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 REPLY

Part I:

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

Part II:

Ground 1

2. In Detective Coen's evidence at trial, the respondent now seeks to distinguish between: the yield of the *particular* plants from *typical* yield; and *typical* range versus *absolute* range of yield.

3. However, such distinctions: were not apparent at the trial;[1] do not reflect the substance of the Detective's evidence at trial; and do not grapple realistically with the likely impact at trial of the fresh evidence (when assessed with the evidence actually given).

4. Rather, the Detective's opinion evidence at trial:

   (a) as to the yield from the particular plants was inextricably linked with his evidence as to typical yield;[2] and

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[1] As is apparent from the prosecutor's closing address. Mitchell JA below also considered Detective Coen's evidence at trial to be to the effect that the 100g and 400g yields were "end points" of the scale: (2017) 51 WAR 96, [212]-[213] per Mitchell JA [CAB.84].

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(b) substantially excluded any real possibility of a plant having a significantly greater yield than the upper limit of his typical yield range.[3]

5. Further, the respondent's submissions on this point do not grapple with the prosecutor's closing based on the Detective's evidence, nor how different it would have had to have been with the fresh evidence.[4] It appears from her closing that the prosecutor, in real time, did not understand the now contended for distinctions.

Ground 2: the *CP Act*

6. The Ground only raises s.95(6) of the *CP Act*.[5] At the time when the relevant authorised officer was required to comply with the obligation in s 95(6) of the *CP Act*:[6] all of the Prior Coen Evidence existed; was relevant; and was in the possession of the organisation or person who investigated the offence (being the police) *and* the DPP (who prosecuted the previous matters).

7. The test for relevance in s.95 of the *CP Act*: is limited to relevant material,[7] as objectively assessed;[8] is not limited to the relevant authorised officer's subjective

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2 His evidence was that: 100g was "the lower end of *the* scale", and 400g is on the "higher end of *the* scale": (2017) 51 WAR 96, [47] per Buss P (emphasis added) [CAB.41], [180] per Mitchell JA. [CAB.76], see also [159] per Mitchell JA [CAB.71]. Detective Coen made repeated references to the "100 to 400 gram scale" in his evidence at trial: see, eg, (2017) 51 WAR 96, [48] per Buss P [CAB.41]

3 His evidence was that: "it's rare that we see plants with the…amount of cannabis head pushing that 300 to 400 gram of the – mark of *the* scale": (2017) 51 WAR 96, [47] per Buss P [CAB.41].

4 In closing, the prosecutor stated that "the evidence that you have is that you have over 500 grams of head material and the expert says not seen before in his experience": (2017) 51 WAR 96, [229] per Mitchell JA [CAB.89], see also [62]-[63] per Buss P [CAB.45-46]. This was the basis of her submission that the appellant was lying about having grown 925g from two plants: [159] per Mitchell JA [CAB.71].

5 The respondent's submissions at [31] appear to admit a breach of s.45(3) of the *CP Act*, in that the prosecutor issued the certificate required by s 45(3)(f) before the appellant was committed for trial. The appellant was not previously aware of this breach. Nonetheless, a breach of s.45(3) of the *CP Act* does not change the obligation on the relevant authorised officer under s 95(6) of the *CP Act*.

6 Pursuant to r 20(2) of the *Criminal Procedure Rules 2005* (WA), the prescribed period for the purposes of s 95(6) is 42 days after the date on which the accused is committed for trial.

7 cf. Respondent's Submissions, [42]-[44]. Although it need not be resolved in this Appeal, any reading of Buss P's reasons in *PAH v Western Australia* (2015) 253 A Crim R 250; [2015] WASCA 159, [132] to the effect that irrelevant material is required to be disclosed must be considered dubious with respect.

