IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY No. P24 of 2018

BETWEEN: PAUL JOSEPH RODI
Appellant

and

10 THE STATE OF WESTERN AUSTRALIA
Respondent

APPELLANT'S SUBMISSIONS

Part I:

1. We certify that these submissions are in a form suitable for publication on the internet.

Part II:

20 2. If the fresh evidence had been before the jury (with the evidence adduced at trial), was there a significant possibility that the appellant would have been acquitted, such that there was a miscarriage of justice within the meaning of s.30(3)(c) of the *Criminal Appeals Act 2004* (WA)?

3. Was there a breach of the duty to disclose evidentiary material pursuant to s.95(6) of the *Criminal Procedure Act 2004* (WA)[1] or at common law, such that there was a miscarriage of justice within the meaning of s.30(3)(c) of the *Criminal Appeals Act*?

Part III:

4. We have considered the issue and certify that no notice is required to be given
30 pursuant to s.78B of the *Judiciary Act 1903* (Cth).

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[1] from here referred to as the ***CP Act***; unless otherwise indicated statutory references are to this Act.

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Part IV:

5. The judgment of the Court of Appeal below, *Rodi v State of Western Australia*[2], is reported in (2017) 51 WAR 96[3].

6. There is no report or internet citation of the appellant's trial and conviction.

Part V:

7. The appellant was convicted by a jury in the District Court of Western Australia of one count of possession of a prohibited drug with intent to sell or supply it to another, contrary to s.6(1)(a) of the *Misuse of Drugs Act 1981* (WA).[4]

10 8. At the beginning of the trial, the appellant admitted that he was in possession of the 925.19g of cannabis, which was the subject of the count in the indictment.[5]

9. During the trial, the appellant gave evidence that the cannabis was for his personal use and was harvested from two plants that were located at his home.[6]

10. Detective Coen was called at the trial for the prosecution. Although Detective Coen's witness statement on the prosecution brief did not refer to cannabis yield,[7] he gave such evidence at trial. Det. Coen's trial evidence regarding yield was that:[8]

    (a) mature naturally grown female cannabis plants typically yield between 100g and 400g of cannabis head material;

    (b) it was rare to see a cannabis plant produce 300g to 400g of cannabis head
20 material; and

    (c) he would expect the yield from the two plants located at the rear of the appellant's house to be at the lower end of the 100g to 400g scale.

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2 [2017] WASCA 81.

3 A copy of the reported version will be included in the Joint Book of Authorities. The "CAB" references in these submissions are references to paragraphs of the unreported version of the judgment (which will be the same paragraphs in the reported version).

4 (2017) 51 WAR 96, [2]-[3] per Buss P, [CAB.35], [157] Newnes JA agreeing with Buss P's reasons [CAB.70].

5 (2017) 51 WAR 96, [18]-[19] per Buss P [CAB.36].

6 (2017) 51 WAR 96, [55] per Buss P [CAB.43].

7 (2017) 51 WAR 96, [47] per Buss P [CAB.41], [167] per Mitchell J [CAB.73].

8 (2017) 51 WAR 96, [47]-[48] per Buss P [CAB.41-42], [159], [224]-[225] per Mitchell J [CAB.71.87-88]

11. In her closing address, the prosecutor:[9]

    (a) referred to Det. Coen's "extensive experience" and called him an expert;

    (b) relied on his evidence regarding yield to attack the appellant's evidence that all of the cannabis in question was for his personal use;

    (c) asserted, in relation to the likely yield of the two cannabis plants that were found, that "the evidence that you have from the experts that it would more likely be on the lower scale, that is, somewhere on the lower end of the 100 to 400 [grams]"; and

    (d) referred to the appellant as having told "lies" on the basis that "there is no expert evidence that anyone could possibly grow 530g of head material on one plant" and that "the evidence that you have over 500g of head material and the expert says that he has not seen that much head material grown ... before in his experience".

12. Although not disclosed at trial, or to the appellant, Det. Coen had previously given evidence in other matters that naturally. grown female cannabis plants may yield between 300g to 600g of head material (**Prior Coen Evidence**).[10] This was consistent with the appellant's account that the head material he had came from the two plants at his house.[11]

13. Without the Prior Coen Evidence, there was no cross-examination on Det. Coen's yield evidence at the trial.[12]

14. As set out below,[13] when cross-examined in the Court of Appeal with the benefit of the Prior Coen Evidence, the Detective gave evidence which was both different from that he gave at trial and was helpful to the appellant's defence.[14]

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[9] (2017) 51 WAR 96, [61]-[62] per Buss P [CAB.45], [194] per Mitchell J [CAB.79].

[10] (2017) 51 WAR 96, [75] per Buss P [CAB.47], [159] per Mitchell J [CAB.71]; Witness statement of Detective Coen for the trial of Graeme Peter Challis, [49] [AFM.21]; Transcript from the trial of Graeme Peter Challis, p28-31 [AFM.4-7]; Witness statement of Detective Coen for the trial of Clinton Ross Bernhardt, [43]-[48] [AFM.29]; Witness statement of Detective Coen for the trial of Ian Malcolm McCully, [42]-[47] [AFM.41-42].

