IN THE HIGH COURT OF AUSTRALIA **No P24 of 2018**

PERTH REGISTRY

BETWEEN **PAUL JOSEPH RODI**

Appellant

AND

THE STATE OF WESTERN AUSTRALIA

Respondent

RESPONDENT'S SUBMISSIONS

Part I – Publication

1. I certify that this submission is in a form suitable for publication on the internet.

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Part II – Concise statement of the issues presented by this appeal

2. The issues raised by this appeal are:

   2.1. Was the Court of Appeal in error to conclude that the fresh evidence, evaluated in the context of the whole of the trial record, including the manner in which the defence case was conducted at trial, did not give rise to a miscarriage of justice?

   2.2. Did the fact that the appellant was not provided with the 'Prior Coen Evidence' breach
20 a statutory disclosure obligation?

   2.3. Has the statutory disclosure scheme contained within *Criminal Procedure Act 2004* (WA) abrogated the prosecution's common law duty of disclosure?

Prepared by the Director of Public Prosecutions for Western Australia whose address for service is Level 1, 26 St Georges Terrace, Perth, WA 6000.
Reference No: 12/2241 Telephone No: 9425 3999 Facsimile No: 9425 3608
Filed on 12 July 2018

Part III – Notice under s 78B of the *Judiciary Act 1903* (Cth)

3. It is certified that this appeal does not involve a matter arising under the Constitution or involving its interpretation. Accordingly, notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV – Narrative statement of material facts or chronology

4. The respondent accepts that the appellant's narrative of facts as outlined in Part V of the appellant's submissions is accurate.

Part V – Succinct statement of argument

Ground 1- the fresh evidence does not establish a miscarriage of justice

5. The respondent does not, for the purposes of this appeal, contest the appellant's submission that the 'Prior Coen Evidence' and the evidence of Detective Coen before the Court of Appeal constituted fresh evidence.[1]

6. Where evidence is fresh, in order to allow the appeal the court must be satisfied that in light of all of the admissible evidence (including the evidence at trial) there is a significant possibility that a jury, acting reasonably, would have acquitted the accused.[2]

7. The summary of Detective Coen's trial evidence at paragraph [10] of the appellant's submissions is accurate. However, the submissions advanced by the appellant at paragraphs [17] to [26] misconstrue the use which could have been made of the 'Prior Coen Evidence', had it been available to the appellant at his trial.

8. As the appellant acknowledges, Detective Coen's evidence at trial was that naturally grown female cannabis plants 'typically' yield between 100 grams and 400 grams of cannabis head

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[1] Appellant's submissions [15(a)].
[2] ***Beamish v The Queen*** [2005] WASCA 62 [14]; ***Mickelberg v The Queen*** [2004] WASCA 145; (2004) 29 WAR 13 [416]; ***Smith v The State of Western Australia*** [2014] WASCA 90 [40].

material. As was clarified in the Court below, this was not Detective Coen's opinion as to the outer limits of the *absolute* range, but his opinion as to the *typical* range. [3]

9. However, the fact in issue to which Detective Coen's evidence at trial was ultimately directed was whether the two plants in the appellant's possession actually yielded the 925 grams of head material found by the police. On that issue, Detective Coen's evidence at trial was that the two plants appeared 'small to medium' in size and that he would expect them to yield on the lower end of the 100 to 400 gram scale.[4] Detective Coen's opinion in this regard was not challenged, either at trial or in evidence before the Court of Appeal.

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10. The 'Prior Coen Evidence' at its highest consists of a series of prior inconsistent statements as to typical yield. For that reason, it did not have, and could not have had, any bearing on Detective Coen's evidence as to the expected yield from the plants in question.

11. The appellant asserts that under cross-examination in the Court of Appeal, Detective Coen went further and 'resiled from the range that he had given at trial.'[5] That Detective Coen had observed yields up to 600 grams as being achievable is not inconsistent with his evidence as to the *typical* upper limit of 400 grams.[6] The appellant's conflation of these two different aspects of the evidence (namely a *typical* yield range and observed maximum) is
20 the foundation which underpins various erroneous submissions to the effect that Detective Coen's evidence in the appeal contradicted his evidence at trial.[7]

12. It is unclear on what basis there could have been, as the appellant asserts, a 'real possibility of a material challenge'[8] to Detective Coen's expertise had defence counsel known of the Prior Coen Evidence. That Detective Coen was prepared to modify a previously held opinion on the basis of ongoing experimentation, experience and learning reinforces rather than detracts from his expertise.

