

CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA

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ASSESSMENT PREPARATION

CHAPTER 8

ACTIVE LEARNING QUESTIONS

1. How is a person's maximum liability to a term of imprisonment determined in terms of the type and quantity of a dangerous or prohibited drug/plant?

Offences and penalties are determined by whether a person is trafficking, supplying, producing or in possession of prohibited drugs, in conjunction with the type and quantity of the prohibited drug involved. In Queensland, the important Schedules listing the types of dangerous drugs and the key quantities are found in the *Drugs Misuse Regulation 1987* (Qld). In Western Australia these Schedules are found in the *Misuse of Drugs Act 1981* (WA) itself.

For example, under s 9 Possessing dangerous drugs of the *Drugs Misuse Act 1986* (Qld), sub-section 9(1)(a) states that where the dangerous drug is specified in Schedule 1 of the *Drugs Misuse Regulation 1987* (Qld), such as heroin or cocaine, and the quantity is of or exceeds that specified in Schedule 4 (200 g for both heroin and cocaine), the maximum penalty is 25 years' imprisonment.

9 Possessing dangerous drugs

(1) A person who unlawfully has possession of a dangerous drug is guilty of a crime.

Maximum penalty—

(a) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the quantity of the thing is of or exceeds the quantity specified in the *Drugs Misuse Regulation 1987*, schedule 4 in respect of that thing—25 years imprisonment; or

(b) if the dangerous drug is a thing specified in the Drugs Misuse Regulation 1987, schedule 1 and the quantity of the thing is of or exceeds the quantity specified in the Drugs Misuse Regulation 1987, schedule 3 but is less than the quantity specified in the Drugs Misuse Regulation 1987, schedule 4 in respect of that thing and the person convicted—

(i) satisfies the judge constituting the court before which the person is convicted that when the person committed the offence the person was a drug dependent person—20 years imprisonment; or

(ii) does not so satisfy the judge constituting the court before which the person is convicted—25 years imprisonment; or

(c) if the dangerous drug is a thing specified in the Drugs Misuse Regulation 1987, schedule 2 and the quantity of the thing is of or exceeds the quantity specified in the Drugs Misuse Regulation 1987, schedule 3 in respect of that thing—20 years imprisonment; or

(d) in any other case where the dangerous drug is a thing specified in the Drugs Misuse Regulation 1987, schedule 1 or 2—15 years imprisonment.

(2) For a dangerous drug that is a thing specified in the Drugs Misuse Regulation 1987, schedule 1, part 2 (a part 2 drug), a reference in subsection (1) to the quantity of the thing is a reference to the whole weight of all the part 2 drugs (whether of the same or different types) that the person is convicted of unlawfully possessing.

It can be seen that the maximum penalty depends (a) on the type of drug, which determines the Schedule that applies, and then (b) on the actual quantity of that drug. Thus, under s 9(1)(c) above if the dangerous drug is found in Schedule 2, and the quantity of that drug exceeds the quantity specified in Schedule 3, then the maximum penalty is 20 years imprisonment. Similarly, under s 9(1)(d), in any other case where the dangerous drug is specified in Schedules 1 or 2, the maximum penalty is 15 years imprisonment.

The type of drug and the quantity are also determinants of a person's maximum liability to a term of imprisonment for the production of dangerous drugs: s 8 Producing dangerous drugs (Qld), and s 6(1)(b) Manufacturing or preparing prohibited drugs and s 7(2) Cultivating a prohibited plant (WA).

2. Aside from the type and quantity of the drug/plant, what other factors determine the maximum liability to a term of imprisonment?

The main factor aside from the type and quantity of the drug/plant that determines the maximum liability to a term of imprisonment is the type of drug offence: whether a person is trafficking, supplying, producing or in possession of prohibited drugs.

Self-evidently, society views a drug trafficker or a supplier who preys on children with greater severity than a person who is in possession of a dangerous drug for personal use. Hence, under s 5

Trafficking in dangerous drugs of the *Drugs Misuse Act 1986* (Qld), the maximum penalty is determined by whether the dangerous drug is specified in Schedule 1 or 2. The quantity involved is not a factor.

