



HIGH COURT OF AUSTRALIA

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

BETWEEN:

ADRIAN HILARY BARBER

Appellant

and

THE KING

Respondent

RESPONDENT'S SUBMISSIONS

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PART I FORM OF SUBMISSIONS

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

PART II CONCISE STATEMENT OF ISSUES

2. **On construction:** Section 29(a) of the *Drug Misuse and Trafficking Act 1985* (NSW) (DMTA) provides that a person found in possession of an amount of a prohibited drug which is not less than the traffickable quantity of the prohibited drug shall be deemed to have the prohibited drug in their possession for supply unless the person proves that they possessed the prohibited drug otherwise than for supply.
3. Where an accused is found in possession of 1,105.2 grams of 1,4-butanediol (which is not less than a traffickable quantity), must they prove that the entire amount of 1,105.2 grams was possessed otherwise than for supply to avoid being deemed to have possessed that entire amount for supply (as the Court of Criminal Appeal (CCA) held and as the respondent contends) or is the presumption rebutted in respect of those amounts of the prohibited drug which the accused proves that they possessed otherwise than for supply (as the appellant contends)?
4. **On relief if the appeal is allowed:** If the appellant's construction is accepted, then did the appellant actually prove that he possessed a sufficient amount of 1,4-butanediol otherwise than for supply such that the Crown could not prove beyond reasonable doubt that he possessed a commercial quantity? The respondent submits "no". The CCA did not have to address this because it rejected the appellant's argument on construction. The appropriate relief is to order a retrial.

PART III SECTION 78B NOTICE

5. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV MATERIAL FACTS IN DISPUTE

6. There is no dispute about the facts in **AS [8]-[13]**, but it is necessary to supplement those facts as follows.
7. The appellant's car was stopped and searched on 14 December 2022. Inside the car, police found a white plastic bottle containing 96.5g of 1,4-butanediol (part of **count 1**) (**RFM 7-11**)¹. Police also found some other drugs, including methylamphetamine, and a plunger syringe.
- 10 8. Police seized and examined the appellant's phone. The application "Signal" was installed on it (**RFM 15**)². There was expert evidence that encrypted applications like Signal are used to avoid law enforcement detection because of a (false) belief that they cannot be accessed by law enforcement (**RFM 38**)³.
9. On the appellant's phone were found text and Signal messages, including the following (**RFM 5**):⁴
- 9.1. An outgoing text message to "Vic" on 3 December 2022 reading "Whats doen Vic? My mates here now I need my cash !".
- 9.2. An incoming text message from "Tatum MJ" on 14 December 2022 reading "Hey could you stop by Unanderra plz I have paper".
- 20 9.3. An incoming Signal message from "Pauly" reading "If you could bring me 10 drinks that would be hectic I can't believe how fkn hard mutsai has made things for me this time bro".
10. There was expert evidence that:
- 10.1. the term "drink" is a common term for drugs like 1,4-butanediol (**CAB 23**);
- 10.2. "papers" is a common term for money (**CAB 24**); and

¹ Exhibit C.

² Exhibit D at [16].

³ Exhibit J1 at [46].

⁴ Exhibit A.

10.3. the message reading “If you bring 10 drinks that would be hectic” was consistent with a person requesting the supply of 10ml or \$10 of GBL or its derivative (**CAB 24**).

11. After arresting the appellant, police searched his home. Inside a locked safe in the wardrobe, police found three bottles of 1,4-butanediol weighing a total of 1,008.7g (**CAB 12**) (remainder of **count 1**). One of the bottles was identical to the one that had been found in the car (**RFM 8, 9**).⁵ Also inside the safe were a flick knife, other drugs and \$500 in cash (**RFM 14**).⁶ All of these items belonged to the appellant (**RFM 14**).⁷ A number of plunger syringes were found in the walk-in robe (**CAB 19; RFM 27**)⁸, although the prosecution’s drug expert was unable to express an opinion as to whether the syringes were indicative of supply or personal use because he could not tell how large the syringes were (**CAB 25; AFM 54**).
12. On top of a tallboy was a page with handwritten numbers on it (**RFM 17**)⁹. There was expert evidence that some of the notations on the page were consistent with a drug ledger. Drug ledgers are used by drug suppliers to track money owed, paid and received (**CAB 24**). By contrast, “users generally do not document what they buy” (**CAB 25**). There is a line referring to “30ml” and “\$150”. There was expert evidence that this was consistent with pricing for GBL (\$5 per ml) (**CAB 25**). The amounts recorded appeared to be in the lower street level range of supply (**CAB 25**).
13. The appellant’s case was that he was a heavy user of 1,4-butanediol and that all the 1,4- butanediol in his possession was for personal use. He also used ice and other drugs (**CAB 28**). He said that a litre of 1,4-butanediol would last him one to two weeks, depending on quality (**CAB 29**). He admitted that he sold ice to fund his 1,4-butanediol addiction (**CAB 29**). He said that “Pauly”, “Vic” and “MJ” were all his suppliers (**CAB 30**).

