IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No M 144 of 2016

BETWEEN:

THE QUEEN — Appellant

-and-

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STEVEN LAKAMU SIOSIUA AFFORD — Respondent

RESPONDENT'S AMENDED SUBMISSIONS

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I

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

II

2.1 Did the trial judge's directions to the jury in the Respondent's trial – reproduced at paras [5] and [123] of the Court's judgment in the Court of Appeal[1] – cause the Respondent's trial to miscarry?

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2.2 Is the inferential process identified by the High Court in *Kural v The Queen*[2] – formulated as a guide to trial judges directing juries on the *mens rea* in drug importation trials under the *Customs Act 1901* ('Customs Act') and at common law – an appropriate model direction for juries charged with determining proof of 'intention' for the offence created by s 307.1 and for drug importation (and other) offences created by the *Criminal Code* (Cth) 1995 ('the Code')?

2.3 Was the majority in the Court of Appeal correct in concluding that the jury's guilty verdict was unsafe or not supported by the evidence?

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III

3.1 The Respondent certifies that he has considered whether notice should be given in compliance with s. 78B of *the Judiciary Act 1903* (Cth) and determined that notice is not necessary.

IV

4.1 The Respondent adopts the statement of facts set out by the majority in the Court of Appeal at paras [88]-[125]. The summary of evidence advanced by the Appellant is not without error.

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4.2 In accordance with their duties under the *Jury Directions Act 2013*[3] ('the JDA'), the prosecutor and defence counsel at trial advanced submissions on how the trial judge ought to

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1 *Afford v The Queen* (2016) 308 FLR 1; [2016] VSCA 56.

2 (1987) 162 CLR 502 ('*Kural*').

3 Section 11; cf *Jury Directions Act 2015*, s 12.

direct the jury on the elements of the offence charged, and in accordance with sections 307.1(a) and (b) and 307.1 (2) of the *Criminal Code* (Cth) ('the Code').[4]

4.3 The prosecutor submitted[5] that the judge ought to direct the jury in terms that incorporated the statutory language utilised in ss 5.2(1) and 5.4(1) of the Code, and its (supposed) amplification in authorities such as *Kural*,[6] *Saengsai-Or*[7] and *Cao*.[8]

4.4 She submitted that, notwithstanding that the introduction of the Code had shifted the prosecution of importation offences from the Customs Act and the common law to the Code, that shift had not disturbed the applicability to the Code offences of the inferential process that had been formulated, and been applied in jury trials, at common law.

4.5 Defence counsel submitted that the judge ought to confine himself to the statutory language of the Code and to the terms of s 5.2(1).

4.6 It was to the submissions advanced by the prosecutor that the judge acceded.

V

5.1 The Appellant's statement of applicable statutory provisions is accurate but incomplete. To those cited, the Respondent adds: *Criminal Code*, ss 2.1, 2.2, 3.1, 3.2, 4.1, 5.6 and 11.1; and *Jury Directions Act 2013* (Vic), s 11.

VI

AN EXERCISE IN STATUTORY CONSTRUCTION

6.1 The resolution of Grounds 1 and 2 begins and ends with the true construction of Division 307 of the Code and, in particular, s 307.1. The majority in the Court of Appeal focused their attention upon that exercise. They were correct to have done so.

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4 T at pp 315-49.

5 T at pp 310-18; 329-38.

6 (1987) 162 CLR 502.

7 (2004) 61 NSWLR 135.

8 (2006) 65 NSWLR 552.

6.2 The form and implications of that exercise by the Court of Appeal in the Respondent's case were foreshadowed by McLure P in the Court 0f Appeal of Western Australia. In *Karamitsios v The Queen*[9] the appellants had been convicted of attempting to possess a marketable quantity of methylamphetamine, which had been unlawfully imported contrary to ss 11.1 and 307.6 of the Code. The relevant ground of appeal sought to impugn a passage from the trial judge's summing up which, it was alleged, had departed from the formulation in *Kural* and its *prima facie* endorsement by, *inter alia*, the Victorian Court of Appeal in *Luong*.[10] Mazza JA wrote the leading judgment dismissing the appeal with the concurrence of

10 Beech J. McLure P joined in the orders made and agreed that the trial judge's summing up did not betray the error alleged by the appellants.

