IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B68 of 2017

BETWEEN:

JOHN COLLINS
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I:

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

Part II:

2. Where the common form proviso might be applied by a Court of Appeal in circumstances where the proviso has been the subject of brief submissions by the appellant but has not been relied on by the prosecution, what obligations lie on the Court to give notice to the appellant that it might be applied?

3. By Notice of Contention, the following issue is raised:
Did the Court of Appeal err in concluding that the adoption by the complainant's mother of her own earlier testimony amounted in the particular circumstances to an acceptance of both the fact of giving that earlier account as well as the truth of that earlier account?

Part III:

4. In counsel's opinion notice under section 78B of the *Judiciary Act 1903* is not required.

Part IV:

5. The appellant's statement of relevant facts is accepted as accurate, however the following facts are also relevant and worthy of express mention:

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a. The complainant asserted that the appellant used a set of electric clippers to shave her pubic hair.[1] Police located a set of electric clippers on the appellant's yacht some 17 days later. The complainant's DNA was located on the inner and outer surfaces of the top and bottom cutting blades.[2]

b. The complainant slept after the relevant conduct occurred. After waking she was contacted by her friend Ms. Johnson and complained to Ms. Johnson that she had been raped.[3]

c. It was this complaint that caused Ms. Johnson to get the complainant from the yacht. When the complainant arrived home she phoned and complained to her mother (Ms. M), the terms of which are the subject of conflicting evidence.[4]

d. On a date not precisely identified but before 23 January 2000 the complainant told a journalist that she had been raped.[5]

6. The appellant's chronology is accepted as accurate, although the date of the sexual contact in the first entry can be specified with greater precision and other events are also relevant for the purpose of the issue raised by the notice of contention:

Date	Description	Reference
11 January 2000 or 12 January 2000	Sexual contact occurred between the appellant and the complainant	Formal Admissions – trial transcript 2-52 line 12 and Exhibit 21.
12 January 2000	Preliminary complaint conversation with Ms. Johnson.	Trial transcript 1-27 lines 27-37; 2-11 lines 4-27.
12 January 2000	Preliminary complaint conversation with Ms. M.	Trial transcript 1-29 line 34 – 1-30 line 8; 2-25 lines 21-36.
Date unknown between 12 January 2000 and 23 January 2000	Preliminary complaint conversation with Mr Haberfield.	Trial transcript 2-32 lines 15-19 and 2-33 line 5.
28 January 2000	Complainant provided statement to police.	Trial transcript 1-31 line 21.

[1] *R v Collins* [2017] QCA 113 at [13].
[2] *R v Collins* at [21].
[3] *R v Collins* at [15] and [16].
[4] *R v Collins* at [17]-[20].
[5] *R v Collins* at [21].

28 January 2000	Police searched appellant's yacht	Trial transcript 2-36 line 17, 2-39 line 35 and Exhibit 21.
21 September 2007	Ms. M testified at the committal hearing.	Trial Transcript 2-29 line 28.

Part V:

7. The appellant's statement of applicable statutes in Annexure A is accepted, except to add the statutory provisions which are raised by the notice of contention and to be found in Annexure A to the Respodnent's submissions.

Part VI:

8. The Court of Appeal (Burns J, Morrison and Gotterson JJA agreeing) found that there had been a material misdirection concerning the use that the jury could make of Ms. M's admission as to having given a different account of the complaint received from her daughter on 12 January 2000.[6]

9. The underlying basis for the misdirection as asserted by the appellant differed from the underlying basis for the misdirection as found by the Court of Appeal.[7] However it is accepted that both go to the same complaint; that the misdirection deprived the appellant of the benefit of a direction that Ms. M's account at the committal hearing could be used to assess in what terms the complainant complained to her mother. For that reason it is not suggested by the respondent that the concession in the Court of Appeal as to the non-application of the proviso to a different argument is of any relevance. This was recognized by Burns J at [71].

10. The concession by the prosecution in the Court of Appeal did not bind that court. As the appellant concedes,[8] the Court of Appeal may apply the proviso of its own motion. In *Lindsay* the prosecution did not, in terms, invoke the application of the

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[6] *R v Collins* at [59], [61] and [69].
[7] A Notice of Contention has been filed in effect contending that there was in fact no misdirection. For the purposes of this part of the respondent's outline, it is assumed that the Court of Appeal was correct. This should not be taken as an abandonment of the Notice of Contention.
[8] Appellant's outline at paragraph 21.

proviso prior to oral submissions.[9] The appeal to this Court was dismissed primarily because the Court of Appeal had given the appellant sufficient notice that its application was a live issue.[10] It is not a point of distinction that in *Lindsay* the prosecution did not invoke the proviso whereas here the prosecution disavowed reliance on it. One is non-reliance by omission whilst the other is non-reliance by express statement. Both amount to non-reliance.

