HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA**
**MELBOURNE REGISTRY**

**BETWEEN:** **SEYYED ABDOLZADEH FARSHCHI**
Appellant

and

**THE KING**
Respondent

# APPELLANT'S SUBMISSIONS

## PART I: CERTIFICATION AS TO PUBLICATION

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

## PART II: CONCISE STATEMENT OF ISSUES

2. The appellant was tried on indictment for, and found guilty of, Commonwealth offences. The crux of the appellant's case is that the trial judge's explanation of 'proof beyond reasonable doubt' diminished the criminal standard of proof.

3. The appellant's complaint is limited to the fact that the jury was told, in terms reflecting the last clause of s 64(1)(e) of the *Jury Directions Act 2015* (Vic) (the **JDA**), that "a reasonable doubt is not … an unrealistic possibility" (the **Direction**).

4. Before the Court of Appeal, the appellant contended that the trial judge had erred by giving the Direction, including because it diminished the standard of proof, and was therefore inconsistent with s 13.2 of the *Criminal Code 1995* (Cth) (the ***Code***) and s 80 of the *Constitution*. The respondent accepted that, if the Direction diminished the standard of proof, it would be inconsistent with s 13.2 of the *Code*.[1]

[1] However, the respondent submitted that, even if the Direction was inconsistent with s 13.2 of the *Code*, there was no substantial miscarriage of justice in the appellant's trial.

5. It appears that the primary issues in contention are therefore:

5.1. First, whether the Direction diminishes the criminal standard of proof; and

5.2. Second, whether the criminal standard of proof is an essential characteristic of trial by jury under s 80 of the *Constitution*.

## PART III: NOTICE OF CONSTITUTIONAL MATTER

6. The appellant has given notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) (***Judiciary Act***).[2]

## PART IV: AUTHORISED REPORT CITATION

7. The decision below is not reported. The medium neutral citation is [2024] VSCA 235 (**Reasons**).

## PART V: FACTS

8. The appellant was charged on indictment with two offences contrary to ss 270.6A(1) and (2) of the *Code* (causing a person to remain in forced labour and conducting a business involving forced labour, respectively). The appellant's wife was charged on the same indictment.[3] The trial was held in the County Court of Victoria, exercising federal jurisdiction.[4]

9. The prosecution case was that the appellant and his wife had threatened the complainant (**RA**) to keep him in a condition of forced labour in their family business. The defence case centred on RA's credibility, including his reliability, and whether he was prone to exaggeration and had a motive to lie.[5]

10. The laws of Victoria with respect to the procedure for the trial applied, so far as applicable, by virtue of s 68(1)(c) of the *Judiciary Act*. Section 63(1) of the JDA

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2 Core Appeal Book (**CAB**) at 241-243.

3 Indictment (CAB at 5-6). The appellant's wife made a successful no case submission on charge 3 and was acquitted by the jury of charge 4.

4 *Constitution*, ss 76(ii) and 77(iii); *Judiciary Act*, s 68(2); See further, *Attorney-General (Cth) v* ***Huynh*** (2023) 97 ALJR 298 at 310 [43] (Kiefel CJ, Gageler and Gleeson JJ), 327-328 [144] (Gordon and Steward JJ), 341 [211] (Edelman J), 351 [269] (Jagot J).

5 Chief Judge Kidd's charge to the jury (CAB at 31-36, 51-53, 87-88).

requires a trial judge to explain the phrase 'proof beyond reasonable doubt' to a jury unless there are good reasons for not doing so.[6] Section 64 outlines how the explanation may be given. Under s 64(1)(e), one of the explanations that may be given is that "a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility."[7]

11. The appellant's counsel opposed the giving of a direction containing the words "a reasonable doubt is not … an unrealistic possibility", including because those words diminish the criminal standard of proof.[8] After hearing submissions,[9] the trial judge did not give the Direction at the outset of the trial during his introductory remarks to the jury, but ultimately gave the Direction in the charge.[10] The appellant was found guilty of both charges.

## PART VI: ARGUMENT

### A. THE DIRECTION DIMINISHES THE STANDARD OF PROOF

### A.1 The nature of the question

12. The central question in this appeal is whether the Direction diminishes the criminal standard of proof. The question arises in two ways:

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6 Pursuant to s 63(2) of the JDA, the trial judge must give the explanation before any evidence is adduced in the trial unless there are good reasons for not doing so.

7 These directions were first introduced by ss 20 and 21(1)(e) of the *Jury Directions Act 2013* (Vic). Under s 21(1) of that Act, the directions could only be given in response to a jury question about the meaning of the phrase. When the current JDA was first enacted in 2015, the provisions were replicated in ss 63(1) and 64(1)(e). Sections 57 and 58 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) amended the JDA to introduce the current statutory regime whereby an explanation of the phrase 'beyond reasonable doubt' must be given in *all* criminal trials, unless there are good reasons for not doing so. Those changes followed a 2021 Victorian Law Reform Commission (**VLRC**) recommendation that an explanation be given in all trials for sexual offences and the observations of the Victorian Court of Appeal in *Dookheea v The Queen* [2016] VSCA 67 at [91]. The citation for the VLRC report is: Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) at 449.

8 Reasons at [26]-[27] (CAB at 214-215).

9 These submissions were made at the outset of the appellant's first trial. The jury was discharged before reaching verdict because of an issue with an interpreter. The trial judge took the same approach at the appellant's second trial, where additional submissions were made prior to the charge.

