in *Libke* when juxtaposing the duty of an appellate court and that of a jury by use of the term discretion. A jury does not exercise a discretion in a *House* sense; it may only acquit or convict. An appellate court has a wider range of orders available to it on hearing an appeal – including dismissing or allowing the appeal and, if the latter, directing an acquittal or a retrial.

Removal of a defence: there can be nothing other than a substantial miscarriage of justice

6.13 The appellant argued at trial that it did not have control over relevant matters involving health and safety, being forklift traffic management outside broiler sheds at grower farms. Alternatively, it was contended that the appellant was entitled to rely on the expertise of subcontractors, being the chicken catchers, DMP, whose direct employee and forklift was involved in the relevant incident.

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[19] Ibid. at 232[79].

[20] (2007) 230 CLR 559.

[21] Ibid. at 581 [49].

[22] *House v The King* (1936) 55 CLR 499 at 504–5.

6.14 As Nettle JA held, the issue of reasonable practicability was of fundamental importance to the appellant's defence. He said:[23]

> Although the issue of reasonable practicability did not arise until late in the trial, in the end *it turned out to be one of fundamental importance to Baiada's defence.* What was needed, therefore, was a clear direction that, if the jury were satisfied that control had been established, they were bound to go on and consider whether they were satisfied beyond reasonable doubt that Baiada's engagement of DMP and Azzopardi Haulage was not sufficient to discharge Baiada's obligation to do what was reasonably practicable to provide and maintain a safe work site in the particular respect in issue. *The jury should have been directed in clear terms that, unless the Crown had satisfied them of that beyond reasonable doubt, they were bound to acquit.* [Emphasis added.]

6.15 Given that reasonable practicability was of fundamental importance to the appellant's defence, and that the jury were bound to acquit if not satisfied that the appellant's engagement of independent contractors was not sufficient to discharge its duty to do what was reasonably practicable, the failure to give an adequate direction – and thereby expose one of the appellant's principal defences for the jury's consideration – cannot, it is submitted, be other than a substantial miscarriage of justice.

6.16 Quite apart from their error in believing that the application of the proviso was discretionary, the majority in the Court of Appeal erred further in taking into account the jury's verdict, in purported reliance upon *Weiss*. They held that the fact that the jury had returned a verdict of guilty was "a factor which may be taken into account in deciding whether a substantial miscarriage of justice has occurred".[24] It is submitted, however, that where a defence has effectively been removed from the jury's consideration – and thus the verdict has been returned without consideration of whether the jury might still have been satisfied of guilt had the defence been properly before them for their consideration – the jury's verdict should be accorded no weight in deciding whether or not to apply the proviso.[25]

6.17 As has been observed, not only was reasonable practicability an element of the offence (in the sense that the prosecution was required to prove that the system of work provided was not "so far as is reasonably practicable, safe and without risks to health"), but it was

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[23] (2011) 203 IR 396 at 406–7 [47].

[24] (2011) 203 IR 396 at 409 [59].

[25] *Cf. Weiss v The Queen* (2005) 224 CLR 300 at 317 [43].

– as Nettle JA recognised[26] – one of the appellant's two defences. If that be correct – as, it is submitted, it undoubtedly is – then this is a case where it cannot be said that there was other than a substantial miscarriage of justice (notwithstanding that the appellate court was persuaded of guilt to the requisite degree).

6.18 As this Court observed in *Weiss*:[27]

> [44] ... No single universally applicable description of what constitutes 'no *substantial* miscarriage of justice' can be given. But one negative proposition may safely be offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court 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.
>
> [45] 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.

6.19 And as Nettle JA recognised, the "inadequacy of the judge's direction denied Baiada the benefit of the jury's consideration of one of its two principal defences", which is "functionally not dissimilar" to a "significant denial of procedural fairness".[28] Thus at the very least, it is submitted, it is one of those cases where it was proper to allow the appeal even though the appellate court was persuaded (as the majority said they were) of guilt.