[11] (2017) 51 WAR 96, [55] per Buss P [CAB.43].

[12] (2017) 51 WAR 96, [52] per Buss P [CAB.43].

Part VI:

Ground 1: the fresh evidence led to a miscarriage of justice

15. With respect, the Court below correctly:

    (a) characterised the Prior Coen Evidence as fresh evidence,[15] being evidence which either did not exist at the time of the trial or which could not then, with reasonable diligence, have been discovered[16]; and

    (b) identified the relevant test as being whether there was a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence (with the evidence actually given at trial) been given at trial[17].

16. However, the majority below erred in finding that there was no significant possibility that the appellant would have been acquitted.

With the fresh evidence there was a significant possibility of acquittal

17. Firstly, the Prior Coen Evidence supported the appellant's evidence that the cannabis came from his own two plants.

18. If the evidence from the appellant and the Prior Coen Evidence was accepted by the jury, then the jury may well have accepted the appellant's defence to the charge – that is, that the cannabis was for his own personal use. It was open to the jury to accept the Prior Coen Evidence, which was consistent with the appellant's evidence, rather than the evidence given by Det. Coen in examination in chief.

19. Secondly, and leaving aside the first matter above, the Prior Coen Evidence would have significantly impacted on the dynamics of the trial.

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[13] See paragraph [21] below.

[14] (2017) 51 WAR 96, [213] per Mitchell J [CAB.84].

[15] (2017) 51 WAR 96, [140] per Buss P [CAB.67], [222] per Mitchell J [CAB.87].

[16] *Gallagher v R* [1986] HCA 26; (1986) 160 CLR 392, 411 per Dawson J; *Mickelberg v R* [1989] HCA 35; (1989) 167 CLR 259, 301 per Toohey and Gaudron JJ; *Beamish v R* [2005] WASCA 62, [9] per the Court.

[17] *Mickelberg v R* [1989] HCA 35; (1989) 167 CLR 259, 273 per Mason CJ, 288-289 per Deane J, 301 per Toohey and Gaudron JJ; *Gallagher v R* [1986] HCA 26; (1986) 160 CLR 392, 399 per Gibbs CJ, 402 per Mason and Deane JJ, 421 per Dawson J.

20. Such impacts at trial would have included:

    (a) cross-examination of Det. Coen on his "new" evidence of yield compared with the Prior Coen Evidence;

    (b) the real possibility of a material challenge to Det. Coen as an expert in yield;

    (c) the prosecutor may not have been able to rely on Det. Coen's evidence as that of an "expert" to discredit the truthfulness of the appellant;

    (d) the jury would have had the Prior Coen Evidence, which was consistent with the appellant's evidence;

    (e) the jury may have placed less weight on Det. Coen's evidence in chief, in light of the Prior Coen Evidence and the outcome of any cross-examination of him in relation to yield; and

    (f) the prosecutor would not have been able to close in the way she did and to unreservedly accuse the appellant of being a liar.

21. During cross-examination in the Court of Appeal below, Det. Coen gave evidence that:

    (a) it is possible for a cannabis plant to yield less than 100g and that he has seen cannabis plants yield between 500g and 600g;[18]

    (b) he would not be surprised by a plant yielding between 500g and 600g;[19]

    (c) in his experience, plants yielding very large amounts of cannabis were naturally grown.[20]

22. That Det. Coen resiled from the range that he had given at trial, when cross-examined in the appeal below, provides some insight into how cross-examination at trial may have gone if defence counsel had the benefit of the Prior Coen Evidence. The impact of cross-examination might have been critical to the jury's verdict.[21]

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[18] (2017) 51 WAR 96, [83(h)] per Buss P [CAB.50], [212] per Mitchell J [CAB.84].

[19] (2017) 51 WAR 96, [83(h)] per Buss P [CAB.50], [212] per Mitchell J [CAB.84].

[20] (2017) 51 WAR 96, [209] per Mitchell J [CAB.83].

[21] see *R v Lewis-Hamilton* [1998] 1 VR 630, 635 per Charles JA, Winneke P and Hayne JA agreeing.

23. Had Det. Coen been cross-examined (with the benefit of the Prior Coen Evidence) the jury could have reasonably:[22]

    (a) preferred the Prior Coen Evidence, or that which may have been elicited from the Detective in cross-examination, which was consistent with the appellant's evidence;

    (b) formed doubts about the existence and extent of Det. Coen's expertise to give opinion evidence about the yields of head material produced by cannabis plants;

    (c) taken an adverse view as to Det. Coen's credibility, given the significant changes to his evidence regarding yield; and / or

    (d) concluded that the appellant was credible and was not lying about the yield from his two plants.

24. Further, the Prior Coen Evidence:

    (a) would have led to the appellant being able to mount a material challenge as to the Detective's expertise, before the jury; and

    (b) may well have led to the State not being able to hold Det. Coen out as an expert.