11. The qualification in the plurality's judgment was that the appellant's counsel had been "*put squarely on notice that consideration of the proviso was a live issue*"[11].

12. Similarly, although imposing a seemingly stricter requirement, Nettle J. considered that there was nothing in principle to prevent the application of the proviso "... *where a court of criminal appeal makes it clear to an appellant that the court contemplates the proviso might be applicable, identifies with sufficient clarity the basis on which the court envisages the proviso could possibly so apply, and gives to the appellant an appropriate opportunity to advance submissions and other material in opposition to the identified basis of application of the proviso* ...".[12]

13. Although not expressly stated in *Lindsay*, it is sufficiently clear that the appellant had not addressed the application of the proviso prior to the Court raising it in oral argument. It is submitted that the statements in *Lindsay* to the effect that sufficient notice must be given to the appellant before the proviso is invoked[13] must be seen in that light. That is, in the context where the appellant had not first raised the issue himself.

14. In *Lindsay* it was further complained of that the appellant had not been given the opportunity to make submissions on the issue which was determinative of the appeal.[14] Whilst it is conceded that the court here did not expressly invite submissions as to the application of the proviso on the basis on which it was applied, it is submitted that the appellant was on notice of its applicability and

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[9] *Lindsay v The Queen* (2015) 255 CLR 272, [44], [46].
[10] *Lindsay v The Queen* at [45], [46], [68]-[69].
[11] *Lindsay v The Queen* per French CJ, Kiefel, Bell and Keane JJ at [45].
[12] *Lindsay v The Queen* per Nettle J at [64].
[13] See footnote 10.
[14] *Lindsay v The Queen* at [44]

chose not to advance his submissions past the limited basis outlined in the written submissions.

15. Given the variety of circumstances by which the application of the proviso can fall for consideration, there can be no hard and fast rule about the categories of error or miscarriage of justice to which it can apply,[15] although it will not readily be engaged where it has been established that the verdict(s) are unreasonable.[16] Of relevance in the present matter, the proviso is capable of application where there has been a misdirection on law.[17] Where relevant error is established,[18] the appellate court may only dismiss the appeal if satisfied that the error has not been productive of a substantial miscarriage of justice.[19] That is, consideration of the proviso is engaged by the conduct of the appeal itself. Hence, even though the common form proviso is expressed in permissive terms, where the court reaches the conclusion that notwithstanding the proof of relevant error, the appeal must be dismissed if there has in fact been no substantial miscarriage of justice.[20] It is also consistent with the rationale for the introduction of the proviso, namely to do away with the old Exchequer rule.[21]

16. It follows that any onus on the prosecution to establish the applicability of the common form proviso is an evidential onus only.[22]

17. The appellant must be taken to have been in effect notified of the potential application of the proviso by the terms of the legislation. That he was in fact on notice is evidenced by the fact it was he who first raised the application of the proviso in written submissions to the Court of Appeal,[23] albeit only briefly, which submission included reference to authority wherein it was held that failure of the trial judge to direct to the jury on a matter of importance made that appeal an

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[15] *Wilde v The Queen* (1988) 164 CLR 365, 373; *Weiss v The Queen* (2005) 224 CLR 300, [44]-[45]; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92, [23].
[16] *Filippou v The Queen* (2015) 256 CLR 47, [15].
[17] *Wilde v The Queen, ibid*; *Filippou v The Queen, ibid.*
[18] The term "error" is here used to encompass any basis established under section 668E(1) of the *Criminal Code* for allowing the appeal.
[19] *Filippou v The Queen, ibid*; *Lindsay v The Queen* at [64] and [86].
[20] *Baiada Poultry Pty Ltd v The Queen* at [25]; *Lindsay v The Queen,* at [43] and [65]; *Filippou v The Queen* at [15].
[21] *Lindsay v The Queen* at [47] citing *Weiss v The Queen* at [18].
[22] *Lindsay v The Queen* per Nettle J at [64]; *Filippou v The Queen* per Gageler J at [78].
[23] *R v Collins* at [71].

inappropriate vehicle for the application of the proviso.[24] Senior Counsel experienced in the criminal jurisdiction chose not to pursue the topic in oral submissions, but that election does not deny the fact that he was aware of its possible engagement. This is not a case where there has been a breach of the *audi alteram partem* rule thereby evidencing a miscarriage of justice.