⁵ Exhibit C.

⁶ Exhibit D at [11].

⁷ Exhibit D at [11].

⁸ Exhibit H.

⁹ Exhibit G.

14. The trial judge summarised the appellant's evidence about the messages on his phone (**RFM 5**)¹⁰, the document on the tallboy (**RFM 16**)¹¹ and the cash in the safe at **CAB 32-43**:

14.1. Exhibit G (the alleged drug ledger) "could be anything". In cross-examination, he said that the references to "mls" were references to the internet. However, when asked how they could relate to the internet, he said "I'm not too sure" and "I don't know what it is".

14.2. He had sold ice on credit but did not make a record of that.

10 14.3. As to the message reading "Hey could you stop in Unanderra I have paper", that related to his supply to "MJ" of ice.

14.4. As to the message reading "If you could bring me 10 drinks that would be hectic", he said that Pauly was asking him to supply 1,4-butanediol but that he had not supplied it to him. In cross-examination he said that Pauly was his supplier, not the other way around, and that he never replied to that message.

14.5. He said that the \$500 in cash were savings. He denied that it was the proceeds of sale of 1,4-butanediol but admitted it could have been from the sale of ice.

15. The trial judge made the following findings in finding the appellant guilty of count 1:

15.1. While the appellant was a heavy user of 1,4-butanediol, no finding could be made as to the extent of that usage (**CAB 35**).

20 15.2. The appellant's evidence concerning the message from "Pauly" on 6 December was "unpersuasive". His Honour said that "I do not accept the fact that eight days prior to the alleged offence that a person who the accused said he had known for four years and was his supplier of BD would ask the accused to supply him with BD without good reason or an explanation for an expectation that the accused would supply him with BD" (**CAB 42**).

15.3. As to Exhibit G (the drug ledger), "the accused's evidence concerning his entry on that document to be evasive and unconvincing. His denial of any knowledge of what that entry related to or a suggestion that it related to the internet, was implausible

¹⁰ Exhibit A.

¹¹ Exhibit G.

and deliberately untruthful. I found his evidence on this to be a deliberate attempt to mislead” (CAB 43).

15.4. The appellant was at times argumentative and “not an impressive witness”. This caused his Honour to have concern about the appellant’s credibility and reliability generally (CAB 43).

16. The trial judge ultimately found that he was not satisfied on the balance of probabilities that the appellant possessed the entire amount of 1,4-butanediol for his own personal use, being the issue that was joined between the parties at trial (CAB 43).

17. Finally and for completeness, AS [14] relies on the sentencing judge’s findings on sentence. Those are not relevant to his conviction appeal.

PART V SECTION 29 OF THE DMTA

A. The legislative history of s 29 of the DMTA

18. While the text of s 29 of the DMTA is critical to its construction, it is important to appreciate its history.

19. *Poisons (Amendment) Act 1970*. Prior to the enactment of the DMTA, the supply of prohibited drugs was governed by the *Poisons Act 1966* (NSW) (*Poisons Act*). The predecessor to s 29 of the DMTA was s 45A(4) of the *Poisons Act*, which was introduced by the *Poisons (Amendment) Act 1970* (NSW). It provided:

A person who has in his possession a quantity of any drug of addiction, prohibited drug or addictive or prohibited substance in excess of the quantity prescribed in respect of that drug, in respect of addictive or prohibited substances generally or in respect of any such substance for the purposes of this subsection shall, for the purposes of any proceedings for an offence to which this section applies, be deemed to have that drug or substance in his possession for supply or sale, unless—

- (a) the defendant proves the contrary; or
- (b) except where that drug is, or that substance contains, prepared opium, Indian hemp or a prohibited drug, the defendant proves that he obtained possession of that drug or substance on and in accordance with the prescription of a medical practitioner, dentist or veterinary surgeon.

20. In his second reading speech, the Minister for Health extolled recent advances in medicine that “have placed at the disposal of the medical profession an extensive armamentarium of new drugs”¹² and then turned to the mischief at hand in saying:¹³

It is not surprising, therefore, that the increase in the range and variety of drugs available has led to a corresponding increase in the problems which have accompanied the wider knowledge of and use of them. When these increases are coupled with a rapidly changing society which has seen changes, radical at times, in many of the attitudes and outlooks previously held, it is not surprising that the problem of abuse of drugs has reached its present proportions.