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[3] ***Rodi v The State of Western Australia*** [2017] WASCA 91; (2017) 51 WAR 96 [83(h)]. (CAB 50).
[4] ***Rodi*** [48] (CAB 42).
[5] Appellant's submissions [22].
[6] ***Rodi*** [83(h)] (CAB 50).
[7] Appellant's submissions [14], [22], [25], [33(c)].
[8] Appellant's submissions [20(b)].

13. Other aspects of the appellant's submissions[9] proceed on the flawed premise that the Prior Coen Evidence was capable of being received into evidence on a basis other than as a prior inconsistent statement.[10]

14. It is in this context that the first eleven reasons and the fourteenth reason of the majority[11] fall to be assessed. This was not a case where the appellant needed to do no more than put the prosecution to proof. The only relevant facts which needed to be proved against him were his possession of the cannabis and that the quantity possessed was more than 100 grams. Those facts were admitted.[12]

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15. Prior inconsistent statements of the State's expert as to his past opinions about *typical* yields could not have *materially* affected the jury's consideration of Detective Coen's evidence as to the yield expected from the appellant's two relatively small plants.

16. Fresh evidence is not to be assessed in a vacuum; relevant to the cogency of the Prior Coen Evidence upon which the appellant relies is Detective Coen's explanation for the refinement of his opinion over time and the court's acceptance of that explanation (the twelfth, thirteenth, fourteenth and sixteenth reasons).

20 17. Central to a consideration as to whether fresh evidence reveals a miscarriage of justice is the need to evaluate that evidence in the context of the evidence adduced at trial, which must be taken as having been accepted by the jury,[13] and the manner in which the appellant conducted his defence at trial.[14]

18. The weight that could have been attributed to the Prior Coen Evidence in this case was informed by the appellate court's assessment of the cogency of the explanation for the inconsistency. The Court of Appeal was entitled to receive evidence which weakened the otherwise probative force of a prior inconsistent statement on a relevant issue.[15]

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[9] Appellant's submissions [18], [20(d)].
[10] ***Rodi*** [143] (CAB 68), [226] (CAB 88).
[11] ***Rodi*** [118]-[128] (CAB 63-65).
[12] ***Rodi*** [19] (CAB 36), [25]-[26] (CAB 37).
[13] ***Rodi*** [102] (CAB 57), [116] (CAB 63); ***Ratten v The Queen*** (1974) 131 CLR 510 at 518.
[14] ***Rodi*** [112]-[115] (CAB 62-63), ***TKWJ v The Queen*** [2002] HCA 46; (2002) 212 CLR 124 [8], [16]-[17].
[15] ***Ratten*** at 518.

19. The majority found that Detective Coen was an honest witness[16] and, in particular, accepted his explanation as to why his opinion as to yield had changed over time.[17] Beyond an acceptance of this explanation as being honest, the majority found that Detective Coen's evidence as to why he had changed his opinion on typical yields of cannabis head material from female plants was 'credible and cogent.'[18] Upon these findings, the impact that the prior inconsistent evidence would have had, if any, on the jury's evaluation of Detective Coen's evidence as a whole was limited.

20. For these reasons, the submissions advanced at paragraph [33] of the appellant's submissions must be rejected. The appellant's submissions require the Prior Coen Evidence to be assessed in a vacuum, whereas the correct approach (adopted by the majority below) was to determine the effect that the Prior Coen Evidence would have had at trial by having regard to the honesty, plausibility and cogency of the explanation for the prior inconsistent statements. That those issues were decided adversely to the appellant does not mean that the majority 'failed to assess or appreciate the impact at trial of the Prior Coen Evidence.'[19]

21. The fifteenth reason assumes, favourably to the appellant, a breach of statutory disclosure obligations. By way of its notice of contention and the submissions developed below concerning ground 2, the respondent challenges the correctness of that assumption.

Ground 2 – the alleged breach of statutory disclosure obligations

22. Sections 35, 42, 45 and 95 of the *Criminal Procedure Act 2004* (*"CPA"*) impose different disclosure obligations on different persons at different stages of proceedings to be heard on indictment. The statutory obligation does not fall upon organisations or entities such as the police, 'prosecution' or the 'DPP' but, rather, upon a number of specifically identified individuals. The person who commenced the prosecution (usually a police officer) has a broad, initial duty of disclosure which, once discharged, is replaced by a continuing duty which is narrower in scope.