10 Reasons at [27] (CAB at 214-215); trial judge's charge to the jury (CAB at 23).

12.1. First, whether the jury in the appellant's trial were misdirected on the standard of proof; and

12.2. Second, whether the Direction is inconsistent with s 80 of the *Constitution* and s 13.2 of the *Code*, and was therefore not picked up by s 68(1) of the *Judiciary Act* in the appellant's trial.

13. The first question turns on whether the jury was properly instructed as to the standard of proof.[11] That involves reading the charge "as a whole" and "as a jury listening to it might understand it".[12] The analysis should take into account the practical realities that directions "are as much directed to each individual member of the jury as they are to the jury as whole",[13] and that language is open-textured.[14]

14. It would be impossible to ascertain the effect that the Direction had, in fact, on each member of the jury.[15] Rather, the question requires an evaluative assessment of how a reasonable jury might understand the charge and the resulting danger that the standard of proof was diminished.[16]

15. By their terms, the words "a reasonable doubt is not … an unrealistic possibility" controlled the meaning of 'reasonable doubt' throughout the charge. A jury listening to the Direction would understand it to perform a definitional function. That follows not only as a matter of human experience and logic, but

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11 ***Green*** *v The Queen* (1971) 126 CLR 28 at 34 (Barwick CJ, McTiernan and Owen JJ). See also, *R v* ***Dookheea*** (2017) 262 CLR 402 at 424 [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ) citing ***La Fontaine*** *v The Queen* (1976) 136 CLR 62 at 72-73 (Barwick CJ, Mason J relevantly agreeing at 87).

12 *Dookheea* (2017) 262 CLR 402 at 424 [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ).

13 *Dookheea* (2017) 262 CLR 402 at 423 [35] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ). See also, *King v The Queen* (2012) 245 CLR 588 at 615 [66] (Heydon J): "'Trial by jury' is trial by jurors. Different jurors are likely to react to what they hear and see in court in different ways."

14 See, *DVO16 v Minister for Immigration* (2021) 273 CLR 177 at 187 [6] (Kiefel CJ, Gageler, Gordon and Steward JJ) citing Wigmore, *The Science of Judicial Proof*, 3rd ed (1937) at 569-571, in turn quoting Whitney, *Language and the Study of Language*, 4th ed (1869) at 111.

15 *Ward v James* [1966] 1 QB 273 at 301 (Lord Denning MR): the verdict of the jury is "as inscrutable as the sphynx."

16 See, eg, *Green* (1971) 126 CLR 28 at 32 (Barwick CJ, McTiernan and Owen JJ). See also, ***Thomas*** *v The Queen* (1960) 102 CLR 584 at 599 (Taylor J), 606 (Windeyer J). See also, *Dookheea* (2017) 262 CLR 402 at 424 [37], read with 425 [39].

finds support in the authorities.[17] Indeed, it is the very purpose of the Direction.[18]

16. The second question is whether the impugned words in s 64(1)(e) are inconsistent with s 80 of the *Constitution* (when given in a trial on indictment for a Commonwealth offence) and s 13.2 of the *Code* (when given in relation to a Commonwealth offence).[19]

17. As explained in *Huynh*,[20] the purpose of s 68(1) of the *Judiciary Act* is to "enable State [and Territory] courts in the exercise of federal jurisdiction to apply federal laws according to a common procedure in one judicial system."[21] To that end, s 68(1) operates to pick up and apply State and Territory laws respecting (among other matters) the procedure for trials and conviction on indictment. However, "s 68(1) does not apply the text of a State or Territory law to the extent that in so applying as a Commonwealth law it would be inconsistent with the *Constitution* or another Commonwealth law."[22]

18. Section 68(2) of the *Judiciary Act* imposes a correlative constraint on the conferral of federal judicial power on State and Territory Courts, the jurisdiction expressly being "subject to this section and to section 80 of the *Constitution*".

19. Within that legislative framework, the starting point is to ascertain the purpose, operation and effect of s 80 of the *Constitution* and s 13.2 of the *Code*. More is said about each below. For present purposes, it is enough to note that, on the appellant's case, each demand that the prosecution be required to prove its case beyond reasonable doubt.[23] Necessarily, both are concerned with practical effect and substance.[24]

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17 See, *Green* (1971) 126 CLR 28 at 31 (Barwick CJ, McTiernan and Owen JJ); *Thomas* (1960) 102 CLR 584, especially at 593 (Fullagar J).

18 JDA, ss 63 and 64; Explanatory Memorandum, Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (Vic), 2.

19 The *Code*, ss 2.1-2.2.

20 (2023) 97 ALJR 298.

21 *Huynh* (2023) 97 ALJR 298 at 310 [41] (Kiefel CJ, Gageler and Gleeson JJ), quoting *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 345.

22 *Huynh* (2023) 97 ALJR 298 at 312 [58] (Kiefel CJ, Gageler and Gleeson JJ), 328-329 [149] (Gordon and Steward JJ), 338 [194] (Edelman J); *Putland v The Queen* (2004) 218 CLR 174 at 179 [7] (Gleeson CJ),189 [41] (Gummow and Heydon JJ), 215 [121] (Callinan J).

23 Subject to certain statutory exceptions. See, *Lee v The Queen* (2014) 253 CLR 455 at 467 [32] (French CJ, Crennan, Kiefel, Bell and Keane JJ) and below at [75].

