



HIGH COURT OF AUSTRALIA

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Form 27A—Appellant’s submissions

Note: See rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

ADRIAN HILARY BARBER

Appellant

and

THE KING

Respondent

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APPELLANT’S SUBMISSIONS**PART I: CERTIFICATION**

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

PART II: ISSUES ON THE APPEAL

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2. This appeal presents a question of statutory construction, namely, where a person has in his or her possession an amount of a prohibited drug (which is not less than the traffickable quantity), and proves on the balance of probabilities that part of that amount was in his or her possession otherwise than for supply, does s 29 of the *Drug Misuse and Trafficking Act 1985* (NSW) (the **DMTA**), read in the context of Div 2 of Pt 2 of the DMTA, nonetheless deem the whole of the amount to be in the person’s possession for supply?

3. The New South Wales Court of Criminal Appeal (**CCA**) found that unless the person proves that the whole of the drug was possessed otherwise than for supply, s 29(a) is not satisfied and the entirety is deemed to be possessed for supply: *Barber v R* [2025] NSWCCA 179 (**J**) at [27], [31].

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4. However, s 29 is an evidentiary provision. Its purpose is to shift the burden of proof on the question whether the drug was possessed for supply, that is, instead of the prosecution being required to prove that the drug was possessed “for supply”, the person must prove that it was possessed “otherwise than for supply”. To the extent that the person discharges that burden in respect of an amount of the drug, that amount is not deemed to be in his or her possession for supply.

5. On the CCA's construction, a person charged with supply of not less than a commercial quantity of a prohibited drug under s 25(2) of the DMTA (on the basis of possessing not less than that quantity for supply), who proves that part of the drug was possessed otherwise than for supply, sufficient to reduce the quantity otherwise deemed to be possessed for supply below the commercial quantity threshold, but cannot prove that as to the whole, must nonetheless be convicted of the offence. The person must be convicted of that offence even where the person proves that the offence was not committed. It is implausible, to say the least, that Parliament intended s 29 to bear a meaning productive of so manifestly unjust a result, and the text of the section does not compel it.

PART III: SECTION 78B NOTICES

6. No notice in compliance with s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: CITATION OF THE REASONS BELOW

7. The reasons of the Court of Criminal Appeal (Garling, Ierace and Dhanji JJ) are reported at *Barber v R* [2025] NSWCCA 179: CAB 69-88. The reasons of the primary judge (Baker SC DCJ) on the trial are unreported: *R v Barber* (District Court of New South Wales, 19 October 2023) (CAB 8-44), and the remarks on sentence are also unreported: *R v Barber* (District Court of New South Wales, 26 April 2024) (**ROS**) (CAB 45-63).

PART V: STATEMENT OF FACTS

8. At about 8.15 am on 14 December 2022 the appellant was stopped by police while driving at Kiama. In a hidden compartment in the boot of the car police found a white plastic bottle containing 96.5 grams of 1,4-butanediol (**BD**), together with a plunger syringe of the kind used to administer that drug. A key to a safe was in the appellant's possession: J [12] (CAB 76).
9. Police then executed a search warrant at the appellant's home. In a safe in a wardrobe in his bedroom, opened with that key, police found three bottles containing BD in a combined weight of 1,008.7 grams: J [13] (CAB 77). The four containers, totalling 1,105.2 grams, comprised the single quantity relied upon by the Crown on a charge of supplying an amount of a prohibited drug not less than the commercial quantity,

contrary to s 25(2) of the DMTA: J [13], [23] (CAB 77, 80). The commercial quantity applicable to BD, as provided in Sch 1 of the DMTA, is 1 kilogram: J [17] (CAB 78). The traffickable quantity applicable to BD is 30 grams: J [21] (CAB 79).

10. The appellant was tried on that charge (and on a weapons charge, of which he was acquitted) before Baker SC DCJ, sitting without a jury, from 16 to 19 October 2023.