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[16] ***Rodi*** [108] (CAB 59).
[17] ***Rodi*** [137] (CAB 67).
[18] ***Rodi*** [138] (CAB 67).
[19] Appellant's submissions [33(d)].

23. Similarly, after committal to a superior court, the duty imposed upon the relevant authorised officer is initially broad but, once discharged, is replaced by a narrow continuing obligation. The trial prosecutor, being a person who represents the relevant authorised officer in court, is only subject to this narrow obligation.

24. The relevance of what the appellant calls the 'Prior Coen Evidence' on the subject of how much "head"[20] material a naturally grown female cannabis plant might be expected to yield ("yield issue") was limited. It could only have ever have been admissible as a prior inconsistent statement.[21] Its relevance was thus dependent upon Detective Coen expressing an opinion on the yield issue in the context of this case, something which was not contemplated, and did not occur, until after the trial was underway.

The statutory disclosure scheme in the summary court

25. Section 35 requires initial disclosure by the prosecutor of a limited class of material which must be served upon an accused as soon as practicable after service of the prosecution notice. During the proceedings in the summary court, 'prosecutor' is defined to mean the person who commenced the prosecution or a person who in court represents that person.[22] This person will ordinarily, as in this case, be a police officer or a police prosecutor respectively.

26. For an offence which is to be dealt with on indictment, it is only after an accused has entered a plea other than one of guilty (or does not plead) that the substantive disclosure obligations under s 42 arise.[23]

27. The obligations under s 42 fall upon the 'prosecutor'. The first obligation on the 'prosecutor' is to serve upon the accused 'confessional material' and 'evidentiary material.' 'Evidentiary material' includes all documents or objects which 'may assist the accused's defence'[24] and include all witness statements or recorded statements 'irrespective of whether or not it assists the prosecutor's case or the accused's case.'[25] The obligation to

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[20] More accurately, the floral cluster part of the cannabis plant.
[21] ***Rodi*** [143] (CAB 68).
[22] s 3 *CPA*.
[23] s 41(4) *CPA*.
[24] s 42(1), paragraph (e) of the definition of 'evidentiary material', of the *CPA*.
[25] s 42(1), paragraph (a) of the definition of 'evidentiary material', of the *CPA*.

serve material under s 42(5) extends to material which is 'in the possession of the organisation or person who investigated the offence', not just material in the possession of the 'prosecutor'.[26] Implicit in this obligation is a requirement to make proper inquiries as to the material in the possession of the organisation or person who investigated the offence.

28. Certification, pursuant to s 45(5), of compliance with the obligations imposed by s 42 by a 'person who was involved in, and has knowledge of, the investigation' requires a minimum standard of 'reasonable diligence'.

10 29. The obligations under s 42(5) are to be complied with 'as soon as practicable' after a charge has been adjourned to a disclosure/committal hearing in accordance with s 41(4). In this matter, on 13 July 2012 the charge was adjourned to a disclosure/committal hearing on 5 October 2012.

30. Once the prosecutor has discharged the obligation under s 42(5), they are only subject to a narrowly confined continuing obligation under s 42(6). The continuing duty of disclosure upon the 'prosecutor' remains in force until the charge is 'finally dealt with'[27], that is, ultimately determined in the relevant superior court. However, this continuing obligation only falls to be discharged if the prosecutor 'receives or obtains' additional material.

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The statutory disclosure scheme after committal to a superior court

31. Pursuant to s 45(3), the 'prosecutor' must give the 'relevant authorised officer' 'any evidentiary material relevant to the charge' within a prescribed period after committal for trial.[28] On 24 August 2012, the 'prosecutor', Detective Davey, certified compliance with s 45(3) (even though, in fact, committal for trial did not take place until 24 April 2013).[29] That certification predated the existence of Detective Coen's written statement in this matter by five months,[30] and also predated Detective Coen's written statements and oral evidence in the Challis, Bernhardt and McCully matters.

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[26] s 42(1) *CPA*.
[27] s 45(6) *CPA*.
[28] See also regulation 11(2) *Criminal Procedure Regulations*.
[29] Respondent's book of further materials, p5. Detective Davey was also the 'prosecutor' who commenced the prosecution in the summary court: Respondent's book of further materials pp3-4.
[30] Dated 29 January 2013.