6.3 But in an almost unrelated – and unnecessary – passage of considered *obiter dictum* her Honour volunteered the following:[11]

> *Luong* [in so far as it applied *Kural* and *Saad*] is open to challenge. The opposing argument may go something along these lines. First, the 'conduct' of the appellants for the purpose of s 11.1(2) of the Code was that connected with them obtaining physical custody or control of the backpack that contained rock salt in lieu of the border controlled drugs. Second, the fault element of intention or knowledge must be present at the time of the conduct that constitutes the attempt. Knowledge can have no application because a person cannot 'know' something unless it is so.
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> 20 However, proof that the appellants knew the drugs were in the backpack before being covertly removed and replaced would establish that they had a belief that drugs were in the backpack when it was collected and thus had an intention to possess the drugs. Third, *an awareness of the likelihood that drugs were in the backpack is outside the scope of the definitions of intention and knowledge for the purpose of s 11.1(3) of the Code*. See Criminal Law Officers Committee Report, General Principles of Criminal Responsibility, December 1992 [203.1], [203.2]. Finally, *the common-law position that awareness or belief in likelihood can satisfy the requirement of intention to possess is positively inconsistent with, and does not prevail over, the fault requirements in s 11.1(3)*. [Emphasis added.]

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9 [2015] WASCA 2014 ('*Karamitsios*').

10 *Luong v DPP (Cth)* (2013) 46 VR 780 ('*Luong*').

11 Ibid, [15]. [Footnotes omitted.]

6.4 That passage applies, *mutatis mutandis*, and with equal force, to the construction of the 307.1 of the Code. It emphasises the importance of attaching primacy to the text of the Code when engaging in the constructional exercise with which the Court of Appeal in the Respondent's case was tasked.

6.5 Relatedly, this Court had occasion to apply that same rationale to its construction of s 317(b) of the *Criminal Code* (Q) ('Code Q') in *Zaburoni v The Queen.*[12] The appellant was convicted, in breach of s 317(b), of intentionally transmitting a serious disease (HIV) to another with intent to do so. The appellant, who was HIV positive, had lied to the complainant (his girlfriend) about his HIV status and knowingly exposed her to the risk of contracting the disease. After frequent unprotected sex with the appellant the complainant contracted HIV.

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6.6 The sole issue for the jury's determination at trial was proof of the appellant's intention. In the High Court, the parties were at one in submitting that that meant proof of *actual* intent.[13]

6.7 An element of the offence created by s 317(b) is proof of intention to produce a particular result.[14] At issue in the High Court was whether, in proof of actual intent, a jury must find that an accused meant to transmit the disease, in that his actions must have been designed to bring about that result; or whether it was sufficient that a jury find that an accused knew that, by having unprotected sex with the complainant, it was probable or likely that the disease would be passed. Could the latter, without more, properly found an inference of actual intent under the Code (Q)?

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6.8 The plurality (French CJ, Bell and Keane JJ) concluded the following:[15]

- common law concepts of foreseeability, likelihood and probability are not relevant to prove the intentional element for the offence created by s 317(b);

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12 *Zaburoni v The Queen* (2016) 256 CLR 482 ('*Zaburoni*').

13 Ibid, [7].

14 Code Q, s 23(2).

15 *Zaburoni*, [13]-[15], [17[and [19].

- where proof of the intention *to produce a particular result* is made an element of liability for an offence under the Code Q, the prosecution is required to establish that the accused *meant to produce* that result by his or her conduct;
- the prosecution must prove that *the accused had that result as his or her purpose or object* at the time of engaging in the relevant conduct;[16]
- knowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the Code Q. Foresight of likelihood of outcome cannot, under the Code Q, be substituted for proof of intention to cause that outcome; and
- where the accused is aware that, save for some supervening event, his or her conduct will certainly produce a particular result, the inference that the accused intended, by engaging in that conduct, to produce that particular result is compelling. Nonetheless, foresight that conduct will produce a particular result as a "virtual certainty" is of evidential significance and under the Code it remains that the jury be satisfied that the accused meant to produce the particular result.