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

appreciation of relevance;[9] and is not limited to the disclosure previously made under s.45 of the *CP Act*.[10]

8. The majority found that yield was an "issue" that was "related to the critical issue" of whether the appellant intended to sell or supply the cannabis to another.[11] Assuming a knowledge and understanding of the full range of issues that would or could arise at trial, the relevant authorised officer should have appreciated the relevance of yield.

9. The duty of disclosure can be breached without there having been any subjective fault on the part of the prosecution.[12]

Ground 2: at common law

10 10. It is difficult to imagine a more fundamental right than an accused's right to a fair trial.[13] The common law duty of disclosure is an incident, and an inseparable part, of the accused's right to a fair trial.[14]

11. There is no "unmistakable and unambiguous language"[15] in the text of the *CP Act*[16] which shows a legislative intention to abrogate this aspect of the common law. The *CP Act* does not use any relevant language of exclusion or abrogation.[17]

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[9] It does not include, for example, the common law notion of a "sensible appraisal by the prosecution: *PAH v State of Western Australia* (2015) 253 A Crim R 250; [2015] WASCA 159, [133], [136] per Buss JA, McLure P and Hall J agreeing. For example, assessing relevance by reference to the case theory of the prosecution, or by reference only to the evidence which the prosecution proposes to call in support of its case, is an approach that is "fundamentally misconceived": *Western Australia v JWRL* [2010] WASCA 179, [60] per Martin CJ.

[10] *Hughes v Western Australia* (2015) 299 FLR 197; [2015] WASCA 164, [48]-[49] per the Court; cf. Respondent's Submissions, [50].

[11] (2017) 51 WAR 96, [26]-[27] per Buss P [CAB.37].

[12] *Easterday v R* (2003) 143 A Crim R 154; [2003] WASCA 69, [199] per Steytler J; *WK v R* [2002] WASCA 176, [13]-[14] per Miller J, Wallwork and Murray JJ agreeing.

[13] *Wilde v The Queen* (1988) 164 CLR 365, p375 per Deane J; *R v Glennon* (1992) 173 CLR 592, p623 per Deane, Gaudron, McHugh JJ; *Easterday v R* (2003) 143 A Crim R 154; [2003] WASCA 69, [194] per Steytler J; *Dietrich v R* (1992) 17 CLR 292, p299 (Mason CJ and McHugh J).

[14] See the cases cited at footnote 66 of the Appellant's Submissions; see also *R v Brown (Winston)* [1994] 1 WLR 1599, p1606 per Steyn LJ; *D v Western Australia* (2007) 179 A Crim R 377; [2007] WASCA 272, [4] per Buss JA; *Easterday v R* (2003) 143 A Crim R 154; [2003] WASCA 69, [194]-[195] per Steytler J.

[15] *Coco v R* (1994) 179 CLR 427, p437 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309; [2004] HCA 40, [20] per Gleeson

12. In respect of an analogous provision of the *CP Act*, the Court of Appeal has held (with respect, correctly) that: the *CP Act* did not displace the Court's jurisdiction at common law to set aside a guilty plea;[18] and the *CP Act* did not, relevantly, represent a "code".

13. The assertion that the *CP Act* expands an accused's right to disclosure (over the common law)[19] is not correct as a general proposition. For example, the common law extends disclosure to evidence in the possession of the investigating police both before and during the trial – whether or not in the possession of the DPP.[20] So, the common law duty here is broader and more comprehensive than that provided in the *CP Act*.

14. The relevant disclosure obligations in the *CP Act* were based on existing statutory disclosure obligations that previously co-existed with the common law obligations.[21] It is not a "new regime" which "superseded the common law".[22]

15. Before the *CP Act*, the prosecution was required to comply with both statutory and common law disclosure obligations.[23] That remains the case.[24]

CJ; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15], [58] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

16 *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503 at [39]; *Alcan (NT) Alumina v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47].

