IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P21 of 2017

BETWEEN:

Pouyan KALBASI
Appellant

and

The State of Western Australia
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Statement of the issues

2. Did the Western Australian Court of Appeal err in applying the proviso in s30(4) of the *Criminal Appeals Act 2004* (WA) to the appellant's conviction appeal?
3. Should the decision of *Weiss v The Queen* (2005) 224 CLR 300 be revisited and/or qualified and/or overruled?
4. What is the correct test for the application of the proviso in s30(4) of the *Criminal Appeals Act* and what considerations are relevant to the application of the proviso?
5. To what extent is an appellate court required to consider the nature of the established error, irregularity or complaint when considering whether to apply the proviso in s30(4) of the *Criminal Appeals Act*? In what way and at what point should this analysis be undertaken?
6. Is it appropriate to divide consideration of the proviso in s30(4) of the *Criminal Appeals Act* into two distinct categories, one described as an 'outcome aspect' and the other a 'process aspect'?

Part III: Notice

7. The appellant considers that no notice under s78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Citation

8. The internet citation of the reasons for judgment of the Court of Appeal is *Kalbasi v The State of Western Australia* [2016] WASCA 144 ("CA").

Part V: Narrative statement of the facts

9. The appellant stood trial before a jury and Stevenson DCJ in the District Court of Western Australian charged with one count of attempting to supply a prohibited drug,

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namely, methylamphetamine, with intent to sell or supply it to another, contrary to s6(1)(a) and s33(1) of the *Misuse of Drugs Act 1981* (WA). It was a retrial following a successful conviction appeal. The appellant was charged with the attempt offence because the package containing the prohibited drug was intercepted and the drug was replaced with rock salt (CA at [54], [79]). On 26 September 2014 the jury found the appellant guilty. He was sentenced to 14 years and 6 months imprisonment.

10. On 12 November 2010 NSW Police, at the request of WA police, obtained and executed a search warrant on a freight company's premises in Sydney (CA at [53]). At the premises was a cardboard box destined for Western Australia with a consignment note that contained an instruction to call 'James Walker' on a phone number ending in '731' when the package was received (CA at [53]). Inside the cardboard box were two padlocked yellow plastic tool boxes each containing 5 sealed plastic bags of methylamphetamine (CA [53]). Subsequent analysis showed that the total amount of methylamphetamine was 4.981kg with a purity of 84% (CA at [53]).

11. On 14 November 2010 the cardboard box was brought to Perth by Detective Kral (CA at [54]). The packages were replaced with rock salt and the cardboard box was reconstructed (CA at [54]). A listening device was placed in the package (CA at [54]). The package was to be collected from a freight company's premises in Perth. Detective Hill went to these premises and observed a man named Mr Lothian attempting to pick up the cardboard box (CA at [55]). Mr Lothian was told to return the following day to collect the box (CA at [55]). Mr Lothian was placed under surveillance and was seen attending an address in Falstaff Crescent, Spearwood (CA at [55]). He was also seen making two calls from a public telephone box (CA at [54]).

12. On 16 November 2010 Detective Hill took the cardboard box to the freight company and gave it to the manager (CA at [56]). Mr Lothian was seen driving his car towards the freight company's premises (CA at [56]). On his way, his car ran out of fuel and he took a taxi to the freight company (CA at [56]). He arrived there at about 2:15pm and was seen using a mobile telephone (CA at [56]). He collected the cardboard box and placed it in the back of the taxi (CA at [56]). The taxi drove to a petrol station where Mr Lothian purchased a jerry can of fuel and he was then taken back to his car (CA at [56]).

13. At about 3:09pm Mr Lothian arrived back at the Falstaff Crescent premises (CA at [57]). He was seen carrying the cardboard box inside the house at about 3:16pm (CA at [57]). The appellant arrived by bicycle at the house at about 3:20pm (CA at [58]). Ms Tilbrook, Mr Lothian's girlfriend, left the house at 3:38pm and Mr Lothian temporarily left the house at about this time (CA at [59]). The appellant left the house at 3:57pm and was seen riding his bicycle into a large park (CA at [60]). He appeared to make a telephone call (CA at [60]). No telephone was apparently found (CA at [205]).

14. The listening device recording was in evidence before the jury (Exhibit 31). The recording picked up sounds consistent with the box being opened and the locks on the tool box being cut (CA at [61]). At one point Mr Lothian recounted to the appellant a story about his car running out of fuel and that he stopped about 50m before 'the servo' (CA at [61]). He said this happened just after he first texted the appellant (CA at [61]). At about 3:40pm the appellant asked Mr Lothian for a pipe (CA at [61]).

Approximately 10 minutes later the appellant told Mr Lothian 'Don't move, I'll come back' (CA).

15. The appellant was seen riding his bicycle away from the premises (CA at [62]). Police officers in an unmarked police vehicle pursued the appellant as he rode his bicycle through the park (CA at [62]). Detective Shanahan gave evidence that the appellant looked in his direction, stopped pedaling for a second but continued to ride away (CA at [62]). Detective Ferrie shouted out of the vehicle window 'Police stop' but the appellant did not stop (CA at [62]). As the police got closer to the appellant, Detective Ferrie again yelled 'Police stop' (CA at [62]). The appellant fell of his bicycle (CA at [62]). The police vehicle collided with the bicycle (CA at [62]). Detective Ferrie yelled out 'Police stop' a third time (CA at [62]). The appellant ran off and was pursued by both police officers (CA at [62]). He was eventually apprehended (CA at [62]). This evidence was relied upon as consciousness of guilt evidence (CA at [62]).

16. At 4pm police executed a search warrant at the Falstaff premises (CA at [63]). Mr Lothian was the only occupant (CA at [63]). The video of the search was exhibit 15 (CA at [63]). The living room of the premises was in close proximity to the kitchen and it was possible to see the living room from the kitchen and vice versa (CA at [63]). The opened cardboard box was in the lounge room and the open tool boxes were in the kitchen (CA at [63]). One bag of rock salt was found in a beer carton box, which was being used as a makeshift bin, together with plastic clip seal bags and two broken padlocks (CA at [63]). The other nine bags of rock salt were found on the bottom shelf of a kitchen cupboard (CA at [63]). The plastic outer wrapping of the 10 bags of rock salt was in the kitchen sink (CA at [63]). There were four clean mixing bowls, three sets of digital scales and a box of disposable gloves on the kitchen sink (CA at [63]). Bolt cutters were found in the kitchen (CA at [53]). A substance used to cut methamphetamine was found in a baking dish on the stove (CA at [64]).