6.9 Gageler and Nettle JJ each wrote a short judgment generally concurring with the plurality's analysis. Nettle J added a rider:[17] his Honour held that proof of the intentional element of the offence created by s 317(b) *could* be founded, without more, upon an accused's foresight that his or her conduct rendered it inevitable or a certainty that the disease was transmitted to the victim.

6.10 The Court's analysis is instructive for a number of reasons. First, it provides a recent example of this Court's construction of a Criminal Code the relevant provisions of which are not dissimilar to those the subject of these proceedings. Second, it emphasises the limited scope for recourse to common law principles when engaging in that constructional exercise. It manifests the importance of attaching primacy to the construction of the Code's text. Third, it all-but answers the questions raised by Grounds 1 and 2 in this proceeding.

6.11 Further, when emphasising that foresight of likelihood of outcome cannot, under the Code Q, be substituted for proof of intention to cause that outcome, the plurality distinguished that

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16 Ibid, [8]; *R v Willmot* (No 2) [1985] 2 Qd R 413, 418; *R v Reid* [2007] 1 Qd R 64, 72[13].

17 At [67].

imperative with the text of s 5.2(3) of the Commonwealth Code.[18] That section states that a person has intention *with respect to a result* if the person is aware that the result will occur in the ordinary course of events.

6.12 But in the Respondent's trial the live issue was whether he engaged in the 'conduct' of importing a substance for which the fault element was intention and intention only.[19] Applying *Zaburoni*, that meant that the prosecution had to prove that *the Respondent had that result as his or her purpose or object* at the time of engaging in the relevant conduct. The jury ought to have been directed in those terms. Belief, foresight or an awareness on his part of the result, whether possible, likely or certain, was no substitute in law for proof of the intentional imperative mandated by the Code. Again, the jury ought to have been directed in terms that made that clear. Instead, they were directed in terms that positively invited an inferential process that was proscribed by the Code's text, structure and true construction.

6.13 The core vice in the Appellant's submissions is that her analysis is not properly predicated upon a construction of the Code and its text. It commences with an acceptance of a line of authority founded upon principles formulated at common law and later refined and applied to the prosecution of offences under the Customs Act utilising Chapter 2 of the Code. Those principles are then said to apply to the drug offence provisions of the Code, despite the fact that those provisions are materially different to their predecessors in the Customs Act.

6.14 The Respondent's case attaches primacy to the construction of the Code and its text, free of preconceptions about the applicability of a body of law developed and refined before the relevant Code offences were enacted. The distinction may be subtle, but it is real and significant. Thus, by acknowledging the primary importance of the constructional task, Priest and Beach JJA in the Court of Appeal proceeded to:

- construe a statute that had not before been authoritatively construed;
- construe a statute that formed part of a Code;
- perform their task unfettered by historical considerations except in so far as they legitimately bore upon the interpretation of the text in its proper context; and
- interpret to Code unfettered by the principle of comity.

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18 At [14].

19 Sections 5.6(1) and s 5.2.

6.15 The Appellant betrays an underappreciation of the primacy of that constructional task.

THE CODE

6.16 Section 2.1 of the Code provides that Chapter 2 'contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created. By sub-s(1) Chapter 2 'applies to all offences under the Code.' By s 3.1(1) an offence consists of physical elements and fault elements.

6.17 In so far as the Code is otherwise relevant, it provides:

5.2 Intention

10 (1) A person has intention with respect to conduct if he or she means to engage in that conduct.

...

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

20 (2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

...

307.1 Importing ... commercial quantities of border controlled drugs ...

(1) A person commits an offence if:

30 (a) the person imports ... a substance; and
(b) the substance is a border controlled drug ... ; and
(c) the quantity imported ... is a commercial quantity.

...

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

6.18 At trial, it was accepted that s 307.1 has three elements:[20] the first relates to the importation of a substance for which the fault element is intention (s 5.6(1) and s 5.2 of the Code); the second element is that the substance is a border controlled drug for which the fault element is recklessness (s 307.1(2) and s 5.4 of the Code); and the third element is that the quantity is a commercial quantity. For this element there is absolute liability.