24 As to s 80, see further below at [72].

20. Section 64(1)(e) explains the phrase 'proof beyond reasonable doubt' to jurors.[25] If the provision is apt to mislead juries as to the standard of proof, it follows that it impairs, detracts from and is inconsistent with the practical operation of s 80 of the *Constitution* and s 13.2 of the *Code*.

21. For that reason, both questions can and should be answered in essentially the same way; by asking how jurors listening to the Direction might understand it.

### A.2 The Court of Appeal's reasoning

22. The Court of Appeal held that the Direction did not diminish the standard of proof, for essentially two reasons.

23. First, the Court reasoned that "[a]n insurmountable obstacle standing in the way of accepting the applicant's submission" was that "[t]he legislature has … unequivocally expressed the view that an unrealistic possibility is not a reasonable doubt. And importantly, it has expressed an intention that a judge be permitted to explain to a criminal jury that an unrealistic possibility cannot be the foundation of a reasonable doubt."[26]

24. The appellant's grounds of appeal relevantly turned on inconsistencies between the Direction and s 80 of the *Constitution* and s 13.2 of the *Code*. Axiomatically within our federal constitutional framework, it is beyond the power of the Victorian Parliament to alter the meaning of either.

25. Second, the Court of Appeal reasoned from this Court's decision in *Green* that: (1) an 'unreal possibility' does not diminish the standard of proof; and (2) there is no meaningful difference between an 'unreal' and an 'unrealistic' possibility.[27]

26. Specifically, the Court of Appeal characterised an 'unrealistic possibility' as one that is "unreasonable, irrational, illogical, improbable, foolish or similar" and an 'unreal possibility' as one that is "absurd, bizarre, fanciful, fantastic, illusory,

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25 See, Explanatory Memorandum, Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (Vic), 2.

26 Reasons at [39] (Priest JA, with whom Niall and Taylor JJA relevantly agreed at [79]-[80]) (CAB at 217, 225).

27 Reasons, [40] (CAB at 217).

non-sensical, preposterous or similar."[28] It concluded that there was "little or no practical difference" between the two.[29]

27. Before addressing why that analysis should not be accepted, it is convenient to say more about *Green*. In *Green*, this Court held that the trial judge's explanation of the standard of proof was a misdirection. The vices of the direction included that it encouraged jurors to subject their processes of mind to objective analysis and that it tended to suggest that a 'comfortable satisfaction' of the accused's guilt would be sufficient to warrant conviction.[30]

28. The Court held that the direction "was calculated to lessen the sense of responsibility of the jury"[31] and that "its clear tendency apart from its obfuscation and inaccuracy was to blunt the jury's proper sense of reluctance to act whilst what they might consider a reasonable doubt had not been removed."[32]

29. In the course of setting out its reasons, the Court articulated the (then) proper limits on explaining the criminal standard of proof:[33]

> If during the course of a trial, particularly in his address to the jury, counsel for the accused has laboured the emphasis on the onus of proof to such a degree as to suggest to the minds of the jury that possibilities which are in truth fantastic or completely unreal ought by them to be regarded as affording a reason for doubt, it would be proper and indeed necessary for the presiding judge to restore, but to do no more than restore, the balance. In such a case the judge can properly instruct the jury that fantastic and unreal possibilities ought not to be regarded by them as the source of reasonable doubt.

30. The reference to fantastic and unreal possibilities echoed a consistent thread of reasoning in earlier cases. In ***Thomas*** *v The Queen,* for example, Windeyer J observed: "if the trial judge thinks that, influenced by advocacy or for some other reason, the jury may conjure up mere chimeras of doubt, he may well

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28 Ibid.
29 Ibid.
30 *Green* (1971) 126 CLR 28 at 33 (Barwick CJ, McTiernan and Owen JJ).
31 *Green* (1971) 126 CLR 28 at 34 (Barwick CJ, McTiernan and Owen JJ), citing *Hicks v The King* (1920) 28 CLR 36 at 46 (Isaacs and Rich JJ).
32 *Green* (1971) 126 CLR 28 at 34 (Barwick CJ, McTiernan and Owen JJ).
33 *Green* (1971) 126 CLR 28 at 33 (Barwick CJ, McTiernan and Owen JJ).

emphasise that for a doubt to stand in the way of a conviction of guilt it must be a real doubt and a reasonable doubt".[34]

31. Following those authorities and in particular *Green*, the appellant accepts that the language of 'unreal possibilities' does not, alone, diminish the criminal standard of proof.

32. However, to then anchor the question in the meaning of 'unreal' is the wrong starting point for the analysis. It obscures the history, purpose and meaning of 'beyond reasonable doubt'.

### A.3 The Direction diminishes the time-honoured standard

33. The history of 'proof beyond reasonable doubt' was traced by this Court in *Dookheea*.[35] That it has been the accepted criminal standard of proof around the common law world since the mid-18th century is no accident of history.

34. In a fallible system of fact-finding, the standard of proof influences the relative frequency of erroneous convictions and erroneous acquittals. 'Beyond reasonable doubt' reflects a longstanding error-preference[36] regarding the "serious consequences of an erroneous condemnation, both to the accused and society" and "the immeasurably greater evils which flow from it than from an erroneous acquittal".[37]

35. As explained below, that error-preference has constitutional significance. It reflects and protects our constitutional conception of liberty and the relationship between the individual and the state.[38]

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34 (1960) 102 CLR 584 at 605. See also, *R v Roberts* (1910) 10 SR (NSW) 612 at 615 (Cohen J, with whom Pring and Gordon JJ concurred at 616, 617 respectively).