- 10 21. The Minister asserted that “the abuse of drugs presents today one of the rapidly increasing menaces to our society”¹⁴ and went on to say that:¹⁵

Lying at the core of the drug abuse problem is the pedlar. The pedlar is insidious and unscrupulous; without him there is no organized drug abuse problem. ... Huge profits can be made in drug trafficking. Many people from various levels of society are associated with it, despite the human degradation and destruction caused by it. If the pedlar can be eliminated, much of the problem is solved. The Government has announced its intention of pursuing and exposing the pedlar and of providing substantially increased penalties, particularly for the pedlar of the so-called hard drugs. The bill accordingly contains provisions to enable
20 certain offences to be prosecuted on indictment if the seriousness of the case merits it.

22. The *Poisons (Amendment) Act 1970* (NSW) introduced a number of provisions intended to curb the abuse of drugs by targeting drug suppliers. One such provision was s 45A(4). The Minister explained this provision in the following terms (emphasis added):¹⁶

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, dentist or veterinary surgeon. This is a drastic procedure, but the Government has not lightly introduced it. The Government respects the liberty of the individual, but considers that this action should be taken.

23. The Minister then added (emphasis added):¹⁷

¹² New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1970 at 5340.

¹³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1970 at 5340.

¹⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1970 at 5340.

¹⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1970 at 5340.

¹⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1970 at 5341.

¹⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1970 at 5341.

This provision will at first sight appear repugnant to fair-minded people who will assert that it is a denial of justice, as it shifts the onus of proof from the accuser to the accused. That the onus of proof is reversed is undoubtedly so, and I make no bones about it. The problem of drug peddling is a desperate situation demanding desperate measures if it is to be remedied. Law-abiding citizens will have nothing to fear from this provision-they will not have any difficulty in proving that their possession of such drugs is legitimate. It will be the person in illegal possession who will have difficulty in proving that he does not have it in possession for supply or sale. This will enable the lawbreaker to be placed where he is in a position to break the law no more-in gaol. ...

At the present time, the police may apprehend known or suspected pedlars with drugs illegally in their possession, but they are unable to prove that they are held for supply or sale and consequently can lay only a charge of illegal possession. The proposed amendment will enable the police to deal more effectively with such cases.

24. The Minister noted that a similar reversed onus provision applied in the context of prescribed restricted substances (emphasis added):¹⁸

... As is proposed in the case of prohibited drugs and drugs of addiction, the onus of proof will be reversed in respect of prescribed restricted substances and possession will be evidence of having in possession for supply or sale, unless it is proved by the defendant to the contrary, or that the possession is legitimate. As I said before, **this provision may be considered by some to be repugnant, but the problems caused by the illegal use of these drugs impels the Government to this course of action.**

25. The Minister explained the significance of the (new) statutory concept of an amount “in excess of the quantity prescribed in respect of that drug” in s 45A(4) as follows (emphasis added):¹⁹

Coupled with the foregoing proposals is a new avenue of the attack on pedlars, which I have already mentioned briefly. **It is intended to prescribe by regulation a quantity in respect of certain restricted substances, drugs of addiction and prohibited and addictive drugs and then to make it evidence of possession for supply or sale where a person is found in possession of a quantity of the drug in excess of that prescribed quantity.** This will assist in discriminating between addicts and pedlars, as **the quantity prescribed in respect of each drug will be set at such a figure as to take account of the quantity an addict is likely to have in possession.**

For example, if the prescribed quantity for marijuana were set at a quantity, say, in excess of 25 grammes, then a person in possession of 10 grammes would be regarded as being an addict and would not fall within the provisions of the bill relating to the reversal of onus of proof. **If, however, he were in possession of 100 grammes of marijuana, he would be regarded as a pedlar and would be**

¹⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1970 at 5341.

¹⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1970 at 5342.

required to prove that he did not have it in possession for supply or sale. Regulations prescribing the quantities of drugs, the possession of which will be regarded as peddling will be introduced should this legislation be approved.