5 Trafficking in dangerous drugs

(1) A person who carries on the business of unlawfully trafficking in a dangerous drug is guilty of a crime.

Maximum penalty—

(a) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1—25 years imprisonment; or

(b) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 2—20 years imprisonment.

Similarly, under s 6 Supplying dangerous drugs of the *Drugs Misuse Act 1986* (Qld), the maximum penalty is determined by whether the dangerous drug is specified in Schedule 1 or 2, and whether the offence is one of aggravated supply as defined in s 6(2), such as supplying a minor under 16 years or an intellectually impaired person.

6 Supplying dangerous drugs

(1) A person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland, is guilty of a crime.

Maximum penalty—

(a) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the offence is one of aggravated supply under subsection (2)(a)—life imprisonment; or

(b) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the offence is one of aggravated supply under subsection (2)(aa), (b), (c), (d) or (e)—25 years imprisonment; or

(c) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and paragraphs (a) and (b) do not apply—20 years imprisonment; or

(d) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 2 and the offence is one of aggravated supply under subsection (2)(a)—25 years imprisonment; or

(e) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 2 and the offence is one of aggravated supply under subsection (2)(aa), (b), (c), (d) or (e)—20 years imprisonment; or

(f) if the dangerous drug is a thing specified in the Drugs Misuse Regulation 1987, schedule 2 and paragraphs (d) and (e) do not apply—15 years imprisonment.

(2) For the purposes of this section, an offence is one of aggravated supply if the offender is an adult and—

- (a) the person to whom the thing is supplied is a minor under 16 years; or
- (aa) the person to whom the thing is supplied is a minor who is 16 years or more; or
- (b) the person to whom the thing is supplied is an intellectually impaired person; or
- (c) the person to whom the thing is supplied is within an educational institution; or
- (d) the person to whom the thing is supplied is within a correctional facility; or
- (e) the person to whom the thing is supplied does not know he or she is being supplied with the thing.

It can be seen that the maximum penalty ranges from life imprisonment under s 6(1)(a) to 15 years imprisonment under s 6(1)(f).

In Queensland, but not Western Australia, there are also concessions in terms of the penalty for drug dependent persons. Under s 4 of the *Drugs Misuse Act 1986* (Qld), a drug dependent person means a person—

- (a) who, as a result of repeated administration to the person of dangerous drugs— (i) demonstrates impaired control; or (ii) exhibits drug-seeking behaviour that suggests impaired control; over the person's continued use of dangerous drugs; and (b) who, when the administration to the person of dangerous drugs ceases, suffers or is likely to suffer mental or physical distress or disorder.

The onus is on a person to satisfy the court that he or she is drug dependent. For example, s 9(1)(b)(i) of the *Drugs Misuse Act 1986* (Qld) reduces the maximum penalty to 20 years' imprisonment where the person 'satisfies the judge constituting the court before which the person is convicted that when the person committed the offence the person was a drug dependent person', provided that the quantity of the drug, such as heroin or cocaine, is between 2.0 g and 200 g (the quantities specified in Schedule 3 and Schedule 4 of the *Drugs Misuse Regulation 1987* (Qld) respectively).

3. How have the courts interpreted the physical element of possession? What is the difference between supplying and trafficking?

There is no minimum quantity of a drug specified in either the Queensland or Western Australian legislation, but common sense requires a pragmatic approach to prosecution. In *Williams v The Queen* (1978) 140 CLR 591, at 598–599, Gibbs and Mason JJ held that the prohibition was aimed

‘not at the possession of a minute quantity of a drug incapable of discernment by the naked eye and detectable only by a scientific means, but at the possession of such a quantity of the drug as makes it reasonable to say as a matter of common sense and reality that it is the drug of which the person is in possession’.