11. The Crown relied on the extended definition of “supply” in s 3(1) of the DMTA (“keeping or having in possession for supply”) and on s 29. Its case was put on the footing that the appellant was deemed to possess the whole of the BD for supply unless he proved that the whole of it was possessed otherwise than for supply. The
10 Crown opened: “Unless the accused is able to show that he had the entire quantity of the drug in his possession solely for his own use - that is, he had no intention to supply any of it - you will be satisfied beyond reasonable doubt that it was for the purpose of supply”: T 16.10.23, p 2 (ABFM 5). The Crown closed to the same effect: “The accused must prove this in relation to the entire quantity involved”: T 18.10.23, p 146 (ABFM 149). The appellant’s case at trial was that the whole was for his personal use: CAB 13.

12. The appellant gave evidence that he had used the drug for 15 to 20 years, that he had become addicted and increasingly tolerant of it, and that at the time of his arrest he was using 100 to 120 mls in each 24-hour period: T 18.10.23, p 84 (ABFM 87). He
20 said that a litre would last him “a week or two depending on the quality”: T 17.10.23, p 80.20-27 (ABFM 83). The evidence of a forensic pharmacologist and toxicologist, Dr Van Nieuwenhuijzen, was that users who are addicted can use more than 50 mls a day, and that in the study which the witness accepted was “probably the best tool to try and meaningfully represent the average daily GHB and GBL use amongst users”, males who were addicted used on average 92 mls per day: CAB 21-23.

13. The trial judge stated that the principal issue was “whether the accused has established, on the balance of probabilities, that the entire amount of [butanediol] was in his possession for a purpose other than for supply, that is for his own personal use”: CAB 13, quoted at J [41] (CAB 85). His Honour accepted that the appellant “was a heavy
30 and experienced user of BD”: CAB 35. However, his Honour concluded: “Ultimately, having regard to the whole of the evidence and the accused’s evidence I am not satisfied on the balance of probabilities that the accused possessed the entire amount

of the [butanediol] for his own personal use”: CAB 43, quoted at J [43] (CAB 86). He found the appellant guilty.

14. On sentence, his Honour found “that at the time of the offence, the offender was a heavy and experienced drug user and that a portion of the BD, although I cannot determine how much, was for his own use”: ROS p 7 (CAB 50); see J [46] (CAB 87). The appellant was sentenced, for this and other offending, to an aggregate term of imprisonment of 5 years and 7 months with a non-parole period of 3 years and 7 months commencing 14 December 2022: J [10] (CAB 76).

15. The appellant brought an appeal against conviction to the CCA. The sole ground of appeal was that the verdict of guilty was “unreasonable, or cannot be supported”: s 6(1) of the *Criminal Appeal Act 1912* (NSW); J [2] (CAB 74). It was contended that, given the finding of heavy personal use made by the trial judge, s 29 of the DMTA should not have been relied upon to make the appellant guilty of the charge of supply a commercial quantity of a prohibited drug. It was contended that he should be acquitted of that offence and, instead, convicted of the less serious offence of supply a prohibited drug contrary to s 25(1) of the DMTA: J [3] (CAB 74). The appellant did not seek to challenge the finding that he possessed at least some of the drug for the purposes of supply: J [2] (CAB 74). Notwithstanding that the sentencing judge was unable to determine (precisely) how much was for personal use, it was contended that it was probable that the amount was greater than 105.2 grams. Several arguments were advanced as to why s 29 should not be construed to have the effect that the appellant was deemed to possess for supply (all) the amount of 1,105.2 grams that was in his possession unless he proved that all of it was possessed otherwise than for supply. The CCA granted leave to appeal but dismissed the appeal against conviction: J [48] (CAB 88). The CCA was “prepared to accept for the purposes of the applicant’s argument that, had the DMTA been construed in the manner the applicant now contends it should have been, it would not have been possible to be satisfied beyond reasonable doubt that the applicant intended to supply a commercial quantity of the drug”: J [26] (CAB 81). However, the CCA found that unless the person proves that the whole of the drug was possessed otherwise than for supply, s 29(a) is not satisfied and the entirety is deemed to be possessed for supply: J [27], [31] (CAB 81-82).