35 (2017) 262 CLR 402 at 419-422 [30]-[34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ). See further, Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, 2008); Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (University of California Press, 1991); Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development" (2012) 10(1) *University of New Hampshire Law Review* 97; Langbien, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003) at 261-265.

36 See further, the helpful analysis of Harlan J in *In Re Winship* (1970) 397 US 358 at 370-372. See also, generally, The Hon Justice Stephen Gageler, "Alternative Facts in the Courts" (2019) 93 *Australian Law Journal* 585.

37 See, ***Brown*** *v The King* (1913) 17 CLR 570 at 585 (Barton ACJ), quoting Best, *Best on Evidence* (Sweet & Maxwell, 9th ed, 1902) § 95. See also, Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 4th ed, 1770), Bk 4, c 27 at 352.

38 See further below at [56]-[76].

36. It may be accepted that the standard is quantitatively imprecise: "no one has yet invented or discovered a mode of measurement for the intensity of human belief."[39] But that is not to deny its qualitative meaning.

37. Up until the words "or an unrealistic possibility", the directions in s 64(1) of the JDA properly and carefully explain the standard of proof to jurors in terms that reflect its history, purpose and significance.[40]

38. Directions about the presumption of innocence and the prosecution's obligation to prove that the accused is guilty[41] emphasise the onus of proof and the underlying concern for individual liberty. Directions that it is not enough for the prosecution to persuade the jury that the accused is "probably guilty" or "very likely to be guilty"[42] guard against the risk of jurors under-estimating the state of satisfaction required of them.

39. Consistently with the longstanding recognition of the limits of human certainty about past events,[43] the directions in s 64(1)(c) direct jurors that it is almost impossible to prove anything with absolute certainty when reconstructing past events, and that the prosecution does not have to do so. The directions in s 64(1)(d) serve to remind the jury of the duty to acquit in the event of a reasonable doubt. Consistently with the reasoning in *Green*, the first part of the direction in s 64(1)(e) properly guards against the risk of jurors over-estimating the state of satisfaction required of them, making clear that imaginary or fanciful doubts should not stand in the way of a conviction.

40. In contrast, the direction that a reasonable doubt is not "an unrealistic possibility" represents a tangible departure from the meaning and purpose of the time-honoured standard.

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39 *In Re Winship* (1970) 397 US 358 at 369 (Harlan J), quoting Wigmore, *Evidence* (Little, Brown & Co, 3rd ed, 1940) 325.

40 This distinction perhaps explains why Justice Bell, in a 2018 lecture and after explaining the other directions in s 64(1), stated: "Perhaps more controversially, the judge may tell the jury that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility." See, The Hon Virginia Bell AC, *Jury Directions: the Struggle for Simplicity and Clarity* (Banco Court Lecture, Supreme Court of Queensland, 20 September 2018) at 27.

41 JDA, s 64(1)(a).

42 JDA, s 64(1)(b).

43 See further, *Dookheea* (2017) 262 CLR 402 at 420-422 [32]-[34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ).

41. As far as the appellant is aware, the Direction is unique in the common law world. That can be distinguished from the other aspects of s 64(1), which share much in common with directions given in New Zealand and Canada.[44]

42. The Direction distorts the standard in several ways. Most importantly and most straightforwardly, the word 'unrealistic' conveys a lesser state of satisfaction or degree of certainty required to support a conviction.

43. Though dictionary definitions are not exhaustive of meaning, they provide a useful starting point. The Oxford English Dictionary contains two entries for 'unrealistic': "1. Of art, literature etc: not representative of real life, not realistic" and "2. Not realistic in expectation or outlook; impracticable."[45] 'Realistic' in turn is relevantly defined to mean "3. Concerned with, or characterized by, a practical view of life; having or showing a sensible and practical idea of what can be achieved or expected."[46]

44. The Macquarie Dictionary contains two entries for 'unrealistic': "1. Not closely or accurately resembling an object or situation depicted" and "2. Not practical, hard-headed or clear-sighted."[47]

45. In ordinary parlance, and as the entries themselves indicate, the first meaning is ordinarily associated with a description of art, literature or an object or situation.

46. The second meaning is often used to describe a person's disposition or expectations, and the possibility of future events occurring. A political party might have an unrealistic possibility of winning an election; a football team an unrealistic possibility of winning a game. Similarly, that is the sense of the word that more naturally attaches to the possibility of a past event having occurred. In the context of a criminal trial, it might be 'unrealistic' to think that an accused falsely confessed, that two deaths were a coincidence, or that an eyewitness misidentified a perpetrator. In this case, the jury might have thought it 'unrealistic' that RA considered himself free to leave the appellant's employment.

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44 See further, *R v Lifchus* [1997] 3 SCR 320; *R v Wanhalla* [2007] 2 NZLR 573.
45 *Oxford English Dictionary* (online at 20 April 2025) 'unrealistic'.
46 *Macquarie Dictionary* (online at 20 April 2025) 'realistic'.
47 *Macquarie Dictionary* (online at 20 April 2025) 'unrealistic'.

47. Contrary to the reasoning of the Court of Appeal, to describe any of those possibilities as 'unreal' would be to convey an altogether different meaning. Whereas 'unrealistic' conveys something that is possible but unlikely, 'unreal' conveys something that is so unlikely as to be removed from reality. In other words, unrealistic things happen.

