HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

MDP
Appellant

and

THE KING
Respondent

SUBMISSIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS (CTH) SEEKING LEAVE TO INTERVENE OR BE HEARD AS *AMICUS CURIAE*

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION / LEAVE TO BE HEARD

2 The Director of Public Prosecutions (Cth) (**Commonwealth Director**) seeks leave to intervene, alternatively to be heard as *amicus curiae* in the proceeding. She seeks to make submissions only on the general principles concerning a "miscarriage of justice" within the third limb of the "common form appeal" provisions. She does not seek to make submissions as to how those principles apply in this proceeding.

PART III: REASONS FOR LEAVE TO INTERVENE / BE HEARD AS AMICUS

10 3 The Commonwealth Director's functions include instituting, and carrying on, "prosecutions on indictment for indictable offences against the laws of the Commonwealth" and "proceedings for the summary conviction of persons in respect of offences against the laws of the Commonwealth".[1]

4 In the exercise of those functions, the Commonwealth Director conducts trials for the prosecution of Commonwealth offences, and any appeals arising from those trials, in courts in all of the States and Territories. Those trials and appeals are necessarily matters within federal jurisdiction because they are matters that arise under a law made by the Commonwealth Parliament (namely, the law creating the Commonwealth offence).[2] That jurisdiction is conferred on the relevant courts of the States and Territories by s 68(2) of

20 the *Judiciary Act 1903* (Cth).

5 The Commonwealth Parliament has not enacted any specific law that governs the hearing and determination of appeals arising out of trials and convictions for Commonwealth offences. Rather, it relies on the operation of s 68(1) of the Judiciary Act, which operates to apply the laws of the States and Territories that govern the "hearing and determination of appeals" arising out of trials and convictions for State and Territory offences.[3] The laws applied by s 68(1) include those laws that determine the circumstances in which an appeal against conviction will be allowed.

[1] *Director of Public Prosecutions Act 1983* (Cth), s 6(1)(a)-(b), (c)-(d); see also s 9.

[2] Constitution, s 76(ii); *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at [43] (Kiefel CJ, Gageler and Gleeson JJ), [144] (Gordon and Steward JJ), [211] (Edelman J), [269] (Jagot J).

[3] *Huynh* (2023) 97 ALJR 298 at [64] (Kiefel CJ, Gageler and Gleeson JJ); [145]-[147] (Gordon and Steward JJ), [235] (Edelman J), [268] (Jagot J).

6 In that way, the Commonwealth Director has a substantial, albeit indirect, "legal interest" in the principles that govern what constitutes a "miscarriage of justice" under the third limb of the "common form appeal provision", including under s 668E of *Criminal Code* (Qld).[4] The development and application of those principles necessarily affects the conduct of every conviction appeal that raises the third limb, in every jurisdiction that has adopted the common form appeal provision — being every State and Territory except Victoria.[5] Accordingly, the outcome of this proceeding will have (or is "likely"[6] to have) an indirect, but substantial, effect on the Commonwealth Director's legal interests. That is sufficient to satisfy a "precondition" for leave to intervene.[7]

10 7 The Court then being reposed with a discretion as to whether to grant leave to intervene, should do so for four reasons.[8]

8 *First*, it can be accepted that the issues in the appeal are joined between the Appellant and the Crown (here, the Director of Public Prosecutions (Qld)). However, the contentions that the Commonwealth Director seeks to advance "directly support those of the Crown" in relation to the "miscarriage of justice" issue. In particular, both the Crown (see **RS [59]**) and the Commonwealth Director ultimately endorse Gageler J's statement of principle in *Hofer v The Queen* that:[9]

> an error or irregularity will rise to the level of a miscarriage of justice only if found by an appellate court to be of a nature and degree that could realistically have affected the
> 20 verdict of guilt that was in fact returned by the jury in the trial that was had. Only if that threshold is met is a miscarriage of justice established.

9 Accordingly, the Commonwealth Director's intervention will not require the Appellant to meet more than one case on the point of principle.[10]

[4] See also *Supreme Court Act 1933* (ACT), s 37O(2)-(3); *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Code* (NT), s 410; *Criminal Procedure Act 1921* (SA), s 158(1)-(2); *Criminal Code* (Tas), s 402(1)-(2); *Criminal Appeals Act 2004* (WA), s 30(3)-(4).

[5] Even then, a broadly equivalent framework to that advanced by the Commonwealth Director in this proceeding has been adopted in relation to s 276(1)(b)-(c) of the *Criminal Procedure Act 2009* (Vic): see *Lee (a pseudonym) v The King* [2024] VSCA 10 at [45] (McLeish, Kennedy and T Forrest JJA).

