HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 16 Aug 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	B72/2023
File Title:	MDP v. The King
Registry:	Brisbane
Document filed:	Intervener's supplementary submissions (DPP for Cth)
Filing party:	Interveners
Date filed:	16 Aug 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **MDP**
Appellant

and

THE KING
Respondent

SUPPLEMENTARY SUBMISSIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS (CTH)

PART I: CERTIFICATION

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

PARTS II AND III: INTERVENTION / LEAVE TO BE HEARD

2 The Commonwealth Director has been granted leave to intervene in the appeal and to file supplementary written submissions.[1]

PART IV: SUBMISSIONS

A INTRODUCTION

3 The appellant's proposed grounds 2 and 4 raise questions about the operation of the **second limb** of the "common form appeal provisions": whether there has been a "wrong decision on any question of law".

4 Consistent with the basis on which the Commonwealth Director sought leave to intervene in the appeal (**Cth [2]**), the Commonwealth Director makes submissions on the general principles concerning the second limb (**Section B**). Those submissions are then developed by reference to the *type* of "wrong decisions" said to have been made by the trial judge,[2] namely:

4.1 where the judge admits "inadmissible" evidence (proposed ground 4: **Section C**); and

4.2 where the judge gives a misdirection on a matter of law (proposed ground 2: **Section D**).

5 In short, the Commonwealth Director contends that:

5.1 the admission of "inadmissible" evidence may amount to a "wrong decision", but **only** if the evidence is admitted over the objection of a party;

5.2 a misdirection (or non-direction) on a matter of law may constitute a "wrong decision", but **only** if the direction is made following a request by a party.

6 The Commonwealth Director does not make submissions as to the circumstances of the particular "wrong decisions" said to have been made by the trial judge. Nonetheless, the

1 See *MDP v The King* [2024] HCATrans 41 at lines 34-38 (order 1), 50-53 (order 5).

2 There are, of course, other types: see, eg, *Fleming v The Queen* (1998) 197 CLR 25 at [27] (the Court) (failure by judge to comply with "legal imperatives" imposed by statutory provision, in context of judge making findings in judge-alone trial); *Stanoevski v The Queen* (2001) 202 CLR 115 at [55] (McHugh J) (failure by judge to consider mandatory considerations before granting leave under s 192 of the *Evidence Act*); *Evans v The Queen* (2007) 235 CLR 521 at [31], [37] (Gleeson CJ and Hayne JJ) (judge required defendant to wear particular clothing, over objection).

Commonwealth acknowledges that, if the Court accepts that the proposition at paragraph 5.1 above is correct, that would result in the Court dismissing proposed ground 4.

7 The appellant's proposed ground 3 concerns the **third limb** of the of the "common form appeal" provisions: whether there has been a "miscarriage of justice". The Commonwealth Director refers to her initial written submissions in relation to the general principles that govern that limb: see **Cth [18]-[20], [26]-[44]**. She notes that, since her those submissions were filed, the Court has unanimously expressed the "materiality" threshold in the jurisdictional error context in a way that is consistent with her approach to the third limb.[3] In addition, in these supplementary submissions, she seeks to explain the relationship between the second and third limbs in relation to the types of "wrong decisions" raised by the appellant: see **Sections C.2** and **D.2**.

B "WRONG DECISION ON ANY QUESTION OF LAW"

8 *Weiss* establishes that the common form appeal provisions are to be construed in accordance with the ordinary principles of statutory construction: **Cth [31]**.[4] Thus, in determining the operation of the second limb, the "starting point" is the text of the provision, "while at the same time regard is to be had to its context and purpose".[5]

9 It is therefore necessary to start with the words "wrong decision of any question of law". Two components are central to the scope of this limb: *first*, there must be a "decision" on "any question" and, *second*, the question must be one of "law".