48. That 'unrealistic' conveys a lower standard is illustrated in the record of this case. According to the Court of Appeal's reasoning, an unrealistic possibility includes one that is "improbable".[48] Having regard to the long understood meaning of beyond reasonable doubt and the terms of s 64(1)(b) of the JDA, a direction suggesting that an 'improbable possibility' is not a reasonable doubt must constitute a fundamental misdirection.[49] Yet, that is what the Court of Appeal took the phrase to mean.

49. The Direction also conveys a qualitatively different task. Reasonable doubt is a matter of logic and rationality. As explained in *Dookheea*,[50] by at least the 17th century, English law had rejected the idea that facts could be proven beyond all doubt. Trial judges thus directed jurors that "they should acquit unless satisfied in their conscience or morally certain of the accused's guilt".[51] Conscience was understood as "a product of rationality and understanding and not of the passions or feelings".[52]

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48 Reasons at [40] (CAB at 217).

49 *Macquarie Dictionary* (online at 20 April 2025) defines 'improbable' as: "not probable; unlikely to be true or to happen."

50 *Dookheea* (2017) 262 CLR 402 at 420-421 [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ).

51 Ibid, citing Morano, "A Reexamination of the Development of the Reasonable Doubt Rule" (1975) 55 *Boston University Law Review* 507 at 511-512; Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development" (2012) 10(1) *University of New Hampshire Law Review* 97 at 141; Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, 2008) at 180-181.

52 *Dookheea* (2017) 262 CLR 402 at 420-421 [32], quoting Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development" (2012) 10(1) *University of New Hampshire Law Review* 97 at 142.

50. As this Court has made clear, whether a doubt is reasonable is for the jury to say, and it is not the task of jurors to subject their mental processes to objective analysis.[53]

51. However, the Direction is apt to do just that. The word 'unrealistic' tends to convey an assessment of the likelihood of something being true, and whether believing it to be true is 'sensible, hard-headed or practical.' The Direction encourages jurors to subject their mental processes to objective analysis through the lens of whether their doubts are 'realistic.'

52. In addition, the Direction creates the real risk of jurors shifting their focus onto whether the defence has raised a doubt that can properly be considered to be 'realistic', rather than on whether the prosecution has established its case to the criminal standard.[54]

53. Finally, the structure and language of the Direction is confusing.[55] Jurors must first identify the relationship between 'beyond reasonable doubt' and a 'reasonable doubt'. The presence of a reasonable doubt, it may be accepted, fairly straightforwardly conveys that conviction is not open. Jurors are then instructed to define 'reasonable doubt' by what it is not: "an unrealistic possibility". The confusion is compounded by the fact that, in ordinary parlance, it is unusual to describe the occurrence of a past event as 'unrealistic'.

54. The overarching result is that the Direction is "confusing, insufficient and misleading."[56] It transposes the question from what is a 'reasonable doubt' to what is "an unrealistic possibility". It leaves jurors with a distorted understanding of their fundamental task and lessens their sense of responsibility.[57]

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53 See, *Green* (1971) 126 CLR 28 at 33 (Barwick CJ, McTiernan and Owen JJ); *Thomas* (1960) 102 CLR 584 at 606 (Windeyer J). That approach was not relevantly departed from in *Dookheea* (2017) 262 CLR 402, see especially, 416-417 [25], 418 [28], 422-423 [34].

54 See further, Saks and Spellman, *The Psychological Foundations of Evidence Law* (NYU Press, 2016) at 44-45: "the 'story model' of jury decision making suggests that jurors try to understand the evidence by constructing a story with it, and evaluating competing stories by testing which holds the evidence most coherently. If the lawyers do not propose explicit stories, jurors will invent their own."

55 See, *Dookheea* (2017) 262 CLR 402 at 416 [23].

56 *Brown* (1913) 17 CLR 570 at 594 (Isaacs and Powers JJ).

57 *Green* (1971) 126 CLR 28 at 34 (Barwick CJ, McTiernan and Owen JJ).

## B. THE CRIMINAL STANDARD OF PROOF IS AN ESSENTIAL CHARACTERISTIC OF TRIAL BY JURY

### B.1 Authority

55. To date, this Court has not had occasion to directly decide whether the criminal standard of proof is an essential characteristic of trial by jury.[58] The authorities, however, lend significant weight to support the proposition.

56. In ***Cheatle*** *v The Queen*,[59] this Court held that "history, principle and authority combined to compel the conclusion" that unanimity is an essential characteristic of trial by jury. The 'fundamental' nature of the criminal standard provided a conceptual foundation for that holding, the joint reasons explaining: "unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt."[60]

57. Later, in ***Brownlee*** *v the Queen*, Gleeson CJ and McHugh J treated the lack of connection between the impugned provisions and the criminal standard as a point of departure from the reasoning in *Cheatle*. In explaining why a unanimous verdict reached by ten jurors did not offend s 80 of the *Constitution*, their Honours observed: "[s]uch a system is not inconsistent with the purposes of trial by jury. In particular, it is not inconsistent with … the need to maintain the prosecution's obligation to prove its case beyond reasonable doubt."[61]

58. Consistently with that line of constitutional reasoning, the criminal standard should be understood as an entrenched characteristic of trial by jury.

### B.2 Principle

59. Reasoning from first principles leads to the same conclusion. In *R v Snow*, Griffith CJ declared that s 80 "ought *prima facie* to be construed as an adoption of the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England."[62] It may be accepted

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58 See, *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-521 (Brennan J).