26. Later in the second reading debates, the Minister said (emphasis added):²⁰

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Only once during the debate was any reference made to the reverse onus of proof. For the first time **evidence of possession of these drugs will prima facie be evidence of drug peddling. The onus will be upon persons found in possession of the drugs to establish that they have not been peddling them** and they will be rendered open to substantial penalties. I am delighted that **this dramatic departure from the usual procedure has been widely accepted because of the importance of taking punitive action against people who are operating in this field.**

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27. *DMTA*. The DMTA was “the final legislative measure in the Government’s integrated strategy to attack drug misuse and trafficking”.²¹ The strategy was said to involve “initiatives and legislation on every front in what the Premier has described as a ‘full-scale war on illegal drugs’”.²² In his second reading speech in the Legislative Assembly, the Attorney General described “the offences of supplying, possessing and using prohibited drugs” as “amongst the most serious of any criminal offences”²³ and said of the concept of “traffickable quantity” 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 ...”²⁴
28. These matters were elaborated in the Minister for Transport’s second reading speech in the Legislative Council. He identified the Bill as “compris[ing] the third arm of the Government’s attack on serious drug activity”.²⁵ He said that “The principal bill codifies

²⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 September 1970 at 5498. The onus provision was referred to by the Member of Northcote, who said:

The bill addresses itself to a very grave social problem, and approaches it in a number of ways. First, it increases penalties, with particular emphasis upon penalties for drug pedlars. It introduces certain new sections creating offences, and in an important respect it changes the onus of proof, taking cognizance of the severity of the problem to which it is addressing itself for the justification of that fairly extreme measure. In short, the bill is punitive in its approach, addressing itself to a great social evil.

See New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 September 1970 at 5427-5428.

²¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 November 1985 at 10614.

²² New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 November 1985 at 10615.

²³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 November 1985 at 10615.

²⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 November 1985 at 10617.

²⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 2 November 1985 at 11122.

and extends the range of drug offences and penalties available in the war against drug trafficking”.²⁶ He explained cl 29 (now s 29) as follows:²⁷

The new term, traffickable quantity, is also introduced. This is the quantity of prohibited drug or 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 45A(4) of the Poisons Act.

29. The explanatory note accompanying the Bill said:²⁸

10 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.

30. The following threads emerge from this history.

31. *First*, the Parliament directly turned its attention to the fact that s 29 and its predecessor could have harsh consequences on persons charged with an offence to which it applies. Indeed, the Parliament made a deliberate decision to adopt and embrace such consequences as a means of pursuing its object of combatting drug use and supply.

20 32. *Second*, the statutory concept of a “traffickable quantity” was of significance to the legislative scheme. It reflected a legislative determination as to the amount which, if possessed, made it likely that the person was a supplier rather than a mere user of the relevant prohibited drug, such that the person ought to be treated as a supplier unless they could prove that that amount was not possessed for supply.

33. *Third*, the mischief sought to be remedied could be described at one level of generality as the difficulty police had in proving that substances were possessed for the purpose of supply. The mischief could also accurately be described at a higher level of generality as widespread drug abuse which the Parliament laid at the door of suppliers (“pedlars”). The Parliament enacted a suite of measures to address that mischief, of which the reversal of onus provision was only one aspect.

²⁶ New South Wales, *Parliamentary Debates*, Legislative Council, 2 November 1985 at 11122.

²⁷ New South Wales, *Parliamentary Debates*, Legislative Council, 2 November 1985 at 11124.

²⁸ Explanatory Note, Drug Misuse and Trafficking Bill 1985 (NSW) at 3.

34. The legislative history summarised in Part A above sets the scene for interpreting s 29 of the DMTA. These historical threads come together to inform and support the construction of s 29 which is amply apparent from its text in any event.

B. Argument: Proper construction of s 29

35. The starting point is the text. It is convenient to again set out the language of s 29:

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 purposes of this Division, be deemed to have the prohibited drug in his or her possession for supply, unless—

- 10 (a) the person proves that he or she had the prohibited drug in his or her possession otherwise than for supply;
- (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.

- 20 36. The initial reference to “an amount of a prohibited drug which is not less than the traffickable quantity of the prohibited drug” obviously refers to the entire amount which the accused was found to have possessed. It can only sensibly be by reference to the entirety of what is possessed that the court assesses whether the traffickable quantity threshold has or has not been crossed.

37. It is next important to appreciate that the chapeau to paragraphs (a) and (b) sets out the rule which paragraphs (a) and (b) then qualify (the explanatory note quoted at [29] described them as “defences”). That rule is that if a person has in his or her possession “an amount of a prohibited drug which is not less than the traffickable quantity of the prohibited drug”, then that person possesses “the prohibited drug” for supply. There is no rational reason to read the reference to “the prohibited drug” to mean only the identity of the drug, rather than both the identity of the prohibited drug and the quantity of that drug that was in the person’s possession. After all, it is the possession of “an amount of a prohibited drug which is not less than the traffickable quantity of the prohibited drug” (a compound statutory concept taking into account both the quantity of drug possessed and the identity of the drug possessed) that triggers the application of the rule.
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38. That being the nature of the rule, there is then no rational reason to read the qualification in subsection (a) (that the person had “the prohibited drug in his or her possession other

than for supply”) to refer to anything other than the quantity that was sufficient to trigger the rule in the first place. Such a view is consistent with the use of the definite article “the” in subsection (a), which naturally refers back to that which has been mentioned already (that is, “an amount of a prohibited drug which is not less than the traffickable quantity of the prohibited drug”).