18. The appellant submits that had he been called upon by the Court of Appeal on the topic "there was much to be said",[25] but the appellant had his opportunity to be heard on the matter and elected not to go past the limited written submissions of which the Court had obviously taken notice.

10 19. Does this decision by experienced counsel lead in itself to a miscarriage of justice? That question should be answered in the negative by having regard to that line of authority dealing with whether decisions made by Counsel at trial to lead evidence or not have caused a miscarriage of justice, notably *TKWJ v The Queen* (2002) 212 CLR 124. From that decision, the following propositions can be identified:

a. Apparently rational decisions that may have worked a disadvantage and which are later regretted do not necessarily create an unfairness amounting to a miscarriage of justice.[26]

b. A relevant question to ask is whether counsel's decision has or could have led to a forensic advantage.[27] That question requires the application of an

20 objective test.[28]

c. An accused will not ordinarily be deprived of a chance of an acquittal if the decision is informed and deliberate. There will not have been a miscarriage of justice if the decision could have resulted in a forensic advantage unless the advantage is slight in comparison with the disadvantage.[29]

20. Counsel was alive to the possible application of the proviso. Having raised it in the outline, he was met by an outline from the respondent prosecution which did not

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[24] *R v Baker* [2014] QCA 5 at [89].
[25] Appellant's submissions at paragraph 26.
[26] *TKWJ v The Queen* per Gleeson CJ at [16].

[27] *TKWJ v The Queen* per Gaudron J at [25]-[28], Hayne J at [107]-[108], Gummow J agreeing with both at [101].
[28] *TKWJ v The Queen* per Gaudron J at [27], Hayne J at [107]-[108], Gummow J agreeing with both at [101].
[29] *TKWJ v The Queen* per Gaudron J at [33], Gummow J agreeing at [101].

seek to counter his argument. As counsel experienced in the criminal jurisdiction, he chose not to pursue the issue further at any stage of oral submissions. That was a valid tactical decision; to continue with submissions risked raising matters adverse to his written submissions and giving some credence to an issue he was content to leave alone given the respondent's attitude. The fact that the proviso was applied in the end result is not conclusive of the point.

21. The appellant now submits that the application of the proviso was an "*impossibility*" in this case, for reasons concerned with the central importance of the issue affected by the misdirection, the state of the evidence and the natural limitations involved in considering the transcript as opposed to seeing and hearing the witnesses. The basis on which the appellant submitted below that the proviso could not be properly applied is noted in paragraph 16 above and related only to the central importance of the issue affected by the misdirection. He was heard on that topic to the extent he then wished to be. The last two grounds are different to the sole basis pursued (albeit briefly) below and should not be entertained unless exceptional circumstances exist. [30] They do not exist. Considerations of finality of litigation loom large, as was recognised in *Crampton*.

22. It was open to properly apply the proviso, regardless of the complaints now made. Whilst none of the supportive evidence went directly to the issue of consent, it was supportive of the complaint's account generally. The complainant maintained a consistent account under detailed and testing cross examination. Her preliminary complaint on the first occasion, that is to Ms. Johnson, was a positive complaint of rape with no suggestion of equivocation, as was the complaint to Mr Haberfield.

23. The relevance of it not being put to the complainant that she had tentatively complained to her mother (i.e. that she thought she had been raped) was that in the end result her account of the preliminary complaint was unchallenged, even by the suggestion of a tentative complaint to her mother. That went to the state of the evidence and the state of the defence case rather than any notions concerned with *Browne v Dunn* or notions of fairness towards the prosecution. The fact that it had not been put to the complainant meant that the jury might more readily consider

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[30] *Crampton v The Queen* (2000) 206 CLR 161, [10], [14]-[19] and [122].

that Ms. M's account at the committal some 7 years after the conversation was an aberration and inaccurate.

24. Put another way, the failure to put the suggestion left the jury, and in turn the appellate court assessing the evidence for the purposes of the proviso, to assess the credit of the complainant against the following background:

a. Her account remained consistent in its essential features;

b. Her credibility was supported generally by other evidence;

c. Her credibility was supported by two preliminary complaint witnesses, one of whom was the first person to whom a complaint had been made and the first person the complainant had spoken to after the relevant events other than the appellant.

d. On the other hand there were conflicting accounts of the preliminary complaint placed in testimony by her mother.