25. Had the evidence given by Det. Coen in cross-examination at the appeal below[23] been given at trial, the prosecutor in all probability would not have closed in the same "forceful" manner.[24]

26. One or more of the above had the real possibility of causing the jury to have reasonable doubt as to the appellant's guilt and, consequently, gave rise to the significant possibility that the jury, acting reasonably, would have acquitted the appellant.

"Reasons" of the majority

27. Most of the "reasons" relied upon by Buss P (with whom Newnes JA agreed) below were, with respect, irrelevant to the applicable test for fresh evidence.

28. The *first reason* concerned the appellant bearing the onus of establishing that he did not have the requisite intent.[25] However, irrespective of which party bore the onus of proof,

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[22] see generally (2017) 51 WAR 96, [226]-[231], [233] per Mitchell J [CAB.88-89. 90].

[23] see paragraph [21] above.

[24] see (2017) 51 WAR 96, [193]-[195] per Mitchell J [CAB.79-80]

the Prior Coen Evidence went to the issue of the appellant's intent to sell or supply. Indeed, if anything, with the applicant having the onus, the ability of the fresh evidence to discharge that onus assumed a much greater forensic significance.

29. The *second and eleventh reasons* were to the effect that the appellant did not call any opinion evidence from a botanist or other expert as to yield.[26] The majority below (with respect, erroneously) seemed to suggest that the availability of such evidence had bearing on whether the Prior Coen Evidence was to be characterised as new or fresh evidence.[27] Further, the test does not turn on whether there was evidence the appellant could have led, but did not lead, at trial. The relevant question is whether there is a significant possibility that the jury would have acquitted the appellant, had the Prior Coen Evidence been before the jury in combination with the other evidence that was, in fact (and not what could have been), before the jury at trial.

30. The *third and fourth reasons* were to the effect that defence counsel did not object to Det. Coen giving his opinion evidence[28]. This may have been relevant if there was a challenge on appeal to the reception of Det. Coen's evidence.[29] That is, and was not below, the appellant's complaint. The complaint is effectively about the receipt of only some parts of the relevant evidence which the Detective could give.

31. The *fifth, sixth, seventh and eighth reasons* relate to the manner in which defence counsel conducted the trial (including defence counsel's failure to seek an adjournment or cross-examine Det. Coen on his yield evidence).[30] There was nothing to suggest that if the Prior Coen evidence was given at trial, there was something in the way the trial was conducted which would have prevented the fresh evidence from raising the significant possibility of an acquittal. On the contrary, as set out in paragraphs 19 to 26 above and found by Mitchell JA,[31] the forensic significance of the Prior Coen Evidence

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[25] (2017) 51 WAR 96, [118] per Buss P [CAB.63].

[26] (2017) 51 WAR 96, [119], [133] per Buss P [CAB.63, 66].

[27] (2017) 51 WAR 96, [138]-[139] per Buss P [CAB.67].

[28] (2017) 51 WAR 96, [120]-[121] per Buss P [CAB.63-64].

[29] *Patel v R* (2012) 247 CLR 531, [114] per French CJ, Hayne, Kiefel and Bell JJ.

[30] (2017) 51 WAR 96, [122]-[128] per Buss P [CAB.64-65].

[31] (2017) 51 WAR 96, [223], [227], [229]-[232] per Mitchell J [CAB.88, 88-89].

is likely to have changed the course of the trial, and thereby created a significant possibility that the jury would have acquitted the appellant at trial.

32. The *ninth and tenth reasons* relate to the evidence given by the prosecutor on appeal regarding when Det. Coen's yield evidence was disclosed to the defence and why it had not been disclosed at an earlier stage.[32] This evidence could not have been given at trial and is irrelevant to the enquiry created by the fresh evidence test.

33. The *twelfth, thirteenth, fifteenth and sixteenth reasons* relate to the evidence that was adduced at trial and given by Det. Coen on appeal.[33] However, instead of considering whether the Prior Coen Evidence would have led to a significant possibility of the appellant's acquittal by a jury, Buss P:

(a) accepted Det. Coen's explanation for changing his opinion regarding yield as being credible and cogent;

(b) as a result of this acceptance, placed weight on his view of Det. Coen's credibility, rather than focussing on how a jury may have viewed the Detective's credibility;

(c) considered it to be "plain that Det. Coen would not have accepted the correctness of his previous opinion"[34] (even though that proposition appears to be contradicted by the Detective's own evidence in the Court of Appeal[35]); and

(d) failed to assess or appreciate the impact at trial of the Prior Coen Evidence being used to attack Det. Coen's expertise and ability to provide opinion evidence.[36]

34. An appellate Court is responsible for examining the probative value of the fresh evidence to satisfy itself that the evidence is relevant, plausible and cogent.[37] Here:

(a) the Prior Coen Evidence was relevant;[38] and

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[32] (2017) 51 WAR 96, [129]-[132] per Buss P [CAB.65-66].

[33] (2017) 51 WAR 96, [129]-[132] per Buss P [CAB.65-66].