B.1 Text: "decision" on "any question"

10 As to the *first* component, the word "decision" demonstrates that the second limb is not directed to any error of law that occurs during the course of the trial. It is directed only to circumstances where a "decision" has been made.

11 The word "decision" has a "variety of potential meanings".[6] It is therefore particularly sensitive to the context in which it appears. In some contexts, it may mean no more than "the mental process of making up one's mind".[7] However, in the context of judicial

3 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610 at [7], [14]-[16] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), [38] (Beech-Jones J). Earlier cases in this context are cited at **Cth [36.4] n 59; [38] n 61; [40] n 67; [41] n 69**.

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

5 *ENT19 v Minister for Home Affairs* (2023) 97 ALJR 509 at [86] (Gordon, Edelman, Steward and Gleeson JJ).

6 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 335 (Mason CJ).

7 *Director-General of Social Services v Chaney* (1980) 31 ALR 571 at 590 (Deane J).

proceedings, "it ordinarily refers to an accounted or published ruling or adjudication".[8] There is no reason why "decision" in the context of the second limb should not be given that ordinary meaning.

12 Stated simply, there will be a "decision" where the judge makes a *ruling*. In the ordinary course, a ruling will be the product of a contest between the parties on a particular issue.[9] In the absence of a contest, there will be no occasion for the judge to make a ruling.[10]

13 That understanding of "decision" is reinforced by the inclusion of word "question" in the second limb. In the context of an adversarial trial, the issues in the proceeding are defined by the parties: see paragraphs 17 to 18 below. That inclusion tends to suggest that a "question" is something that is raised in the proceeding by one or more of the parties, which the judge must then rule upon.

14 Further, in the judicial context, the word "decision":[11]

> … may signify a determination of any question of substance or procedure or, more narrowly, a determination effectively resolving an actual substantive issue. Even if it has that more limited meaning, the word can refer to a determination whether final or intermediate or, more narrowly again, a determination which effectively disposes of the matter in hand.

15 Because a "decision" may be on "*any* question", a decision may relate to matters of substance or procedure. Further, because ordinarily it is the jury (not the judge) who makes the "final" determination in a criminal trial, the word "decision" also necessarily extends to "intermediate", in the sense of interlocutory, decisions.

B.2 Text: question of "law"

16 As to the *second* component, a "question of *law*" is to be distinguished from a "question of fact". That reflects the distinction between questions of law (which are within the province of the judge) and questions of fact (which are within the province of the jury as

8 *Chaney* (1980) 31 ALR 571 at 590 (Deane J).

9 Cf *Gassy v The Queen* (2008) 236 CLR 293 at [55] (Kirby J).

10 Leaving aside those rare cases where a judge makes a ruling in circumstances where the judge should have but did not seek the input of the parties: see, eg, *Ayles v The Queen* (2008) 232 CLR 410 at [40] (Gummow and Kirby JJ), where the judge wrongly amended an indictment in a judge-alone trial, without any application for amendment being made.

11 *Bond* (1990) 170 CLR 321 at 335 (Mason CJ), see also 374 (Toohey and Gaudron JJ).

"the constitutional tribunal for deciding issues of fact"[12]). Thus, it is a judge (not a jury) who must be found to have made a "wrong decision" for the purpose of the second limb.[13]

B.3 Context: adversarial trial

17 The second limb must also be construed having regard to the adversarial nature of a criminal trial. As Gleeson CJ explained:[14]

> A criminal trial is conducted as adversarial litigation. A cardinal principle of such litigation is that, subject to carefully controlled qualifications, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and
10 what lines of argument to pursue.

18 As his Honour also recognised, "[t]he law does not pursue that principle at all costs" but rather recognises "the possibility that justice may demand exceptions".[15] Nonetheless, the nature of adversarial litigation (including the principles concerning the role of counsel in criminal matters) provides important context for the operation of the common form appeal provisions (including the second limb).[16]

B.4 Context: the other limbs

19 Finally, the second limb must also be construed in the context of the other two limbs. Most relevantly for present purposes, it is evident from the text of the common form appeal provision that the second limb is *narrower* in scope that the third limb.