On that basis it was open, and remains open, to consider that MS. M was mistaken when she testified of receiving a complaint in tentative terms, especially when the timelines involved and the explanation given by the mother for the different versions is considered, together with the failure to suggest to the complainant that Ms. M's account at committal was correct.

25. Burns J properly observed the need to make "*due allowance for the natural limitations that exist in the case of such a review*" concerning the application of the proviso.[31] The appellant criticizes this "*passing reference*"[32] for not explaining what natural limitations were being referred to. With respect, the criticism is without merit. In referring to the "*natural limitations*", *Darkan v The Queen* (2006) 227 CLR 373 at 399 was referenced by way of a footnote. That passage in turn references *Weiss v The Queen* by way of footnote, which in turn references the very same passage from *Fox v Percy* that the appellant himself refers to in his submissions,[33] and which in turn cites the passage from *Dearman v Dearman* that the appellant reproduces at paragraph 29 of his submissions. The concept of the

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[31] *R v Collins* at [72].
[32] Appellant's submissions at paragraph 30.
[33] See paragraph 29, footnote 24 and paragraph 30, footnote 26 of the appellant's submissions.

natural limitations of a review on the papers is well understood, and in this case was specifically referenced and identified.

26. Whilst those natural limitations undoubtedly exist, they do not mean that the proviso can never be applied where the central issue requires assessment of credit. The appellant's submissions, taken to their conclusion in the emphatic terms in which they are expressed, result in that conclusion. What is required to be done is what Burns J did, as outlined at [73]. It was open to reach the conclusion he did.

27. If the Court of Appeal did err, this Court may apply the proviso even though it was not sought by the prosecution below.[34] Even though that form of disposition has not been sought by the appellant, it is submitted it would be an appropriate course to follow rather than remitting to the Court of Appeal if a lack of procedural fairness is held to have occurred. It would appear that the appellant is squarely on notice now if he wasn't earlier and the material is in relatively short compass for independent assessment and consideration by this Court.

Part VII:

28. The respondent contends that Burns J (Gotterson and Morrison JJA agreeing) erred at [61] in concluding that there was evidence before the jury of two competing accounts from Ms. M (the complainant's mother) as to what her daughter had told her, and which the jury could use to assess the preliminary complaint evidence. This error was informed by an analysis of the effect of the Ms. M's cross-examination at [59], to which attention will turn later in these submissions.

29. His Honour then concluded at [65] that there had been a misdirection when the jury was told, in effect,[35] that any inconsistency in Ms. M's account of that conversation could only be used to assess Ms. M's credit rather than also being used to determine what was said to her by way of preliminary complaint. As this evidence was preliminary complaint evidence, such an assessment could potentially damage the complainant's credit. He considered in effect at [67]-[68] that a later direction as to the use that could be made of Ms. M's evidence – "... *any inconsistencies between any one of those accounts and the complainant's evidence my cause you to*

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[34] *Lindsay v The Queen* at [48]; *Kelly v The Queen* (2004) 218 CLR 216, [56], [123].
[35] The full direction can be found in the summing up transcript at page 5 lines 37-47.

have doubts about the complainant's credibility [or] reliability"[36] - did not rectify the earlier misdirection, and thus concluded at [69] that there was a misdirection. If the analysis of the effect of Ms. M's cross examination at [59] is correct, then the respondent does not complain about the conclusions that his Honour drew about the existence of a misdirection.

30. Similarly, no complaint is made concerning his Honour's analysis of the state of the authorities concerning the use to be made of prior inconsistent statements in the context of this matter. Neither is it contended that those authorities require correction or clarification. His Honour correctly observed at [51] and [52] that if the maker of a prior inconsistent statement adopts as true the facts stated in it, that account becomes evidence of those facts in the trial.[37] In that instance, it is a matter for the jury to decide which version of the inconsistent account, if any, it will accept. It is centrally important to this appeal to recognize the distinction between cross examination which establishes that a prior statement was made and cross examination which establishes both that fact and the truth of the earlier statement.

31. Ms. M's accounts of the conversation during cross examination at committal and evidence in chief at trial were inconsistent, and cross examination at trial established that the earlier oral statement was made but, it is submitted, it did not establish the truth of that earlier account. (i.e. that the words attributed to the complainant in Ms. M's earlier testimony were in fact the ones used.)

32. The relevant portion of Ms. M's evidence in chief is found at [19]. She testified at trial in 2014 that her daughter had, in 2000, telephoned her to say in positive terms that she had been raped. ("*...she phoned to tell me that she had been raped ...*")[38] The relevant cross examination is found at [20]. In the course of that cross examination Ms. M admitted having testified in 2007 that her daughter asserted in

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[36] *R v Collins* at [67].