[34] (2017) 51 WAR 96, [148] per Buss P [CAB.69].

[35] see paragraph 21 above; (2017) 51 WAR 96, [83(h)] per Buss P [CAB.50], [209], [212] per Mitchell J [CAB.83.84].

[36] cf. (2017) 51 WAR 96, [227] per Mitchell J [CAB.88]; see paragraph 20 above.

[37] *Gallagher v R* [1986] HCA 26; (1986) 160 CLR 392, 409 per Brennan J, 400-401 per Mason and Deane JJ, 414 per Dawson J.

[38] (2017) 51 WAR 96, [213] per Mitchell J [CAB.84].

(b) there was no basis for impeaching the plausibility and cogency of the Prior Coen Evidence. Indeed, Det. Coen gave evidence in the Court of Appeal below, which was consistent with the Prior Coen Evidence.[39]

35. While it is inevitable that an appellate court will form its own assessment of the fresh evidence, the court must keep in mind the possibility that, in some instances, a jury, acting reasonably, might come to a different view from the Court as to the credibility of the witness, or the cogency of the fresh evidence.[40]

36. However, it is apparent that the majority below placed significant weight on their own assessment of Det. Coen's evidence at trial, and the extent to which it was likely to have been undermined by defence counsel's use of the Prior Coen Evidence, in concluding that there would have been no significant possibility of acquittal. The majority below erred in this regard.

37. The majority below recognised that, given its character as a prior inconsistent statement, the truth or reliability of Det. Coen may have been impeached by the Prior Coen Evidence.[41] Fresh evidence relevant to credibility, that has the capacity to cause the jury to have a reasonable doubt about whether the evidence of a witness on a crucial issue should be accepted, can result in a miscarriage of justice.[42] As noted above, however, the majority did not consider the other impacts which the Prior Coen Evidence may have had.

Ground 2: the breach of a duty to disclose led to a miscarriage of justice

38. If the appellant is successful in making out Appeal Ground 2, then it may be that the operative miscarriage of justice arises from the failure to comply with the obligations of disclosure, rather than by operation of the fresh evidence test.[43]

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[39] (2017) 51 WAR 96, [83(h)] per Buss P [CAB.50], [212] per Mitchell J [CAB.84].

[40] *White v R* [2006] WASCA 62, [147] per Wheeler JA; *Pileggi v R* [2001] WASCA 260, [49] per Parker J, Malcolm CJ and Wallwork J agreeing.

[41] (2017) 51 WAR 96, [144]-[145] per Buss P [CAB.68].

[42] *Muller v Western Australia* [2014] WASCA 81, [63] per Hall J, Buss and Mazza JJA agreeing.

[43] *Grey v R* [2001] HCA 65; (2001) 75 ALJR 1708 at [9], [23]-[24] per Gleeson CJ, Gummow and Callinan JJ; *Mallard v R* (2005) 224 CLR 125 at [17] per Gummow, Hayne, Callinan and Heydon JJ.

39. The Court below erred in failing to consider whether non-disclosure by the prosecution breached the prosecution's disclosure obligations under statute and at common law, such that a miscarriage of justice arose on the appellant's conviction.

40. Given that "any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice [within s.30(3)(c) of the *Criminal Appeals Act*]",[44] the majority below – having assumed that there was a breach of the prosecutor's statutory duty of disclosure[45] – should have held that there was a miscarriage of justice.

Breach of statutory duty of disclosure

41. In summary, the appellant contends that:

10 (a) the Prior Coen Evidence was relevant to the charge and was evidentiary material within ss.42(1)(a)(iv) and 42(1)(e) of the *CP Act*;

(b) the relevant authorised officer within the meaning of s.95(6), in this case, was the Director herself and, or Ms Keane who signed the indictment; and

(c) there was an obligation on the relevant authorised officer to disclose the Prior Coen Evidence, being evidentiary material, pursuant to s.95(6).

Evidentiary material

42. The Prior Coen Evidence fell within the definition of "evidentiary material" in ss.42(1)(a)(iv) and 42(1)(e).

43. The Prior Coen Evidence was:

20 (a) comprised of recorded statements (and documents) by a person who was able to (and did) give evidence that was relevant to the charge;

(b) in the possession of the WA police (who had investigated the office) and the office of the DPP; and

(c) for the reasons set out at paragraphs 45 to 53 below, relevant to the charge.

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[44] *Kalbasi v Western Australia* (2018) 352 ALR 1; [2018] HCA 7, [12] per Kiefel CJ, Bell, Keane and Gordon JJ; see also *Weiss v R* (2005) 224 CLR 300, [18] per the Court; *Carney v State of Western Australia* (2010) 201 A Crim R 537; [2010] WASCA 90, [44]-[46], [109] per Pullin JA.

[45] (2017) 51 WAR 96, [142] per Buss P [CAB.68].