32. The 'prosecutor' in the superior court is the authorised officer who commenced the prosecution in the superior court, or a person who in court represents that person. 'Authorised officer' is defined by s 80(2) as including the DPP or a member of the DPP's staff appointed in writing as an authorised officer. The 'relevant authorised officer' is the person who is responsible for the prosecution of the charge in a superior court.[31]

33. Pursuant to s 95(6), the 'relevant authorised officer' is obliged to ensure that 'evidentiary material that is relevant to the charge' is 'lodged' with the superior court. The obligation to serve the accused is limited to material with which the accused 'has not already been served.' The only material listed in s 95(6)(a) to (e) which is not contained in the earlier disclosure requirements under ss 35 and 42 is the certificate of compliance in accordance with s 45.

34. Pursuant to s 95(9), the 'prosecutor' has an ongoing obligation of disclosure of any 'additional evidentiary material that is relevant to the charge' that the 'prosecutor receives or obtains'. [32]

35. The meaning of the phrase 'evidentiary material that is relevant to the charge' is critical. While Detective Coen made his statement on 29 January 2013, it was only at the time of the trial that he was asked to give an opinion as to yield. It was only when Detective Coen gave that opinion (which was inconsistent with the Prior Coen Evidence) that the Prior Coen Evidence became relevant. However, the appellant submits that the Prior Coen Evidence was disclosable before then, pursuant to s 95(6)(c).[33]

Meaning of 'Evidentiary Material' in s 95

36. Section 95(1) provides that the terms '***confessional material***' and '***evidentiary material***' have the same meaning given by s 42.[34] However, in ***PAH v The State of Western Australia*** Buss JA concluded that the words 'relevant to a charge' within the compilation '***evidentiary material*** relevant to a charge' are part of the phrase defined in s 42(1).[35]

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[31] s 80(1) *CPA*.
[32] ***Vo v The State of Western Australia*** [2012] WASCA 6 [36].
[33] Appellant's submissions [60]-[61]
[34] s 95(1) *CPA*.
[35] ***PAH v The State of Western Australia*** [2015] WASCA 159 [129].

37. Buss JA also held in ***PAH*** that '[t]he words 'relevant to the charge' in the last three lines of par (a) relate to the 'person who may be able to give evidence', and not to the items referred to in par (a)(i)-(iv).'

38. Buss JA held that 'it is plain that the meaning ascribed to the phrase '***evidentiary material*** relevant to a charge' in s 42(1), applies to the phrase 'evidentiary material that is relevant to the charge' in s 95(9)(b).'[36] The same must logically apply in relation to the same phrase in s 95(6).

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39. The scope of 'evidentiary material' under s 42 is that such material must be in the possession of the 'organisation or person who investigated the offence.'[37]

40. However, in ***PAH***, Buss JA held that that the words 'organisation or person who investigated the offence' have a 'broad connotation' and, thus, for the purposes of s 95, include the Director of Public Prosecutions and the Director's staff.[38] His Honour did not elaborate as to the reasons why the Director and the Director's staff would fall within this 'broad connotation.' It is submitted that it is a proposition which is erroneous. The investigation of offences is not a function of the Director.[39]

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41. The statutory definition of 'evidentiary material' could, by simple language, have been readily expanded to encompass material in the possession of the Director or any other government entity. Nonetheless, the plain text of the statute retains the earlier definition in s 42 following the committal to a superior court, but imposes the duty upon a 'relevant authorised officer' who is generally a law officer of the State or a member of the Director's staff appointed in writing.[40]

42. Upon a literal interpretation of paragraph [132] of ***PAH***, the meaning of 'evidentiary material relevant to a charge', combined with Buss JA's finding that the phrase 'the
30 organisation or person who investigated the offence' encompasses the DPP at the s 95 stage,

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[36] ***PAH*** [131].
[37] s 41(1) *CPA*; ***Hughes v The State of Western Australia*** [2015] WASCA 164 [51].
[38] ***PAH*** [138].
[39] Part 3, *Director of Public Prosecutions Act 1991*.
[40] s 80(2) *CPA*.

is such that the relevant authorised officer would have been required to locate, obtain, lodge and serve the Challis statement and *every* recorded statement of Detective Coen, whether written or oral, which Detective Coen had *ever* made (irrespective of subject matter or relevance) which was in the possession of the WA Police or the DPP.