[37] See for example *Taylor v The King* (1918) 25 CLR 573; *Morris v The Queen* (1987) 163 CLR 454, per Deane, Toohey and Gaudron JJ at 468-469; *Bull v The Queen* (2000) 201 CLR 443 per McHugh, Gummow and Hayne JJ at 466 [79]; *Stateliner Pty Ltd v Legal & General Assurance Society Ltd* (1981) 29 SASR 16, per Mitchell J at 51; *R v CBL and BCT* [2014] 2 Qd. R 331, [150].

[38] Trial transcript 2-25, line 26.

tentative terms that she had been raped ("*I think he's raped me.*") and that she didn't remember anything after a certain time.[39]

33. The cross examination did not establish that her earlier account in fact repeated the words used by her daughter. Ms. M expressly adopted only that she had earlier given that evidence.[40] The cross examination then relevantly went only so far as to establish that, at trial, Ms. M couldn't "*say anything further than*" her memory (impliedly of the relevant telephone conversation) when she testified in 2007 was better than it was at the time of trial in 2014 and at committal she had given the best recollection she could give. [20] That concession went only to the state of the witness' recollection and did not establish the truth (or accuracy) of the conversation she had previously testified about.

34. At [59] Burns J considered that the cross examination of Ms. M established three things; first an acceptance that the earlier account had been given, secondly that the parts Ms. M was taken to of her committal testimony were more reliable than her evidence in chief because she accepted that her "*memory was better back in 2007*" and thirdly that Ms. M accepted "*that those parts were true (or accurate), that is to say, that the 'represented the best recollection [she] could give to the court*'".

35. The first proposition can be accepted without comment. The second proposition is accurate in so far as it goes, but it does not provide anything more than slight weight in support of the third proposition. It is that third proposition which is directly in dispute here.

36. What suffices to amount to an acceptance of the truth of the earlier account when there has been no explicit acceptance? It is submitted that the question can be answered by considering whether the evidence, taken as a whole and at its highest, would allow a reasonable conclusion that Ms. M had accepted in cross examination at trial that the earlier account at committal was true (or accurate) notwithstanding her later contradictory account.[41]

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[39] Trial transcript 2-29 lines 4-9.
[40] Trial transcript 2-29 lines 8 and 13.
[41] This is consistent with the test for the sufficiency of evidence to allow a "defence" to be left to a jury. See for example *Van Den Hoek v The Queen* (1986) 161 CLR 158 per Gibbs CJ, Wilson, Brennan and Deane JJ at 161-162 and per Mason J at 169; *Stingel v The Queen* (1990) 171 CLR 312, per the Court at 334; *Braysich*

37. On that basis it is accepted that the effect of the cross examination needs to be read broadly and in terms of its overall effect.[42] There will be occasions where a witness has not precisely admitted the truth of the earlier assertion but the effect of the cross examination carries an implicit acceptance of the truth of the earlier account. That is not the present case.

38. There was a gap of roughly 7 years between the preliminary complaint to Ms. M and when she recounted the terms of that complaint at the committal hearing, and then another roughly 7 years before she testified at trial. This is not a case where the earlier account was recorded close in time to the conversation in question, and thus when it may be more readily inferred that it accurately recorded the truth of the event. Indeed, at the point of cross examination when defence counsel sought to have the witness adopt the truth of the earlier oral statement, Ms. M testified in terms that suggested she was unsure of what she was told by her daughter:

> "*All right. And does that assist you that whilst you might have taken away from the conversation that she thought she'd been raped, what she actually told you was that she couldn't remember what had happened after a certain point?--- I can appreciate what you're saying, but what you need to remember is that the phone call happened in 2000. ... We were then approached in 2007 to try to remember ... and life goes on ... 365 days a year.*"[43]

39. On a different topic, the following question and answer occurred:

> "*All right. Did you have any involvement at around that time, the end of '99, the start of 2000, shutting it down so she could get the money? --- Probably. Again, gee, what a long time ago.*"[44]

40. The overall effect of the cross examination did not establish that Ms. M's account at committal was true (or accurate). The real effect of her evidence is that, given the passage of time, she could not be sure of which account was truthful. It is one thing to establish greater or more likely reliability but it requires a further step to say that the earlier account was true (or accurate). In this case, Ms. M could not go that

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v The Queen (2011) 243 CLR 434 per French CJ, Crennan and Kiefel JJ at 454 [36] and per Bell J at 472 [102].