16. Special leave to appeal was granted on 6 August 2026 (CAB 92-93).

17. By notice of appeal filed 19 August 2026 (CAB 94-96), the sole ground of appeal is that the CCA “erred in the construction of s 29” of the DMTA: CAB 95.

PART VI: ARGUMENT

18. The appellant appeals, pursuant to the grant of special leave, from the whole of the judgment of the CCA given on 7 November 2025.

19. The ground is made good in three steps:

- (a) first, the purpose of s 29, within Div 2 of Pt 2 of the DMTA, is to shift the burden of proof of the purpose of possession, and no more;
- (b) secondly, the text of s 29 accommodates at least two constructions under which proof that part of the drug was possessed otherwise than for supply displaces the deeming to that extent, and the traditional modes of construction, including the principle of legality, require that one of them be preferred to a construction productive of manifest injustice; and
- (c) thirdly, the CCA’s reasoning to the contrary cannot be supported.

The statutory scheme

20. Division 2 of Pt 2 of the DMTA creates offences of supply graded by amount.

21. Section 25(1) makes it an offence to supply, or knowingly take part in the supply of, “a prohibited drug”. Section 25(2) makes it an offence to supply, or knowingly take part in the supply of, “an amount of a prohibited drug which is not less than the commercial quantity applicable to the prohibited drug”. The grading is reflected in the maximum penalties: imprisonment for 15 years for an offence against s 25(1) (s 32); imprisonment for 20 years where the amount is not less than the commercial quantity (s 33(2)); imprisonment for life where the amount is not less than the large commercial quantity (s 33(3)).

22. The amount had in possession for supply is what distinguishes an offence against s 25(2) from an offence against s 25(1). Consistently with that structure, s 25(3) provides for an alternative verdict:

(3) Where, on the trial of a person for an offence under subsection (2) or (2D), the jury are not satisfied that the amount of prohibited drug involved is equal to or more

than the commercial quantity applicable to the prohibited drug, they may acquit the person of the offence charged and find the person guilty of an offence under subsection (1) or (2C), respectively, and the person shall be liable to punishment accordingly.

23. “Supply” is defined inclusively in s 3(1) as follows:

supply includes sell and distribute, and also includes agreeing to supply, or offering to supply, or keeping or having in possession for supply, or sending, forwarding, delivering or receiving for supply, or authorising, directing, causing, suffering, permitting or attempting any of those acts or things.

- 10 24. Where the prosecution relies upon possession of drugs, the conduct constituting an offence against s 25(2) is identified by the application of s 25(2) with the definition of “supply” in s 3(1): the conduct is having in possession for supply an amount of the drug not less than the commercial quantity. In doing so, the s 3(1) definition creates a statutory fiction, extending the meaning of “supply” “to a subject matter which it does not properly designate”, namely possession: *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696; [1909] HCA 67 (Griffith CJ). Where a statute creates a fiction of that kind, “it becomes very important to consider the purpose for which the statutory fiction is introduced” (*Muller* at 696), and the provision “should not be construed to have a legal operation beyond that required to achieve the object of its incorporation”:
- 20 *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 254 CLR 288 at 314 [51] (Gageler J).

25. Section 29, which is within Div 2, provides:

29 Traffickable quantity – possession taken to be for supply

A person who has in his or her possession an amount of a prohibited drug which is not less than the traffickable quantity of the prohibited drug shall, for the purposes of this Division, be deemed to have the prohibited drug in his or her possession for supply, unless—

- (a) the person proves that he or she had the prohibited drug in his or her possession otherwise than for supply, or
- 30 (b) except where the prohibited drug is prepared opium, cannabis leaf, cannabis oil, cannabis resin, heroin or 6-monoacetylmorphine or any other acetylated derivatives of morphine, the person proves that he or she obtained possession of the prohibited drug on and in accordance with the prescription of a medical practitioner, nurse practitioner, midwife practitioner, dentist or veterinary practitioner.

26. The provision is engaged by possession of not less than the “traffickable quantity”, which for BD is 30 grams: see Sch 1 of the DMTA. It operates in an identical way whichever offence in Div 2 the prosecution seeks to prove by its aid.