SUBMISSIONS TO THE COURT OF APPEAL

10 6.19 When directing the jury on intention to import a substance, the trial judge charged:[21]

> The second element that the prosecution must prove is that the accused ... intended to import the substance. This means that the accused meant to import the substance. This element doesn't look at whether the accused was aware that the substance was a border controlled drug even. All that is required to establish the intention is proof that the accused *intended to import the package whatever it contained.* To determine the accused's state of mind you will asked [sic.] to draw inference and you will remember what I told you so the prosecution must prove and this is very important for you to note that at the time of entering — at the time at which the importation crystallises in to Australia — that is the relevant time at which intention has to be proved. Not at an earlier time or not even at a later time, really. It is at that time that you must find intention —
20 that the accused meant to import the substance, that is *either* he knew, that is *he had knowledge or he was aware or he believed that his conduct involved the importation of the substance* or *believed in the likelihood of importation of the substance and by likelihood, I mean a real or significant chance.*
>
> So the issue of *intention does not only rest on actual knowledge*, that is the prosecution does *not* have to prove the accused *actually knew* that there was the substance in the suitcase. If you are satisfied beyond reasonable doubt that the accused believed that the suitcase believed the substance [sic] that would sustain an inference, that would sustain an inference as to intention. So also if you were satisfied beyond reasonable doubt that *he was aware of a real and significant chance that his conduct involved the importation of the substance and he nevertheless persisted*
30 *with that conduct.* That would suffice to infer an intention to import. [The judge then directed the jury that mere suspicion did not suffice to make out intention.]

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[20] *Afford*, [119] per Priest and Beach JJA.

[21] Ibid, [123]. [Emphasis reproduced from the majority's judgment.]

6.20 In the Court of Appeal, it was submitted by the Respondent that those directions had caused his trial to miscarry;[22] that they invited the jury to engage in an inferential process that emasculated the intentional imperative demanded by s 5.2(1) of the Code. Put another way, the jury were directed that they could find the intentional fault element proven if satisfied of '*one or more of a series of cascading states of mind*'[23] on the Respondent's part. Although the jury were instructed that an intention to import entailed that the Respondent meant to import the substance, they were also directed that the accused intended to import the substance if he *knew, believed*, or was *aware* that his conduct involved the importation of the substance; and they were directed that it sufficed if the accused man *believed in the likelihood or was aware of a real and significant chance* that his conduct involved the importation of the substance. Those directions, it was submitted, improperly left open the real risk that one or more jurors founded an inference that the Respondent had intended to import the substance upon no more than an awareness on his part of a significant or real chance that his conduct involved the importation of that substance. That awareness, it was said, could not be reconciled with the intentional imperative mandated by s 5.2(1).[24]

6.21 The Crown submitted that the judge's charge was unimpeachable[25] and that what the trial judge said was supported by the High Court in *Kural* and by subsequent intermediate appellate authority from Victoria[26] and the New South Wales.[27] The Crown contended – and still contends – that those authorities inform authoritatively the construction of the offence created by s 307.1 and, in particular, the inferential process in which a jury may engage in determining whether the Crown has made out its intentional fault element.

ANALYSIS

6.22 In *He Kaw Teh v The Queen*.[28] the High Court held that the application of common law principles of criminal responsibility to the Customs Act offences of importing or possessing

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22 Ibid, [124].

23 Ibid. [Emphasis added.]

24 Cf *Zaburoni*, [13]-[15], [17[, [19].

25 Ibid, [125]

26 Relying upon, in particular, *Weng v The Queen* (2013) 236 A Crim R 299 ('*Weng*') and *Luong v DPP (Cth)* (2013) 236 A Crim R 85 ('*Luong*').

27 See, in particular, *Saengsai-Or* and *Cao*.

28 (1985) 157 CLR 523 ('*He Kaw Teh*').

prohibited goods contrary to ss 233B(1)(b) and (c) respectively required proof of *mens rea* in the sense of guilty knowledge.[29]

6.23 *He Kaw Teh* was considered by the High Court again in *Kural*. It too was a prosecution under s 233B(1)(b) of the Customs Act. The plurality – Mason, Deane and Dawson JJ, citing *He Kaw Teh* – held[30] that the prosecution was required to prove that a person accused of an offence under s 233B acted with *mens rea*. Their Honours observed that it was desirable 'to indicate ... what will... in the ordinary case of a prosecution for such an offence be necessary to discharge [the] onus' of proving that the person acted with a guilty mind.