44. The Prior Coen Evidence also satisfied the definition of "evidentiary material" in s.42(1)(e) as it was documents that may have assisted the accused's defence.[46]

Relevant to the charge

45. The test for relevance in s.42(1)(a)(iv) of the definition of "evidentiary material" is objective, in that:

    (a) it is not qualified or conditioned by reference to the opinion or evaluation of the relevant authorised officer, or the prosecutor, or the organisation or person who investigated the office; and

    (b) the notion of "a sensible appraisal by the prosecution", which is part of the prosecution's common law duty of disclosure, is not incorporated into s.95 read together with s.42.[47]

46. That is, whether the relevant authorised officer has complied with their disclosure obligation in s.95(6), given an assumed knowledge and understanding of the full range of legal and factual issues that would or could arise at trial[48], must be assessed objectively by the Court.

47. Section 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) provides that a "person commits a crime if the person with intent to sell or supply it to another, has in his or her possession a prohibited drug".

48. In this regard, intent – being one of the offence's two elements – was an issue that was obviously relevant to the charge and clearly one of the legal and factual ones that "will or could arise at trial".[49] Whether the onus was on the prosecution or the defence to satisfy the jury as to the issue of intent was immaterial to the relevance of the issue.[50]

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[46] The possible impacts of the Prior Coen Evidence, at trial, is discussed above at paragraph 20. It is asserted that one or more of these impacts would have materially assisted the accused's defence.

[47] *PAH v State of Western Australia* (2015) 253 A Crim R 250; [2015] WASCA 159, [133] per Buss JA, McLure P and Hall J agreeing.

[48] see *Hughes v Western Australia* (2015) 299 FLR 197; [2015] WASCA 164, [48] per the Court and the discussion at paragraphs 58 to 59 below.

[49] *Hughes v Western Australia* (2015) 299 FLR 197; [2015] WASCA 164, [48] per the Court.

[50] Pursuant to s.11(a) of the *Misuse of Drugs Act*, the appellant was deemed to have possession of the drug with intent to sell or supply it to another, because he had in his possession a quantity that exceeded the quantity specified in Schedule V of the Act: (2017) 51 WAR 96, [23]-[26] [CAB.37]. Consequently, at

49. The majority below (correctly) recognised that whether the appellant intended to sell or supply any of the cannabis to another was "the critical issue at the trial". The majority (also correctly) recognised that "related to the critical issue", was whether the cannabis was, as the appellant asserted, wholly derived from two cannabis plants located outside of his home.[51]

50. In carrying out the objective independent assessment that is required by s.95(6) of the *Criminal Procedure Act*,[52] the relevant authorised officer ought to have been aware that, whether the cannabis was cultivated from the two plants outside of the appellant's home for the appellant's personal use, was an issue that could arise at trial. It did, in fact, arise at trial.[53]

51. Accordingly, it is unnecessary to determine in this case whether the proper construction of s.95(6) extends the obligation to evidentiary material that is "potentially relevant".[54]

52. The scheme of this part of the *CP Act*, and the appellant, are not to be prejudiced by any failure by the prosecution to appreciate that the issues at trial may well include whether the appellant intended to sell or supply the cannabis in question and (related to that issue) the source of the drugs.[55] An appellate court is to concern itself about *what* happened at trial and whether that gave rise to a miscarriage of justice; *why* the miscarriage of justice happened is ordinarily irrelevant and of no significance.[56]

53. Objectively, the Prior Coen Evidence was evidentiary material that was relevant to a legal or factual issue that could arise at trial and, so, had to be disclosed under s.95(6).

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trial, the appellant had the onus of establishing, on the balance of probabilities, that he did not intend to sell or supply any of the prohibited drug (being the cannabis in this possession) to another.

[51] (2017) 51 WAR 96, [26]-[27] per Buss P [CAB.37]

[52] see *Hughes v Western Australia* (2015) 299 FLR 197; [2015] WASCA 164, [48] per the Court.

[53] (2017) 51 WAR 96, [27] per Buss P [CAB.37].

[54] see *Western Australia v JWRL* [2010] WASCA 179, [61] per Martin CJ, with McLure P and Buss JA opining that it is unnecessary to determine whether the statutory expression "relevant to the charge" includes material that is potentially relevant at [153] and [155]); see also *Tey v Carpenter* [2012] WASCA 81, [13], [25]-[30] where Buss JA did not disapprove of, or correct, the judge below applying Martin CJ's comments at [60]-[61] of *Western Australia v JWRL* [2010] WASCA 179.

[55] see (2017) 51 WAR 96, [110(f)] [CAB.61]

[56] *Nudd v R* (2006) 225 ALR 161; (2006) 80 ALJR 614; [2006] HCA 9, [8] per Gleeson CJ.