43. Upon application of the ***PAH*** construction, a relevant authorised officer, in the context of this case, would be responsible for:

43.1. appreciating that Detective Coen was a person 'who may be able to give evidence that is relevant to the charge'[41] (an uncontroversial proposition);

43.2. obtaining every witness statement,[42] recording[43] or recorded statement[44] of Detective Coen (essentially, any document which he authored or which recorded something he had said) in the possession of the Western Australian Police Force, regardless of whether their contents were in any way rationally connected to the facts in issue at the trial (which would be voluminous given his 18 year career as a police officer);[45]

43.3. carry out a search of the DPP's records in relation to every case in which Detective Coen had provided any written statement, or given oral testimony recorded by transcript, regardless of whether their contents were in any way rationally connected to the facts in issue at the trial; and

43.4. disclosing all such material to the accused and lodging it with the court.

44. It is manifest that compliance with disclosure obligations is an inseparable part of an accused's right to a fair trial.[46] The right to a fair trial is not advanced by the disclosure of voluminous irrelevant material simply because the author of such material is a person who can give relevant evidence at trial.

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[41] See paragraph (a)(i) in the definition of 'evidentiary material' in s 42.
[42] A statement made in accordance with Schedule 3 clause 4 of the *CPA* as referred to in paragraph (a)(i) in the definition of 'evidentiary material' in s 42.
[43] See paragraph (a)(ii) in the definition of 'evidentiary material' in s 42
[44] See paragraph (a)(iv) in the definition of 'evidentiary material' in s 42.
[45] ***Rodi*** [43] (CAB 39).
[46] ***R v Brown (Winston)*** [1994] 1 WLR 1599 at 1606.

45. The evident purpose of the statutory disclosure regime under the *CPA* is to ensure that an accused is provided with all *relevant* material by the investigator and the prosecutor. That all relevant material must be provided 'irrespective of whether or not it assists the prosecutor's case or the accused's defence'[47] is clearly directed towards that objective. No legislative objective is achieved by serving an accused with irrelevant material simply because that irrelevant material consists of statements made by a person who is 'able to give evidence relevant to the charge.'

10 46. Subparagraphs (i) to (iii) of paragraph (a) of the definition of '***evidentiary material***' refer to statements or recordings generated under the rubric of a statutory provision which are ordinarily obtained by an investigator during the course of the investigation of a charge. It would be a rare occurrence whereby material of that nature obtained during that investigative process would completely lack any relevance to the charge. It is implicit in the definition in paragraph (a) that the contents of such material would be relevant to the charge, and could not extend to *any* pre-trial statement in *any* proceeding irrespective of relevance.

47. Accordingly, the respondent submits that the construction of the term '***evidentiary material***' in ***PAH*** should be rejected.

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48. The appellant submits that there 'can be no question' that the 'Prior Coen Evidence' was in the possession of the 'DPP.'[48] It is unclear whether the appellant is referring to the Director personally or the Director's staff in general in making this assertion. That it was in possession of the organisation at the time of the trial is not contested. Only some was in the possession of the organisation at the time the indictment was signed. However, in asserting this possession leads to a disclosure obligation, the appellant overlooks issues concerning:

48.1. the identification of the particular individual upon whom a disclosure obligation is placed ('authorised officer' as opposed to 'relevant authorised officer');

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48.2. the time when the individual was required to fulfil their obligation;

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[47] See the final three sentences in paragraph (a) of the definition of evidentiary material under s 42(1) *CPA*.
[48] Appellant's submissions [60].

48.3. the varying scope of the obligations which arise at different stages of proceedings;

48.4. whether the Prior Coen Evidence existed at the time the obligation came to be fulfilled;

48.5. whether the Prior Coen Evidence was relevant to the charge at the time the obligation came to be fulfilled; and

48.6. who in fact possessed the Prior Coen Evidence.

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49. Section 95(6) requires the relevant authorised officer to make an independent assessment of whether the material handed over by the prosecutor constitutes all the material required to be disclosed under s 42.[49] However, such an independent assessment would not have revealed the existence of the Prior Coen Evidence, because it was not then contemplated that it would be relevant to a fact in issue at the trial.

50. Practical considerations support the proposition that there are limitations upon the tasks to be performed by the relevant authorised officer in order to comply with s 95(6). Authorised officers are not police officers or employees of the organisation which conducted the
20 investigation. The relevant authorised officer is in a limited position to assess whether the investigating organisation possesses evidentiary material which has not been provided to the relevant authorised officer in compliance with s 45.