39. Once it is appreciated that the rule in the chapeau to s 29 is directed to the entirety of the drug in the person’s possession, the qualification to that rule in s 29(a) cannot reasonably be interpreted to refer to anything other than the entirety of the prohibited drug found in the person’s possession. That matches the scope of the qualification to the scope of the rule it is qualifying.

40. **AS [40]** suggests that the appellant’s construction is consistent with *Salameh v R*²⁹ but that case instead supports the CCA’s construction. A critical aspect of the reasoning in *Salameh* was that the phrase “**the** prohibited drug” in s 25(2) must have been intended to be a reference to the same drug as reflected by the phrase “**a** prohibited drug” earlier in the section (at [6]). In the same way, “**the** prohibited drug” which a person may prove was in their possession otherwise than for supply in s 29(a) must be understood as referring to the same drug referred to in the chapeau phrase “**an amount of a prohibited drug which is not less than the traffickable quantity...**”.

41. This textual analysis is supported by the evident purpose of the provision as revealed by the text and legislative history, namely to combat illicit drug use by facilitating the prosecution of those who supply drugs: see [22]-[26] above. The specification of a “traffickable quantity” was an important means to achieve this purpose. The concept of a “traffickable quantity” was employed to distinguish suppliers (“pedlars”) from users (“addicts”). The legislature decided that possession of the traffickable quantity was sufficient to designate the person as a supplier. This designation was only to be displaced if that amount was proved by the accused to be in their possession otherwise than for supply. The appellant’s reference to the provision as a (mere) “evidentiary provision” (**AS [4]**) does not fully capture the Parliament’s intention in enacting s 29 and its legislative predecessor.

42. There are statements in the **extrinsic materials** that directly support this analysis. As noted above at [25], on the second reading of the Bill, the Minister was quoted as saying

²⁹ [2024] NSWCCA 239.

“If, however, he were in possession of 100 grammes of marijuana, he would be regarded as a pedlar and would be required to prove that he did not have it in possession for supply or sale”. This is consistent with the position taken by the trial judge and the CCA, namely that the accused had to prove that he possessed the entire amount otherwise than for supply (being 100 grams in the Minister’s example).

43. Finally, the overall context of the DMTA is important. The statutory policy of the DMTA is to deter the drug trade even at the expense of potentially “harsh” consequences in individual cases. This policy is manifest throughout the statute in different ways.

10 43.1. There is the extended definition of supply (see s 3), which defines “supply” to include “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”.

43.2. There is the admixture provision in s 4, which provides that “a reference to a prohibited drug includes a reference to any preparation, admixture, extract or other substance containing any proportion of the prohibited drug”.

43.3. There is the reversal of onus provision in s 11B, which requires proof that possession of a drug encapsulator is for a lawful purpose.

20 43.4. There is the reversal of onus provision in s 11C, which requires proof that possession of instructions for manufacture or production of a prohibited drug is for a lawful purpose.

43.5. There is the offence of ongoing supply in s 25A, which renders a person who supplies small quantities of a drug on 3 or more occasions during 30 consecutive days liable to an offence carrying a maximum penalty of 20 years.

43.6. A final example is s 36X, which makes it an offence to enter or leave drug premises with a reversal of the onus to prove that the person entered or left for a lawful purpose.

- 30 44. The CCA’s construction of s 29 is in harmony with the general statutory policy which these provisions manifest. Conversely, the appellant’s resort to “fairness” is inconsistent with the overall statutory context that adopts statutory mechanisms that might, from the perspective of an accused person, be regarded as “unfair”.

45. It is useful to consider the admixture provision in more detail. Section 4 of the DMTA provides that “a reference to a prohibited drug includes a reference to any preparation, admixture, extract or other substance containing any proportion of the prohibited drug”. This provision enables a person in possession of over a traffickable quantity of a substance, which may be almost entirely inert, to be convicted of supply. In *R v Tuncok* [1982] 2 NSWLR 332, it was argued that the deeming provision in then s 45A(4) of the Poisons Act could not be understood to apply to the entire quantity of a substance if only a small portion of it were a prohibited drug. That argument was rejected:³⁰

10 A substance such as I have postulated containing a small proportion of Indian hemp could exceed the prescribed quantity if there were more than 25 grammes of the substance in the parcel under consideration. Mr Papayanni contends this could never have been the intention of the legislation. I fail to see why not. Indeed the complications and refining involved in analyses and other measurements would seem to make it eminently likely that the legislature intended that if a person has more than 25 grammes of either pure Indian hemp or a substance which contains Indian hemp within it, then he is deemed to have that – be it pure Indian hemp or a diluted substance – in his possession for supply.