[42] This is the approach taken in *R v CBL and BCT* [2014] 2 Qd. R 331 per Muir JA, Gotterson JA and Douglas J agreeing, at [152].

[43] *R v Collins* at [20] pages 8-9.

[44] Trial transcript 2-30 lines 4 – 7.

further step. She expressly couldn't "*say anything further than*" her memory (impliedly of the telephone conversation) was better in 2007 than at the time of trial in 2014. There was no attempt to have Ms. M accept a proposition that when testifying at committal she would have been careful to ensure that she testified accurately and truthfully. Such a proposition may have assisted in drawing an inference as to the earlier account's truth and accuracy, but it is non-existent.

41. The finding by Burns J at [59] that the witness' evidence amounted to an acceptance that the earlier account was true (or accurate) was erroneous, and fed into the error already particularised at [61].

42. In that event, the direction reproduced by Burns J at [67] was erroneous in that it permitted a use of Ms. M's evidence that was not permitted by law. However, the error was unduly favourable to the appellant and hence did not result in a miscarriage of justice.

43. The prior inconsistent statement by Ms. M went only to her credit and there was no misdirection at trial that resulted in a miscarriage of justice. The Court of Appeal should have dismissed the appeal on that basis.

Proposed Orders

44. The respondent's primary contention is that the notice of contention should be upheld resulting in the appeal being dismissed.

45. Alternatively, the respondent contends that the application of the proviso by the Court of Appeal was appropriate, resulting in the appeal being dismissed.

46. Alternatively, the respondent submits that this Court will conclude that there was no substantial miscarriage of justice resulting in the appeal being dismissed.

47. Alternatively, in the event that this Court considers that procedural fairness has not been afforded the appellant in the Court of Appeal in terms of the application of the proviso, and this Court does not consider the application of the proviso afresh:

    a. Appeal allowed.

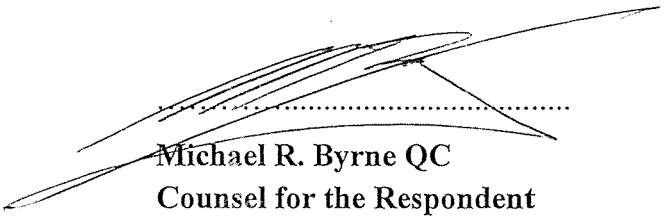
    b. The order of the Court of Appeal Supreme Court of Queensland dated 2 June 2017 is set aside.

    c. The matter is remitted to the Court of Appeal Supreme Court of Queensland to be dealt with according to law.

Part VIII:

48. The respondent estimates that 1 – 1½ hours may be required to present the oral argument.

Dated 16 January 2018.



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ANNEXURE A

PART V OF THE RESPONDENT'S SUBMISSIONS

Sections 18, 19, 101 and 102 *Evidence Act 1977*, reprint current as at 5 September 2014. The provisions remain in that form at present.

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18 Proof of previous inconsistent statement of witness

(1) If a witness upon cross-examination as to a former statement made by the witness relative to the subject matter of the proceeding and inconsistent with the present testimony of the witness does not distinctly admit that the witness has made such statement, proof may be given that the witness did in fact make it.

(2) However, before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether or not the

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witness has made such statement.

19 Witness may be cross-examined as to written statement without being shown it

(1) A witness may be cross-examined as to a previous statement made by the witness in writing or reduced into writing relative to the subject matter of the proceeding without such writing being shown to the witness.

(1A) However, if it is intended to contradict the witness by the writing the attention of the witness must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting the witness.

(2) A court may at any time during the hearing of a proceeding direct that the writing containing a statement referred to in subsection (1) be produced to the court and the court may make such use in the proceeding of the writing as the court thinks fit.

101 Witness's previous statement, if proved, to be evidence of facts stated

(1) Where in any proceeding—

(a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19; or

(b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that the person's evidence has been fabricated;

that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.

(2) Subsection (1) shall apply to any statement or information proved by virtue of section 94(1)(b) as it applies to a previous inconsistent or contradictory statement made by a person called as a witness which is proved as mentioned in subsection (1)(a).

(3) Nothing in this part shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any proceeding is cross-examined on a document used by the person to refresh the person's memory, that document may be made evidence in that proceeding, and where a document or any part of a document is received in evidence in any such proceeding by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh the person's memory shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.

102 Weight to be attached to evidence

In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—

(a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and

(b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.