20 20 The second limb is confined to a "wrong decision of any question of law". The making of such a decision by a judge is one way in which a "miscarriage of justice" may manifest. Thus, it has been said that a "criminal trial which involves a wrong decision of a question of law and which results in a conviction of the accused, in one sense, itself involves a miscarriage of justice without more".[17] That explains why "if there is a wrong decision of any question of law the appellant has the right to have his [or her] appeal allowed,

12 *Baden-Clay* (2016) 258 CLR 308 at [65] (the Court). See also **Cth [33]**.

13 See *Nudd v The Queen* (2006) 80 ALJR 614 at [6] (Gleeson CJ). Jury irregularities may constitute a "miscarriage of justice" within the third limb: see, eg, *HCF* (2023) 97 ALJR 978.

14 *Nudd v The Queen* (2006) 80 ALJR 614 at [9] (Gleeson CJ). See also *TKWJ v The Queen* (2002) 212 CLR 124 at [8] (Gleeson CJ), cited in *Craig v The Queen* (2018) 264 CLR 202 at [23] (the Court); *Graham v The Queen* (2016) 90 ALJR 820 at [58]-[59] (Gordon J).

15 *Nudd* (2006) 80 ALJR 614 at [9] (Gleeson CJ). See also *Patel v The Queen* (2012) 247 CLR 531 at [114] (French CJ, Hayne, Kiefel and Bell JJ).

16 See *Nudd* (2006) 80 ALJR 614 at [9] (Gleeson CJ). See also *Doggett v The Queen* (2001) 208 CLR 343 at [1]-[3] (Gleeson CJ).

17 *Festa v The Queen* (2001) 208 CLR 593 at [199] (Kirby J). See also *R v Tahiata* [2024] QCA 59 at [6]-[7], [60]-[61] (Flanagan JA).

unless the case can be brought within the proviso": **ASupp [21]**.[18] That line of reasoning suggests that there is no "materiality" threshold that applies to the second limb (although that issue has not been conclusively settled by this Court[19]).

21 In contrast, the third limb captures a "miscarriage of justice" on "any ground whatsoever". In that way, the third limb is, in effect, a "catch-all" provision for miscarriages of justice that do not fall within the first or second limb.[20] However, for there to be a miscarriage of justice within the third limb, any error or irregularity must be one that could realistically have affected the result of the trial: see **Cth [36]-[38]**. That is, the third limb contains a "materiality" threshold.

10 22 On the basis that the second limb does not incorporate such a threshold, the "materiality" threshold on the third limb would be undermined if the second limb were read too expansively. In particular, an overly expansive reading of the second limb would result in a larger number of cases potentially attracting the operation of the proviso: see **Cth [32]-[34]**.[21]

23 That analysis tends in favour of a narrower reading of the terms of the second limb, including the scope of what constitutes a "decision". Such a reading would lead to fewer cases in which the second limb might successfully be invoked. But, in those cases in which it is successfully invoked, establishing a "wrong decision on any question of law" would be sufficient for an appellant to succeed, subject to the proviso.

20 **B.5 The proviso and the second limb**

24 It is uncontroversial that the proviso applies to the second limb.[22] Even if an appellant establishes that there has been a "wrong decision", the appeal may be dismissed if there has been no "substantial miscarriage of justice": see **Cth [45]-[50]**. However, there will be some "wrong decisions" that are so "serious" that they will constitute a "fundamental

18 *Mraz v The Queen* (1955) 93 CLR 493 at 514, quoting *R v Cohen* (1909) 2 Cr App R 197 at 207. See also *Baini* (2012) 246 CLR 469 at [49] (Gageler J); *McIlwraith v The Queen* [2020] NSWCCA 274 at [19] (Meagher JA).

