HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **MATHEW CUCU BRAWN**
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, particularly as they apply where the prosecution is alleged to have breached its duty of disclosure. She does not seek to make submissions as to how those principles apply to the particular factual circumstances of the Appellant's trial.

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

3 In *MDP v The King* (B72/2023), the Commonwealth Director has been granted leave to intervene. Pursuant to that leave, she has filed written submissions relating to the operation of the third limb (28 March 2024: **MDP Cth**), supplementary written submissions relating to the operation of the second limb (15 August 2024: **MDP Cth Supp**) and proposes to make oral submissions of no more than 30 minutes.

4 For the reasons explained at **MDP Cth [3]-[5]**, 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 provisions", including s 158 of the *Criminal Procedure Act 1921* (SA). Accordingly, a precondition for leave to intervene it satisfied. The Court should then exercise its discretion to grant leave to the Commonwealth Director to intervene in this proceeding (or be heard as *amicus curiae*), in addition to her intervention in *MDP*.

5 Because of her intervention in *MDP*, if granted leave, the Commonwealth Director anticipates that her role in this proceeding would be minimal. In writing, she seeks to adopt relevant parts of the written submissions she has filed in *MDP*. She otherwise seeks only to briefly supplement those existing submissions. The Appellant in this proceeding will therefore not be required to meet more than one case on the point of principle: see **MDP Cth [9]**. And the Appellant has already engaged with that point in his written submissions: see **Brawn App [38]-[77]**; **MDP Cth [10]**. The Commonwealth Director's intervention will therefore not expand the scope of the issues to be addressed, nor materially add to the parties' preparation for the hearing: see **MDP Cth [12]**.

6 As to the hearing itself, the Commonwealth Director anticipates that most (if not all) of the matters on which she may wish to make oral submissions will be ventilated during the course of the earlier hearing in *MDP*. However, as the Commonwealth Director understands the position, the Appellant in this proceeding will not be a participant in that proceeding. Nor will the South Australian Director. It is therefore possible that additional or supplementary matters may be raised during the hearing in this proceeding that are relevant to the Commonwealth Director's legal interests — particularly because the South Australian Director has adopted in this proceeding certain written submissions of the Commonwealth Director in the *MDP* proceeding: see **Brawn SA [3] n 4**; **[32] n 52**; **[35] n 58**; **[40] n 67**; **[47] n 83**.[1]

7 It is in that "peculiar"[2] context that the Commonwealth Director seeks the opportunity to appear at the hearing in this proceeding and, having had the benefit of observing the course of argument, decide whether there are any additional or supplementary matters on which she would seek to make oral submissions. If so, she anticipates that any such submissions would not exceed 10 minutes.

PART IV: PROPOSED SUBMISSIONS

8 If granted leave, the Commonwealth Director adopts the written submissions set out at **MDP Cth [14]-[50]** and **MDP Cth Supp [7], [19]-[23]**. She adds three points relating to the application of those submissions in the context of an alleged breach of the prosecution's duty of disclosure.

9 *First*, in relation to the prosecution of Commonwealth offences, the common law duty of disclosure applies.[3] So too does any supplementation of that duty by State or Territory statute.[4] The Commonwealth Director also publishes a "Statement on Disclosure", which sets out her "expectations as to how the prosecution should fulfil its duty of disclosure".[5]

1 Referring to **MDP Cth [21]-[25], [32]-[34], [36]-[38]**; **MDP Cth Supp [19]-[23]**.

2 See *ASF17 v Commonwealth* (2024) 98 ALJR 782 at [16] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), see also at [81]-[84] (Edelman J).

3 Because the common law duty is owed to the court (not the accused), it may be that this also occurs by operation of s 80 of the *Judiciary Act 1903* (Cth).

4 By operation of s 68(1) of the *Judiciary Act 1903* (Cth). See, eg, **Brawn SA [51]**; *Magistrates Court Act 1930* (ACT), s 90; *Criminal Procedure Act 1986* (NSW), s 62(1); *Local Court (Criminal Procedure) Act 1928* (NT), s 105C; *Criminal Code 1899* (Qld), s 590AH(2); *Magistrates Court (Criminal and General Division) Act 2019* (Tas), s 66; *Criminal Procedure Act 2009* (Vic), s 110; *Criminal Procedure Act 2004* (WA), s 42.

5 Commonwealth Director of Public Prosecutions, *Statement on Disclosure in Prosecutions conducted by the Commonwealth* (March 2017) at [1]. See also *Edwards* (2021) 273 CLR 585 at [49] (Edelman and Steward JJ).

Individual practitioners who appear on her behalf are also bound by the relevant conduct rules.[6]

10 *Second*, it is "well settled that the prosecution's failure to disclose all relevant evidence to an accused may, *in some circumstances*, require the quashing of a verdict of guilty if there has been a breach of the duty".[7] That statement recognises that not *all* breaches of the duty will constitute a "miscarriage of justice". In other words, consistent with the Commonwealth Director's position, it recognises the existence of a "materiality" threshold in relation to the third limb of the common form appeal provisions. That being so, determining whether a particular breach constitutes a "miscarriage of justice" can be
10 resolved applying the Commonwealth Director's analytical framework:

10.1 As noted at **MDP Cth [20]**, a breach of the prosecution's duty of disclosure is an error or irregularity connected to the trial, even if the breach occurs before the trial has formally commenced (Step 1: see **MDP Cth [16.1]**).