[6] *Levy v Victoria* (1997) 189 CLR 579 at 602 (Brennan CJ).

[7] See *Levy* (1997) 189 CLR 579 at 602 (Brennan CJ). See also *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37 at [2]-[3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at [55] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[8] See also *Hughes v The Queen* (2017) 263 CLR 338, where leave was granted to the Victorian Director in an appeal where the Crown was represented by the New South Wales Director.

[9] (2021) 274 CLR 351 at [123].

[10] *Strickland* (2018) 266 CLR 325 at [109] (Kiefel CJ, Bell and Nettle JJ).

10 *Second*, the Appellant has already appropriately engaged with the point of principle in his written submissions: see **AS [32], [41], [48]**. That reveals that there are, in fact, some matters where there is little distance between the Appellant and the Commonwealth Director (at least on the Appellant's alternative position that there is a materiality threshold).

11 *Third*, in *HCF v The Queen*, two members of the Court suggested that there may be a need for the Court to reconcile various statements in the authorities about the principles governing a "miscarriage of justice", and that should be done "after proper submissions on the point".[11] Given the significance of the principles for the exercise of the Commonwealth Director's functions, it is appropriate that she be given an opportunity to contribute to those submissions.

12 *Fourth*, a grant of leave would not add materially to the parties' preparation for the hearing or the length of the oral hearing itself.[12] As noted, the Appellant has already engaged in a substantive way with the relevant issues of principle in his written submissions; it is therefore reasonable to expect that he will prepare accordingly for the oral hearing. Further, the Commonwealth Director seeks only a very short period for any oral submissions, primarily for the purpose of addressing matters that may arise during the course of the hearing.

13 In the alternative, the Commonwealth Director seeks leave to be heard as *amicus curiae* for the above reasons and, in particular, because she "will make submissions which the Court should have to assist it to reach a correct determination", including submissions on issues "not fully argued" or not "fully covered" in the parties' submissions.[13]

[11] (2023) 97 ALJR 978 at [79] (Edelman and Steward JJ).

[12] *Roadshow Films* (2011) 248 CLR 37 at [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[13] *Roadshow Films* (2011) 248 CLR 37 at [6], [7(3)] and [7(5)] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

PART IV: PROPOSED SUBMISSIONS

A THE ANALYTICAL FRAMEWORK

14 In broad terms, the "common form appeal provision" requires an appellate court to allow an appeal against conviction if it concludes that:

14.1 the verdict is "unreasonable" or "cannot be supported" having regard to the evidence (**first limb**);[14]

14.2 there has been a "wrong decision of any question of law" (**second limb**); or

14.3 on any ground there has been a "miscarriage of justice" (**third limb**).

15 The second and third limbs are subject to a "**proviso**": an appellate court may nonetheless dismiss the appeal if it considers that "no substantial miscarriage of justice has actually occurred". *Weiss v The Queen* establishes that, for the proviso to apply, the appellate court itself must be persuaded "that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty".[15] However, since *Weiss*, it has been less clear is how an appellate court is to determine whether there has been a "miscarriage of justice" under the third limb.

16 The Commonwealth Director submits that in a case where an appellant contends that there has been a "miscarriage of justice" within the third limb, the analytical framework has three distinct steps:[16]

16.1 *First*, the appellant must identify an irregularity or error in, or in relation to, the trial (see **Part B**).

(a) If the appellant establishes that the identified error or irregularity is properly characterised as "fundamental", the appeal must be allowed. The court cannot apply the proviso in such a case.

(b) If the identified error or irregularity is not of that character, the analysis must proceed to the second step.

[14] As to which, see *Dansie v The Queen* (2022) 274 CLR 651 at [7]-[14] (the Court).

[15] (2005) 224 CLR 300 at [44] (the Court); *Kalbasi v Western Australia* (2018) 264 CLR 62 at [12] (Kiefel CJ, Bell, Keane and Gordon JJ).

[16] *Filippou v The Queen* (2015) 256 CLR 47 at [4] (French CJ, Bell, Keane and Nettle JJ); *Hofer* (2021) 274 CLR 351 at [123] (Gageler J).

16.2 *Second*, the appellant must establish that the identified error or irregularity could realistically have affected the verdict of guilt that was in fact returned by the jury in the trial that was had (see **Part C**).

(a) If the appellant cannot demonstrate that threshold has been reached, the appeal must be dismissed.

(b) If the appellant can demonstrate that the threshold has been reached, then the analysis will proceed to the third step.

16.3 *Third*, the respondent may seek to establish that "no substantial miscarriage of justice" has actually occurred (see **Part D**).

10 (a) If the respondent establishes that there has been no substantial miscarriage of justice, the appellate court must dismiss the appeal.