19 See *Adamson (a Pseudonym) v The King* [2024] SASCA 91 at [81]-[92] (Lovell, Doyle and Bleby JJA), leaving open the possibility that the second limb also incorporates a "materiality" threshold. It may be that the notion of a "wrong decision" is itself capable of excluding trivial errors.

20 See also *Matenga* [2009] 3 NZLR 145 at [11] (Blanchard J), describing it as a "residual provision".

21 See also *R v Tofilau (No 2)* (2006) 13 VR 28 at [15] (Callaway JA).

22 See *Kalbasi* (2018) 264 CLR 62 at [13] (Kiefel CJ, Bell, Keane and Gordon JJ). *Weiss* itself was a second limb case: see **Cth [29.1]**. The only limb to which the proviso does not apply is the first limb. That is because an unreasonable verdict will always constitute a "substantial miscarriage of justice": see *Haydar v The King* [2023] NSWCCA 213 at [6] (Leeming JA); *Matenga* [2009] 3 NZLR 145 at [9] (Blanchard J).

error" in the trial (see **Cth [21]-[25]**).[23] In such a case, the wrong decision will itself constitute a "substantial miscarriage of justice", leaving no scope for the application of the proviso.[24]

C ADMISSION OF "INADMISSIBLE" EVIDENCE

C.1 No "decision" where there is no objection

25 Where a party objects to the admission of evidence and the trial judge wrongly overrules that objection, the judge makes a "wrong decision" on a "question of law".[25] That conclusion is straightforward because, in that case: (a) the ruling on the question of "whether particular evidence should be received" constitutes a "decision" on a "question";[26] and (b) whether evidence should be admitted is a "question of law".

26 In contrast, where no objection is taken, and "inadmissible" evidence is admitted, there is no "decision". That proposition is established by *R v Soma*,[27] which has been applied by intermediate appellate courts.[28] The explanation for the proposition is simple: in the absence of any objection, the trial judge is "not required to *rule* on the course that was taken".[29] In other words, there is no occasion for the judge to make a "decision". The logic of that explanation applies irrespective of whether the inadmissible evidence first emerged in cross-examination of a defendant by the prosecution, or in some other way: cf **ASupp [23]-[28]**.[30]

27 The approach in *Soma* also accounts for the fact that, in relation to hearsay evidence (at least), its reception without objection "is an ordinary incident of a trial regularly

23 *Huxley v The Queen* (2023) 98 ALJR 62 at [44] (Gordon, Steward and Gleeson JJ). See also *Kalbasi* (2018) 264 CLR 62 at [16] (Kiefel CJ, Bell, Keane and Gordon JJ). In the specific context of whether a misdirection may constitute a "fundamental" error, see *Krakouer v The Queen* (1998) 194 CLR 202 at [20]-[24] (Gaudron, Gummow, Kirby and Hayne JJ).

24 *Huxley* (2023) 98 ALJR 62 at [44] (Gordon, Steward and Gleeson JJ), see also at [11] (Gageler CJ and Jagot JJ); *HCF* (2023) 97 ALJR 978 at [7] (Gageler CJ, Gleeson and Jagot JJ).

25 See, eg, *Honeysett v The Queen* (2014) 253 CLR 122 at [2], [4] (the Court). See also *HG v The Queen* (1999) 197 CLR 414 at [98] (McHugh J); *R v Huynh* (2006) 165 A Crim R 586 at [4] (Callaway JA).

26 See *Chaney* (1980) 31 ALR 571 at 590 (Deane J).

27 (2003) 212 CLR 299 at [11] (Gleeson CJ, Gummow, Kirby and Hayne JJ), [79] (McHugh J). See also *Johnson v The Queen* (2018) 266 CLR 106 at [52] (the Court); *HML v The Queen* (2008) 235 CLR 334 at [175], [189] (Hayne J); *Hofer* (2021) 274 CLR 351 at [119] (Gageler J); *R v Huynh* (2006) 165 A Crim R 586 at [5] (Callaway JA).