59 (1993) 177 CLR 541 at 562 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

60 Ibid at 553-554, 561.

61 (2001) 207 CLR 278 at 289 [22]. See also, 328 [143] where Kirby J reasoned to similar effect. See further, the observations of Kiefel J in *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 266 [177].

62 *R v Snow* (1915) 20 CLR 315 at 323.

that s 80 does not entrench all common law elements of 'trial by jury'. The *Constitution* speaks to the present,[63] and the procedural incidents of trial by jury are not immutable.[64]

60. For those reasons, only the essential elements of the institution are constitutionally entrenched. Those elements are identified by taking a functional approach. As explained in the joint judgment of Gaudron, Gummow and Hayne JJ in *Brownlee*, "[c]lassification as an essential feature or fundamental of the institution of trial by jury involves an appreciation of the objectives that institution advances or achieves."[65]

61. In ***Ng*** *v The Queen*, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ made clear that matters of history are relevant, though not dispositive: "essential features are to be discerned with regard to the purpose which s 80 was intended to serve and to the constant evolution, before and since federation, of the characteristics and incidents of jury trial."[66]

62. In the appellant's submission, s 80 fulfills two interdependent purposes: democratic representation and the protection of individual liberty. Those purposes are revealed by the context and language of s 80 and by the wider context, structure and language of the *Constitution* read as a whole.[67]

63. The purpose of the *Constitution* is "to enlarge the powers of self-government of the people of Australia."[68] To that end, the *Constitution* reserves significant

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63 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 144 (Brennan J). See also, *Brownlee* (2001) 207 CLR 278 at 286 [10] (Gleeson CJ and McHugh J); ***Alqudsi*** *v The Queen* (2016) 258 CLR 203 at 272 [191] (Nettle and Gordon JJ); *McCulloch v Maryland* (1819) 17 US 316 at 407 (Marshall CJ).

64 *Brownlee* (2001) 207 CLR 278 at 286 [12] (Gleeson CJ and McHugh J), 291-292 [34] (Gaudron, Gummow and Hayne JJ), quoting Scott, "Trial by Jury and the Reform of Civil Procedure" (1918) 31(5) *Harvard Law Review* 669 at 669-670. See generally, Devlin, *Trial by Jury* (Stevens, 1966); Windeyer, *Lectures on Legal History* (LawBook Co, 2nd ed, 1957) at 60-69.

65 *Brownlee* (2001) 207 CLR 278 at 298 [54]. See also, the judgments of Gleeson CJ and McHugh J at 288-289 [21]-[23] and Kirby J at 329 [146]. See further, Emerton, "The Integrity of State Courts under the *Australian Constitution*" (2019) 47(4) *Federal Law Review* 521, especially at 531, 537-538.

66 (2003) 217 CLR 521 at 526 [9].

67 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 188-189 [53] (Gummow, Kirby and Crennan JJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 102 [288] (Hayne and Kiefel JJ).

68 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 228 (McHugh J), quoting *Official Report of the National Australasian Convention Debates*, Adelaide (1897) at 17.

political power to the people. Most obviously, it does so through the institutions of representative and responsible government.[69] It also does so through the entrenchment of trial by jury in s 80.

64. Section 80 serves an important democratic function.[70] The jury "places the people, or at least a class of the people in the judgment seat" and "in fact, therefore, places the direction of society in the hands of the people, or of the class from which the juries are taken."[71]

65. As explained in the American context, the entrenchment of trial by jury represents "a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[72]

66. The uniquely Australian significance of that purpose is illuminated by the history of the campaign for jury trial in colonial New South Wales.[73] The campaign was motivated not only by the right of an accused to be tried by jury, but by the desire for political participation and representation in the colony.[74] As that history highlights,[75] the representative function of s 80 is both an important end in its own right, and a means to advancing the section's other core purpose, the protection of individual liberty.

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69 *Constitution*, especially ss 7, 24.

70 As explained by Gageler J in *Alqudsi* (2016) 258 CLR 203 at 254-259 [127]-[140].

71 *Alqudsi* (2016) 258 CLR 203 at 254-255 [129] (Gageler J), quoting De Tocqueville, *Democracy in America* (Saunders and Otley,1835).

72 *Blakely v Washington* (2004) 542 US 296 at 305-306 (Scalia J, delivering the opinion of the Court).

73 See further, *Alqudsi* (2016) 258 CLR 203 at 254 [129] (Gageler J). See also, Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press 1991) at 167-187; Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (Federation Press, 2002) at 62-72; Bennett "The Establishment of Jury Trial in New South Wales" (1961) 3(3) *Sydney Law Review* 463; Barker, *Sorely Tried: Democracy and Trial by Jury in New South Wales* (Dreamweaver Pub, 2003).

74 *Alqudsi* (2016) 258 CLR 203 at 254 [129] (Gageler J).

75 See further, Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) at 168 (speaking of the experience of trial by military jurors); *R v Magistrates* [1824] NSWSC 20 (Forbes CJ): "It would not merely be against the express language of the *Magna Carta* to try free British subjects without the common right of a Jury, but against the whole Law and Constitution of England." For historical analysis of that case see, Castles "The Judiciary and Political Questions: The First Australian Experience, 1824-1825" (1975) 5(3) *Adelaide Law Review* 294.