(b) If the respondent fails to establish that there has been no substantial miscarriage of justice (or concedes that it cannot discharge its burden at this step), the appellate court must allow the appeal.

17 Each step in that "tool of analysis"[17] is discussed below.

B STEP 1: AN ERROR OR IRREGULARITY

B.1 The content of the first step

18 The first step of the analysis requires an appellant to identify an error *or* irregularity in or in relation to the trial: the demonstration of "error" is not required; an "irregularity"

20 falling short of an error will be sufficient.[18] That reflects the statutory language of the third limb, which refers to a miscarriage of justice "on any ground".[19]

19 An error or irregularity, which might ultimately be found to be a "miscarriage of justice" within the third limb, "may occur in many circumstances and may take many forms".[20] Thus, no narrow or pedantic approach should be taken to the identification of what constitutes an error or irregularity. So much is apparent from the summary provided by the New South Wales Director at **NSW [41]**.

[17] See *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655 at [172] (Gordon J).

[18] See *Baini v The Queen* (2012) 246 CLR 469 at [54] (Gageler J).

[19] See *TKWJ v The Queen* (2002) 212 CLR 124 at [30] (McHugh J).

[20] *Baini* (2012) 246 CLR 469 at [25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); see also [54] (Gageler J); *HCF* (2023) 97 ALJR 978 at [84] (Edelman and Steward JJ).

20 Self-evidently, however, the error or irregularity must be one that is connected to the trial that occurred. That is not to say it must be *in* the trial itself. The error or irregularity may occur before the trial has formally commenced: as in the case, for example, of a breach of the prosecution's duty of disclosure.[21]

B.2 Fundamental errors

21 The Appellant contends that the question of whether there is a "fundamental" error is one that should be considered only at the stage of applying the proviso: **AS [53]**. On the Commonwealth Director's approach, it is logically a question to be asked at the first step. If it is concluded that an error is properly characterised as fundamental, that is the end of the analysis. There will have been a miscarriage of justice that is "inherently substantial" and, accordingly, there will be "no scope of the application of the proviso".[22] The appeal must be allowed.[23]

22 Leaving that question of analytical approach to one side, the Appellant does not suggest that the error or irregularity involved in this appeal is one that can be characterised as "fundamental". The following summary of the relevant principles is provided for completeness only.

23 "There is no rigid formula to determine what constitutes such a radical or fundamental error"; such an error "may go either to the form of the trial or the manner in which it was conducted".[24] That being so, various formulations have been used to capture different types of "fundamental" error including, for example: an error that "goes to the root of the proceedings";[25] an error that amounts to "a serious breach of the presuppositions of the trial";[26] or an error that is a "serious departure from the prescribed processes of trial".[27]

[21] See, eg, *Mallard v The Queen* (2005) 224 CLR 125 at [16]-[17] (Gummow, Hayne, Callinan and Heydon JJ); *Edwards v The Queen* (2021) 273 CLR 585 at [3] (Kiefel CJ, Keane and Gleeson JJ).

[22] *HCF* (2023) 97 ALJR 978 at [7] (Gageler CJ, Gleeson and Jagot JJ). See also *TKWJ* (2002) 212 CLR 124 at [73] (McHugh J).

[23] See *Lane v The Queen* (2018) 265 CLR 196 at [38] (Kiefel CJ, Bell, Keane and Edelman JJ).

[24] *Wilde v The Queen* (1988) 164 CLR 365 at 372-373 (Brennan, Dawson and Toohey JJ). See also *Lee v The Queen* (2014) 253 CLR 455 at [47]-[51] (the Court), as explained in *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46 at [18] (the Court).

[25] *Wilde* (1988) 164 CLR 365 at 373 (Brennan, Dawson and Toohey JJ).

[26] *Weiss* (2005) 224 CLR 300 at [46] (the Court); *HCF* (2023) 97 ALJR 978 at [11] (Gageler CJ, Gleeson and Jagot JJ).

[27] *Baini* (2012) 246 CLR 469 at [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

24 Ultimately, whatever language is used, "paraphrases do not, and cannot, stand in the place of the words of the statute".[28] The paraphrases are no more than tools of analysis.[29] In each case, an appellant must explain how an error is so "fundamental" that it meets that statutory language. The tools of analysis may be useful in so far as they "focus attention upon the effect of the error in question upon the trial in order to determine whether a substantial miscarriage of justice has actually occurred".[30] For example, if it is said there is a "serious departure" from the prescribed processes of trial, that directs attention to what is said to be the relevant "prescribed process" and then, in the context of the trial that occurred, how there was a "serious departure" from that process.