The purpose of s 29

27. The chapeau of s 29 does two things. It identifies the person to whom the section applies: a person who “has in his or her possession an amount of a prohibited drug which is not less than the traffickable quantity”. And it states the deemed fact: the person is “deemed to have the prohibited drug in his or her possession for supply”. The deemed fact is the character of the possession. By force of the definition in s 3(1), possession for supply constitutes “supply” such that the deeming relieves the prosecution of proving the purpose with which the drug was possessed. It shifts the burden of proof on the factual question whether the drug was possessed for supply: instead of the prosecution having to prove that the drug was possessed “for supply”, the onus is placed on the person to prove that it was possessed “otherwise than for supply”. The person may displace the deeming by proof on the balance of probabilities: *Evidence Act 1995* (NSW), s 141(2); *R v Carey* (1990) 20 NSWLR 292 at 294, cited at J [22] (CAB 80).
28. The object of s 29, evident from the text, the statutory precondition (the traffickable quantity, for BD 30 grams) and the expressed operation “for the purposes of this Division”, is to reverse the burden of proof of the purpose of possession.
29. That purpose is confirmed by the extrinsic material.¹ The second reading speech introducing s 29 of the DMTA in the Assembly noted that “[a] person is deemed to have the drug in possession for the purpose of supply if the amount possessed is equal to, or more than the specified quantity. This concept is derived from the Poisons Act”.² The second reading speech in the Council similarly noted that “[t]he new term, traffickable quantity, is also introduced. This is the quantity of prohibited drug or

¹ See also the Explanatory Note to the *Drug Misuse and Trafficking Bill 1985* (NSW) which relevantly stated as follows:

Clause 29 provides that a person who has possession of an amount of a prohibited drug which is not less than the amount prescribed by the proposed Act to be the traffickable quantity shall, for the purposes of the proposed Division, be deemed to have possession of the prohibited drug for the purpose of supply, subject to certain defences.

² New South Wales, Parliamentary Debates, Legislative Assembly, 26 November 1985, p 10617.

plant which, if found in a person's possession, is deemed under clause 29 to be for the purpose of supply unless the possessor proves otherwise. This provision is currently found in section 45(4) of the Poisons Act".³

30. Section 45(4) was inserted into the *Poisons Act 1966* (NSW) by the *Poisons (Amendment) Act 1970* (NSW) (Act No 53 of 1970). The Council second reading speech which inserted that provision recorded as follows:⁴

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In addition, any person who has in his possession a quantity of a drug of addiction, prohibited drug, or a substance containing any drug of addiction or prohibited drug, which is in excess of the quantity prescribed by the regulations will be required to accept the onus of proving that he does not have that drug in his possession for supply or sale, or that he has it legitimately in accordance with a prescription issued by a doctor, a dentist or a veterinary surgeon.

31. The purpose of s 29, from its introduction in the *Poisons Act* to its re-enactment in the DMTA, has been to relieve the prosecution of proving that possession was for the purpose of supply, by requiring the possessor to prove otherwise. As Gleeson CJ stated, "the section is merely an evidentiary provision which deals with proof that a quantity of a prohibited drug is possessed for the purpose of supply": *R v Dodd* (1991) 56 A Crim R 451 at 453; see also *Alliston v R* [2011] NSWCCA 281; (2011) 217 A Crim R 323 at [6], cited at J [21] (CAB 79).

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32. Nothing in the history suggests a further purpose of creating a fiction whereby a person who did *not* possess a commercial quantity of a prohibited drug for supply (and is guilty only of the offence which carries a maximum penalty of 15 years) is conclusively presumed to have possessed that quantity of the drug for supply (and so to be guilty of an offence which carries a maximum penalty of 20 years).

The proper construction of ss 25 and 29

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33. Against that background, s 29 falls to be construed in the context of Div 2 and in the light of that purpose: see eg *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14]. The question is whether a person may discharge the burden which s 29(a) casts by proving that part of the drug possessed was possessed otherwise than for supply, or whether nothing short of proof as to the whole will suffice. It may

³ New South Wales, Parliamentary Debates, Legislative Council, 28 November 1985, p 11124.