46. This argument was again advanced the argument in *R v R*³¹ in respect of s 29 of the DMTA and it was once again rejected.

20 **C. Other responses to the appellant’s arguments**

C.1 Unfairness

47. The appellant contends that the CCA’s construction of s 29 produces “unjust” results which, it is asserted, Parliament cannot have intended: see **AS [5], [42]**. However, the legislative history shows quite clearly that harsh results were contemplated (even intended). The legislature determined that potential unfairness to an individual was an acceptable price to pay to achieve the legislative policy of deterring drug abuse so as to achieve a greater public good: see [22]-[26] above. This case bears out the observation that “fairness... is often in the eye of the beholder”.³² The appellant’s argument illustrates the often-repeated warning not to give effect to *a priori* assumptions about the “desirable reach” of a provision divorced from the statutory text read in context.³³
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³⁰ [1982] 2 NSWLR 332 at 335 (Street CJ; Hope JA agreeing).

³¹ (1990) 19 NSWLR 513 at 515-517 (Gleeson CJ; Smart and McInerney JJ agreeing).

³² *Conroy’s Smallgoods v Australasian Meat Industry Employees Union* (2023) 408 ALR 316 at [117].

³³ See, eg, *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378 at [26].

48. Observations by King CJ in *R v Billick & Starke* are apt:³⁴

10 ... When a legislature creates a presumption of fact having possible penal consequences, it takes a serious step. It attributes to a citizen some act or state of mind possibly contrary to the truth of the matter. The presumption in the present case is rebuttable but the result of its application may nevertheless be the attribution to the accused person of a purpose which he did not in fact entertain. Such a legislative step is understandable when directed towards a particular offence. Parliament can then contemplate and appreciate the likely consequences of the presumption. It may be prepared to accept that a person who possesses a substantial quantity of a prohibited drug is to be punished as a person possessing it for the purposes of trading notwithstanding that that may not have been his true purpose. Nevertheless a deemed state of facts is not to be confused with the true state of facts. Normally the legislative purpose will be simply to facilitate the proof of a particular offence or type of offence which might otherwise be difficult of proof. A court should be slow to attribute to the legislature an intention to apply the presumption, not only to the proof of a particular contemplated offence or type of offence created by the Act, but for some more general purpose. If Parliament creates a presumption for the purpose of a particular offence or type of offence, and, in a particular case, that presumption leads to a conclusion which is contrary to the truth of the matter, the accused person is, by reason of the statutory fiction, convicted of an offence which he has not in reality committed. This possibility may be understood and contemplated by the legislature. ...

20 49. The appellant's argument about "fairness" must also be seen in its proper context. A person in possession of a prohibited drug is still committing an offence even if it is possessed otherwise than for supply. That was partly why the Parliament was willing to accept that there may be harsh consequences in individual cases; the user was not, in any event, in innocent possession of the drug. Mere possession, otherwise than for supply, was regarded by the Parliament as a serious offence: see [27] above, where it is noted that the Attorney General in a second reading speech described "the offences of supplying, possessing and using prohibited drugs" as "amongst the most serious of any criminal offences".³⁵ It would be wrong to strain the legislative text, read in context, to favour the interests of a person who, in any event, nonetheless commits an offence under the Act.

30 50. The same policy consideration underlies the law of honest and reasonable mistake of fact. To avoid conviction, the mistake relied upon by an accused must render the conduct in question entirely innocent. That is, it is not to the point if the honest and reasonable mistake renders the conduct less serious than the conduct charged, but nonetheless still

³⁴ (1984) 36 SASR 321 at 329.

³⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 November 1985 at 10615.

criminal; if it is not innocent, then the more serious offence is made out.³⁶ As Kiefel CJ and Keane J explained in *Bell v Tasmania*, the rationale is that “the unacceptable prospect of convicting a person of a serious charge where that person is ‘in no way blameworthy’ does not arise”.³⁷

C.2 Deeming

51. The appellant describes s 29 as merely a deeming provision that enacts a “statutory fiction”, which makes it “very important to consider the purpose for which the statutory fiction is introduced”:³⁸ see **AS [24]**. The argument does not ultimately assist the appellant for at least two reasons.

10 52. *First*, even assuming that s 29 is a deeming provision, the CCA’s construction is consistent with, and does not stray beyond, its purpose once the purpose is properly identified and understood, including by reference to the full legislative history set out in Part A above.