17. Two worn disposable gloves were found on the kitchen sink (CA at [63]). The glove of one pair was inside the other (CA at [64]). A third pair of gloves was found on the table in the hallway (CA at [64]). These gloves were subjected to DNA testing. The mixed DNA profile detected on the gloves in the hallway matched Ms Tilbrook and Mr Lothian and the appellant could be excluded as a contributor (CA at [67]). Likewise, the appellant could be excluded as a contributor to the DNA profiles detected on one pair of gloves on the kitchen sink; the profiles matched Mr Lothian and Ms Tilbrook (CA at [68]). A mixed DNA profile was recovered from the inside of glove A of the other pair of gloves on the kitchen sink and the number of contributors to this profile could not be determined (T997; cf. CA at [68]). A mixed profile was recovered from the outside of glove A which came from at least 3 individuals (T997). It was 100 billion times more likely that the appellant was a contributor to this mixed DNA profile than not (T997). Mr Lothian and Ms Tilbrook were excluded as contributors (T997, CA at [68]). A mixed DNA profile from at least two individuals was detected on the inside of glove B and it was 100 billion times more likely that the appellant was a contributor than not (CA at [68]). Ms Tilbrook could not be excluded as a contributor but this was quite unlikely (CA at [68], T998). The testing was inconclusive with respect to Mr Lothian (CA at [68]). A mixed DNA profile was recovered from the outside of glove B but the number of contributors could not be determined (CA at [68]).

18. There was evidence before the jury regarding the possibility of secondary transfer (CA at [70). Dr Broome explained that secondary transfer involves the transfer of DNA via an intermediary (CA at [70]). She explained that it was a complex subject and said it is possible under certain circumstance but was unable to say if it occurred in a particular case and could not say how likely it would be (CA at [70]). She agreed that DNA may be transferred onto disposable gloves other than through wear (CA at [71]).

19. A white blackberry was found in a room used to store tools (CA at [64]). The phone had a pin lock on it and the information on it could not be downloaded (CA at [64]). Mr Lothian had been seen using a white telephone at the freight company's premises (CA at [64]). Documents found at the Falstaff premises indicated Mr Lothian had flown from Perth to Sydney on 11 November 2010 (CA at [65]).

20. On 18 November 2010 the appellant was collected from Hakea prison by Mr Tassone when he was released from custody on bail (CA at [73]). He was taken to Kintail Rd (CA at [73]). Later that day, police executed a search warrant at the appellant's residence at Kintail Rd (CA at [73]). The appellant, Mr Tassone and a woman believed to be the appellant's wife were present (CA at [73]). A number of telephones and a Blackberry charger were seized (CA at [74]). No Blackberry telephone was found at the house (CA at [74]). Travel documents found indicated that the appellant flew from Perth to Sydney on 3 November 2010 and returned to Perth on 13 November 2010 (CA at [74]). Neither the appellant nor Mr Lothian dropped the cardboard box to the freight company's premises in Sydney (CA at [169]).

21. Examination of Ms Tilbrook's phone showed that there were three calls from the '731' phone number: two on 10 November 2010 and one on 17 November 2010 (CA at [76]). There was also evidence that Mr Lothian used Ms Tilbrook's phone (CA at [76]). The contact details of the appellant and his wife were stored on Mr Tassone's phone (CA at [77]). There was a record of an incoming call to Mr Tassone's from the '731' number on 9 November 2010 (CA at [77]). There was a record of a text message between Mr Tassone's phone and the appellant's wife's phone the day after the offence on 17 November 2010 (CA at [77]).

22. Det Senior Constable Marron gave evidence regarding methylamphetamine and the use of cutting agents to dilute the purity of it (CA at [78]). He opined that the purity of the methylamphetamine (75%-80%) indicated that it was 'from the point of manufacture' (CA at [78]). As at October and December 2010 the average purity of methylamphetamine was 40% (CA at [78]). A table setting out the prices of methylamphetamine was tendered as Exhibit 60. It was said that this evidence showed that '4.981kg of methylamphetamine was a highly valuable commodity' (CA at [78]).

23. The State's case was that during the period of time that the appellant was at the house he attempted to possess the whole quantity of the (substituted) drug. It was alleged that the appellant knowingly attempted to possess what he thought was the methylamphetamine in the cardboard box (CA at [80]). The State's case was that he was either the sole possessor of the substance or was in joint possession with, at least, Mr Lothian (CA at [80]). The appellant put the State to proof (CA at [81]).

24. The State's case on possession was that he was exercising control over the drugs because of his (alleged) involvement in unpacking them and in preparing to cut them

with another substance and repackage them (T14 25.09.2014, repeated at T15). It is noted that ground 2 of the appellant's conviction appeal, which alleged the directions on possession were erroneous because the directions treated being 'involved with' and 'doing [something] with' the drugs as synonymous with possession or control, was dismissed (partly) on the basis that the use of these expressions were 'no more than a [sic] convenient methods of encapsulating the State's case' (CA at [117]).

25. The jury were directed that the term 'to possess' 'includes to control or have dominion over and to have the order or disposition of and inflections and derivatives of the verb to possess have correlated meanings' (T1052). The jury were told they had to be satisfied that the appellant had 'knowledge that the thing he was in possession of was a prohibited drug of some kind' but the State need not prove that he knew the type of drug or quantity of it (T1052). The jury were directed that in order for the State to prove possession the appellant must have had actual physical custody of the substituted drugs or that he 'exercised control and dominion over the drugs to the exclusion of all other people, except those people with whom he might have been acting jointly.' (T1054). The directions to the jury treated possession or control as synonymous with the concepts of being "involved with", "having done something" or "doing something" with or "dealing with the intended drugs in some way" (T1052, 1053, 1055, 1057, 1062). The jury were also told that: you can possess something by physically holding it (T1054); you can possess something without physically holding it but you must have either physical custody of it or that it be under your control (T1054); you can possess something without having physical custody of it (T1054); you can possess something temporarily and for a limited purpose (T1054); you can possess something without owning it (T1054-1055); you can possess something even though it is hidden provided you know that it is hidden and have access to that place (T1055); and possession may include joint possession (T1056).

Part VI: Argument

26. To establish the appellant's guilt the prosecution had to prove that he attempted to possess the drug with the intent to sell or supply it to another (ss 6, 33 *Misuse of Drugs Act*). The trial was conducted on the basis that s11 of the *Misuse of Drugs Act* applied to the offence of attempt to possess a prohibited drug with intent to sell or supply it to another such that the appellant was deemed to have the requisite intention because the quantity of the prohibited drug was not less than 2g (CA at [82], [85]-[90], [97], ss 6, 11, 33, Schedule V *Misuse of Drugs Act*).

27. In respect of this element the jury were directed 'Very briefly, the law is that if you are found in possession of more than 2g of methylamphetamine then you are presumed to be in possession with intent to sell or supply it to another and the onus is on you to remove that presumption' (CA at [97]). This is a reference to the deeming provision in s11 of the *Misuse of Drugs Act.* The jury were told that this element was not an issue in the trial and they could 'give that element a tick' (CA at [97]).

28. However, s11 of the *Misuse of Drugs Act* does not apply to offences of attempt to possess a prohibited drug with intent to sell or supply it to another (*Krakouer v The Queen* (1998) 194 CLR 202 at 211, 221). The erroneous direction was the subject of ground 1 of the appellant's appeal and this ground was conceded by the State (CA at [95], [96]). Mazza and Mitchell JJA concluded that the trial judge's directions on the

subject of intention and the applicability of the presumption in s11(1)(a) of the *Misuse of Drugs Act* were erroneous and upheld ground 1 of the appellant's conviction appeal (CA at [98]). Their Honours found that the prosecutor, defence counsel and the trial judge all shared the misapprehension that the presumption applied to the appellant's offence (CA at [97], see also CA [186]-[188]).