⁴ New South Wales, Parliamentary Debates, Legislative Council, 16 September 1970, p 5911.

be accepted that, on one reading of para (a), “the prohibited drug” refers to the whole of the drug the possession of which engaged the section, so that the proof must be of the whole. But the text does not compel that reading. Applying traditional modes of construction, at least two constructions are open which permit the burden to be discharged in respect of part.

34. First, even on the assumption that the “amount” referred to in the introductory words is the total amount proved to have been in the person’s possession, “a reference to a word or expression in the singular form includes a reference to the word or expression in the plural form” unless a contrary intention appears: *Interpretation Act 1987* (NSW), s 8(b). The reference to “the prohibited drug” in the person’s possession may be understood as including various discrete amounts in the person’s possession, which may be held for different purposes. If the person proves that he or she had one or more of those amounts in his or her possession otherwise than for supply, only the remaining amounts are deemed to be possessed for supply.
35. Consider the following scenario. The prosecution adduces evidence to prove that a person has in his or her possession two bottles each containing 550 grams of BD. The person seeks to prove that one of the bottles was possessed for personal use. The combined amount of 1,100 grams may be understood as composed of two separate amounts of 550 grams each. Even if the prosecution proves that both were in the possession of the person, if the person proves that one of the amounts was possessed for personal use then that amount is to be regarded as not possessed for supply. As regards the other bottle, if the person fails to prove that it was possessed otherwise than for supply it will be deemed to be in possession for supply.
36. Secondly, on the same assumption that the “amount” referred to in the introductory words is the total amount proved to have been in the person’s possession, the words of para (a), “otherwise than for supply”, are directed to purpose, not quantity, and their natural meaning requires the person to prove any state of affairs other than the deemed position, which is that the whole of the drug in the person’s possession was for supply. Para (a) does not say “the whole of the prohibited drug”, and the contrast with the express quantitative language of the chapeau (“an amount... which is not less than the traffickable quantity”) tells against implying words of totality into it. A person who proves that part of the drug was for personal use has proved that he or she had the

drug in possession otherwise than for supply, that is, otherwise than for the supply of the whole (some being for supply, some for personal use).

37. On the scenario noted above, “the prohibited drug” is the combined amount of 1,100 grams but if the person proves that one of the amounts was possessed for personal use then the person has proved that he or she had the drug in possession otherwise than for supply, that is, otherwise than for the supply of the whole. The deeming then operates upon the amount not proved to be possessed otherwise than for supply since, as regards the other bottle, if the person fails to prove that it was possessed otherwise than for supply it will be deemed to be in possession for supply (if the prosecution proves that it was in the possession of the person).

38. On neither of these constructions can an accused avoid the engagement of the section by notionally subdividing the whole into parcels below the traffickable quantity, and nor does proof under para (a) as to part of the drug disengage the section, even where the amount remaining is itself less than the traffickable quantity. A person found with 60 grams of BD who proves that 40 grams were for personal use remains deemed, by force of the section engaged by the whole, to possess the remaining 20 grams for supply.

39. The exception in para (a) then operates according to the evidence. To the extent that the person proves that the drug was in his or her possession otherwise than for supply, the deeming is displaced, and the balance remains deemed to be possessed for supply. The deeming is never wholly defeated by proof of partial personal use, and no acquittal results because the person remains guilty of supply in respect of the balance. That is, the person is still deemed to supply whatever he or she has not proved was possessed otherwise than for supply. What the evidence affects is the amount. Where the balance is not less than the “commercial quantity”, the person may be convicted of an offence against s 25(2). Where it is less, the deemed possession for supply is of a lesser amount, and s 25(3) permits the jury (or a judge sitting alone) to acquit the person of the offence charged and find the person guilty of an offence under s 25(1). The person is still guilty of “supply”, but not in respect of that part of the quantity not intended to be supplied.