10.2 If there a breach of the duty (and the breach is not "fundamental" in the relevant sense: see **MDP Cth [21]-[25]**), the question for the Court will be whether that breach could realistically have affected the verdict of guilt that was in fact returned by the jury in the trial that was had (Step 2: **MDP Cth [16.2]**). If so, the breach will be material in the relevant sense, and the appellant will have established a "miscarriage of justice" within the meaning of the third limb.

20 10.3 If the error or irregularity was material, the respondent to an appeal may seek to have the appeal dismissed on the basis of the proviso. That is, the respondent may seek to establish that there was no "substantial miscarriage of justice" (Step 3: **MDP Cth [16.3]**). It may or may not be possible for the respondent to rely on the proviso, depending on the nature of the information that was not disclosed: see **MDP Cth [47]-[49]**.

11 The result in cases such as *Grey v The Queen*,[8] *Mallard v The Queen*[9] and *Edwards v The Queen*[10] can be explained consistently with the application of that framework, even though those cases (and other cases) may contain "differences of expression and

6 See, eg, *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) and (Vic), rr 87-88.
7 ***Edwards** v The Queen* (2021) 273 CLR 585 at [24] (Kiefel CJ, Keane and Gleeson JJ) (emphasis added). See also ***Mallard** v The Queen* (2005) 224 CLR 125 at [17] (Gummow, Hayne, Callinan and Heydon JJ).
8 (2001) 75 ALJR 1708.
9 (2005) 224 CLR 125.
10 (2021) 273 CLR 585.

emphasis".[11] The benefit of adopting the framework is that it would provide "practical guidance"[12] to both parties and intermediate appellate courts and, therefore, a greater degree of consistency and predictability in the conduct of criminal appeals across the country.

12 *Third*, the appellant bears the onus at Step 2 of the analysis. On the Commonwealth Director's approach, the threshold of materiality at that step remains constant, but "[w]hat must be shown to demonstrate that an established error meets the threshold of materiality will depend upon the error".[13] Discharging that onus may not be demanding or onerous: see **MDP Cth [41]**.[14] But, in the context of a breach of the duty of disclosure, the appellant must do something more than simply point out that there has been a breach of the duty.

12.1 That is because the duty of disclosure extends to a wide range of information. Shortly stated, the common law duty requires "disclosure of all material that, on a sensible appraisal by the prosecution: (i) is relevant or possibly relevant to an issue in the case; (ii) raises or possibly raises a new issue that was not apparent from the prosecution case; and (iii) holds out a real (as opposed to fanciful) prospect of providing a lead in relation to evidence concerning (i) or (ii)": see also **Brawn SA [52]-[53]**.[15]

12.2 That means, for example, there will inevitably be cases where certain information should have been disclosed (for example, because on a sensible appraisal by the prosecution, it was "possibly relevant"), but ultimately could not have had any effect on the conduct of the trial and, therefore, could not have had any effect on the jury's verdict.[16]

13 Accordingly, an appellant must articulate precisely: (a) how the information that should have been disclosed could have been deployed by the appellant in connection with the trial that was had; and (b) how, if the information had been so deployed, the jury's verdict could realistically have been different. Mere "speculation" about the "forensic value" of

11 See ***LPDT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610 at [8] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

12 See, by analogy, *LPDT* (2024) 98 ALJR 610 at [8] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

13 See *LPDT* (2024) 98 ALJR 610 at [15] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

14 See *LPDT* (2024) 98 ALJR 610 at [14] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ). See also **MDP Cth Supp [7]**.

15 *Edwards* (2021) 273 CLR 585 at [48] (Edelman and Steward JJ).

16 See, eg, *Edwards* (2021) 273 CLR 585 at [84] (Edelman and Steward JJ).

the information will not be enough to discharge the appellant's burden at this step in the analysis.[17] Nor will "vague and unspecified allegations".[18]

PART V: ESTIMATED TIME

14 As noted, if the Commonwealth Director were granted leave to appear at the hearing and, because of matters raised during the hearing, sought to make oral submissions, she would require no more than 10 minutes.

Dated: 14 November 2024

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[17] *Edwards* (2021) 273 CLR 585 at [24] (Kiefel CJ, Keane and Gleeson JJ). Compare, for example, the analysis in *Grey v The Queen* (2001) 75 ALJR 1708 at [16]-[22] (Gleeson CJ, Gummow and Callinan JJ); *Mallard* (2005) 224 CLR 125 at [23], [26] (Gummow, Hayne, Callinan and Heydon JJ).

[18] *Edwards* (2021) 273 CLR 585 at [76] (Edelman and Steward JJ). Consistently with paragraph 2 above, in making those observations, the Commonwealth Director is not suggesting one way or the other that the Appellant has or has not discharged his onus at Step 2 in this proceeding.

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and

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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 Procedure Act 1921* (SA)	Reprint current from 22 June 2023	s 158(1)-(2)
2	*Magistrates Court Act 1930* (ACT)	Reprint current from 20 April 2024	s 90
3	*Criminal Procedure Act 1986* (NSW)	Reprint current from 15 August 2024	s 62(1)
4	*Local Court (Criminal Procedure) Act 1928* (NT)	Reprint current from 25 March 2024	s 105C
5	*Criminal Code 1899* (Qld)	Reprint current from 23 September 2024	s 590AH(2)
6	*Magistrates Court (Criminal and General Division) Act 2019* (Tas)	Reprint current from 21 September 2023	s 66
7	*Criminal Procedure Act 2009* (Vic)	Reprint current from 11 September 2024	s 110
8	*Criminal Procedure Act 2004* (WA)	Reprint current from 1 September 2024	s 42

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