6.24 Their Honours held that:[31]

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> Because the mental elements in different crimes vary widely it is impossible to make a statement which is universally valid for all purposes about the essential elements of a guilty mind. *Depending upon the nature of the particular offence the requirement of a guilty mind may involve intention, foresight, knowledge or awareness with respect to some act, circumstance or consequence.* Where the offence charged is the commission of a proscribed act, a guilty mind exists when an intention on the part of the accused to do the proscribed act is shown. *The problem then is one of proof.* How does one prove the existence of the requisite intention? Sometimes there is direct evidence in the form of an admission by the accused that he intended his conduct to involve the forbidden act. *More often, the existence of the requisite intention is a matter of inference from what the accused has actually done. The intention may be inferred from the doing of the proscribed act and the circumstances in which it was done.*

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> Where, as here, it is necessary to show an intention on the part of the accused to import a narcotic drug, that intent is established if the accused knew or was aware that an article which he intentionally brought into Australia comprised or contained narcotic drugs. But that is not to say that actual knowledge or awareness is an essential element in the guilty mind required for the commission of the offence. It is only to say that knowledge or awareness is relevant to the existence of the necessary intent. Belief, falling short of actual knowledge, that the article comprised or contained narcotic drugs would obviously sustain an inference of intention. So also would proof that the forbidden act was done in circumstances where it appears beyond reasonable doubt that the accused was aware of the likelihood, in the sense that there was a significant or real

29 Ibid at p 536-37 per Gibbs CJ (with whom Mason J agreed); at pp 570 and 584-85 per Brennan J; and at 596 per Dawson J.

30 *Kural* at p 504.

31 Ibid at pp 504-05. [Emphasis added.]

chance, that his conduct involved that act and nevertheless persisted in that conduct. (Emphasis added)

6.25 However, their Honours went on to stress[32] that:

> What [they had] said was *designed to emphasise that the existence of the requisite intention is a question of fact and that in most cases the outcome will depend on an inference to be drawn from primary facts found by the tribunal of fact*… [I]t was *important not to succumb to the temptation of transforming matters of fact into propositions of law*. In that regard, [they] emphasise[d] that the[ir] foregoing comments [were] not designed as a direction or instruction to be read by trial judges to juries. They [were] intended to give guidance to trial judges in order to enable them to formulate such directions as may be appropriate to the facts and circumstances of particular cases.

6.26 In the Court of Appeal the Respondent advanced two submissions in answer to the Crown's reliance upon *Kural*.[33] First, it was submitted that *Kural* had no application to a prosecution for an offence under s 307.1 of the Code where codified physical and fault elements had taken the place of common law precepts such as *actus reas* and *mens rea*. Second, it was argued that, even if *Kural* did apply to the Respondent's prosecution under s 307.1 of the Code, the High Court itself had expressly cautioned against that which the trial judge's directions to the jury betrayed: an elevation of the '*Kural*-endorsed inferential process' to a proposition of law.

6.27 The Crown's primary submission was that the *Kural*-reasoning had been correctly affirmed in subsequent intermediate appellate decisions involving prosecutions to which Chapter 2 of Code applied. It submitted that the complaint that the trial judge had elevated the *Kural* reasoning to a proposition of law was without substance.

6.28 In support of its primary submission the Crown relied, in particular, upon two decisions of the New South Wales Court of Criminal Appeal: *R v Saengsai-Or* and *R v Cao*; and two decisions of the Victorian Court of Appeal: *Weng v The Queen* and *Luong v DPP (Cth)*.

6.29 Priest and Beach JJA (correctly) held that those authorities neither bound nor did they constrain their proper construction of the Code.

6.30 *Saengsai-Or* and *Cao* were prosecutions under s 233B(1) of the Customs Act. But they were cases to which Chapter 2 of the Code then applied in proof of their elements. In 2005,

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32 Ibid at p 505.

33 *Afford*, [128] per Priest and Beach JJA.