40. That is the orthodox understanding of the scheme. In *Salameh v R* [2024] NSWCCA 239, Bell CJ, Payne JA and Sweeney J, adopting *Can v R* [2023] NSWCCA 179 at [31],

identified the elements of an offence of this kind as being that there was a substance that was a prohibited drug, that the offender possessed that substance, and that the offender possessed that substance for the purpose of supply, and observed that the third element “is proven by the application of the deeming provision in s 29”: *Salameh* at [10]. Their Honours likewise described s 25(3) as requiring the jury “to identify the amount of the prohibited drug actually involved” in order to be satisfied that it reaches the commercial quantity: *Salameh* at [8].

41. Each of these constructions gives s 29 its full facilitative effect, and no more. The prosecution retains the benefit of the deeming in every case, except to the precise extent that the accused affirmatively discharges the onus. That is, unless the tribunal of fact is affirmatively satisfied, on the balance of probabilities, that at least a particular quantity was possessed otherwise than for supply, the whole remains deemed. Nor does proof that a trivial quantity was for personal use produce any absurdity where it displaces the deeming only as to that quantity, and the remainder, however large, remains deemed to be possessed for supply. The prosecution thus has the presumption in respect of all of the drug that the person has not proven was held otherwise than for supply. It needs no more, and the purpose of the provision warrants no more. In fact, to extend the deeming to quantities proved to be for personal use would give s 29 “a legal operation beyond that required to achieve the object of its incorporation”: *Wellington Capital* at [51].

The construction to be preferred

42. The choice between these constructions and that adopted by the CCA is to be made in the ordinary way, by reference to text, context and purpose: see eg *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at [1], [17], [20]. In making that choice, it is appropriate to ask whether a particular construction of a criminal statute would produce a wholly unjust outcome, because it is implausible that Parliament intended the statute to bear a meaning productive of manifest injustice. The CCA’s construction would do so. A person found in possession of two containers of BD, each containing 550 grams, who proves that one was held wholly for personal use and fails to prove that as to the other, has been proved to possess (only) 550 grams for supply; yet on the CCA’s construction the person must be convicted of supplying not less than 1 kilogram.

43. To give s 29 that effect simply because its general words can be so read “would be to give them a meaning in which they were not really used”, and “[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness”: *Potter v Minahan* (1908) 7 CLR 277 at 304. That is, a statutory intention to abrogate or curtail fundamental principles of the general law must be “clearly manifested by unmistakable and unambiguous language”: *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [171]-[173].

10 44. Section 29 derogates from the fundamental principle that the prosecution must prove beyond reasonable doubt the facts on which criminal liability depends. Its clear words require the person to prove the purpose of the possession, and to that extent the derogation is plain. The CCA’s construction carries the derogation much further, in convicting the person of the more serious, quantity-graded offence although the person has proved that part of the drug was not possessed for supply, with the remaining part less than the commercial quantity. Nothing short of clear language or necessary intendment could give a reverse onus provision that operation, and s 29 contains neither.

The reasoning of the Court of Criminal Appeal

20 45. The CCA’s textual reasoning rested upon the definite article, where it stated that “the prohibited drug” in the chapeau and in para (a) “refers to the entirety of the prohibited drug in the person’s possession”, such that a failure to prove that “the” whole single quantity was possessed otherwise than for supply means that para (a) is not satisfied: J [27] (CAB 81). The definite article, however, does not prescribe the manner in which the exception in s 29(a) may be satisfied. The appellant accepts that “the prohibited drug” bears a consistent meaning across the section in that both the chapeau and para (a) refer to the drug the possession of which engaged the section. However, what the CCA’s construction adds is a further requirement, found nowhere in the words, that the proof contemplated by para (a) is proof as to the whole of that drug and nothing
30 less. The error is then compounded, with the deemed fact thereafter being treated as proving, conclusively, that the supply was of an amount not less than the commercial

quantity, a matter to which the deeming, read in the light of its purpose, does not extend.