10 25 Finally, where a fundamental error is said to depend on breach of a statutory provision, close attention must be paid to the terms of the statute. That is because whether such a breach is "fundamental" is a question of statutory interpretation.[31]

C STEP 2: REAL CAPACITY TO HAVE AFFECTED THE VERDICT?

C.1 The existence of a second step

26 In *Weiss*, the Court said that history reveals that a "'miscarriage of justice', under the old Exchequer rule, was *any* departure from trial according to law, regardless of the nature or importance of that departure".[32] In *Hofer*, Kiefel CJ, Keane and Gleeson JJ interpreted that passage to mean that there will be a "miscarriage of justice" under the third limb if there is a departure from a trial according to law that is "to the prejudice of the accused".[33]

20 27 That interpretation is correct. As Gageler J explained in the same case, consistent with the English and Australian understandings of the Exchequer rule, an error or irregularity in the trial cannot be *presumed* to be prejudicial to the accused: **RS [57]**; **NSW [14]-[18]**.[34] The Appellant has candidly acknowledged the "force" of that analysis: **AS [35]**. And, on that analysis, a further step is required to determine whether an identified error or irregularity can be properly characterised as "prejudicial" to the accused: see also

[28] *Awad v The Queen* (2022) 275 CLR 421 at [87] (Gordon and Edelman JJ). See also *AK v Western Australia* (2008) 232 CLR 438 at [54] (Gummow and Hayne JJ).

[29] *Lane* (2018) 265 CLR 196 at [46] (Kiefel CJ, Bell, Keane and Edelman JJ).

[30] *Lane* (2018) 265 CLR 196 at [46] (Kiefel CJ, Bell, Keane and Edelman JJ).

[31] *Awad* (2022) 275 CLR 421 at [17] (Kiefel CJ and Gleeson J), [88] (Gordon and Edelman JJ). See also *AK* (2008) 232 CLR 438 at [57] (Gummow and Hayne JJ).

[32] *Weiss* (2005) 224 CLR 300 at [18].

[33] *Hofer* (2021) 274 CLR 351 at [41].

[34] See *Hofer* (2021) 274 CLR 351 at [106]-[108].

AS [59]. That is the issue addressed by this second step of the analytical framework. The content of this step is addressed at paragraphs 36 to 44 below.

28 However, on one reading of the passage from *Weiss* quoted at paragraph 26 above, there is no room for a second step in the framework: **AS [29]-[31]**.[35] On that reading, any error or irregularity will be sufficient to generate a miscarriage of justice, such that one moves immediately from the first step (identification of an error or irregularity) to the third step (the proviso).

29 That reading of *Weiss* does not appear to represent the current state of authority.[36] However, for the avoidance of doubt, to the extent that *Weiss* stands as authority for that

10 proposition (as suggested at **AS [34], [36]**), it should be re-opened and overruled.[37] As to each of the factors that govern re-opening in this Court:[38]

29.1 This aspect of *Weiss* did not "reason upon a principle carefully worked on in a significant succession of cases". Importantly, *Weiss* "presented no occasion to explore the metes and bounds of the miscarriage of justice ground".[39] It was a case involving the second limb, not the third limb, of the common form appeal provision.[40]

29.2 There was one unanimous judgment, which the Commonwealth Director accepts weighs against re-opening.

29.3 To the extent that it removes any threshold of materiality, it has "achieved no

20 useful result" but led to "considerable inconvenience". The stream of authority on this point since *Weiss* has not been uniform: **NSW [21]-[39]**. The pages of the law reports are not blank,[41] but the story they tell is not straightforward. In those

[35] See *Hofer* (2021) 274 CLR 351 at [100]-[101] (Gageler J).

[36] See *HCF* (2023) 97 ALJR 978 at [2] (Gageler CJ, Gleeson and Jagot JJ), [76]-[79] (Edelman and Steward JJ). See also **AS [49]**.

[37] This is distinct from the application made in *Kalbasi*, which concerned the correct approach to the proviso itself (ie, the third step): see (2018) 264 CLR 62 at [9] (Kiefel CJ, Bell, Keane and Gordon JJ).

[38] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

[39] *Hofer* (2021) 274 CLR 351 at [110] (Gageler J). See also *Weiss* (2005) 224 CLR 300 at [11] (the Court). As to the relevance of that fact, see *Namoa v The Queen* (2021) 271 CLR 442 at [17] (Gleeson J).

[40] See *R v Weiss* (2004) 8 VR 388 at [59], [64] (Callaway JA); *Baini* (2012) 246 CLR 469 at [49]-[51] (Gageler J).