17 The short title to the *CP Act* merely says that it is "An Act to provide procedures for dealing with alleged offenders and for related matters." Even if legislation describes a set of provisions as a "code" – which is not the case here – that is not conclusive, although it is not to be disregarded as an indication of legislative intention: *Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57, [43] per Gleeson CJ and Hayne J, [90] per Gaudron J, [131] per McHugh J, [181] and [183] per Kirby J

18 *Birch v State of Western Australia* (2017) 51 WAR 454; [2017] WASCA 19, [213] per Mazza JA; at [254] per Mitchell JA.

19 Respondent's submissions, [70].

20 *Mallard v R* (2005) 224 CLR 125 at [16]-[17] per Gummow, Hayne, Callinan and Heydon JJ.

21 The obligations in s.42 of the *CP Act* are based on those that were contained in s.103 of the *Justices Act 1902* (WA) and s.611B of the *Criminal Code* (WA); the certificate of compliance in s.45 of the *CP Act* is based on s.611B of the *Criminal Code* (WA); and s.95 of the *CP Act* is based on ss.611B and 745 of the *Criminal Code* (WA): see Explanatory Memorandum to the *CP Act*.

22 Respondent's Submissions, [68]. So, by further example, the offence is s.45(6) of the *CP Act*, on which the respondent places weight, already existed in s.611B(5) of the *Criminal Code (WA)*.

23 See, for example, *King v Cork* (2004) 154 A Crim R 9; [2004] WASCA 98, [11]-[23] per Barker J

24 *Hughes* referred to both the common law and statutory duties and described *Mallard* as the "leading authority on non-disclosure": [2015] 299 FLR 197; (2015) WASCA 164, [61]-[62] per the Court.

16. The WA Court of Appeal (and the Supreme Court on appeal) has consistently – and, with respect, correctly – treated the common law duty of disclosure as extant, notwithstanding the *CP Act*.[25]

The proviso in this Court

17. Leaving aside (the required) notice of contention under Rule 42.08.5, the respondent has not yet favoured the Court with submissions as to the application of the proviso to Ground 2.

18. Whether or not this Court can,[26] it should not with respect, consider the proviso[27] for Ground 2. That is because it has not been: considered by the majority below; the
10 subject of a notice of contention; nor, the subject of submissions by the respondent.

Dated: 23 July 2018

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[25] Significantly in *D v Western Australia*, the Court of Appeal considered the common law obligation where a breach of the statutory duty under the *CP Act* could not be established (2007) 179 A Crim R 377; [2007] WASCA 272, [29]-[47] per Le Miere AJA, Miller JA agreeing, see also [4]-[9] per Buss JA; See also *Tema v Western Australia* (2011) 206 A Crim R 104, [63] per Blaxell J, Pullin JA and Buss JA agreeing; *Hughes v Western Australia* (2015) 299 FLR 197; [2015] WASCA 164, [35], [62] per the Court; *Western Australia v JWRL* [2010] WASCA 179, [58] per Martin CJ; *Koushappis v Western Australia* (2007) 168 A Crim R 51, [153]-[154] per Roberts-Smith JA, McLure and Buss JJA agreeing; *Bozzer v Western Australia* [2017] WASCA 226, [84] per the Court; *VJS v Western Australia* [2017] WASCA 172, [203] per Mazza JA, Martin CJ and Buss P agreeing; *Re Her Honour E A Woods; Ex Parte Hardie Finance Corporation Ltd* [2008] WASC 282, [16], [18] per Blaxell J; *Tey v Plotz (No 2)* [2011] WASC 34, [36] per Jenkins J.

[26] Although it is not clear, it may be that *Lindsay v R* (2015) 255 CLR 272; [48] per French CJ, Kiefel, Bell and Keane JJ is to the effect that this Court can consider the proviso in this appeal.

[27] See, for example, *Antoun v R* (2006) 80 ALJR 497; [59] [60] per Hayne J; *Darkan v R* (2006) 227 CLR 373 at [144], [145] per Kirby J.