46. *Salameh v R* [2024] NSWCCA 239, from which the CCA drew support (J [28]; CAB 81), decided a different question: whether the intention required for an offence against s 25(2) related to the prohibited drug actually supplied, or to a drug the accused mistakenly believed he was supplying. The definite article in s 25(2) there resolved the identity of the drug: *Salameh* at [6], quoted at J [28] (CAB 81). It said nothing about whether an accused may discharge the onus under s 29(a) as to part of a quantity. The CCA itself acknowledged that the reasoning was “not directly applicable”: J [29] (CAB 82). Properly read, *Salameh* assists the appellant. Beyond the passages at [8] and [10] set out above, Basten AJA (with whom the other members of the Court agreed) illustrated the severability of the elements by reference to *Albassan v R* [2017] NSWCCA 73 in that where the evidence established that the offender was supplying a prohibited drug but the quantity element could not be proved, “only the s 25(1) offence was proven”: *Salameh* at [128].
47. The second strand of the CCA’s reasoning was that, in the absence of any capacity to distinguish between the four quantities of the drug, the drug “became, in effect, an indivisible whole”, so that it was “not possible to point to any part of the substance and be positively satisfied on the balance of probabilities that it was possessed by the applicant for a purpose other than for supply”: J [31] (CAB 82). That reasoning, with respect, asked the wrong question. The question posed by s 29(a) is one of purpose. A purpose may attach to a quantity or proportion of a whole.
48. In this case, the trial judge accepted at trial that the appellant “was a heavy and experienced user of BD” (CAB 35), and found on sentence that “a portion of the BD, although I cannot determine how much, was for his own use”: ROS p 7 (CAB 50).
49. If a tribunal of fact can be satisfied on the balance of probabilities that at least a specified quantity was possessed for personal use, then para (a) is satisfied to that extent. In the present case, notwithstanding that the sentencing judge was unable to determine (precisely) how much was for personal use, if it was probable that the amount was greater than 105.2 grams then s 25(3) would apply to require the appellant to be acquitted of the s 25(2) offence and found guilty of the s 25(1) offence.

50. On the CCA's construction, by contrast, the exception in para (a) is in practical terms incapable of being satisfied by any user who also supplies. The heavier and the better proved the accused's addiction (as here), the more certainly the deeming convicts him or her of the aggravated, quantity-defined offence, however small the proportion held for supply. Further, where the prosecution relies on s 29, the alternative verdict for which s 25(3) provides can never be reached if the deeming, triggered by possession of 30 grams, conclusively supplies both the purpose and the quantum. An intention that s 25(3) should have no operation in such cases should not be attributed to Parliament.

10 51. Nor did the observations at J [30] (CAB 82) answer the appellant's argument. It may be accepted that there is no separate offence of deemed supply, and that the relevant mental element concerns the intention with which, and at the time at which, the drug is possessed. If anything, those propositions assist the appellant because the offence created by s 25(2), when rested on the possession limb of the definition of supply, is defined by the amount had in possession for supply, with the intention with which the drug, and how much of it, was possessed determining which offence has been committed. It may be said that, if the whole of the drug is deemed to be possessed for supply and not disproven, the amount "involved" is necessarily the whole, so that nothing is left for s 25(3) by way of substitution. That, however, assumes the
20 construction in issue. On the constructions advanced above, the amount deemed to be possessed for supply is the amount that the person has not proved was possessed otherwise than for supply, and s 25(3) operates according to that amount.

52. The CCA's interpretation was to extend s 29 beyond its purpose by converting an undisputed evidentiary provision, engaged at the traffickable quantity and directed to the character of the possession, into conclusive proof of the amount which marks out the more serious offence. Nothing in the text of s 29, which speaks of possession "for supply" and not of the supply of any amount, requires that result.

30 53. A construction under which an accused must be convicted of the 20-year offence although he has proved that the amount possessed for supply was less than the commercial quantity, and although the tribunal of fact could not otherwise be satisfied of that amount, should not be attributed to Parliament. That conclusion follows from the text of para (a), the structure of Div 2 and the purpose of s 29.