28 See, eg, *Gillespie v Western Australia* (2013) 45 WAR 207 at [82] (Martin CJ); *Kane (a pseudonym) v The King* [2024] SASCA 70 at [56] (Doyle JA).

29 (2003) 212 CLR 299 at [42] (Gleeson CJ, Gummow, Kirby and Hayne JJ) (emphasis added). See also *Bounds v The Queen* (2006) 80 ALJR 1380 at [12] (Gleeson CJ, Hayne, Callinan and Crennan JJ), where there was no "decision" in context of a complaint on appeal about joinder of offences on an indictment, where no objection to the indictment was taken at trial.

30 In *Johnson*, the evidence was adduced by the prosecution from a prosecution witness: see (2018) 266 CLR 106 at [4], [24], [52] (the Court).

conducted" and that it "would be difficult to conduct most trials without the reception of some technically inadmissible evidence".[31] On that hypothesis, if a "decision" was made every time hearsay evidence was given before a jury without objection, a significant number of convictions would be liable to be quashed under the second limb (subject only to the proviso).

C.2 Inadmissible evidence: the relationship between the second and third limbs

28 That does not mean a lack of objection to inadmissible evidence closes the door on a possible appeal against conviction. The admission of inadmissible evidence may constitute a miscarriage of justice within the third limb, regardless of whether any objection is taken or not.[32] The third limb does not depend on the making of a wrong *decision*. Whether there was a miscarriage will instead depend on whether the admission of the evidence constituted an error or irregularity in the trial and, if so, whether that error or irregularity *could* realistically have affected the verdict of guilty: see **Cth [36]-[38]**.

29 Importantly, analysis under the third limb in a case where there has been no objection requires consideration of whether the lack of objection had a "rational forensic justification".[33] That requirement flows from the adversarial nature of a criminal trial. It reflects the proposition that, subject to limited exceptions, it is for the parties (ordinarily through their counsel) to define the issues and the arguments that are advanced at trial.

30 That the conduct of the parties requires consideration under the third limb reinforces the correctness of *Soma* in relation to the second limb.

30.1 If the Court were to hold that a judge makes a "decision" on a "question of law" when he or she permits evidence to be adduced in the absence of an objection, the only issue for an appellate court would be whether the decision was "wrong".

30.2 The decision would be "wrong" if the evidence was inadmissible. That would be the end of the analysis. There is no stage at which the forensic decisions made at trial could be factored into that analysis.

31 *R v LRG* (2006) 16 VR 89 at [13] (Callaway JA).

32 *Soma* (2003) 212 CLR 299 at [49] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Hofer* (2021) 274 CLR 351 at [119] (Gageler J). See also the examples at **NSW [41(c)]**.

33 *Craig v The Queen* (2018) 264 CLR 202 at [23] (the Court), explaining the holding in *TKWJ* (2002) 212 CLR 124. See also *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at [49], [54] (Kiefel CJ, Keane and Steward JJ); *Orreal v The Queen* (2021) 274 CLR 630 at [14]-[18] (Kiefel CJ and Keane JJ).

30.3 If *Soma* is not applied, appellants could succeed on the second limb without having the appellate court scrutinise the forensic choices made at trial, subject to the proviso (at which stage the forensic choices made at trial are also irrelevant). The second limb should not be given that operation.