Relevant authorised officer

54. The "relevant authorised officer" in relation to an indictable charge means the authorised officer who is responsible for the prosecution of the charge in a superior court.[57]

55. In State indictable cases in Western Australia, the relevant authorised officer includes the DPP for Western Australia, as the DPP is the authorised officer[58] responsible for the conduct of the prosecution of this charge against the appellant.[59]

56. Further, in this case, Ms Keane signed the indictment as the authorised officer of the DPP[60] and may also be taken to be the "relevant authorised officer". [61]

10 57. The "prosecutor" for the purpose of complying with s.42(5), who is responsible for providing the certificate required by s.45(5) to the relevant authorised officer, is the officer who signed the prosecution notice.[62]

58. The relevant authorised officer is not entitled to simply rely on the s.45(5) certificate. As the Court of Appeal in *Hughes v Western Australia*, stated:[63]

(a) the obligation to disclose "evidentiary material relevant to a charge" requires knowledge and understanding of the full range of issues, legal and factual, that *will or could* arise at trial;

(b) the DPP (who has responsibility for preparing and conducting the trial) will be in a significantly superior position than a police prosecutor to assess what is the
20 evidentiary material that must be disclosed; and

(c) the purpose of s.45(5)(c) is to enable the relevant authorised officer to consider the adequacy of the grounds and the inquiries already made by the prosecutor.

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[57] s.80(1) of the *CP Act*.

[58] ss.80(1) and 80(2)(d) of the *CP Act*.

[59] s.11(1)(a) of the *Director of Public Prosecutions Act 1991* (WA).

[60] Indictment [CAB.4]

[61] *Zanon v Western Australia* [2016] WASCA 91; (2016) 50 WAR 1 at [238]-[239] per Mitchell J.

[62] No evidence was led in the courts below, or is available in this court, regarding the identity of the officer who signed the prosecution notice. However, this person will ordinarily be a police officer: *Hughes v Western Australia* (2015) 299 FLR 197; [2015] WASCA 164, [41] (the Court).

[63] (2015) 299 FLR 197; [2015] WASCA 164, [48]-[50] per the Court; see also *Zanon v Western Australia* (2016) 50 WAR 1; [2016] WASCA 91, [109] per McLure P.

59. The relevant authorised officer is required to make an independent assessment of whether the material handed over by the prosecutor constitutes all of the material required to be disclosed under s.42 of the *Criminal Procedure Act*.[64]

Required to be disclosed by s.95(6)

60. There can be no question that the Prior Coen Evidence was in the possession of the DPP (if that is a statutory requirement). The DPP had been responsible for the prosecutions of each of Graeme Peter Challis, Clinton Ross Bernhardt, and Ian Malcolm McCully, when the Prior Coen Evidence had been given by the Detective.

61. In any event, the *CP Act* does not, by its express terms, limit what must be disclosed by s.95(6) to that which is in the possession of the relevant authorised officer. In this respect, the language used is to be contrasted with the concluding words of the definition of "evidentiary material" in s.42 and in the chapeau of s.95(9); both of which are express in requiring possession of the evidentiary material.

62. That is unsurprising, in circumstances where:

    (a) it was material in the possession of the WA Police and should have been the subject of the certificate given in accordance with ss.45(3) and (5);

    (b) there was a certificate from the investigating body to the relevant authorised officer, as required under s.45, which identifies the evidentiary material that has already been served and the inquiries that have been made;

    (c) there is a separate obligation on the relevant authorised officer to assess the adequacy of the disclosure provided and the inquiries made; and

    (d) the common law obligation does not require such possession; and it should not be inferred, as a matter of interpretation, that the *CP Act* imposed, in this respect, a less strict obligation.

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[64] *Zanon v Western Australia* (2016) 50 WAR 1; [2016] WASCA 91, [109] per McLure P; *Hughes v Western Australia* (2015) 299 FLR 197; [2015] WASCA 164, [47]-[48] per the Court.

The common law duty of disclosure

63. The common law duty of disclosure exists independently of, and is not derogated by, any statutory disclosure obligations.[65] The common law duty arises from the prosecution's duty to present its case with fairness to the accused.[66]

64. The statutory and common law duties of disclosure may be similar, but they are not, necessarily, identical.

65. The Court below erred in failing to find that the non-disclosure of the Prior Coen Evidence was a breach of the common law duty of disclosure.

The scope of the common law duty of disclosure

10 66. The common law duty of disclosure required the prosecution to disclose all material available to it or in its possession that was relevant or possibly relevant to an issue in the case.[67] This required a "sensible appraisal" by the prosecution.[68]

67. The common law disclosure obligation extended to (among other things[69]) material which:

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[65] See, for example, *Mallard v R* (2005) 224 CLR 125; [2005] HCA 68, [63] per Kirby J; *R v Lipton* (2011) 82 NSWLR 123, [80] per McColl JA, Hislop J agreeing; *R v LN* [2017] NSWSC 153, [33] per Johnson J; *Tema v State of Western Australia* (2011) 206 A Crim R 104; [2011] WASCA 41, [63] per Blaxell J, Pullin and Buss JJA agreeing.

[66] *Mallard v R* (2005) 224 CLR 125; [2005] HCA 68, [74] per Kirby J; *Tema v State of Western Australia* (2011) 206 A Crim R 104; [2011] WASCA 41, [63] per Blaxell J, Pullin and Buss JJA agreeing; see also *Koushappis v Western Australia* [2007] WASCA 26, [153] per Roberts-Smith JA, McLure and Buss JJA agreeing; *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1, [71] per Bell J.