67. That the protection of liberty is a core function of s 80 is uncontroversial. So much is clear from the case law,[76] the Convention debates,[77] and the place of s 80 within Ch III of the *Constitution*.[78]

68. The purpose is achieved by placing a body of citizens between the state and the accused:[79]

> The purpose of the jury trial … is to prevent oppression by the Government … [g]iven this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.

69. That ensures checks on the exercise of executive and judicial power:[80]

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

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76 See, eg, *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 580 (Dixon and Evatt JJ); *Kingswell v The Queen* (1985) 159 CLR 264 at 300-1 (Deane J); *Brown v The Queen* (1986) 160 CLR 171 at 179 (Gibbs CJ), 189 (Wilson J), 197 (Brennan J); *Cheatle* (1993) 177 CLR 541 at 559 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), citing *Newell v The King* (1936) 55 CLR 707 at 711-712 (Latham CJ). See further, Final Report of the Constitutional Commission (1988) vol 1 at 593-599, and especially 596; The Hon Justice Virginia Bell "*Section 80 — The Great Constitutional Tautology*" (2014) 40(1) *Monash University Law Review* 6 (paper delivered as the 19th Lucinda Lecture at Monash University, 24 October 2013).

77 See generally, the summary in *Alqudsi* (2016) 258 CLR 203 at 211-216 [13]-[24], and see especially at 230 [54] quoting *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 31 January 1898, at 350. See further, Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (revised edition, 2015) at 977-982.

78 See, *Alqudsi* (2016) 258 CLR 203 at 251 [115] (Kiefel, Bell and Keane JJ), 265-266 [167]-[172] (Nettle and Gordon JJ); ***YBFZ*** *v Minister for Immigration Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 9 [6], 11 [12]-[14] (Gageler CJ, Gordon, Gleeson and Jagot JJ). See also, ***Garlett*** *v Western Australia* (2022) 277 CLR 1 at 47-49 [125]-[133] (Gageler J); 60-63 [169]-[174] (Gordon J); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 108-110 [66]-[70] (Gageler J); 130-134 [130]-[141] (Gordon J).

79 *Williams v Florida* (1970) 399 US 78 at 100 (White J delivering the opinion of the Court), as quoted in *Brownlee* (2001) 207 CLR 278 at 288 [21] (Gleeson CJ and McHugh J),

80 *Duncan v Louisiana* (1968) 391 US 145 at 156 (White J, delivering the opinion of the Court).

70. In that sense, trial by jury is an important part of a wider constitutional design of checks and balances in the operation of Commonwealth criminal laws:[81]

70.1. The content of the criminal law is determined by Parliament, accountable to the people through the institutions of representative and responsible government;[82]

70.2. The criminal law is enforced by the executive, ultimately responsible to the people;[83]

70.3. The adjudication and punishment of criminal guilt is the exclusive province of Ch III courts, subject to the express and implied limits of Ch III;[84] and

70.4. For trials on indictment, the judicial power of the Commonwealth is preconditioned on there being a 'trial by jury', including its essential characteristics.

71. That constitutional design reflects and protects our conception of liberty, and the "common law's acceptance of the inherent and irreducible status of each human being in the compact between the individual and the state, a compact which this country inherited and within which the *Constitution* was enacted."[85]

72. Understood that light, it can readily be seen why this Court in *Cheatle* and members of this Court in *Brownlee* treated the criminal standard of proof as a fundamental premise of trial by jury.

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81 See further, *Magaming v The Queen* (2013) 252 CLR 381 at 399-402 [61]-[68] (Gageler J); *Garlett* (2022) 277 CLR 1 at 60-62 [170]-[173] (Gordon J).

82 See generally, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

83 See generally, *Barton v The Queen* (1980) 147 CLR 75 at 91 (Gibbs and Mason JJ). See also, by analogy in the civil context, *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 276-278 [82]-[86].

84 See generally, *R v Kirby; Ex parte Boilermakers' Society of* Australia (1956) 94 CLR 254; *Chu Kheng* ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

85 *YBFZ* (2024) 99 ALJR 1 at 11 [12] (Gageler CJ, Gordon, Gleeson and Jagot JJ). Note also the observations of Gummow J in *Gould v Brown* (1998) 193 CLR 346 at 444 [186] to the effect that the coming into force of the *Constitution* itself altered the character of institutions.

73. As a constitutional guarantee,[86] and consistently with its place in Ch III,[87] 'trial by jury' should be construed liberally, and according to substance over form. It cannot be whittled down so as to undermine its institutional functions.

74. The criminal standard of proof is an essential and inseparable part of those functions. Lowering the standard undermines the strength of the 'interposition between the accused and his accuser';[88] it weakens the constitutional checks on the 'overzealous prosecutor' and the 'compliant, biased, or eccentric judge';[89] and it diminishes the error preference that so carefully reflects the constitutional significance of liberty and the compact between the individual and the state.

75. That conclusion also finds support in the history of trial by jury and its evolution since federation. In Australia, the pre-federation position was that the standard of proof in a criminal trial was beyond reasonable doubt, and the onus rested on the prosecution, subject to some limited exceptions.[90] Throughout changing social and political circumstances, 'beyond reasonable doubt' has remained the widely accepted criminal standard since at least the mid-eighteenth century.[91]

76. Finally, the essential and inseparable character of the standard finds support in its very nature. As Professor Shapiro has noted, the history of trial by jury is interwoven with the development of the criminal standard of proof.[92] The requirement to determine guilt by reference to the criminal standard is not merely a rule of evidence or procedure;[93] it is the very task of the jury.