31 Finally, the third limb is also capable of dealing with the situation in which a trial judge ought to have acted on "his or her own motion to exclude inadmissible evidence".[34] Even in such a case, the appellate court will still be required to consider the forensic decisions made a trial. There is no reason to strain the meaning of the second limb to capture that "very exceptional" situation: cf **ASupp [29]-[30]**.[35]

D MISDIRECTION ON A MATTER OF LAW

D.1 A "decision" where there is a request for a direction

32 The second limb is concerned only with misdirections or non-directions on matters of law. That is because a misdirection or non-direction on a matter of *fact* cannot constitute a wrong decision on a "question of *law*".[36]

33 Where a party requests the trial judge give a direction (including a redirection) and, as a consequence, the judge misdirects or fails to direct the jury on a matter of law, that misdirection or non-direction can be understood as "the product" of a "wrong decision" on a "question of law".[37] In other words, where a request is made by a party, the judge will be required to rule on whether he or she should make that direction. That is a "decision" within the ordinary meaning of the word. The question is then whether the "decision" was wrong. That will require an assessment of the context in which the decision was made, "including the issues at the trial, the evidence, closing addresses by counsel and the whole of the trial judge's summing-up".[38]

34 The position is different where the judge is "not asked" to direct (or redirect) the jury, but the judge gives a misdirection or fails to give a direction. In such a case, the judge does

[34] See *Perish v The Queen* (2016) 92 NSWLR 161 at [272] (Bathurst CJ).

[35] See, eg, *R v LRG* (2006) 16 VR 89 at [13] (Callaway JA): "It is a very exceptional case where an objection to hearsay can be taken for the first time in the Court of Appeal". An example given by his Honour was: "where an unrepresented accused fails to object and the judge is unable to secure a fair trial or where seriously prejudicial material is admitted and defence counsel could not have had a forensic reason for failing to object".

[36] It may, however, constitute a "miscarriage of justice" within the third limb: see *Baini* (2014) 246 CLR 469 at [54] (Gageler J).

[37] *Huxley* (2023) 98 ALJR 62 at [42] (Gordon, Edelman and Steward JJ). See, eg, *Gillard v The Queen* (2003) 219 CLR 1 at [9], [26] (Gleeson CJ and Heydon JJ), [32] (Gummow J), [103]-[106], [129] (Hayne J) (failure to leave alternative charge to jury, where sought by pr).

[38] See *Huxley* (2023) 98 ALJR 62 at [43] (Gordon, Edelman and Steward JJ).

not make "wrong *decision*" on any question of law.[39] That was the view held by McHugh and Gummow JJ in *Dhanhoa v The Queen*.[40] The Commonwealth Director accepts that their Honours' view has not been endorsed by a majority of the Court: see **ASupp [13]**.

35 However, if the Court considers it appropriate to decide the issue in this proceeding (see **ASupp [17]**), the Court should now endorse their Honours' view.[41] That view accords with the general principles of construction set out at paragraphs 8 to 18 above — including the ordinary meaning of the word "decision" in the context of a judicial proceeding (a ruling) and the adversarial nature of a criminal trial. It also accords with the approach in *Soma* in the context of inadmissible evidence that is admitted without objection. Put simply, in the absence of a request for a direction, a trial judge is "not required to *rule* on the course that was taken".[42] The judge makes no "decision".

36 *Simic v The Queen* does not stand as authority against the Commonwealth Director's position on this point: cf **ASupp [11], [20]**. That case concerned a misdirection on a matter of fact and, therefore, the case did not fall within the second limb. The observations relied on by the Appellant are therefore not binding.[43]

D.2 Misdirections and non-directions: the relationship between the second and the third limbs

37 Where there has been a misdirection or non-direction, there may have been a "miscarriage of justice" within the meaning of the third limb — even if no party requested a direction (or redirection).[44] That will depend on whether the misdirection or non-direction constituted an error or irregularity in the trial and, if so, whether that error or irregularity *could* realistically have affected the verdict: see **Cth [36]-[38]**.[45]

39 *Dhanhoa v The Queen* (2003) 217 CLR 1 at [49].

40 See also *Papakosmas v The Queen* (1999) 196 CLR 297 at [72] (McHugh J), where his Honour was discussing r 4 of the *Criminal Appeal Rules* (NSW) and expressed the view that there must be an arguable case before leave would be granted under that rule (necessarily under the common form appeal provision). It is that "rigid approach" to r 4 with which Gaudron and Kirby JJ disagreed: see at [44]; cf **ASupp [12]**.