Legal principles identified by Mazza and Mitchell JJA

29. Mazza and Mitchell JJA concluded that notwithstanding the established error, there was no substantial miscarriage of justice and applied the proviso in s30(4) of the *Criminal Appeals Act* to the appellant's conviction appeal (CA at [215]).

30. The grounds upon which the court must allow an appeal are set out in s30(3) of the *Criminal Appeal Act*. They are: (a) that the verdict is unreasonable; (b) that 'the conviction should be set aside because of a wrong decision on a question of law by the judge' or (c) that 'there was a miscarriage of justice'. The applicable ground in the appellant's appeal was s30(3)(b) of the *Criminal Appeal Act*. However, even if one of these grounds 'might' be decided in favour of the appellant, the court may nevertheless dismiss the appeal 'if it considers that no substantial miscarriage of justice has occurred.' (s30(4) of the *Criminal Appeals Act*). This is the Western Australian formulation of the proviso. Similar provisions exist in Criminal Appeal statutes across Australia. It is slightly different to the common form appeal provision that was adopted in the various jurisdictions in Australia from the UK *Criminal Appeal Act 1907*. The common form appeal provision provides that the appeal may be dismissed if the court 'considers that no substantial miscarriage of justice has *actually* occurred.' (additional word italicized).

31. Their Honours considered that *Weiss* remained the 'leading authority on the proviso' and that consideration of the proviso required consideration of two aspects: outcome and process (CA at [179] citing *Hughes v Western Australia* (2015) 299 FLR 197 at [61]). Their Honours said that 'where the process aspect is engaged, the proviso cannot be invoked even if the appellate court is satisfied beyond reasonable doubt of the accused's guilt' (CA at [179]). The implication of this observation is that the 'outcome aspect' of the proviso merely required satisfaction of the accused's guilt beyond reasonable doubt.

32. Their Honours did not set out what test was to be applied to determine the 'process aspect' of the proviso. In *Hughes* it was said that examples of cases where the process aspect is engaged include 'where there has been a significant denial of procedural fairness at trial; a serious breach of the presuppositions of a trial; a failure which departs from the essential requirements of a fair trial; or where the appellate court is deprived of the capacity justly to assess the strength of the case against the appellant' (at [67]). *Quartermaine v The Queen* (1980) 143 CLR 595 is also an example of such a case (see at 601). This case was cited by their Honours at the commencement of their consideration of the 'process aspect' of the proviso (CA at [208]). Their Honours also relied on *Krakouer v The Queen* (1998) 194 CLR 202 when considering this 'process' aspect as authority for the proposition that a misdirection on an element of the offence resulted in a trial that was fundamentally flawed (CA at [211]). Thus, it can be seen that the test applied by their Honours in respect of the 'process' aspect was whether there was a fundamental defect in the appellant's trial.

33. The conclusion that the proviso should be applied to the appellant's conviction appeal was based on their Honours' satisfaction of the appellant's guilt beyond reasonable doubt (that is, the 'outcome aspect') and a finding that the 'process aspect' of the proviso was not engaged (CA at [179], [192]-[206], [214], [215]). It is submitted that this approach to the proviso in s30(4) of the *Criminal Appeals Act,* derived from *Weiss,* was erroneous and their Honours erred in applying the proviso to the appellant's appeal against conviction. This is addressed in greater detail below.

The decision in *Weiss*

34. As Gageler J observed in *Baini v The Queen* (2012) 246 CLR 469, until *Weiss* in 2005, it had long been understood that application of the proviso required satisfaction that the wrong decision on the question of law did not deny the appellant a chance of acquittal or satisfaction that the jury would inevitably have convicted the accused (*Baini* at [50], citing *Wilde v The Queen* (1988) 164 CLR 365 at 372). The proviso was to be understood 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' (*Mraz v The Queen* (1955) 93 CLR 493 at 514, *Baini* at [50]). The authorities on the proviso also recognized a category of case where the error was of such a fundamental nature that the proviso was precluded (*Quartermaine v The Queen* (1980) 143 CLR 595 at 600-601, *Wilde*).

35. In *Weiss*, the Court emphasized the requirement to consider and apply the statutory language of the proviso and it was for the appellate court to determine for itself whether a substantial miscarriage of justice had actually occurred (*Weiss* at [31], [33], [39] and [42]). The Court cautioned against using the lost chance of acquittal test and the inevitable conviction test as these tests 'must not be taken as substitutes for [the statutory language]' and 'may mask the nature of the appellate court's task in considering the application of the proviso' (*Weiss* at [33]).

36. The test to be applied when considering the proviso was reformulated in *Weiss*. The Court held that the 'statutory task' is to be undertaken in the same way that an appellate court considers whether the verdict is unreasonable (*Weiss* at [41]). The reformulated test required the appellate court to 'make its own independent assessment of the evidence and determine whether, making due allowance for the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty.' (*Weiss* at [41]). Later, what is called the negative proposition was set out, to the effect that it cannot be concluded that no substantial miscarriage of justice has actually occurred unless the appellate court is satisfied of the accused's guilt beyond reasonable doubt (*Weiss* at [44]).

37. The Court in *Weiss* went on to describe a type of case where the proviso could not be applied notwithstanding the court's satisfaction of the guilt of the accused, for example 'cases where there has been a significant denial of procedural fairness at trial' (*Weiss* at [45]). The implication here would appear to be that where the case did not meet this description the proviso could be applied on the basis that the appellate court was satisfied of the accused's guilt. The Court in *Weiss* considered it unnecessary to further examine the issue of cases precluding the application of the proviso or the

'related question' of whether some errors may deny the application of the proviso because they amount to 'a serious breach of the presuppositions of the trial' (at [46]).

38. The Court in *Weiss* did make plain that the test for the proviso was whether the appellate court was satisfied of the accused's guilt beyond reasonable doubt and, if so, whether the error was of such a nature that it precluded the application of the proviso. This is how the test for the proviso in *Weiss* was apparently understood by the plurality in *Darkan v The Queen* (2006) 227 CLR 373 and the plurality in *Bounds v The Queen* (2006) 80 ALJR 1380 at [13]. In *Darkan*, the plurality considered that the proviso was precluded only in circumstances where there had been a significant denial of procedural fairness *or* where there had been a sufficiently 'serious breach of the presuppositions of the trial' (*Darkan* at [84], [94]).

39. This is how *Weiss* was applied in *Hughes v Western Australia* at [76], [79]. It was the test applied by their Honours in this case in intended application of *Weiss*. Under the *Weiss* reformulation, the essential condition for the application of the proviso appears to have been that the appellate court was satisfied of the appellant's guilt beyond reasonable doubt (*Baini* at [51] per Gageler J).