[41] *Queensland v Commonwealth* (1977) 139 CLR 585 at 599 (Aickin J).

circumstances, re-opening *Weiss* would assist in achieving the interests of "continuity and consistency" in the law.[42]

29.4 This aspect of *Weiss* has not been independently acted upon in a manner which militates against consideration.[43]

30 The strength of the substantive argument may also be taken into account in considering the question of leave to reopen.[44] And, in addition to the reasons advanced in *Hofer*, there are compelling reasons for the existence of a second step in the analytical framework.

31 *First*, an important lesson from *Weiss* is that the common form appeal provision must be interpreted in accordance with the principles of statutory construction.[45] That requires close attention to be given to the text of the third limb: here, "on any ground whatsoever there was a miscarriage of justice".[46] As a matter of ordinary language, there is some difficulty in construing the concept of "miscarriage of justice" as extending to include trivial or inconsequential errors or irregularities. In other words, the "ordinary meaning of the phrase 'miscarriage of justice' may be thought to carry with it an implication of materiality": **AS [59]**.

32 *Second*, "[f]ew trials are perfect in all respects".[47] If *any* error or irregularity amounted to a "miscarriage of justice" that would "lead to the application of the proviso in a large number of cases".[48] Given the nature of the appellate task in applying the proviso (as explained in Part D below), that would lead to large number of cases being decided by appellate judges, themselves acting as a "jury". That is the "mischief" that the second step guards against, not a return to the strictures of the Exchequer rule: cf **AS [52]**.

33 At a systemic level, widespread application of the proviso for any and all errors or irregularities would cut across the "traditional common law understanding of the jury as the constitutional tribunal for the determination of criminal guilt".[49] That role of the jury

42 See *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [70] (French CJ); *NZYQ* (2023) 97 ALJR 1005 at [37] (the Court).

43 Compare *NZYQ* (2023) 97 ALJR 1005 at [19]-[23], [36] (the Court).

44 See, eg, *Vanderstock v Victoria* [2023] HCA 30 at [607]-[608] (Edelman J).

45 See, eg, *Weiss* (2005) 224 CLR 300 at [9], [31] (the Court).

46 *Criminal Code* (Qld), s 668E(1). There are minor differences in the text across jurisdictions, but none of any significance for present purposes.

47 *R v Matenga* [2009] 3 NZLR 145 at [30] (Blanchard J for the Court).

48 *Matenga* [2009] 3 NZLR 145 at [30] (Blanchard J for the Court).

49 See *Hofer* (2021) 274 CLR 351 at [85] (Gageler J).

is "fundamental to our system of criminal justice".[50] In relation to Commonwealth offences tried on indictment, that position is constitutionally entrenched.[51] And, more generally, as Gaudron J explained in *Cheng v The Queen*:[52]

> Trial by jury is so deeply embedded in our judicial process that its importance in protecting the liberty of the individual from oppression and injustice needs no elaboration. However, what is not generally recognised is its importance to the rule of law and, ultimately, the judicial process and the judiciary itself. Respect for the rule of law and, ultimately, the judicial process and the judiciary is enhanced if the determination of criminal guilt is left in the hands of ordinary citizens who are part of
10 the community, rather than in the hands of judges who are perceived to be and, sometimes, are "remote from the affairs and concerns of ordinary people".

34 *Third*, as the Court recognised in *Weiss*, there will be cases, "perhaps many cases", where the natural limitations that an appellate court faces in reviewing the record mean that the appellate court cannot apply the proviso. If there is no second step in the analysis, then in those "many cases", the identification of *any* error or irregularity would mean that the conviction must be quashed regardless of the significance of the error: see **AS [54]**. Again, that would cut across the role of the jury under our system of criminal justice. But it would also undermine what the Court in *Weiss* considered to be a benefit of its approach to the proviso, namely avoiding "the needless retrial of criminal proceedings".[53] In the absence
20 of the second step, there will be needless retrials in all of those cases in which there is an immaterial error or irregularity and the proviso cannot be applied: **AS [61]**.

35 The Appellant suggests this "possible problem" was resolved in *Kalbasi*, where Kiefel CJ, Bell, Keane and Gordon JJ said an appellate court must "consider the nature and effect of the error in every case": **AS [55]**. But the reason it must do so is not to resolve the problem just identified, but rather "because some errors will prevent the appellate court from being able to assess whether guilt was proved to the criminal standard".[54] In other words, it is necessary to consider the nature and effect of the error to determine whether the proviso is capable of being applied by the appellate court. That is not an inquiry concerned with the "materiality" of any error in relation to the verdict
30 actually returned by the jury: cf **AS [55]**.

[50] See *R v Baden-Clay* (2016) 258 CLR 308 at [65] (the Court).

[51] Constitution, s 80.

[52] (2000) 203 CLR 248 at [80] (Gaudron J), quoting *Kingswell v The Queen* (1985) 159 CLR 264 at 301 (Deane J). See also *MFA v The Queen* (2002) 213 CLR 606 at [48] (McHugh, Gummow and Kirby JJ).