Customs Act offences such as those under s 233B(1) were replaced by Code offences which, whilst similar, were not identical to those they replaced. The Explanatory Memorandum[34] that accompanied the creation of those offences in the Code stated that:

> The proposed Division 307 offences have been designed to accord as closely as possible to the offences they are replacing in the Customs Act. A guiding principle has been to ensure that the offences in proposed Division 307 are no more difficult to prove than the existing offences in the Customs Act.

6.31 So much may be accepted about Division 307's design and the underlying principle of its enactment. To the extent that those sentiments inform the context in which Division 307.1 is to be properly construed they occupy their proper place. But they do not, and cannot, displace the statutory text and its clear meaning.[35]

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6.32 At issue in *Saengsai-Or* was whether the offence created by s 233B(1)(b) of the Customs Act comprised a physical element of conduct alone (the act of importing the prohibited imports); or a physical element of conduct (importing Remy Martin bottles) and a physical element of circumstance (the prohibited imports inside the bottles). The Court held that there was one physical element of conduct (the act of importing the prohibited imports). It had to be established by the Crown that the alleged offender intended to import the prohibited goods (the narcotic drugs). Bell J (with whom Wood CJ and CL and Simpson J agreed), stated:[36]

> It is appropriate for a judge in directing a jury on proof of intention under the Criminal Code (Cth) to provide assistance as to how (in the absence of an admission) the Crown may establish intention by inferential reasoning in the same way as intention may be proved at common law. Intention to import narcotic goods into Australia may be the inference to be drawn *from circumstances that include the person's awareness of the likelihood that the thing imported contained narcotic goods.*

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34 The Explanatory Memorandum to the *Law and Justice Legislation Amendment (serious Drug Offences and Other Measures) Bill 2005.*

35 See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, [47]per Hayne, Heydon, Crennan and Kiefel JJ; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd,* [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [31] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; and *Thiess v Collector of Customs* (2014) 250 CLR 664, [22] per French CJ, Hayne, Kiefel, Gageler and Keane JJ.

36 *Saengsai-Or*, [74]. [Emphasis added.]

6.33 That passage was in fact relied upon to find in favour of the Respondent's application in the Court of Appeal.[37] The submission that the jury was misdirected, and that the Respondent's trial miscarried, is not contingent upon this Court's acceptance of the Respondent's construction of s 3017.1. Applying *Saengsai-Or*, the impugned direction did not convey to the jury that intention 'may be the inference to be drawn from circumstances *that include the person's awareness of the likelihood that the thing imported contained narcotic goods.*'[38] It instructed the jury that, were they satisfied that the Respondent was aware that there was a significant or real chance that he was importing a substance, that awareness sufficed to found the inference of intention. Even on the Appellant's construction of s 307.1, the Respondent's
10 trial miscarried.

6.34 But the Appellant's case *is* flawed. Having regard to the analysis undertaken by the majority in the Court of Appeal, and to this Court's analysis of s 317(b) of the Code (Q) in *Zaburoni*, it cannot be sensibly submitted that the majority in the Court below were not at liberty, in construing s 307.1(1) of the Code, to treat *Saengsai-Or* (and *Cao* for that matter) as distinguishable from the case before them. In *Saengsai-Or* the Crown had to prove an intention to import narcotic goods — not merely, as in the present case, an intention to import a substance. In *Cao*, the issue was whether the appellant had relevantly and intentionally possessed a prohibited import – and not just a substance – under s 233B(1)(c).

6.35 Similarly, *Weng* was a case that involved a conviction for the offence of attempting to possess
20 a border controlled drug, contrary to ss 11.1(1) and 307.6(1) of the Code. The relevant issue for the Court was whether it was not 'necessary for the prosecution to prove that the person knew, or was reckless as to the *particular* identity of the... border controlled drug.'[39] *Kural* and *Saengsai-Or* were applied. But the difference again between *Weng* and *Afford* was that in *Weng*, under the attempt provisions that (then) applied[40] the Crown had to prove an *intention* to possess a border controlled drug— not merely an intention to possess a substance.[41] Whatever the parallels between the two cases, the majority in the present case was free to construe s. 307.1 unconstrained by *Weng*. And they were correct to do so.