41 One possible reason for doing so is that the state of the law is unsettled at the intermediate appellate level: see, eg, *OKS v Western Australia* (2018) 52 WAR 482 at [244]-[255] (Beech JA); *R v Smallwood* [2021] QCA 132 at [24] (Fraser JA); *Foster v The King* [2023] NTCCA 5 at [54] (Grant CJ, Barr and Brownhill JJ).

42 (2003) 212 CLR 299 at [42] (Gleeson CJ, Gummow, Kirby and Hayne JJ) (emphasis added).

43 (1980) 144 CLR 319 at 327, see also at 328 (the Court).

44 *Dhanoa* (2003) 217 CLR 1 at [49] (emphasis in original), see also at [38] (McHugh and Gummow JJ). See further the examples at **NSW [41(b)]**.

45 See, eg, *BQ v The Queen* [2024] HCA 29 at [54] (the Court), where in the context of an alleged non-direction regarding the use of particular evidence, it was observed that "there was no realistic possibility or likelihood in this trial that the jury would have employed such illegitimate reasoning". See also *Dhanhoa* (2003) 217 CLR 1 at [38] (McHugh and Gummow JJ); *Graham* (2016) 90 ALJR 820 at [51] (Nettle J) [60], [69] (Gordon J).

38 In the case of a misdirection, it may be possible (or even appropriate depending on the content of the misdirection) for the Court to approach that issue by asking whether the misdirection "had the *capacity* to deflect the jury from their fundamental task of deciding whether or not the prosecution has proved the elements of the charged offence beyond reasonable doubt".[46]

39 Regardless of precisely how the question is framed, in determining whether there has been a miscarriage, it will be relevant for the Court to have regard to the forensic choices made at trial.[47] Again, that reflects the adversarial nature of the criminal trial. And, consistent with what is set out at paragraph 30 above regarding inadmissible evidence, the fact that forensic choices are relevant to the third limb (but not the second limb) reinforce the correctness of the Commonwealth Director's proposed approach to the second limb.

40 Finally, the third limb is capable of dealing with situations in which evidence before the jury raises a defence or partial defence, such that the trial judge is obliged to provide to the jury instructions on that defence "regardless of the tactical decisions of counsel": see also **ASupp [20]**.[48]

PART V: ESTIMATED TIME

41 The Commonwealth Director has been granted leave to make oral submissions not exceeding half an hour.[49] Within that time, she proposes to address the Court on the matters in both her initial written submissions and these supplementary submissions.

Dated: 15 August 2024

Raelene Sharp
Director of Public Prosecutions, Commonwealth
03 9605 4377
raelene.sharp@cdpp.gov.au

Thomas Wood
03 9225 6078
twood@vicbar.com.au

46 See *Awad v The Queen* (2022) 275 CLR 42 at [106], see also at [95] (Gordon and Edelman JJ), [34] (Kiefel CJ and Gleeson J). Compare *Hargraves v The Queen* (2011) 245 CLR 257 at [46] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), which states a *higher* materiality threshold by reference to whether the misdirection *did* deflect the jury from its fundamental task.

47 See *BQ* [2024] HCA 29 at [56] (the Court), citing *De Silva v The Queen* (2019) 268 CLR 57 at [35] (Kiefel CJ, Bell, Gageler and Gordon JJ) and *Hamilton* (2021) 274 CLR 531 at [57] (Kiefel CJ, Keane and Steward JJ).

48 See *James v The Queen* (2014) 253 CLR 475 at [31] (the Court).

49 *MDP v The King* [2024] HCATrans 41 at lines 34-38 (order 1).

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY
BETWEEN:

MDP
Appellant

and

THE KING
Respondent

ANNEXURE TO THE SUPPLEMENTARY SUBMISSIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS (CTH)

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