The two stage test in *Williams* was applied in *Donnelly v Rose* [1995] 1 Qd R 148: (1) the drug is visible to the naked eye when separated from any other substances with which it is mixed; and, if so, then (2) the quantity of the drug is sufficient from a common sense perspective to reasonably state that the person is in possession.

Aside from the issue of quantity, there is also the question of ‘control’ which forms part of the definition of possession. Section 116 of the *Drugs Misuse Act 1986* (Qld) states that the ‘Criminal Code shall, with all necessary adaptations, be read and construed with this Act’. This has the effect of importing the definition of ‘possession’ in s 1 of the *Criminal Code* (Qld) into the *Drugs Misuse Act 1986* (Qld).

Section 1 Definitions

‘Possession’ includes having under control in any place whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question.

Section 3 of the *Misuse of Drugs Act 1981* (WA) defines ‘to possess’ in these terms: ‘includes to control or have dominion over, and to have the order or disposition of, and inflections and derivatives of the verb “to possess” have correlative meanings’.

Notwithstanding the respective definitions above of ‘possession’ in Queensland, and ‘to possess’ in Western Australia, the courts have been required to expound the meaning of possession in a number of circumstances. For example, if a person is holding or storing drugs for another person, does that constitute possession? A key concept is whether the person has ‘control’ over the drugs or plants. In *Lai v The Queen* [1990] WAR 151, the Western Australian Court of Criminal Appeal allowed the appeal and quashed the conviction, holding that proof of possession of an illicit substance may require proof not only of knowledge of its existence but also of a present claim to it or exercise of some control over it. The appellant’s conviction could not stand because he did not have exclusive capacity for control of the package containing the heroin.

In *Davies v State of Western Australia* [2005] WASCA 47, Roberts-Smith JA stated:

[37] Possession need not be exclusive, either as a matter of fact or law. Several persons can have joint possession as against the rest of the world (*Cumming v The Queen* (1995) 86 A Crim R 156).

[38] Possession can therefore be had in a wide variety of ways and exclusively by one person or jointly (in different ways) by several (*Davis v The Queen* (1990) 5 WAR 269; *Atholwood v The Queen* [2000] WASCA 76. So in this case, both the appellants and Tyssul [their son] had control and dominion over the cannabis while it was in the appellants’ house. The appellants knew it was there (*He Kaw Teh v The Queen* (1985) 157 CLR 523), had permitted Tyssul to

store it there in exchange for cash and allowed him access to it. That was sufficient exercise of control or dominion (*Lai v The Queen* [1990] WAR 151).

Thus, the two physical elements of possession are (1) a sufficient quantity of the drug that from a common sense perspective it is possible to reasonably state that the person is in possession; and (2) to have control and dominion over the drug.

What is the difference between supplying and trafficking?

Supply is given a broad definition in both jurisdictions. In Queensland, supply encompasses to 'give, distribute, sell, administer, transport or supply' in s 4 of the *Drugs Misuse Act 1986* (Qld), as well as doing or offering to do any preparatory act that furthers these purposes. In Western Australia, under s 3 of the *Misuse of Drugs Act 1981* (WA) to supply 'includes to deliver, dispense, distribute, forward, furnish, make available, provide, return or send, and it does not matter that something is supplied on behalf of another or on whose behalf it is supplied'.

Trafficking is not defined in either jurisdiction, but is distinguished from supplying by its commercial nature. Thus, s 5 of the *Drugs Misuse Act 1986* (Qld) refers to carrying on a business.

5 Trafficking in dangerous drugs

(1) A person who carries on the business of unlawfully trafficking in a dangerous drug is guilty of a crime.