[53] *Weiss* (2005) 224 CLR 300 at [47] (the Court).

[54] *Kalbasi* (2018) 264 CLR 62 at [15] (Kiefel CJ, Bell, Keane and Gordon JJ).

C.2 The content of the second step

36 The second step requires that an appellant establish "some connection between the relevant defect or irregularity in a trial and the *outcome*".[55] Identifying the necessary connection has been approached in different ways. For example, the issue has been approached by asking (our emphasis):

36.1 Did the error or irregularity give rise to a "real *chance*" of affecting the result of the trial?[56]

36.2 Did the error or irregularity have the "meaningful *potential* or *tendency*" to affect the result of the trial?[57]

10 36.3 *Could* the error or irregularity "realistically have affected the verdict of guilty"?[58]

36.4 Is the error one that was "*capable* of affecting the result of the trial"?[59]

36.5 *Might* the error or irregularity have made a difference to the outcome of the trial?[60]

37 Each formulation is concerned with the existence of a *possibility*, not a probability. Further, there is no reason in logic for any of the formulations to be understood as implying *any* possibility — no matter how far-fetched or fanciful — will be sufficient to conclude that an error or irregularity will amount to a miscarriage of justice. That would risk collapsing the first and second steps of the analytical framework, contrary to the argument set out in Part C.1 above.

38 Accordingly, the Commonwealth Director submits that, ultimately, all of those 20 formulations are ultimately different ways of expressing the same ultimate question: is there "a *realistic possibility* of a causal connection between one or more identified legal errors or procedural irregularities and the verdict returned by the trial jury"?[61]: cf **AS [64]**. If the answer to that question is "yes", the appellate court can be satisfied that there has

55 *AK v R* [2022] NSWCCA 175 at [2], [5] (Beech-Jones CJ at CL) (emphasis added).

56 See *Hofer* (2021) 274 CLR 351 at [47] (Kiefel CJ, Keane and Gleeson JJ), [118] (Gageler J).

57 *Hofer* (2021) 274 CLR 351 at [118].

58 *Hofer* (2021) 274 CLR 351 at [123].

59 *Edwards* (2021) 273 CLR 585 at [74] (Edelman and Steward JJ). See also *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at [162] (Edelman J); *Mategna* [2009] 3 NZLR 145 at [30]-[31] (Blanchard J for the Court); *Awad* (2022) 275 CLR 421 at [78], [84]-[85] [92]-[95], [101], [106] (Gordon and Edelman JJ).

60 *Hofer* (2021) 274 CLR 351 at [130] (Gordon J); *HCF* (2023) 97 ALJR 978 at [78] (Edelman and Steward JJ).

61 *Hofer* (2021) 274 CLR 351 at [120]. See also *HCF* (2023) 97 ALJR 978 at [2] (Gageler CJ, Gleeson and Jagot JJ); *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at [32]-[33] (Kiefel CJ, Keane and Gleeson JJ), [45] (Gageler J).

been a miscarriage of justice. That approach is consistent with numerous decisions of this Court since *Weiss* was decided.[62]

39 If the answer to the question is "no", there will be no miscarriage of justice. By way of example only, one situation in which the answer will be "no" is where "inadmissible evidence is wrongly admitted to prove a fact against an accused who later gives evidence admitting the fact". The wrong admission of evidence can be described as an error or irregularity in the trial; but because of the later admission, there is no realistic possibility of any causal connection between that error or irregularity and the verdict returned by the jury.[63]

10 40 The adoption of a "realistic possibility" formulation does not collapse the second and third steps: **NSW [52], [55]**; cf **AS [44]-[45]**.[64] Nor does it confuse any question of onus of proof.[65] The appellate function at the second step is focused on the "effect-on-the-jury".[66] What is required is a factual inquiry into how the error or irregularity may have "affected the basis on which the trial jury actually reached its verdict in the totality of the events that occurred in the trial that was had".[67]

41 That is *not* an inquiry "into the outcome of a hypothetical trial before a hypothetical jury in which the error or irregularity is assumed not to have occurred".[68] Accordingly, an appellant does *not* need to show what *would* have occurred in the absence of the error or irregularity.[69] Rather, an appellant need do no more than articulate a path of reasoning —
20 by reference to the record of trial — that demonstrates the existence of the requisite realistic possibility. In many cases, that will not be a demanding threshold to meet: see **AS [58]**.

[62] *Hofer* (2021) 274 CLR 351 at [114]-[115].

[63] See *Awad* (2022) 275 CLR 421 at [93] (Gordon and Edelman JJ), citing Gleeson CJ in argument in *Weiss* (2005) 224 CLR 300 at 302.