6.20 Moreover, this case is not dissimilar to *Krakouer*,[29] where there was a misdirection on an element of the relevant offences. (It is noteworthy that *Krakouer* was not cited by Neave JA and Kyrou AJA, despite their observation that the "discretion to apply the proviso ... can be exercised on appeal where the trial judge has failed to direct a jury on all the elements of an offence or has misdirected the jury in part".[30]) In that case, although not

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[26] (2011) 203 IR 396 at 406–7 [44]–[47].

[27] (2005) 224 CLR 300 at 317 [44]–[45].

[28] (2011) 203 IR 396 at 407 [51].

[29] *Krakouer v The Queen* (1998) 194 CLR 202.

[30] (2011) 203 IR 396 at 408 [71].

finding the trial to be fundamentally flawed, the majority (Gaudron, Gummow, Kirby and Hayne JJ) said:[31]

> It may be that a misdirection which has the effect of denying procedural fairness and depriving an accused person of the right to have some substantial part of his or her case decided by the jury would result in a trial that is fundamentally flawed ...

And McHugh J observed:[32]

> But if a direction on the standard or onus of proof or the function of the jury is substantially wrong, I cannot presently conceive of a case where the weight of evidence against the accused could affect the conclusion that a miscarriage of justice has occurred. An accused person is entitled to a trial according to law. Where the law requires that an issue be tried by a jury, the accused does not have a trial in any meaningful sense where the jury is prevented by judicial direction from determining the issue. It is of no relevance in my opinion that a court of criminal appeal thinks that the evidence of guilt is overwhelming. An accused is entitled to be tried by the jury. That is the tribunal that is given the responsibility for determining the guilt of an accused person.

6.21 In the circumstances, for the reasons above, it is submitted that the majority in the Court of appeal were wrong to hold that the proviso could be applied. The appeal should be allowed.

The proviso survives the enactment of s 276 of the Criminal Procedure Act 2009

6.22 The influence of *Weiss* on notions of what constitutes a substantial miscarriage of justice will continue to be authoritative in Victoria, despite the repeal of s 568(1) of the *Crimes Act* 1958. Thus, it was observed recently in *Sibanda v R*[33] that "test for the application for the proviso to s 568(1) of the Crimes Act 1958, which was laid down by the High Court in *Weiss v The Queen*, applies *mutatis mutandis* with equal force to the determination of whether there has been a substantial miscarriage of justice for the purposes of ss 276(1)(b) and (c) of the *Criminal Procedure Act 2009*".

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[31] (1998) 194 CLR 202 at 212 [24].

[32] (1998) 194 CLR 202 at 227 [75].

[33] [2011] VSCA 285 at [5] per Nettle JA. See also at [61]–[65], per Sifris AJA.

PART VII – APPLICABLE LEGISLATION

7.1 When judgment was handed down on 18 February 2011 the application for leave to appeal was governed by s 568(1) of the *Crimes Act* 1958 (Vic.), which provided:

> **568 Determination of appeals in ordinary cases**
>
> (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that 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 that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal:
> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

7.2 As from 1 January 2010, s 568(1) was repealed[34], although it continues to apply to those appeals where sentence was passed prior to that date. For appeals against conviction in which sentence was passed after 1 January 2010, the situation is governed by s 276 of the *Criminal Procedure Act* 2009 (Vic.), which provides:

> **276 Determination of appeal against conviction**
>
> (1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that –
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> (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or
> (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
> (c) for any other reason there has been a substantial miscarriage of justice.
>
> (2) In any other case, the Court of Appeal must dismiss an appeal under section 274.[35]

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[34] Part VI of the *Crimes Act* 1958 (in which s 568(1) was to be found) was repealed by s 422(4) of the *Criminal Procedure Act* 2009, with effect from 1 January 2010. By virtue of s 439 and cl. 10(4), Schedule 4, of the *Criminal Procedure Act* 2009, Division 1 of Part 6.3 of the Act, which contains s 276, applies "to an appeal where the sentence is imposed on or after the commencement day" i.e. 1 January 2010. The sentence was passed in this case on 29 May 2009.