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37 *Afford*, [143] per Priest and Redlich.

38 *Saengsai-Or*, [74]. [Emphasis added.]

39 Section 307.5 of the Code.

40 See *Criminal Code*, s 11.1 reproduced in the index to these submissions at pp 6-7; cf *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth).

41 See s 11.1(3) of the Code.

6.36 Finally, *Luong* too was a case in which the Crown sought to prove an intention to possess a border controlled drug – not a mere substance. On that basis the majority was again at liberty to distinguish it in the manner it did *Weng*.

6.37 The real vice in the authorities relied upon by the Appellant is that exposed by this Court's judgment in *Zaburoni*. When construing the text of s 307.1 of the Code there is little or no room for the application to the constructional task of common law concepts such as foreseeability, likelihood and probability. They are not relevant to the proof of the intentional imperative attaching to the conduct of importing a substance. Thus, at the Respondent's trial, the prosecution bore the onus of proving that the accused intended or meant to import the substance; that his purpose or object was to import the substance. And the jury ought to have been directed in terms that made that plain.

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CONCLUSION – GROUNDS 1 AND 2

6.38 There occurred in the Respondent's trial a substantial miscarriage of justice. The Appellant's Grounds 1 and 2 have not been made out.

GROUND 3 – UNSAFE VERDICT

6.39 The Respondent adopts paras [145]-[149] of the majority judgment on the ground alleging that the Respondent's guilty verdict was not unsafe and unsatisfactory.

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6.40 It was not open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of the Respondent's guilt.[42] The fault elements required the prosecution to prove that the he intended to import the substance (which was found to contain the border controlled drug) and that the Respondent was reckless as to whether the substance imported was a border controlled drug. It was not open to the jury to have been satisfied of either element.

6.41 The Respondent was the victim of an elaborate, lengthy and sophisticated email scam. He was deceived into believing that if he travelled to Manila and brought the two bottles of 'separation oil' back to Adelaide it would lead to his participation in a lucrative building contract with Anwar.

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[42] Exhibit D, Jury Book, Volume 2: email from Hamza to the Applicant dated 4 March 2014 at 8.47pm.

6.42 Whilst the Respondent more than once expressed doubts about the legitimacy of the process, during the negotiation period and before he left Australia, it is clear from the documents that disclosed his state of mind – and from his answers in the record of interview with police – that once the Respondent's airfare and accommodation were paid for, he believed the process was a legitimate one and would result in his securing in a building contract.

6.43 In his personal diary, the Respondent recorded on 7 March 2014 that '*just as I prepare to travel to the Philippines on the Lords call for my very first business deal of a life time to secure a Hotel construction deal and process worth US$155M.*'[43] On 10 March 2014, his diary records the entry: '*waiting for the Lords next purpose and at the same time preparing a team of professionals to manage Gods call for the Afford Property to manage for his people.*'[44] On 11 March 2014, the Respondent noted '*I can see clearly my trip to Manila to view and experience the atmosphere of a city who has adopted High Rise building living. My clients 5 star hotel project are clearly viewed in Manila.*' On 13 March 2014, the Respondent wrote: '*Returning to Perth after viewing absolutely awe of the Manila high rise buildings and super services by the Hotel. The orienteering process to appreciate the building structural style gives me enough idea for the 5 star Hotel project.*'

6.44 In his exercise book[45] the Respondent had noted references from the Memorandum of Understanding.[46] Under the date 8 March 2014, he noted 'Afford Property Team' and included a list of names and titles, suggesting planning on his part regarding the building project.[47] In the same book, under the heading 'Flight from Singapore to Melbourne', the applicant noted:

> [T]o imagine the All mighty God had called on me Steven Lakamu Siosiua Afford for a prestige travel to Manila to view Manila's building structures and coherence of the old Manila with the new provides some vision to Building 5 Star hotel in a similar magnitude. Investors who are requesting the Afford Property for exclusive constructions management plus a 20% stake of the whole completed project, is a God sent.