[64] Cf *HCF* (2023) 97 ALJR 978 at [81] (Edelman and Steward JJ).

[65] Cf *HCF* (2023) 97 ALJR 978 at [80] (Edelman and Steward JJ).

[66] *Hofer* (2021) 274 CLR 351 at [84] (Gageler J).

[67] *Hofer* (2021) 274 CLR 351 at [121] (Gageler J). See also *Nudd v The Queen* (2006) 80 ALJR 614 at [24] (Gummow and Hayne JJ), explaining *TKWJ* (2002) 212 CLR 124. And, by analogy, see *MZAPC* (2021) 273 CLR 506 at [38]; *Nathanson* (2022) 276 CLR 80 at [32], [39] (Kiefel CJ, Keane and Gleeson JJ).

[68] *Hofer* (2021) 274 CLR 351 at [121] (Gageler J).

[69] See also *Nathanson* (2022) 276 CLR 80 at [34] (Kiefel CJ, Keane and Gleeson JJ) and [47] (Gageler J), explaining *Stead v State Government Insurance Commission* (1986) 161 CLR 141. See also *Nobarani v Mariconte* (2018) 265 CLR 236 at [38]-[39] (the Court).

42 In contrast, the appellate function at the third step is one that entails a "determination-of-guilt".[70] That function is explored further in Part D below. The immediate point is that, since *Weiss*, the application of the proviso no longer involves any inquiry about a "real chance" of acquittal (or similar).[71] Thus, the adoption of such language at the second step cannot be understood as overlapping with the inquiry required at the third step.

43 It is therefore not correct to say that the adoption of "real chance" (or similar) language at the second step "would, almost by definition, involve collapsing the test for the proviso into the test for a miscarriage of justice by adopting a paraphrase of the statutory language of the proviso and applying that paraphrase as the test for a miscarriage of justice".[72] Nor does that concern appear to have manifested in practice: see **NSW [40]-[56]**.

44 On the other hand, the Appellant's suggestion that "as little" be taken "out of the ambit of the proviso as is possible" (if materiality is to be addressed at the "miscarriage of justice" stage) risks collapsing the second and third steps of the analysis: **AS [63]**. That suggestion is one that is apt to reintroduce confusion as to the precise role of the appellate court in applying the proviso, which has now otherwise been settled in the manner set out below.

D STEP 3: THE PROVISO

45 At the third step, the appellate court is not to try and predict what a hypothetical jury would or might do.[73] Rather, the appellate court must itself be satisfied that, on the evidence properly admissible at trial, the appellant's guilt "was established beyond reasonable doubt".[74] It is for the respondent to an appeal to persuade the court of that guilt.

46 The appellate court must make that determination on the written record of the trial. Thus, the court must examine the trial record for itself.[75] The court must do so alive to the "natural limitations" inherent in that task.[76] Those limitations include the disadvantage that the appellate court has when compared with a jury, "in respect of the evaluation of

[70] *Hofer* (2021) 274 CLR 351 at [84] (Gageler J).
[71] *Hofer* (2021) 274 CLR 351 at [85], [93]-[94] (Gageler J).
[72] *HCF* (2023) 97 ALJR 978 at [81].
[73] *Weiss* (2005) 224 CLR 300 at [35]. See also *Kalbasi* (2018) 264 CLR 62 at [12] (Kiefel CJ, Bell, Keane and Gordon JJ).
[74] *Hofer* (2021) 274 CLR 351 at [54] (Kiefel CJ, Keane and Gleeson JJ), [93] (Gageler J), [135] (Gordon J).
[75] *Weiss* (2005) 224 CLR 300 at [41] (the Court).
[76] *Weiss* (2005) 224 CLR 300 at [40]-[41] (the Court). See also *Hofer* (2021) 274 CLR 351 at [132]-[133] (Gordon J); *Awad* (2022) 275 CLR 421 at [28] (Kiefel CJ and Gleeson J).

witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share".[77]

47 As noted above, in some cases, the nature of the error or irregularity may "prevent the appellate court from being able to assess whether guilt was proved to the criminal standard".[78] As recognised by Kiefel CJ, Bell, Keane and Gordon JJ in *Kalbasi*, that may be the position in:[79]

> cases which turn on issues of contested credibility,[80] cases in which there has been a failure to leave a defence or partial defence for the jury's consideration[81] and cases in which there has been a wrong direction on an element of liability in issue or on a defence or partial defence.[82]

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48 In those cases, the appellate court will be unable to be satisfied that no substantive miscarriage of justice has "actually occurred".[83]

49 The categories of case recognised in *Kalbasi* are no more than examples. Trying to classify "classes of case in which the proviso can be or cannot be applied" is "distracting and apt to mislead": **RS [55]**.[84] Rather, in each case, all of the circumstances must be considered. So much is illustrated by *Hofer*. On one view, *Hofer* turned on "issues of contested credibility" — being the example given in *Kalbasi* (at paragraph 47 above) by reference to *Castle*.[85] On that view, it was not a case in which the proviso could be applied.