53. *Second*, the better view is that s 29 does not create a statutory fiction. The use of the word “deemed” does not necessarily connote a fiction. Windeyer J explained in *Hunter Douglas Australia Pty Limited v Perma Blinds* that:³⁹

20 the verb “deem”, or derivatives of it, can be used in statutory definitions to extend the denotation of the defined term to things it would not in ordinary parlance denote. This is often a convenient device for reducing the verbiage of an enactment. But that the word can be used in that way and for that purpose does not mean that whenever it is used it has that effect. After all, to deem means simply to judge or reach a conclusion about something. ... The words “deem” and “deemed” when used in a statute thus simply state the effect or meaning which some matter or thing has – the way it is to be adjudged. This need not import artificiality or fiction. It may be simply the statement of an indisputable conclusion...

54. The “traffickable quantity” threshold was employed as the trigger or fulcrum of the provision because that reflected a legislative decision that a person who possessed at least that amount was objectively likely to be a supplier (“pedlar”) of drugs unless they proved
30 otherwise. This does not have the effect of defining actual possession as actual supply. It

³⁶ *CTM v The Queen* (2008) 236 CLR 440; *Bell v Tasmania* (2021) 274 CLR 414; *Bergin v Stack* (1953) 88 CLR 248.

³⁷ (2021) 274 CLR 414 at [13].

³⁸ *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696.

³⁹ (1970) 122 CLR 49 at 65.

reflects the judgement of the legislature that the person in possession of that quantity possesses it for the purposes of supply.

C.3 Section 25(3)

55. Also prominent in the appellant's analysis is s 25(3) of the DMTA, which provides that:

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.

56. Section 25(3) does not assist with the proper construction of s 29. Section 25(3) is simply another example of a provision that assists the prosecution of offences under the DMTA in aid of the overall statutory object of deterring drug abuse. Section 25(3) does so by ensuring that, if proof of a charge for an offence under s 25(2) or (2D) fails in relation to proof of the amount of the prohibited drug, then there is still capacity for the decision-maker to find the person guilty of a lesser offence notwithstanding the failure to prove that element of the charged offence (cf **AS [39]**).

C.4 AS [34] and [36] textual constructions

57. The appellant argues (**AS [34]**) that s 8(b) of the *Interpretation Act* allows paragraph (a) in s 29 to be interpreted such that it permits an accused to avoid being liable for supply (or, as relevant, for supply of a commercial or large commercial quantity) by proving that "an amount" of the prohibited drug was possessed otherwise than for supply. However, subsection 29(a) does not use the word "amount", such that s 8(b) may not be relied upon in the manner contended for by the appellant.

58. Moreover, the construction advocated at **AS [34]** is incoherent: while s 8(b) may permit a singular word or expression to be read in the plural, it does not support the proposition that the reference to "an amount of a prohibited drug which is not less than the traffickable quantity of the prohibited drug" could be read as permitting the disaggregation of a singular amount into discrete portions. To do so would do more than reading a reference to the singular as if it were a reference to the plural; it would impermissibly alter the meaning of the provision.⁴⁰ At the risk of repetition, the object of the first clause in the

⁴⁰ See, eg, *Tom & Bill Waterhouse Pty Ltd v Racing New South Wales* (2008) 72 NSWLR 577 at [62]; *Fordham v Brideson* [1986] VR 587 at 591.

chapeau of s 29 is an “amount” of a prohibited drug. Because the qualification in s 29(a) forms part of the same sentence as the chapeau, the use of the definite article “the” in s 29(a) can only refer to the object referred to earlier in the sentence: namely, the (aggregate) amount of prohibited drug. The appellant’s interpretation is plainly inconsistent with the structure and operation of s 29. The principle that the singular can mean the plural has no relevant application here: see also s 5(2) of the *Interpretation Act 1987* (NSW).

59. The separate contention at **AS [36]** should also be rejected. The appellant has focused on the consequences of his construction where a person is charged with supplying a commercial quantity of a prohibited drug and succeeds in proving that a sufficient amount of the drug was not for the purpose of supply as to result in s 29 operating only in respect of an indictable quantity. The appellant observes that the consequence in such a case is that the person is still found guilty of the offence of supply by operation of s 25(3) of the DMTA: **AS [39]**. But the consequences of the appellant’s construction should also be considered in the context of a heavy or habitual drug user who is charged with supplying a quantity of a prohibited drug that falls just over the prescribed quantity. In such a case, the construction of s 29 contended for by the appellant would mean that proof by the accused that even a tiny portion of the entirety of the prohibited drug was possessed for personal use would result in the presumption being disengaged for the balance of the quantity of the drug. A street-level supplier would often succeed in proving on the balance of probabilities that some of the drug was for personal use. The appellant’s construction would thus undermine the legislative intention in enacting s 29 and its predecessor, part of which was to overcome the difficulties of proof that the authorities were then experiencing: see at [23] above.