The nature of trafficking in s 5 of the *Drugs Misuse Act 1986* (Qld) was examined by Williams JA in *R v Dent* [2002] QCA 247 at [6]:

[6] The wording of the trafficking count on the indictment followed precisely the wording of s 5 of the *Drugs Misuse Act*. The elements of that offence have been considered at appellate level in a number of cases; it is sufficient to refer to *R v Quaille* [1988] 2 Qd R 103 [continuing conduct and commercial character], *R v Elhusseini* [1988] 2 Qd R 442 [advertising, promoting and negotiating], *R v Goulden* [1993] 2 Qd R 534, *R v Patena* (CA 107 of 1996, 28 May 1996) and *R v Antipas* (CA 17 of 1999, 14 May 1999). Those authorities clearly establish that the gravamen of the offence is that of trading for profit in a drug or drugs. Whilst a single disposal of a quantity of drug may constitute a trafficking provided the transaction is intended to be repeated, ordinarily it will be necessary to establish a degree of repetition or continuity for the offence to be established. The relevant conduct includes all acts which are part of such a business and that includes negotiations with respect to future transactions. Communications with prospective buyers, setting up lines of supply, negotiating prices and terms of supply, arranging for places and times of delivery and like activities can be the indicia of carrying on a business of the type in question.

The legislation in Western Australia is different to that in Queensland as trafficking is not a separate offence. The approach is to declare a person with a history of serious drug offences to be a trafficker: s 32A(1): 'the court convicting the person of the serious drug offence ... shall on the application of the Director of Public Prosecutions or a police prosecutor declare the person to be a



drug trafficker.' The purpose of such a declaration is to expose the offender's property to forfeiture under the *Criminal Property Confiscation Act 2000* (WA). Queensland has similar forfeiture legislation: *Criminal Proceeds Confiscation Act 2002* (Qld).

4. What is the mental element required for (a) possession; (b) supply; and (c) trafficking?

(a) Possession

The critical mental element for possession of prohibited drugs or plants is knowledge. However, judicial interpretation of the mental element of 'knowledge' is different in Queensland and Western Australia. The criminal responsibility bar is lower in Queensland than in Western Australia.

In Queensland, following *Clare v The Queen* [1994] 2 Qd R 619, it is sufficient if the person knows of the existence of the item in question but need not know its nature or character. By contrast, in Western Australia, following *The State of Western Australia v 'R'* [2007] WASCA 42, a majority of the Court of Appeal held that the mental element of 'knowledge' required an awareness that the item is likely to be a prohibited drug.

(b) Supply

The mental element for selling or supplying is intention. Clearly, it follows that a person who sells or supplies anything intends to part with that item.

In *Pinkstone v The Queen* (2004) 219 CLR 444, where the appellant was convicted of supplying a prohibited drug under s 6(1)(c) of the *Misuse of Drugs Act 1981* (WA), McHugh and Gummow JJ at 463 [53] held:

It follows that a person is liable under s 6(1)(c) for sending a prohibited drug to another person once he or she has knowingly placed the drug in a mail delivery system with the intention that it be received by that person at a particular place. Whether or not the drug in question ultimately reaches the intended recipient once it has arrived at its intended destination is, for this purpose, irrelevant.

In Western Australia, under s 11 of the *Misuse of Drugs Act 1981* (WA) there is a rebuttable presumption (unless the contrary is proved) of intent to sell or supply for the purposes of s 6(1)(a) and s 7(1)(a), where the minimum quantity provisions in Schedules V and VI respectively are satisfied. For example, s 11(1)(a) states for the purposes of –

(a) section 6(1)(a), a person shall, unless the contrary is proved, be deemed to have in his possession a prohibited drug with intent to sell or supply it to another if he has in his possession a quantity of the prohibited drug which is not less than the quantity specified in Schedule V in relation to the prohibited drug

(c) Trafficking

As with supply, the mental element is intention. The distinction between supply and trafficking is the commercial or repetitive nature of the transactions. The Crown is required to prove an intention on the part of the defendant for a degree of repetition or continuity in trading for profit in a drug or drugs for the offence to be established: *R v Dent* [2002] QCA 247 at [6] per Williams JA.

5. Can mistake of fact under s 24 of the Codes be used as a defence to a drug charge?

There are important differences in the evidentiary provisions for drug offences between Queensland and Western Australia by virtue of s 129(1) of the *Drugs Misuse Act 1986* (Qld). For present purposes, s 129(1)(d) is the pertinent sub-section.