40. There is a degree of uncertainty in *Weiss* as to what is required for the application of the proviso that may not have been clarified in subsequent cases considering the proviso and *Weiss*. In *Weiss* the Court referred to cases, 'perhaps many cases, where [the] natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction' (at [41]). Later, when referring to the appellate court's obligation to examine the whole of the record, the Court said 'there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury' (*Weiss* at [43]). These observations might suggest that the appellate court ought to analyse the nature and effect of the error in order to determine (or when determining) whether they are satisfied, on the whole of the record, that the accused is guilty beyond reasonable doubt. The significance to be given to the fact that the jury returned a guilty verdict is dependent on the nature of the error (see *Weiss* at [50]). Put another way, the nature of the error may mean that it is simply not possible to conclude, from the record, that the accused's guilt is established beyond reasonable doubt. *Cesan v The Queen* (2008) 236 CLR 358 may be an example of such a case. However, another view of *Cesan* is that it fell within the 'fundamental defect' category of case.

41. It is by no means clear from *Weiss* that consideration of the nature of the error and its effect on the verdict is necessarily required when determining whether the accused's guilt is established beyond reasonable doubt. The natural limitations the Court referred to in *Weiss* were the disadvantages faced by the appellate court compared to the trial judge (or jury) in respect of evaluating witnesses' credibility and hearing and considering the entirety of the evidence usually over a longer period of time (*Weiss* at [41] fn62, *Fox v Percy* (2003) 214 CLR 118 at [23]). Speaking of 'natural limitations' is different to saying that the error identified might limit what conclusions can be drawn from the verdict because, for example, the record of trial is incomplete or in some way tainted.

42. Further, other parts of *Weiss* may be taken to suggest an analysis of the effect of the

error on the jury's verdict was not required when considering the proviso. The decision cautioned against speculation or prediction of what the jury did or what a jury would or might do in the absence of the error (*Weiss* at [35], [36]). The possibility that the error might have affected the trial jury's verdict was not determinative of the application of the proviso (*Weiss* at [36]). Reference to a 'jury' when considering the application of the proviso was apt to 'distract attention from the statutory task' (*Weiss* at [40]). These statements appear to support the plain reading of *Weiss* set out earlier in these submissions at [36]-[38].

43. Even if *Weiss* does require such an analysis in its terms, this means that consideration of the nature of the error would occur at a different stage than was previously required for application of the proviso. Under *Weiss*, instead of first considering the nature and effect of the error (irregularity or complaint), the appellate court asks itself, in the course of considering guilt, whether the error would or should have had no effect on the verdict.

The proviso post-*Weiss*

44. In the examination which follows it can be seen that a number of subsequent judgments of this Court appear to have either departed from the requirements for the application of the proviso set out in *Weiss* or articulated the test for the proviso in terms that advances matters additional to those required by *Weiss*.

45. The first elaboration of *Weiss* occurred in *AK v Western Australia* (2008) 232 CLR 438 at [53] where Gummow and Hayne JJ cautioned against the use of what was described as 'the negative proposition' (at [44] of *Weiss*) as determinative of the application of the proviso. The negative proposition was said to be a necessary but not sufficient condition for the application of the proviso (*AK v Western Australia* at [53]). This proposition has been applied in a series of cases since *AK* (*Cesan* at [124], *Gassy v The Queen* (2008) 236 CLR 293 at [18], *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [29], *Reeves v The Queen* (2013) 88 ALJR 215 at [50], *Castle v The Queen* (2016) 91 ALJR 93 at [64]). However, the terms of this caution have not necessarily been absolute. In *AK* it was said that the negative proposition 'does not in *every* case conclude the inquiry about the proviso's application' (at [59] per Gummow and Hayne JJ, emphasis added, see also *Cesan* at [124] per Hayne, Crennan and Kiefel JJ which also refers to 'every case'). The implication of these cases appear to be that there were some cases where satisfaction of guilt was sufficient to apply the proviso.

46. Despite the 'statutory task' identified in *Weiss* being framed in terms of whether the court was satisfied of the accused's guilt beyond reasonable doubt subsequent authority on the proviso has held that it is wrong for an intermediate appellate court to focus only upon whether the accused's guilt was established beyond reasonable doubt (*AK v Western Australia* at [42] per Gummow and Hayne JJ, *Baiada* at [29]). Focus on whether the evidence proved the accused's guilt beyond reasonable doubt 'paid insufficient regard to the error of law or miscarriage of justice' which otherwise required the appellate court to allow the appeal (*AK* at [42] per Gummow and Hayne JJ). Further, the question of the proviso is not answered by articulating or identifying a chain of reasoning that would support or require the verdict reached at trial (*AK* at [55], [58], *Baiada* at [29] *Castle* at [65]). These statements seem to be at odds with the test for the proviso stated in *Weiss*.

47. Nevertheless, expressions used in disposing of such appeals have frequently been expressed in terms of *Weiss* and the 'negative proposition'. In *Gassy* it was said that the appellate court 'could not conclude beyond reasonable doubt that the applicant was guilty of Dr Tobin's murder' (at [35] per Gummow and Hayne JJ, although Kirby J considered the appellant had lost a chance of acquittal at [108]). In *Evans* Gummow and Hayne JJ concluded that the appellate court 'ought not to have decided that the appellant had been proved beyond reasonable doubt guilty of the offences charged.' (at [51]). In *Castle* 'the natural limitations of proceeding on the record precluded a conclusion that guilt was proved beyond reasonable doubt' (at [68]). It was not open to the appellate court in *Baiada* 'to conclude from the record of trial that the charge laid against Baiada was proved beyond reasonable doubt' (at [39]). Similarly, in *Cooper v The Queen* (2012) 87 ALJR 32, the plurality appeared to affirm the *Weiss* test, albeit in a qualified manner, and determined the appeal on the basis that it was not open to the appellate court to be satisfied of the accused's guilt beyond reasonable doubt (at [25]-[27]). Against this can be seen cases such as *Pollock v The Queen* (2010) 242 CLR 233 at [70] which applied the "lost chance of acquittal test" and *Baini* at [40] where the matter was remitted because the appellate court 'did not examine whether the appellant's convictions ... were inevitable'.

48. Other cases since *Weiss* have required consideration of the nature of the error (*AK* at [55], [58], [59], *Baiada* at [26], [28]-[29], [34], *Castle* at [64]-[65], *Reeves* at [50], *Baini* at [66]). Such an analysis was conducted by the plurality in *Cooper* notwithstanding the earlier determination that the record did not permit the appellate court to conclude the accused was guilty (see at [28]-[30]). Determination of whether there has been no substantial miscarriage of justice 'necessarily invites attention to whether the jury's verdict might have been different if the identified error had not occurred.' (*AK* at [59], see also *Castle* at [65], *Reeves* at [50], *Baini* at [32], per French CJ, Hayne, Crennan, Kiefel and Bell JJ, [54] per Gageler J). In *AK* Gummow and Hayne JJ said that this was 'why, if the appellate court is not persuaded beyond reasonable doubt of the appellant's guilt it cannot be said that there was no substantial miscarriage of justice' (at [59]). It does not seem to be entirely clear exactly how satisfaction of the accused's guilt *necessarily* invites consideration of the effect of the error (or irregularity) on the jury's verdict in every case. Nor does *Weiss* appear to clearly and expressly require such an analysis. As set out earlier, other parts of *Weiss* might be seen as not requiring the appellate court to engage in such analysis (see above at [42]). Further, under *Weiss* (if it can indeed be read in such a way) consideration of the error appears to only come into play in the question of the court's own satisfaction of the accused's guilt (and consideration of the record) and not as an anterior inquiry.