[67] *D v State of Western Australia* (2007) 179 A Crim R 377; [2007] WASCA 272, [4] per Buss JA, [30] (Le Miere AJA, Miller JA agreeing; *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1, [73] per Bell J; *R v Reardon (No 2)* (2004) 60 NSWLR 454; [2004] NSWCCA 197, [48] per Hodgson JA; *Cooley v State of Western Australia* (2005) 155 A Crim R 528; [2005] WASCA 160, [55] per Roberts-Smith JA, Wheeler and Pullin JJA relevantly agreeing; *Easterday v R* (2003) 143 A Crim R 154; [2003] WASCA 69, [194], [196] per Steytler J.

[68] *Easterday v R* (2003) 143 A Crim R 154; [2003] WASCA 69, [196] per Steytler J; *R v Reardon (No 2)* (2004) 60 NSWLR 454; [2004] NSWCCA 197, [48] per Hodgson JA; *PAH v State of Western Australia* (2015) 253 A Crim R 250; [2015] WASCA 159, [119] per Buss JA, McLure P and Hall J agreeing; *D v Western Australia* (2007) 179 A Crim R 377, [30] per Le Miere AJA.

(a) could be seen to raise or possibly raise a new issue the existence of which was not apparent from the prosecution case;[70] and

(b) may have cast significant light on the credibility or reliability of Det. Coen as a material prosecution witness, or on the truthfulness of the accused.[71]

68. A previous inconsistent statement is recognised to be material affecting the credibility of a witness, which must therefore be disclosed pursuant to the duty of disclosure at common law (if not also under the statute).[72]

69. Although defence counsel could have asked a question that may have revealed the existence of the undisclosed evidence, the defence in a criminal trial is not obliged to
10 fossick for information to which it was entitled.[73] The majority below erred in ascribing relevance to how defence counsel could have cross-examined to elicit the material.[74]

70. The common law duty of disclosure applies not only in the pre-trial period, but also during the course of the trial itself.[75]

71. At common law, it is unnecessary to establish that the DPP had possession of the non-disclosed material; it is sufficient that the investigating police had the non-disclosed material prior to (and during) the trial.[76] In any event, leaving aside any individual

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[69] For a comprehensive discussion of the scope of the common law obligation, see *Ragg v Magistrates Court (Vic)* (2008) 18 VR 300, [73]-[74] per Bell J; *BA v Attorney General* (2017) 319 FLR 329; [2017] VSC 259 at [25], [26] per Bell J.

[70] *R v Reardon (No 2)* (2004) 60 NSWLR 454; [2004] NSWCCA 197, [48] per Hodgson JA; *Easterday v R* (2003) 143 A Crim R 154; [2003] WASCA 69, [196] per Steytler J.

[71] *Mallard v R* (2005) 224 CLR 125; [2005] HCA 68, [82] per Kirby J; *D v Western Australia* (2007) 179 A Crim R 377, [4] per Buss JA; *R v Lewis-Hamilton* [1998] 1 VR 630, 635 per Charles JA; *White v R* [2006] WASCA 62, [188] per McLure JA; *PAH v State of Western Australia* (2015) 253 A Crim R 250; [2015] WASCA 159, [121] per Buss JA, McLure P and Hall J agreeing.

[72] *Bradshaw v The Queen* (Court of Criminal Appeal, Supreme Court of Western Australia, 13 May 1997, per Malcolm CJ, Pidgeon and Owen JJ, 11 citing *R v Ward* (1993) 93 CR App R1; *Cooley v State of Western Australia* (2005) 155 A Crim R 528; [2005] WASCA 160, [56] per Roberts-Smith JA, Wheeler JA agreeing and Pullin JA relevantly agreeing

[73] *Grey v R* (2001) 75 ALJR 1708; [2001] HCA 65, [23] per Gleeson CJ, Gummow & Callinan JJ.

[74] (2017) 51 WAR 96, [141] per Buss P [CAB.67-68].

[75] *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300; [2008] VSC 1, [71] per Bell J.

[76] *Mallard v R* (2005) 224 CLR 125; [2005] HCA 68, [16]-[17] per Gummow, Hayne, Callinan and Heydon JJ; see also *R v Lipton* (2011) 82 NSWLR 123, [80], [119] per McColl JA, Hislop J agreeing.

prosecutor, the appellant repeats here the submission above[77] that the DPP did have possession of the non-disclosed material by reason of having prosecuted the charges in which the Prior Coen Evidence had been given by the Detective.

Disclosure required by the common law obligation

72. On a sensible appraisal by the prosecution, the Prior Coen Evidence was required to have been disclosed pursuant to the prosecution's common law duty of disclosure, as material that was relevant or possibly relevant to an issue in the case.[78]

73. In any event, there can be little doubt that, once the prosecution led evidence from Det. Coen regarding yield from cannabis plants, if not before, it had a duty pursuant to the common law to disclose the Prior Coen Evidence to the defence.