50 That view accords with the view reached (in dissent) by Gordon J in *Hofer*.[86] In contrast,

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despite accepting that the error was relevant to the appellant's credit, Kiefel CJ, Keane and Gleeson JJ (with whose reasons Gageler J broadly agreed[87]) undertook their own independent assessment of the evidence and concluded there had been no substantial miscarriage of justice. Their Honours did so on the basis that the appellant's evidence on

[77] *Fox v Percy* (2003) 214 CLR 118 at [23] (Gleeson CJ, Gummow and Kirby JJ). See also *Pell v The Queen* (2020) 268 CLR 123 at [37] (the Court), cited in *Orreal v The Queen* (2021) 274 CLR 630 at [22] (Kiefel CJ and Keane J), [41] (Gordon, Steward and Gleeson JJ).

[78] *Kalbasi* (2018) 264 CLR 62 at [12] (Kiefel CJ, Bell, Keane and Gordon JJ).

[79] (2018) 264 CLR 62 at [15].

[80] *Castle v The Queen* (2016) 259 CLR 449.

[81] *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92; *Lindsay v The Queen* (2015) 255 CLR 272. See also *Filippou v The Queen* (2015) 256 CLR 47.

[82] *Pollock v The Queen* (2010) 242 CLR 233; and see *Reeves v The Queen* (2013) 88 ALJR 215 at [50] (French CJ, Crennan, Bell and Keane JJ).

[83] In contrast, a fundamental error positively establishes that there has been a substantial miscarriage of justice: see paragraph 21 above.

[84] *Kalbasi* (2018) 264 CLR 62 at [16] (Kiefel CJ, Bell, Keane and Gordon JJ).

[85] (2016) 259 CLR 449.

[86] See (2021) 274 CLR 351 at [125], [135], [139].

[87] *Hofer* (2021) 274 CLR 351 at [80].

the relevant issue was "so glaringly improbable that it could not give rise to a reasonable doubt as to his guilt" and was "incapable of being believed".[88] In other words, it was a case in which the credibility of the witness could be assessed "on the basis of objective evidence".[89] The circumstances of that case were, however, "extraordinary".[90] All of that is to emphasise that each case must be approached by having careful regard to both the evidence and the course of the trial.

PART V: ESTIMATED TIME

51 In the event that the Court grants leave for the Commonwealth Director to appear at the hearing of the appeal, it is estimated that 15 minutes would be required for the presentation of her oral argument. As noted, she seeks that time primarily for the purpose of being able to respond to any matters that may arise in the course of the hearing.

Dated: 28 March 2024

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[88] See *Hofer* (2021) 274 CLR 351 at [58], [61], [63] Kiefel CJ, Keane and Gleeson JJ).
[89] *Awad* (2022) 275 CLR 421 at [39]. See also *Orreal* (2021) 274 CLR 630 at [22] (Kiefel CJ and Keane J).
[90] *Hofer* (2021) 274 CLR 351 at [71] (Kiefel CJ, Keane and Gleeson JJ), [88]-[89] (Gageler J).

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **MDP**
Appellant

and

THE KING
Respondent

ANNEXURE TO SUBMISSIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS (CTH) SEEKING LEAVE TO INTERVENE OR BE HEARD AS *AMICUS CURIAE*

Pursuant to Practice Direction No. 1 of 2019, the Commonwealth Director sets out below a list of the statutes referred to in her submissions.

No.	Description	Version	Provisions
1.	*Criminal Code 1899* (Qld)	Reprint current from 1 February 2024	s 668E
2.	*Supreme Court Act 1933* (ACT)	Reprint current from 12 December 2023	s 37O(2)-(3)
3.	*Criminal Appeal Act 1912* (NSW)	Reprint current from 19 February 2024	s 6(1)
4.	*Criminal Code 1983* (NT)	Reprint current from 25 March 2024	s 410
5.	*Criminal Procedure Act 1921* (SA)	Reprint current from 22 June 2023	s 158(1)-(2)
6.	*Criminal Code 1924* (Tas)	Reprint current from 27 November 2023	s 402(1)-(2)
7.	*Criminal Appeals Act 2004* (WA)	Reprint current from 13 April 2023	s 30(3)-(4)
8.	*Criminal Procedure Act 2009* (Vic)	Reprint current from 25 March 2024	s 276(1)(b)-(c)

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