51. Given the time at which the Prior Coen Evidence came into existence, the statutory obligation of disclosure can only have arisen pursuant to s 95(6) or the continuing obligation pursuant to s 95(9).

Why the relevant authorised officer did not breach her statutory duty of disclosure

30 52. Implicit in paragraphs [50] and [60] of the appellant's submissions is an assertion that the relevant authorised officer failed to perform her duty under s 95(6) on the basis that the Prior Coen Evidence must have been in possession of the 'DPP' or that the relevant

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[49] ***Hughes v The State of Western Australia*** [47]-[48].

authorised officer 'ought to have been aware' of the yield issue being, or potentially being, a live issue at trial. That assertion is incorrect for the following reasons.

53. **First**, at the time that it fell upon the relevant authorised officer to comply with s 95(6), Detective Coen had not yet opined on the yield issue. He had provided a witness statement dated 29 January 2013. That statement contained relevant material, as it consisted of opinion evidence on various subjects connected with the sale and supply of cannabis in the context of this case, even though it did not address the yield issue.

54. The relevance of the Prior Coen Evidence is limited to that of a series of prior inconsistent statements as to yield. Its relevance thus presupposes that Detective Coen had expressed an opinion on the yield. He did not express such an opinion until the second day of trial.[50] Until an opinion on the yield issue was expressed, the Prior Coen Evidence could not be categorised as a collection of prior inconsistent statements and was accordingly irrelevant to the proper discharge of the duty under s 95(6). The appellant's assertions to the effect that the relevant authorised officer 'ought to have been aware'[51] that the yield issue might be a live issue at trial is not to the point.

55. **Secondly**, the appellant's submissions erroneously assume that the Prior Coen Evidence was 'evidentiary material that is relevant to the charge' because the relevant authorised officer 'ought to have been aware' that whether the cannabis was cultivated from the two plants might have been an issue at trial.[52] The appellant does not elaborate as to why the relevant authorised officer 'ought' to have possessed such awareness. This bald assertion is inconsistent with the unchallenged factual finding of the majority in the court below.

56. Buss P in the court below found that the trial prosecutor did not know the nature of the appellant's defence prior to the commencement of the trial.[53] In particular, the trial prosecutor was unaware that the defence case would involve an assertion that the cannabis head material was wholly derived from two of the cannabis plants located outside the appellant's home.[54] It was not until some stage during the first day of the trial that the trial

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[50] ***Rodi*** [109(f)] (CAB 60).
[51] Appellant's submissions [50].
[52] Appellant's submissions [50].
[53] ***Rodi*** [130(a)] (CAB 65).
[54] ***Rodi*** [130(a)] (CAB 65).

prosecutor appreciated that this was the nature of the defence case and that the yield issue would be a live issue at trial.[55]

57. Significantly, Buss P concluded that this subjectively held understanding was reasonable.[56] If it was objectively open for the trial prosecutor to not reasonably appreciate that the yield issue was a live issue until the first day of the trial, then the same must be said for the relevant authorised officer at the time of discharging her s 95(6) obligations.

58. The only basis upon which the appellant could establish a breach of the duty under s 95(6) is if the construction of 'evidentiary material relevant to a charge' contained at paragraph [132] of ***PAH*** is correct. For the reasons set out above, the respondent submits that such a construction should be rejected.

59. In so far as the person who commenced the prosecution is concerned, they had a continuing obligation of disclosure pursuant to s 95(9). However, there is no evidence that that person 'received or obtained' the Prior Coen Evidence, such as to give rise to the obligation to disclose it in this case.

Why the trial prosecutor did not breach her statutory disclosure obligations

60. As the person representing the relevant authorised officer in court,[57] the trial prosecutor was obliged to comply with the continuing disclosure obligation under s 95(9) until such time as the charge was 'finally dealt with' in the superior court.

61. There are 'obvious practical reasons' why the continuing obligation under s 95(9) is more confined in its scope than the initial comprehensive obligation to s 95(6).[58] As stated by Hall J in ***Vo***:[59]

> 'It cannot be the case that the prosecution is required to proactively undertake investigations to discover material relevant to issues that are first raised in the course of

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[55] ***Rodi*** [130(c)] (CAB 66).
[56] ***Rodi*** [130(c)] (CAB 66).
[57] See definition of 'prosecutor' in s 3 of the *CPA*.
[58] ***Vo*** [38].
[59] ***Vo*** [38].

the trial. To impose such an obligation would be impractical and provide opportunity for appellants to utilise claims of non-disclosure in respect of material which the prosecution could not reasonably have anticipated as being relevant. The effect would be to undermine the finality of trial proceedings (subject to proper appeal grounds being established). To read disclosure so broadly would permit appellants to effectively use appeal proceedings as a second trial.'