49. Consideration of the relationship between the error and the jury's verdict may mean that the significance to be given to the jury's verdict is diminished and the natural limitations that attend the appellate task preclude the appellate court from being satisfied of the accused's guilt beyond reasonable doubt (*Castle* at [65]-[68], *Baini* at [29], *Baiada* at [26], [28]). These natural limitations may extend beyond those relating to assessing the credibility of witnesses and the advantages of the trial court in hearing all of the evidence (cf. *Weiss* at [41], *Baini* at [29]). For example, in *Baiada Poultry* the jury were not directed to consider whether the prosecution had established a matter beyond reasonable doubt and, accordingly, the verdict 'said nothing about that question' (at [28], [34]).

50. The nature of the error may indeed preclude an intermediate appellate court from properly assessing whether the accused's guilt was proved beyond reasonable doubt (or even that the conviction was inevitable) from the record of the trial (*Castle* at [68], *Cesan* at [127]-[130], *Evans* at [42], [48]). A reason for this is that the 'the relevant premise for the debate about the proviso's application is that the processes designed to allow a fair assessment of the issues have not been followed at trial' (*Evans* at [42] per Gummow and Hayne JJ). However, these decisions are themselves not free from ambiguity. In *Cesan* there was a difference of opinion as to whether consideration of whether the accused may have lost a fair chance of acquittal remained relevant (*Cesan* at [79] per French CJ, cf. Hayne, Crennan and Kiefel JJ at [123]). On one view of *Evans*, the application of the negative proposition might be seen as sufficient in cases not involving a 'radical departure from the requirements of a fair trial' (at [42] per Gummow and Hayne JJ). Nevertheless, Gummow and Hayne JJ appear to have analysed the effect of the error when considering whether the appellate court erred in applying the proviso (*Evans* at [50]-[51]).

51. In more recent authorities on the proviso there has been a return to the tests of inevitable conviction and lost chance of acquittal (*Filippou v The Queen* (2015) 256 CLR 47 at [15], *Pollock v The Queen* at [70], *Baiada* at [29], *Baini* at [30]-[33], *Lindsay* at [85]-[86]). The plurality's consideration of the application of the proviso in *Baiada* focused not on whether the accused was guilty of the offence but whether it was open to a jury to acquit (i.e. lost chance of acquittal) and that the evidence at trial did not compel the conclusion that a matter was proved beyond reasonable doubt (i.e. inevitable conviction) (see *Baiada* at [35], [36], [38]). These tests have symmetry with the principles in administrative law relating to the practical nature of fairness (*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [36]-[38]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [58], *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145).

52. The plurality in *Baiada* appeared to suggest that the court could only conclude that a particular matter was established beyond reasonable doubt 'if it was not open to a jury to conclude to the contrary' or, put another way, 'it was open to a jury to acquit' (at [32], [35], see also *Lindsay* at [85]-[86] per Nettle J). This is a different formulation of the test as set out in *Weiss* and it appears to be an attempt to reconcile the negative proposition in *Weiss* with subsequent authority on the proviso. It is noted that the test in *M v The Queen* (1994) 181 CLR 487 and *SKA v The Queen* (2011) 243 CLR 400 is formulated as whether it is open to the jury to be satisfied of the accused's guilt beyond reasonable doubt and is answered by whether the appellate court itself is so satisfied. This is a different question to the question posed by the proviso (*Baini* at [32]). This itself might raise a further difficulty with *Weiss* which is that under a literal reading of *Weiss* the proviso might be applied if the Crown establishes that the verdict was not unreasonable (provided that the error is not a fundamental defect). Such an approach does not give effect to the statutory language of s30(3) of the *Criminal Appeals Act* which provides that a separate ground for setting aside the jury's verdict is that it is unreasonable and where it has been observed that where a verdict is unreasonable it can hardly be said that no substantial miscarriage of justice has occurred (see for example, *Baini* at [19], [48]).

53. *Filippou v The Queen* also appears to depart from *Weiss*. Application of the proviso, under *Filippou*, required exclusion that the appellant had been denied a chance of acquittal which was fairly open to him or her or that there was some departure from a trial according to law that constituted a substantial miscarriage of justice or the appellant did not receive a fair trial (*Filippou* at [15]). The negative proposition in *Weiss* was not mentioned. Nor was there any suggestion that the 'statutory task' described in *Weiss* remained the test for the application of the proviso. McLure P in *Petersen v Western Australia* (2016) 50 WAR 45 observed that the decision in *Filippou* 'appeared to be a retreat from' *Weiss* and, after setting out the differences between the decisions, appeared to apply *Weiss* 'there being no obvious intention in *Filippou* to depart from existing authority' (at [18]-[27]).

54. *Castle* is another recent decision that appears to depart from *Weiss*. The plurality in *Castle* affirmed that the appellate court is required to consider the possible effect of the error on the outcome of the trial, and satisfaction that guilt was proved 'did not require the conclusion that there had not been a substantial miscarriage of justice' (at [64]). *Castle*, it is noted, was not a 'fundamental defect' case. Ultimately the plurality in *Castle* considered that the natural limitations of proceeding on the record precluded a conclusion that guilt was proved beyond reasonable doubt apparently on the basis that the nature of the error prevented such a conclusion (*Castle* at [68], citing *Baini* at [29]).

Present status of *Weiss*

55. The present status of *Weiss* may be unclear having regard to developments in the case law since the decision. Gageler J has said that *Weiss* 'is not easy to reconcile' with subsequent cases considering the decision (*Castle* at [80]). Gageler J has also said that it 'might be necessary to revisit the requirements of the proviso as stated in *Weiss v The Queen* in light of subsequent developments' (*Filippou* at [78] citing *Reeves* at [64]-[66] and *Lindsay* at [85]-[86]). In *Reeves* at [64]-[66] Gageler J observed that the plurality in *Reeves* accepted that the appellate court was required to consider whether the appellant had lost a chance of acquittal (or to exclude any real likelihood the jury were misled by the misdirection) and not just whether the evidence established the accused's guilt. In *Lindsay* at [86] Nettle J observed that *Weiss* 'must now be understood in light of what has since been observed in *Baini* ... and in *Pollock v The Queen*' (at [86]).

56. It is submitted that this Court should revisit *Weiss* and the test for the application of the proviso. If the correct interpretation of *Weiss* is that the proviso can be applied where the appellate court is satisfied of the accused's guilt and the error (or irregularity) is not a 'fundamental defect' then, it is submitted, the decision should be re-opened and overruled. If that is not the correct interpretation of *Weiss*, it is submitted that the decision should nevertheless be revisited in order to clarify the correct test for the application of the proviso so as to ensure its proper application across Australia. The proliferation of cases considering *Weiss* and the different expressions of the test for the proviso warrants it being revisited.