43 Exhibit Q (tab 3 of Jury Book Volume 1).

44 Exhibit Q (tab 3 of Jury Book Volume 1).

45 Exhibit L (tab 10 of Jury Book Volume 1).

46 Exhibit L (tab 10 of Jury Book Volume 1, page 1).

47 Exhibit L (tab 10 of Jury Book Volume 1, page 3).

6.45 Documents contained in a yellow manila folder in the Respondent's laptop bag[48] included receipts for expenditures in Manila (inferentially kept as evidence of business expenses),[49] notations relating to monthly income (which corresponded to the amounts in the Memorandum of Understanding)[50] and references to names of persons who might have had a part in the business development.

6.46 In his email communications with Anwar whilst he was in Manila, the Respondent referred to ensuring the Hotel venture is a success.[51] In the same email he referred to a feasibility study being provided once Anwar authorised the building site. On 10 March 2014, the Respondent received an email from Hamza stating that '*our client Dr Anwar Mohammed Qargash warned not to allow anything to stop this hotel project not been establish in Australia hence our chambers is doing everything humanly possible to make this trip a success.*'[52] Between 11 and 13 March 2014, the Respondent sent further emails to Hamza wherein he made it clear that he was planning for the building project that he had been promised.[53] On 13 March 2014 he said to Hamza that:

> I can see clearly some of the issues why I am in Manila, and the amazing building structures already in this city, I could adopted and utilize for the Clients 5 Star Hotel Project..I am please that my trip to Manila high lights some of the magnificent architectural designs, which will help with our designs for proposal. The outstanding support services and day to day running of the hotel paramount to the competition within the Hotel industry, has to be the best.[54]

6.47 The prosecution did not advance a case that any of these emails or notes were contrived. No alleged lie told by the Respondent was relied upon as disclosing a consciousness of guilt or implied admission.

6.48 It was nevertheless incumbent upon the prosecutor to satisfy the jury to the criminal standard that the Respondent intended to import the substance which later turned out to be or to contain

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48. T at p 365.22 – T at p 368.21, Exhibit J (tab 8 of Jury Book Volume 1).

49. Exhibit J (tab 8 of Jury Book Volume 1, pages 3-8).

50. Exhibit J (tab 8 of Jury Book Volume 1, page 24). The Memorandum of Understanding at para [8] refers to a monthly allowance for the respondent of $38,000.

51. Exhibit D, Jury Book Volume 2, email from the respondent to Anwar 10 March 2014 12.10 am.

52. Exhibit D, Jury Book Volume 2, email from Hamza to the respondent dated 10 March 2014 10.34 pm.

53. Exhibit D, Jury Book Volume 2, email from the respondent to Hamza dated 11 March 20114 12.21 am; email from the respondent to Hamsa dated 1 2 March 2014 2.48 am; email from the Respondent to Hamza dated 13 March 2014 1057 am.

54. Exhibit D, Jury Book Volume 2, email from the respondent to Hamza dated 13 March 2014 10.57 am.

a border controlled drug. The substance was not the separation oil. It was not sufficient that the jury may have been satisfied the Respondent intended to import the two bottles of oil (which did not contain anything illegal) and that there turned out to be secreted in the bag a border controlled drug. Clearly, the oil was in the suitcase to bolster the ruse and to ensure that the Respondent was deceived in the event that he looked inside the bag.

6.49 It was simply not open to the jury to find that the Respondent intended to import a substance and was reckless as to its being a border controlled drug. To put it another way, a jury acting reasonably could not on the evidence tendered at trial have excluded the reasonable possibility that the Respondent was a genuine dupe who 'innocently' imported into the country a bag that turned out to contain a border controlled drug.

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CONCLUSION

6.50 The Director's appeal should be dismissed.

VII

7.1 The Respondent has not filed a notice of contention or cross-appeal.

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VIII

8.1 The Respondent estimates that oral argument on his behalf will occupy 1.5 hours.

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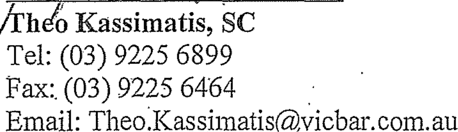

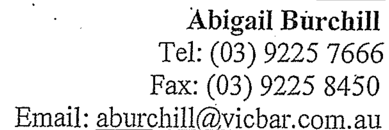

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