62. An uncontested finding from the court below is that the trial prosecutor did not realise that evidence relevant to the yield issue would be relevant to the matters in issue at trial until some point during the first day of the trial and that it was, objectively, reasonable for her to have had that understanding.[60] Also, the trial prosecutor did not know that the evidence which Detective Coen gave during the second day of the trial was inconsistent with evidence he had previously given in other trials involving the cultivation of cannabis.[61]

63. It is accepted that the Prior Coen Evidence became relevant to the issues at trial once the trial prosecutor had resolved to adduce evidence from Detective Coen on the yield issue. However, the fact that the Prior Coen Evidence had changed its character and had now become relevant does not necessarily mean that it fell to be disclosed under the continuing obligation of disclosure under s 95(9).

64. The trial prosecutor did not receive or obtain the Prior Coen Evidence at any time prior to the charge being finally dealt with. The trial prosecutor did not even know that Detective Coen had given evidence in the past inconsistent with the evidence he gave at trial on the yield issue. Given the late stage at which the issue arose, the trial prosecutor would only have been obliged to disclose the Prior Coen Evidence at this late stage if she received or obtained such material. As she did not personally possess such material, the s 95(9) obligation did not fall to be discharged and accordingly was not breached.

[60] ***Rodi*** [130(a)-(c)] (CAB 65-66).
[61] ***Rodi*** [130(d)] (CAB 66).

Ground 2 – the alleged breach of common law disclosure obligations

65. The appellant asserts that the common law duty of disclosure is not derogated by 'any statutory disclosure obligations.'[62] The authorities cited by the appellant do not support that proposition. The observation of Kirby J in ***Mallard v The Queen***[63] concerned whether the Director's guidelines published under the imprimatur of statute derogated from the common law; the *CPA* disclosure regime was not in force at the time of Mallard's trial. ***R v Lipton***[64] addresses a similar point concerning the Disclosure Guidelines in NSW and does not address the position with respect to the comprehensive statutory regime which now exists in Western Australia. The *obiter* observation in ***Tema v The State of Western Australia***[65] to the effect that s 95 does not apply in cases involving *ex officio* indictments is wrong as it overlooked the clear operation of s 95(8) and concerned a prosecution which predated the *CPA* in any event.

66. The Court of Appeal of Western Australia has not previously considered it necessary to determine this issue of abrogation.[66]

67. The *CPA* was introduced as a response to recommendation 16 of the Law Reform Commission of Western Australia's *Review of the Criminal and Civil Justice System in Western Australia*[67] which recommended that '[a] comprehensive code of criminal practice procedure should be developed.' The second reading speech introducing the *CPA* expressly referred to this recommendation.[68] The respondent submits that the *CPA* is a code in the sense that it was intended to displace the common law and a myriad of pre-existing statutes which governed criminal procedure in Western Australia prior to its introduction.

68. The *CPA* introduced a new regime in relation to disclosure. It superseded the common law requirements of disclosure. The statutory regime commences from a point 'as soon as

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[62] Appellant's submissions [63].
[63] ***Mallard v The Queen*** [2005] HCA 68; (2005) 224 CLR 125.
[64] ***R v Lipton*** [2011] NSWCCA 247; (2011) 82 NSWLR 123.
[65] ***Tema v The State of Western Australia*** [2011] WASCA 41.
[66] ***Bozzer v The State of Western Australia*** [2017] WASCA 226 [84]; ***PAH*** [142], ***Carney v The State of Western Australia*** [2010] WASCA 90 [4]. The point appears not to have been the subject of argument in ***D v The State of Western Australia*** [2007] WASCA 272.
[67] Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Report no 92 (1999) 59.
[68] Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 August 2004, 5722b-5726a (J A McGinty, Attorney General).

practicable' after the prosecution notice is served[69] until the moment when the charge is 'finally dealt with.'[70] The scope of material which falls under the statutory scheme is wider in scope than that of the common law; the notion of a 'sensible approach' or 'sensible appraisal' is replaced by purely objective considerations.[71] The fact that 'evidentiary material' also includes 'every other document or object that may assist the accused's defence'[72] covers a broader array of material than the common law obligation. Importantly, a person who knowingly or without reasonable diligence signs a certificate of compliance under s 45(5) which is false in a material particular commits an offence.[73]