74. That the prosecutor at trial was not aware of the Prior Coen Evidence at the time is irrelevant. The accused was entitled to that material whether or not its existence was known to prosecuting counsel.[79]

The breach of one or both of the duties of disclosure led to a miscarriage of justice

75. An appellate court is required to consider the nature and effect of the error in every case.[80] The majority below assumed that the prosecution breached its duty of disclosure,[81] without considering whether that breach was a miscarriage of justice. The Court below erred in this regard.

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[77] see paragraph [60] above.

[78] see paragraphs [47] to [49] above.

[79] *Bradshaw v The Queen* per Court of Criminal Appeal, Supreme Court of Western Australia, 13 May 1997, Malcolm CJ, Pidgeon and Owen JJ, 11 citing *R v Ward* (1993) 93 CR App R1; *Cooley v State of Western Australia* (2005) 155 A Crim R 528; [2005] WASCA 160, [57] per Roberts-Smith JA, Wheeler JA agreeing and Pullin JA relevantly agreeing; *Button v R* (2002) 25 WAR 382; [2002] WASCA 35, [58] per Malcolm CJ. In any event, the prosecutor gave evidence in the court below that she was aware that Detective Coen sometimes provided evidence on cannabis yields: (2017) 51 WAR 96, [167] per Mitchell JA [CAB.73].

[80] *Kalbasi v Western Australia* (2018) 352 ALR 1; [2018] HCA 7, [15] per Kiefel CJ, Bell, Keane and Gordon JJ.

[81] (2017) 51 WAR 96, [142] (Buss P) [CAB.68]; Mitchell J considered it unnecessary to resolve the question of whether the prosecution breached its disclosure obligation at [221] [CAB.86].

76. The majority in *Kalbasi v Western Australia* considered that "any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice [within s.30(3)(c) of the *Criminal Appeals Act*]".[82] This is consistent with the long tradition of criminal law that "every accused 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", failing which the accused may have lost a chance which was fairly open to him being acquitted, resulting in a miscarriage of justice.[83]

77. A failure to disclose conflicting statements of a Crown witness, if the information therein could reasonably lead to the view that cross-examination based upon it might elicit answers materially affecting the credibility of the Crown witness, will result in a miscarriage of justice.[84]

78. The prosecution's failure to comply with its disclosure obligations under the *CP Act* and under the common law resulted in a miscarriage of justice within the meaning of s.30(3)(c) of the *Criminal Appeals Act*.[85]

79. Where the failure to comply with a duty of disclosure gives rise to a miscarriage of justice, then, pursuant to the *Criminal Appeals Act*, the appeal must be allowed unless the appeal court concludes affirmatively that no substantial miscarriage of justice has occurred.[86]

80. The respondent in this appeal does not contend that no substantial miscarriage of justice has occurred within the meaning of s.30(4) of the *Criminal Appeals Act* if the

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[82] *Kalbasi v Western Australia* (2018) 352 ALR 1; [2018] HCA 7, [12] per Kiefel CJ, Bell, Keane and Gordon JJ; see also *Weiss v R* (2005) 224 CLR 300, [18] per the Court; *Carney v State of Western Australia* (2010) 201 A Crim R 537; [2010] WASCA 90, [44]-[46], [109] per Pullin JA.

[83] *Mraz v R* (1955) 93 CLR 493, 514 per Fullagar J.

[84] see *R v Lewis-Hamilton* [1998] 1 VR 630, 635 per Charles JA, Winneke P and Hayne JA agreeing.

[85] See *Hughes v State of Western Australia* (2015) 299 FLR 197; [2015] WASCA 164, [62] per the Court; *Davis v State of Western Australia* [2007] WASCA 267, [109] per Steytler P.

[86] *Mallard v R* (2005) 224 CLR 125; [2005] HCA 68, at [16]-[17] per Gummow, Hayne, Callinan and Heydon JJ; [83] per Kirby J; *White v R* [2006] WASCA 62 at [185] per McLure JA; *PAH v State of Western Australia* (2015) 253 ACrimR 250; [2015] WASCA 159 at [120] per Buss JA; *Weiss v R* (2005) 224 CLR 300; [2005] HCA 81, [18] (the Court); see also *Mraz v R* (1955) 93 CLR 493, 514 per Fullagar J; *Hughes v State of Western Australia* (2015) 299 FLR 197; [2015] WASCA 164, [60] per the Court; *Davis v State of Western Australia* [2007] WASCA 267, [109] (Steytler P).

appellant is successful in making out Appeal Ground 2. Thus, this Court does not need to consider the application of the "proviso" to this case.

Part VII:

81. The appellant seeks the following orders:
    (a) the appeal be allowed;
    (b) the appellant's conviction be quashed and the sentence be set aside;
    (c) there be a re-trial; and
    (d) the respondent to pay the appellant's costs to be taxed, if not agreed.

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Part VIII:

82. The appellant estimates that he will require two hours for the presentation of his argument.

Dated: 15 June 2018

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