57. The principles regarding overruling a previous decision are set out in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ and *Imbree v McNeilly* (2008) 236 CLR 510 at [45] and applied in *Miller v R* (2016) 90 ALJR 918 at [39]. To the extent that intermediate

appellate courts have interpreted *Weiss* in the first way identified immediately above, then the decision in *Weiss* 'stands alone' in respect of the test for the proviso (*John v Federal Commissioner of Taxation* at 439). Cases previous to *Weiss* and subsequent cases regarding the proviso do not appear to support the plain reading of *Weiss* in respect of the test for the proviso (*Warridjal v The Commonwealth* (2009) 237 CLR 309 at [71] per French CJ). There has been considerable controversy in the application of the proviso and the decision in *Weiss* by intermediate appellate courts which have, on a number of occasions, required intervention and clarification by this Court. In these circumstances, it is submitted that *Weiss* should be reconsidered and, if necessary, overruled.

The error in this case and the test to be applied

58. In the appellant's case, the directions to the jury on an element of the offence were erroneous. The directions provided that the accused was presumed to have the requisite intention and reversed the onus of proof on the subject where there was no statutory warrant to do so. The directions removed an element of the offence from the jury's consideration. The error fell under the ground in s30(3)(b) of the *Criminal Appeals*. Section 30(3)(b) provides that the Court must allow the appeal if in its opinion 'the conviction should be set aside because of a wrong decision on a question of law by the judge' (s30(3(b) *Criminal Appeals Act*). This is subject to the operation of the proviso in subsection (4). A wrong decision on a question of law can relate to a range of matters that arise in a criminal trial, including, for example, incorrect directions on elements of the offence or erroneous applications of evidentiary provisions and the like. Further, the proviso arises for consideration where the Court has already provisionally concluded that the conviction should be set aside. These are important features of the statute and an appellate court's consideration of the proviso should acknowledge this statutory context. In the appellant's case it was important to recognise that the wrong decision on a question of law related to the element of the offence as opposed to some evidentiary issue as a wrong decision in relation to the former will generally have greater significance for the outcome of the case than the latter. Further, recognition that the appellate court has already passed through s30(3)(b) will draw attention to the level of satisfaction that is required in order to find no substantial miscarriage of justice has occurred and consequently that the appeal must be dismissed under s30(4) of the *Criminal Appeals Act*.

59. The question posed by the proviso is whether 'no substantial miscarriage of justice has occurred' (s30(4) *Criminal Appeals Act*). It is submitted that the starting point in determining that question is consideration of the nature of the error, irregularity or complaint that otherwise requires the appeal to be allowed. The nature of the error, irregularity or complaint may mean that the Court cannot conclude there has been no substantial miscarriage of justice. This may be because the error (irregularity or complaint) constitutes a fundamental defect or a departure from the presuppositions of a fair trial (see *Wilde v The Queen* (1988) 164 CLR 365 and *Quartermaine, Handlen* at [42]-[43]). This conclusion may also be reached because of the nature of the error, irregularity or complaint for example, where there has been a critical misdirection on an element of the offence. Other errors, irregularities or complaints may bring into consideration the natural limitations of the record, including the fact that the error or irregularity means that the record of trial is incomplete or inadequate or because the error had consequences that would have changed the way the trial was conducted (for example, *Castle* at [68]) In these circumstances the proviso could not be applied.

Where the possibility that the error affected the verdict cannot be excluded then the proviso cannot be applied (*Reeves* at [50], *Castle* at [64]-[65]). This last question might, in some cases, be answered by considering whether the accused has lost a chance of acquittal (*Reeves* at [50]). Articulation of a chain of reasoning that would support the accused's guilt is not sufficient for the application of the proviso (*AK* at [55], [58], *Baiada* at [29] *Castle* at [65]). If an inquiry into the inevitability of conviction can and should be undertaken in the circumstances of any given case, the question is whether it was not open to the jury to acquit and not whether it was open to the jury to convict.

Misdirections on elements of offences

60. Recent authority has suggested that where there is an erroneous direction on an element of liability 'the significance of the verdict [is] to be assessed in light of the capacity of the misdirection to have led the jury to wrongly reason to guilt.' (*Reeves* at [50]). It was observed that this reflected the lost chance of acquittal test (*Reeves* at [50]). In *Reeves*, the plurality held that in the context of the trial the jury were not distracted from determining the 'one issue' presented with respect to the complainant's consent and, accordingly, the court below did not err in concluding that the misdirection did not actually occasion a substantial miscarriage of justice (*Reeves* at [58]).

61. A similar analysis was conducted in *Holland v The Queen* (1993) 117 ALR 193 at 200-201. It was found that the trial judge's directions in *Holland* were inadequate because there were no express and comprehensive directions on attempt (at 199). However, the directions were nevertheless adequate in the context of the trial and in light of the real issue at trial because the trial judge 'correctly conveyed to the jury that the question of attempt arose only if they were satisfied of all the ingredients of the offences involving digital penetration other than penetration, and that, in that event, the issue involved in that question was whether there had been an "attempt", in the ordinary meaning of that word, by the appellant' (at 201).

62. *Krakouer v The Queen* (1998) 194 CLR 202 considered the application of the proviso in circumstances where the jury had been directed that s11 of the *Misuse of Drugs Act* applied to an attempt offence contrary to s6 of that Act. The plurality held that not every misdirection on an element of the offence will necessarily mean that the trial was fundamentally flawed such as to preclude the application of the proviso (*Krakouer* at [23]). However, the trial may be fundamentally flawed where the 'misdirection ... 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' (*Krakouer* at [24]). Further, close scrutiny of whether the trial was fundamentally flawed will be required where there is a misdirection about the onus of proof (*Krakouer* at [24]). Ultimately, the plurality in *Krakouer* appeared to apply the 'lost chance of acquittal test' and the 'inevitable conviction test' (at [36], [37]).

63. *Handlen* raised similar, but not identical, issues to the appellant's case (*Handlen* at [42]-[47]. The error in *Handlen* was an error in respect of the directions to the jury on a non-existent basis of liability (*Handlen* at [2]). However, the vice in the trial was described as 'prosecuting the case against the appellants as one of joint criminal enterprise and in framing the issue for determination as whether the prosecution had proved that the appellants were parties to the group exercise to import the drugs'

(*Handlen* at [42]). The plurality in *Handlen* were critical of the failure of the court below to appreciate that the evidentiary content of the Crown's case was affected by the misconception of the appellant's liability (at [43]). The plurality considered the error at trial in *Handlen* to be a 'fundamental' departure and one which denied the application of the proviso (*Handlen* at [3]). This appears to be the type of case that the plurality in *Krakouer* referred to in that case at [24] which meant that the trial was fundamentally flawed.

64. The idea that a misdirection on an element of the offence can result in a trial which is fundamentally flawed such as to preclude the application of the proviso was examined in *Quartermaine v The Queen.* It is not wholly clear whether the appeal was determined on this basis. However, a reasonable reading of the judgment suggests this was the way in which Gibbs J dealt with the proviso in that case. In *Quartermaine* the trial judge had failed to direct the jury that the Crown had to establish that the accused did an act which was of such a nature as to be likely to endanger human life (at 599). Gibbs J observed that a finding that he did so was clearly supported by the evidence and it may be that the jury 'could not reasonably have made any other finding' (at 600). However, there 'might still be a substantial miscarriage of justice if the trial was so irregular that no proper trial had taken place, in that 'there had been a serious departure from the essential requirements of the law'' (*Quartermaine* at 601). Gibbs J in *Quartermaine* at 601 also referred to *Andrews v The Queen* (1968) 126 CLR 198 where it was held that the accused 'was not in reality tried for the offences for which he was indicted' and the 'very fundamentals of a proper criminal trial have not been observed' (at 207).