69. The statutory scheme requires compliance with disclosure by identifiable individuals within prescribed timeframes. The legislative scheme does not reduce the continuing obligations which were previously imposed upon both the police and prosecution at common law. The scheme specifies a range of consequences for non-disclosure.[74] The non-disclosure of material otherwise required to be disclosed requires a judicial order which may only be made if a court is satisfied that no miscarriage of justice will result.[75]

70. The principle of statutory construction that common law rights should be taken to have been cut down by statute only where there is a clear legislative expression of an unmistakable and unambiguous intention to do so does not apply to the present statutory scheme given it expands upon, rather than contracts, an accused's entitlement to disclosure.[76]

71. The appellant's submissions do not address the fact that the Prior Coen Evidence was not relevant, and hence did not fall within any common law disclosure obligations, until such point in time that the prosecutor appreciated the yield issue would be a live issue at trial. At its highest, the appellant submits that there 'can be little doubt' that once the prosecution led evidence on the yield issue from Detective Coen it was required to disclose the Prior Coen Evidence regardless of whether the prosecutor knew of its existence.[77] It is not self-evident, even at common law, why such omniscience should be attributable to the

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[69] s 35(4) *CPA*.
[70] s 42(6) and 95(9) *CPA*.
[71] ***PAH*** [133].
[72] Paragraph (d) of the definition of 'evidentiary material' in s 42(1) *CPA*.
[73] s 45(6) *CPA*.
[74] s 97 *CPA*.
[75] s 138 *CPA*.
[76] ***Daly v Thiering*** [2013] HCA 45; (2013) 249 CLR 381 [32]-[33].
[77] Appellant's submissions [73]-[74].

prosecution such that, in the middle of the trial, it was required to make enquiries and locate material on an issue which had not been anticipated, which was not reasonable to have anticipated, and of which no notice had been given.[78]

72. In any event, the operation of s 95(9) on the 'prosecutor'[79] and s 42(6) on the police officer who commenced the prosecution must necessarily abrogate from the common law. While notions of knowledge or possession are irrelevant to a continuing obligation at common law, the statute requires the prosecutor to have received or obtained that material to give rise to the statutory obligation. The statutory obligation would be superfluous unless the legislature intended to alter the common law in this respect.

Outcome if ground 2 is made out

73. As most recently stated by this court in ***Kalbasi v The Queen***[80] '...any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice within the third limb of the common form provision (here s 30(3)(c)).'

74. Contrary to paragraph [80] of the appellant's submissions the respondent does rely upon the application of the proviso, as it did in the Court below, in the event that this ground of appeal is made out regardless of whether the duty breached is statutory, common law (assuming it has not been abrogated), or both.

Costs of this appeal

75. Unusually, the appellant seeks the costs of this appeal in the event that he is successful[81] but develops no argument as to why this should be so. This Court has the power to make such an order in a criminal appeal, although it would be unusual to exercise such a power[82] and would be contrary to the longstanding practice not to award costs simply because a convicted person has succeeded on appeal.[83] This is not a case where the Crown or State

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[78] As to the relevance on practical limitations on the common law duty concerning matters raised during the trial without notice see ***R v Winston (Brown)*** [1998] AC 367 at 380C-E.
[79] Both the relevant authorised officer and trial counsel.
[80] ***Kalbasi v The State of Western Australia*** [2018] HCA 7 [12].
[81] Appellant's submissions [81].
[82] ***Momcilovic v The Queen*** [2011] HCA 34; (2011) 245 CLR 1 [279].
[83] ***R v Whitworth*** (1988)164 CLR 500.

has been unsuccessful in bringing an application for special leave[84] or where the appeal involved major constitutional issues in which the appellant has no immediate interest.[85] The order for costs should be refused regardless of the outcome of the appeal.

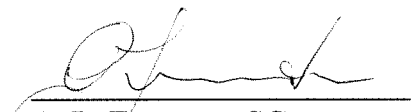
Part VI – Respondent's argument on the notice of contention

76. The issues raised by the notice of contention have been addressed in the above submissions concerning ground 2.

10 **Part VII – Estimate of length of oral argument**

77. The respondent estimates it will require 1.5 hours for the presentation of the respondent's oral argument.

Dated: 12 July 2018

20 

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[84] ***R v Whitworth.***
[85] ***Momcilovic*** [279].