60. For the above reasons, the appellant’s contention that the CCA’s construction of s 29 of the DMTA could not have been intended by Parliament ought to be rejected. There is no error in the CCA’s construction.

D. Appropriate orders if the appeal is allowed

61. The CCA assumed at **CCA [26] (CAB 81)** 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” on the evidence at trial. If the appellant’s construction is accepted, the respondent submits that the CCA’s assumption is wrong.

62. Consistent with the conventional approach to the operation of s 29, the appellant's case at trial was that the entire quantity of 1,4-butanediol was for personal use: see **CAB 11, 13**. The trial judge's findings are set out above at [16]. In short, his Honour rejected the appellant as a truthful witness (other than being prepared to accept that he was a heavy user of 1,4-butanediol). The trial judge made no finding as to how much of the drug was for personal use.
63. Having regard to those findings, there was insufficient evidence upon which a finding of any precision could have been made as to the quantum of 1,4-butanediol the appellant possessed for personal use. Having regard to the way the appellant had defended the charge at trial, and the trial judge's findings, it was not open for the CCA to find that the Crown had not proved that a commercial quantity was for supply (**CCA [26]**) as such a conclusion required the CCA to find on the balance of probabilities that a quantity as precise as just over 105.2g (at least) was possessed for personal use.
64. Once the appellant was rejected as a witness of truth (other than as to the very general proposition that he was a heavy user of 1,4-butanediol), the only evidence available as to the extent of his use was general in nature and related to the amounts known to be used by other heavy users of 1,4-butanediol. Those estimates varied significantly. The vague quality of the evidence is reflected in the trial judge's statement that he could not make such a finding and it was not open to the CCA on that evidence to make any finding as to the actual use by the applicant, much less that at least 105.2g of the quantity possessed was for personal use.
65. While the sole ground of appeal advanced in the CCA was that the verdict was unreasonable (the first limb of s6 (1) *Criminal Appeal Act 1912*), the argument in fact advanced by the appellant and considered by the CCA related to the construction of s 29 of the DMTA and was a second limb error. Being second limb error, the appellant had to demonstrate that there was a wrong decision on a question of law that could have affected the reasoning of the trial judge to verdict in the trial that was had.⁴¹
66. If the appellant's construction of s 29 be correct, then it is accepted that he has established that there was a wrong decision on a question of law. It is further accepted that it had the capacity to affect the reasoning of the trial judge to verdict as, had the trial judge correctly

⁴¹ *MDP v The King* (2025) 99 ALJR 969; [2025] HCA 24 at [3] (Gageler CJ; [96] – [110] Gleeson, Jago and Beech-Jones JJ; Gordon and Steward JJ at [9]; Edelman J at [44]).

directed himself, his Honour would have been required to make a finding of fact as to whether the appellant had succeeded in proving, on balance, that he did not possess a commercial quantity for supply. However, as no such determination was ever made, the respondent contends that the appropriate order in this case, should the appeal be upheld, is for a retrial.

PART VI NOTICE OF CONTENTION OR CROSS-APPEAL

67. There is no notice of contention or cross-appeal.

PART VII ESTIMATE FOR ORAL ARGUMENT

68. The respondent estimates that it requires an hour for oral argument.

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Dated: 22 October 2026



Sally Dowling SC
Director of Public
Prosecutions
(02) 9285 8888
EADPP@odpp.nsw.gov.au



Christopher Tran SC
Fifth Floor St James' Hall
(02) 8257 2578
christopher.tran@stjames.net.au



Cecilia Curtis
Crown Prosecutor's
Chambers
(02) 6937 8320
ccurtis@odpp.nsw.gov.au

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ANNEXURE TO RESPONDENT'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)	Historical version for 1 April 2021 to 13 July 2023	ss 3(1) (“supply”), 4, 11B, 11C, 25, 25A, 29, 36X	Act in force on the date of the offence	14 December 2022
2	<i>Interpretation Act 1987</i> (NSW)	Current version	ss 5(2), 8(b)	Unchanged in relevant respects	-
3	<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
4	<i>Poisons (Amendment) Act 1970</i> (NSW)	As enacted	s 2(1)(n)	Introduced predecessor to s 29 of the DMTA	26 October 1970 (date of assent)
5	<i>Poisons Act 1966</i> (NSW)	Historical version after <i>Poisons (Amendment) Act 1970</i> (NSW)	s 45A(4)	Predecessor to s 29 of the DMTA	26 October 1970 (date of assent)