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86 See, *Cheng v The Queen* (2000) 203 CLR 248 at 276-279 [77]-[79], [82]-[83] (Gaudron J). See further as to substance over form: *Ha v New South Wales* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Street v Queensland Bar Association* (1989) 168 CLR 461 at 522 (Deane J); *Cole v Whitfield* (1988) 165 CLR 360 at 401 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). See further as to liberal construction: *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-202 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Re Dohnert Muller Schmidt and Co; Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371 (Dixon CJ).

87 *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

88 See above at [68].

89 See above at [69].

90 See, Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (Federation Press, 2002) at 4, 378, 429.

91 See further, *Dookheea* (2017) 262 CLR 402 at 420-422 [32]-[33] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ).

92 Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (University of California Press, 1991) at 6.

93 That fundamental task of the jury can be compared to other matters of evidence and procedure, such as the privilege against self-incrimination: See, *Sorby v Commonwealth* (1983) 152 CLR 281 at 298 (Gibbs CJ), 308-309 (Mason, Wilson and Dawson JJ); *Huddart, Parker & Co Pty*

## C. SECTION 13.2 INCONSISTENCY

77. Section 13.2(1) of the *Code* provides that "[a] legal burden of proof on the prosecution must be discharged beyond reasonable doubt."[94]

78. The respondent's concession below that, if the Direction diminished the standard of proof, it would be inconsistent with s 13.2 and therefore not picked up by s 68(1) of the *Judiciary Act* in the appellant's trial, was appropriate.

79. 'Beyond reasonable doubt' in s 13.2 naturally takes its meaning from its common law and constitutional context.[95] It follows that if the Direction diminishes the standard of proof within its common law and constitutional meaning, the provisions are inconsistent.

## D. CONCLUSION

80. If the appellant's propositions on s 13.2 of the *Code* are accepted, it follows that the jury was not properly directed as to the standard of proof and there has been a substantial miscarriage of justice. The impugned part of s 64(1)(e) not having been validly picked up and applied by s 68(1) of the *Judiciary Act*, there can be no argument that the diminished standard was given force by statutory amendment.

81. If the appellant's propositions on s 80 of the *Constitution* are accepted, it follows that the trial was not held in accordance with the requirements of s 80 and the appellant's convictions are unconstitutional and must be set aside.[96] It also follows that s 68(1) of the *Judiciary Act* did not pick up and apply the impugned words in s 64(1)(e) in the appellant's trial.

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*Ltd v Moorehead* (1909) 8 CLR 330 at 358 (Griffith CJ), 366 (Barton J), 375 (O'Connor J), 386 (Isaacs J), 418 (Higgins J). See also *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 125 [64] (French CJ and Crennan J).

94 Read with ss 2.1-2.2, it applies to all offences against the *Code*, and all other Commonwealth offences on and after 15 December 2001.

95 See, *Acts Interpretation Act 1901* (Cth), s 15A; *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). See also, Explanatory Memorandum, Criminal Code Bill 1994 (Cth) at 46-47.

96 See, *Cheatle* (1993) 177 CLR 541 at 562 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

82. In both cases, the jurisdiction of the County Court of Victoria was subject to the correlative constraint contained in s 68(2) of the *Judiciary Act*, which jurisdiction was exceeded.[97]

## PART V ORDERS SOUGHT

83. The appellant seeks orders that:

83.1. the appeal be allowed;

83.2. the order made by the Court below refusing the appellant's application for leave to appeal against conviction be set aside; and,

83.3. in its place, it be ordered that the application for leave to appeal against conviction be granted, the appellant's convictions be set aside and there be a new trial.

## PART VI ESTIMATE FOR ORAL ARGUMENT

84. The appellant seeks up to 3 hours for oral argument, including reply.

Dated: 24 April 2025




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97 *Huynh* (2023) 97 ALJR 298 at 311 [46] (Kiefel CJ, Gageler and Gleeson JJ), citing *Brown v The Queen* (1986) 160 CLR 171 at 197 (Brennan J); *R v Gee* (2003) 212 CLR 230 at [66]-[67] (McHugh and Gummow JJ) and noting also, Lindell, *Cowen and Zine's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) at 302-303.

## ANNEXURE TO APPELLANT'S SUBMISSIONS

| *No* | *Description* | *Version* | *Provision(s)* | *Reason for providing this version* | *Applicable date or dates (to what event(s), if any, does this version apply)* |
|---|---|---|---|---|---|
| 1 | Commonwealth Constitution | Current | Section 80, Ch III | In force at all material times. | All material events — no amendments. |
| 2 | *Judiciary Act 1903* (Cth) | Compilation No. 49 (18 February 2022 to 11 June 2024) | Section 68 | Version in force when the Direction was given (23 October 2023). | All material events — no relevant amendments. |
| 3 | *Criminal Code 1995* (Cth) | Compilation No. 149 (21 September 2023 to 24 November 2023) | Sections 2.1.-2.2, 13.2, 270.6A(1) and (2) | Version in force when the Direction was given (23 October 2023). | All material events — no relevant amendments. |
| 4 | *Jury Directions Act 2015* (Vic) | Version No. 14 (11 October 2023 to 30 November 2023) | Sections 63 and 64 | Version in force when the Direction was given (23 October 2023). | All material events — no relevant amendments. |