65. It is useful in considering this question to observe parallel developments in administrative law in circumstances where identification of jurisdictional error is potentially critical. The analysis from *Andrews* and *Quartermaine* above has symmetry with principles regarding jurisdictional error by an inferior court engaged in determining criminal liability in the context of prerogative relief in the absence of a right of appeal (and in the face of a privative clause) (*Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531). In *Kirk* an error in the construction of the offence provision was found to be jurisdictional error as the inferior court misapprehended the limits of its functions and powers (*Kirk* at [74]). This misconstruction led to the inferior court convicting and sentencing the accused where it had no power to do so (*Kirk* at [74]-[75]).

66. Similar ideas can be seen in the analysis required of the proviso in the cases of *Quartermaine* and *Andrews.* Thus, Gibbs J said in *Quartermaine* that in that case 'the relevant law was not explained to the jury. It was within the jury's province to decide whether they were satisfied that the applicant did an act of such a nature as to be likely to endanger human life. That question was never left to them.' (at 600). This lead to the conclusion in that case that 'When a jury has returned a verdict of guilty of a particular crime without having considered whether that crime was committed, the verdict cannot ... be sustained by holding that the jury would or should have returned the same verdict if they had considered the proper questions' (at 601). This also accords with the statement of principle in *Mraz v The Queen* (1955) 93 CLR 493 at 514 set out above at [34] and quoted in *Quartermaine* at 600.

67. There is (and should be) coherence in the supervisory jurisdiction conferred on

intermediate appellate courts under criminal appeal legislation and the supervisory jurisdiction of State Supreme Courts that enable those courts to determine and enforce the limits on the exercise of judicial power by persons and bodies (or courts) other than the Supreme Court (*Kirk* at [98]-[99]). This supervisory jurisdiction in *Kirk* was observed to be of 'constitutional significance' (*Kirk* at [100]).

Outcome and process

68. In the appellant's case their Honours divided consideration of the proviso into an 'outcome' aspect and a 'process' aspect (see CA at [179] citing *Hughes v Western Australia* (2014) 299 FLR 197 at [61]). It is submitted that this approach was erroneous.

69. Their Honours' approach was supported by *Hughes* where it was said that the 'outcome aspect' of the proviso required consideration of whether the accused was guilty beyond reasonable doubt and the process aspect was engaged where there was a serious breach of the presupposition of a trial or a fundamental defect in the proceedings (at [64]-[66], [67]). There is mention in *Hughes* of the possibility that the proviso should not be applied where the error had an effect on the verdict that was returned by the jury or it is uncertain whether it did (at [65]). However, there was ultimately no such analysis undertaken in *Hughes*.

70. While Gleeson CJ in *Nudd v The Queen* (2006) 80 ALJR 614 speaks of an outcome and a process aspect to the meaning of the term "miscarriage of justice", discussion on the subject there does not actually support dividing consideration of the proviso in this manner (see at [3]-[9]). Further, his Honour observed that process and outcome are related (at [7]) and his exposition on the meaning of the term "miscarriage of justice" appears to support analysing the effect of the irregularity or error on the jury's verdict (see in particular at [6]).

71. Dividing consideration of the proviso in this manner may tend to deflect attention away from the statutory language of the proviso – which requires consideration of whether no substantial miscarriage of justice has occurred and not whether the jury's verdict was open to them. It may also pay inadequate attention to the nature of the error which is what gives rise to the consideration of the proviso and otherwise requires the appeal to be upheld. Under the approach taken by their Honours consideration of the nature and effect of the error (or irregularity/complaint) arises only in consideration of whether the error was a fundamental defect. This meant that a higher bar had to be overcome to preclude the application of the proviso – namely, that the error represented a fundamental departure from a fair trial. The approach also tends to elevate the significance of the court's conclusion that the accused's guilt was established beyond reasonable doubt, which itself is an insufficient condition for the application of the proviso.

The Court of Appeal's consideration of the proviso

72. As set out above, their Honours applied the proviso to the appellant's conviction appeal on the basis that they were satisfied of his guilt beyond reasonable doubt and the error was not of a type that precluded the application of the proviso i.e. a fundamental defect (CA [206], [214], [215]). Their Honours consideration of the nature of the error was limited to concluding that the process aspect of the proviso was not engaged (CA at [179], [208]-[214]). This was on the basis that not every

misdirection on an element of the offence means that trial was 'flawed in such a way as to preclude the application of the proviso' and a rejection that the removal of the element of intention was analogous to a failure to leave a defence to the jury (CA at [213]-[214]). It is submitted that this analysis was erroneous. The application of the proviso requires consideration to be first given to the nature and effect of the error and, as will be explained below, in the appellant's case the nature of the error did preclude an application of the proviso.

73. In the appellant's case, as set out above, the error was a misdirection in relation to an element of the offence charged. It removed the element of the offence from the jury's consideration and reversed the onus of proof. Their Honours observed that not all misdirections on elements of an offence will mean that the trial is fundamentally flawed (CA at [213]). However, that general observation did not excuse the appellate court from considering whether the misdirection in this particular case meant that no substantial miscarriage of justice occurred. There was no such consideration given in the appellant's case. It is submitted, here, that the nature of the error did not permit a finding that no substantial miscarriage of justice had occurred (cf. CA at [215]). The nature of the error meant that it was unnecessary for the Court of Appeal to consider for itself whether the appellant's guilt was established beyond reasonable doubt.

74. The extent of the misdirection, its consequences and the issues at trial will all inform the question of whether no substantial miscarriage of justice has occurred. Their Honours considered the issue at trial was whether the appellant possessed the total quantity of the drugs (CA at [79]-[83]). This was also the starting point of their Honours' consideration of the 'outcome aspect' of the proviso (CA at [192]-[193]). However, framing the issue in this way 'denies the generality of a plea of not guilty' (*Krakouer* at [36]). This is particularly so where their Honours had earlier accepted that the appellant's case was to put the prosecution to proof (CA at [81], *Krakouer* at [36]). Further, in the appellant's case the misapprehension as to the applicability of the presumption in s11 of the *Misuse of Drugs Act* was shared by the prosecutor, defence counsel and the trial judge (CA at [97]). This is to be contrasted with *Krakouer* where counsel for the accused and the prosecution both took issue with the trial judge's erroneous direction (*Krakouer* at [36]). In these circumstances, the error in the appellant's case was more closely aligned with that in *Handlen* at [42]-[47]. In the appellant's case no consideration was given to whether this misapprehension affected other parts of the trial, and, in particular, how the defence was conducted. It is no answer to the proviso to say that the case was conducted on the basis of whether there was possession of the total quantity. If so it may well may have been conducted in this way because of the misapprehension. Further, when viewed in this context, it could not be concluded that no substantial miscarriage of justice had occurred.