54. The CCA's concluding observations confirm, rather than answer, the difficulty. Their Honours accepted that the appellant's offence "did not become radically more serious at the point at which the quantity of the drug in his possession moved from 999 grams to 1 kilogram", and that "[n]or could the fact that the applicant did not intend to supply all of the drug in his possession be removed from the equation", but treated these as matters accommodated in sentencing: J [46]-[47] (CAB 87). The boundary between s 25(1) and s 25(2) is, however, a boundary Parliament drew in terms of amount, and to which it attached a substantially higher maximum penalty. Which offence a person has committed is not a matter of sentencing discretion, as s 25(3) itself demonstrates.
- 10 The observation in *Pearce v The Queen* (1998) 194 CLR 610 at [40], cited at J [46] (CAB 87), that "the punishment to be exacted should reflect what an offender has done", supports the appellant in that on the findings made, what the appellant was proved to have done did not include having in his possession for supply an amount not less than the commercial quantity.

Application to this case and disposition

55. Had ss 25 and 29 been construed as the appellant contends, the question at trial on count 1 would have been whether the appellant proved, on the balance of probabilities, that some part of the BD (relevantly, more than 105.2 grams of the 1,105.2 grams) was in his possession for his own use. The trial was not conducted on that footing. The
- 20 Crown put, and the trial judge accepted, that nothing short of proof by the accused as to "the entire quantity" would suffice: T 16.10.23, p 2 (ABFM 5); T 18.10.23, p 146 (ABFM 149); CAB 13, quoted at J [41] (CAB 85); CAB 43, quoted at J [43] (CAB 86).
56. There was ample evidence on which the narrower finding could have been made: the unchallenged pharmacological evidence of heavy daily use by addicted users (CAB 21-23); the trial judge's acceptance that the appellant "was a heavy and experienced user of BD" (CAB 35); his Honour's finding on sentence that "a portion" of the BD was for the appellant's own use (ROS p 7; CAB 50); and the appellant's evidence that the whole quantity represented no more than one to two weeks' personal use (T 17.10.23, p 80; ABFM 83). The excess of the quantity possessed over the commercial quantity
- 30 was 105.2 grams, which, on the appellant's evidence, was roughly a single day's use. The CCA was prepared to accept in light of the evidence, on the appellant's construction, that "it would not have been possible to be satisfied beyond reasonable

doubt that the applicant intended to supply a commercial quantity of the drug”: J [26] (CAB 81). While that proposition is not the same as a finding that the appellant had proved on the balance of probabilities that he did not possess a commercial quantity for supply, it plainly raises the issue whether such a finding ought to have been made (with the consequence that the s 25(2) conviction would be “unreasonable, or cannot be supported”).

57. The appropriate course, reflecting the orders sought in the notice of appeal, is to set aside the orders of the CCA and to remit the appeal against conviction to that Court, to be determined in conformity with the reasons of this Court.

10 **PART VII: ORDERS SOUGHT**

58. The appellant seeks the following orders:

- (a) Appeal allowed.
- (b) Set aside the orders made by the New South Wales Court of Criminal Appeal on 7 November 2025 and remit the appeal against conviction to the New South Wales Court of Criminal Appeal.

PART VIII: ESTIMATE OF TIME

59. The appellant estimates that 1 hour will be required for the presentation of oral argument, including reply.

Dated: 24 September 2026

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1	<i>Drug Misuse and Trafficking Act 1985</i> (NSW)	version in force 14 December 2022	ss 3(1) ("supply"), 25, 29, 32, 33, Sch 1	Act in force at the date of the offence	14 December 2022
2	<i>Evidence Act 1995</i> (NSW)	version in force October 2023	s 141(2)	Act in force at the date of trial	16-19 October 2023
3	<i>Interpretation Act 1987</i> (NSW)	Current version	s 8(b)	Unchanged in relevant respects	–
4	<i>Criminal Appeal Act 1912</i> (NSW)	Current version	s 6(1)	Act in force at the date of the CCA judgment	7 November 2025
5	<i>Poisons (Amendment) Act 1970</i> (NSW)	As made	s 2(1)(n)	Precursor to s 29 of the DMTA	–