[35] Section 274 permits a convicted person to appeal to the Court of Appeal against the conviction "on any ground of appeal if the Court of Appeal gives the person leave to appeal".

PART VII – ORDERS SOUGHT

8.1 The appellant seeks the following orders:

1. The appeal to this court be allowed.

2. The judgment and orders of the Court of Appeal given on 18 November 2010 be set aside and in lieu there be orders that:
   (a) the application for leave to appeal against conviction be granted;
   (b) the appeal be allowed;
   (c) the appellant's conviction and sentence be quashed;
   (d) a new trial be ordered; and
   (e) an indemnity certificate be granted to the appellant pursuant to s 14 of the *Appeal Costs Act* 1998 (Vic.)

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APPENDIX 1

HIGH COURT CASES CITING MRAZ V THE QUEEN (1955) 93 CLR 493

Ryan v The Queen (1967) 121 CLR 205; [1967] ALR 577; (1967) 40 ALJR 488

Driscoll v The Queen (1977) 137 CLR 517; (1977) 15 ALR 47; (1977) 51 ALJR 731

Simic v The Queen (1980) 144 CLR 319; (1980) 30 ALR 519; (1980) 54 ALJR 406

Quartermaine v The Queen (1980) 143 CLR 595; (1980) 30 ALR 616; (1980) 54 ALJR 453

Liberato v The Queen (1985) 159 CLR 507; (1985) 61 ALR 623; (1985) 59 ALJR 792

Wilde v The Queen (1988) 164 CLR 365; (1988) 76 ALR 570; (1988) 62 ALJR 100

Harriman v The Queen (1989) 167 CLR 590; (1989) 88 ALR 161; (1989) 63 ALJR 694

Ugle v The Queen (1989) 167 CLR 647; (1989) 88 ALR 513; (1989) 64 ALJR 38

Edwards v The Queen (1992) 173 CLR 653; (1992) 107 ALR 190; (1992) 66 ALJR 394

Prasad v The Queen (1994) 119 ALR 399; (1994) 68 ALJR 194

Glennon v The Queen (1994) 179 CLR 1; (1994) 119 ALR 706; (1994) 68 ALJR 209

Mackenzie v The Queen (1996) 190 CLR 348; (1996) 141 ALR 70; (1996) 71 ALJR 91

Jones v The Queen (1997) 143 ALR 52; (1997) 71 ALJR 538

Green v The Queen (1997) 191 CLR 334; (1997) 148 ALR 659; (1997) 72 ALJR 19

KBT v The Queen (1997) 191 CLR 417; (1997) 149 ALR 693; (1997) 72 ALJR 116

Suresh v The Queen (1998) 153 ALR 145; (1998) 72 ALJR 769

Gipp v The Queen (1998) 194 CLR 106; (1998) 155 ALR 15; (1998) 72 ALJR 1012

Hembury v Chief of GS (1998) 193 CLR 641; (1998) 155 ALR 514; (1998) 72 ALJR 1209

Krakouer v The Queen (1998) 194 CLR 202; (1998) 155 ALR 586; (1998) 72 ALJR 1229

Farrell v The Queen (1998) 194 CLR 286; (1998) 155 ALR 652; (1998) 72 ALJR 1292

Lee v The Queen (1998) 195 CLR 594; (1998) 157 ALR 394; (1998) 74 ALJR 1484

Gilbert v The Queen (2000) 201 CLR 414; (2000) 170 ALR 88; (2000) 74 ALJR 676

Eastman v The Queen (2000) 203 CLR 1; (2000) 172 ALR 39; (2000) 74 ALJR 915

Crampton v The Queen (2000) 206 CLR 161; (2000) 176 ALR 369; (2000) 75 ALJR 133

Stanoevski v The Queen (2001) 202 CLR 115; (2001) 177 ALR 285; (2001) 75 ALJR 454

Grey v The Queen (2001) 184 ALR 593; (2001) 75 ALJR 1708

Festa v The Queen	(2001) 208 CLR 593; (2001) 185 ALR 394; (2001) 76 ALJR 291
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