75. It is apparent that their Honours considered the reasoning in *Krakouer* to support their analysis of the proviso in the appellant's case (CA at [208]-[213]). However, the two features of *Krakouer* identified immediately above were critical to distinguishing the comments made by the plurality in *Krakouer* as to the possible availability of the proviso in that case. Further, the observations of the plurality in *Krakouer* that suggested that the proviso might have applied had the attempt offence stood alone were qualified and dependent on whether the jury had been satisfied to the requisite standard that the appellant in that case had attempted to possess the drugs (see *Krakouer* at [32]). These features were not referred to by their Honours (in this case)

and were qualifications on the earlier observations the plurality made in *Krakouer* regarding the conduct of the trial and availability of the proviso at [23]-[26], [32] which were cited by their Honours at CA [211]-[213].

76. In any event, in *Krakouer*, notwithstanding the earlier observation that a misdirection on a relevant matter for the jury's consideration does not mean the trial is fundamentally flawed, the plurality analysed the nature of the error in the context of the trial and concluded that the proviso could not be applied (*Krakouer* at [23]-[36]). There was no such analysis in the appellant's case. In this respect, it is submitted that *Krakouer* actually supported the appellant's appeal being upheld.

77. It is submitted that their Honours' analysis at CA [214] was not an adequate or sufficient analysis of the nature of the error for the purposes of applying the proviso. At that point their Honours rejected the contention that there was an 'arguable defence' on the question of intention (see CA at [214]). This was based on an assumption that the jury were satisfied that the appellant attempted to possess the total quantity of substituted drug (CA at [214]). This assumption stemmed from their Honours' earlier conclusion that they were satisfied beyond reasonable doubt that the appellant exercised control over the entire 4.981kg of the substituted drug (CA at [206]).

78. However, the directions to the jury were not focused on the totality of the substituted drug. The jury were directed that the State need not prove that the appellant knew the quantity or purity of the drug in order to establish the knowledge aspect of 'possession' (T1052). There was no direction that the State must prove that he possessed the total quantity of 'substituted drug' (see T1052-1056). Nor was such a direction required (*Marker v Western Australia* [2002] WASCA 282 at [18]) notwithstanding that the State put its case on the basis that he attempted to possess the total quantity. The directions on possession and the matters relevant to possession suggested possession in the appellant's case could be established in respect of only some part of the total quantity.

79. An additional aspect of the directions to the jury on possession that related to the erroneous direction on intention was that the jury were told that 'you can possess something temporarily and even for a limited purpose' (T1054). However, under the directions, if the jury were satisfied there was possession for a limited purpose the erroneous direction on intention would have rendered the appellant guilty even where that limited purpose did not support such an intention.

80. Further, the erroneous directions given on the intention element of the offence expressly contemplated a finding of possession of only part of the drug. The jury were told that this element was that the appellant 'intended to sell or supply the prohibited drug *or any part of it* to another' (T1057 emphasis added).

81. The directions to the jury left open the possibility that the jury could convict even if the appellant attempted to possess part of the drug. The use of the expressions like "doing something with" in the trial judge's directions to the jury on possession raised the prospect that the jury was satisfied of an attempted possession in respect of a quantity of drug smaller than 4.981kg notwithstanding that the State's case was based on the whole quantity. Further, possession so framed does not necessarily comprehend

possession for the purposes of supply and accordingly the appellant's conduct (so proved) was not necessarily possession for the purposes of supply.

82. The quantity of drug possessed and the way in which was possessed was important as it informed the inferences that could be drawn in respect of the appellant's intention in relation to it. In any given case certain inferences can be drawn from the quantity of a drug possessed. However, decreases in the quantity possessed will affect the strength of those inferences. It was possible that the jury were satisfied that the appellant possessed a much smaller portion of the drug (but greater than 2g).

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83. This is where the misdirection on s11 of the Act became critical and the point at which the error in respect of it affected the jury's verdict. The directions to the jury on the subject of intent meant that the jury could have reasoned: that the appellant attempted to possess a (much) smaller portion (but greater than 2g) of the drug and by reason of the deeming provision he held the requisite intention. It was possible that he possessed this smaller quantity in order to sample it. This scenario was consistent with innocence of the offence charged but, by reason of the misdirection, was foreclosed by the directions to the jury.

20 84. Their Honours failed to perform such an analysis (or something similar) when considering the proviso. Had consideration been given to how the misdirection related to the other directions on the elements of the offence it would have been apparent that the error affected the jury's verdict and that it could not be concluded that no substantial miscarriage of justice had occurred. Further, the significance to be given to the jury's finding of guilt was greatly diminished because the jury had never been asked to consider a question that was critical to liability for the offence (*Quartermaine* at 600, 601, *Baiada* at [28], [34]).

85. In the appellant's case, the directions (including the misdirection) given to the jury
30 were directions that would do no more than satisfy proof of an attempt to possess the prohibited drug which is a separate offence and carries a much lower maximum penalty than the offence of which the appellant was convicted (see ss6(2), 33, and 34 of the *Misuse of Drugs Act*).[1] Further, s10 of the *Misuse of Drugs Act* meant that if the jury were not satisfied of the offence under ss6(1) and 33 of the *Misuse of Drugs Act* consideration could be given to an offence of possession under s6(2) of the *Misuse of Drugs Act* as an alternative verdict. The jury's verdict of guilt might be, in effect, only a finding of guilt as to this lesser offence of possession.

86. McLure P, in separate reasons, concluded that there had been no substantial
40 miscarriage of justice (CA at [30]). This was on the basis that the jury's verdict was correct, that the error 'could and should have no effect on the verdict' and the retrial was fair (CA at [30]). Her Honour's conclusion in respect of the effect on the verdict was apparently based on her conclusion that the 'only live issue' at trial was whether the appellant was in control of the whole of the substituted drugs (CA at [28]). However, this conclusion gave inadequate consideration to the nature of the error, the context of the trial and the directions to the jury on the subject of possession.

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[1] 2 years imprisonment and/or a fine of $2,000 as opposed to 25 years imprisonment and/or a fine of $100,000.

87. It is submitted that it could not be concluded, after proper analysis, that notwithstanding the error no substantial miscarriage of justice had occurred (cf. CA at [30], [215]). The error related to an element of the offence with which the appellant was charged and effectively removed that element from the jury's consideration. Even if it is not regarded as a fundamental defect in the appellant's trial it was of such a nature that did not permit satisfaction that no substantial miscarriage of justice had occurred. The error affected the jury's verdict and this is particularly so when regard is had to the context of the trial including the directions to the jury on possession. It could not be said that the appellant did not lose a chance of acquittal. The significance that could be given to the jury's verdict was greatly diminished. Even if the application of the proviso could, in this case, be answered by consideration of the inevitability of conviction, the appellant's conviction was not inevitable. It was open to the jury to find the appellant possessed a smaller quantity of substituted drug in which case the contention that he did so with anything other than the requisite intent was no longer inconceivable.

Part VII: Applicable provisions

88. The applicable statutory provisions are attached in Annexure A.

Part VIII: Orders sought

89. The following orders are sought:
    i. The appeal is upheld.
    ii. The conviction is quashed and a retrial ordered.
    iii. Or, alternatively, the appeal is remitted to the Western Australian Court of Appeal to be dealt with in accordance with law.

Part IX: Estimate

90. It is estimated that the appellant's oral argument will take 1 ½ hours to present.

Dated: 16 June 2017

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