(d) the operation of the Criminal Code, section 24 is excluded unless that person shows an honest and reasonable belief in the existence of any state of things material to the charge; and

(e) the burden of proving any authorisation to do any act or make any omission lies on that person.

Section 129(1)(d) therefore reverses the onus of proof for a person relying on s 24 Mistake of fact. In *R v Tabe* [2003] QCA 356 at [14] de Jersey CJ states that an offender can 'have recourse to s 129(1)(d) of the *Drugs Misuse Act* and seek to prove an honest and reasonable belief the parcel did not contain (or would not have contained) dangerous drugs'. In Western Australia, there is no equivalent provision to s 129(1)(d), and therefore s 24 requires an evidential burden only.

Thus, mistake of fact under s 24 of the Codes be used as a defence to a drug charge in both Codes, but in Queensland the defendant faces a legal burden, while in Western Australia the defendant faces an evidential burden only.

PROBLEM QUESTION 1**ASSUME THE FOLLOWING FACTS**

Paul owned a house which he shared with Xavier. Xavier had a serious drug habit which he was very adept at concealing. Paul was completely unaware of Xavier's drug habit. One day the police raided Paul's home and found 100 g of cocaine hidden in Xavier's room.

Discuss Xavier's and Paul's criminal liability.

How would your answer differ if the police had merely found traces of cocaine on Xavier's clothes in his wardrobe and minute quantities of cocaine on Xavier's bedside table?

THE ISSUES

This question raises three issues: (1) possession of a dangerous drug for Xavier; (2) the maximum penalty for Xavier; and (3) whether Paul has knowingly permitted his house to be used for a drug offence.

THE RELEVANT LAW

(1) Possession of a dangerous drug for Xavier

In Queensland, s 9(1) of the *Drugs Misuse Act 1986* (Qld) sets out the offence of possessing dangerous drugs: 'A person who unlawfully has possession of a dangerous drug is guilty of a crime.' Section 116 states that the 'Criminal Code shall, with all necessary adaptations, be read and construed with this Act'. This has the effect of importing the definition of 'possession' in s 1 of the *Criminal Code* (Qld) into the *Drugs Misuse Act 1986* (Qld).

Section 1 Definitions

'Possession' includes having under control in any place whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question.

In Western Australia, there are a variety of offences in the *Misuse of Drugs Act 1981* (WA) dealing with the possession of prohibited drugs or plants: s 6(1)(a), s 6(2), s 7(1)(a), s 7(2). Section 3 defines 'to possess' in these terms: 'includes to control or have dominion over, and to have the order or disposition of, and inflections and derivatives of the verb "to possess" have correlative meanings'.

The critical mental element for possession of prohibited drugs or plants is knowledge. However, judicial interpretation of the mental element of 'knowledge' is different in Queensland and Western Australia. The criminal responsibility bar is lower in Queensland than in Western Australia.

In Queensland, following *Clare v The Queen* [1994] 2 Qd R 619, it is sufficient if the person knows of the existence of the item in question but need not know its nature or character. By contrast, in Western Australia, following *The State of Western Australia v 'R'* [2007] WASCA 42, a majority of the Court of Appeal held that the mental element of 'knowledge' required an awareness that the item is likely to be a prohibited drug.

(2) The maximum penalty for Xavier

Offences and penalties are determined by whether a person is trafficking, supplying, producing or in possession of prohibited drugs, in conjunction with the type and quantity of the prohibited drug involved. Here, 100 g of cocaine has been found hidden in Xavier's room.

In Queensland, cocaine is listed as a dangerous drug in Schedule 1. The quantity of 100 g is more than the 2 g quantity specified in Schedule 3, and less than the 200 g specified in Schedule 4. Section 9 Possessing dangerous drugs of the *Drugs Misuse Act 1986* (Qld) sets out the relevant penalties.

9 Possessing dangerous drugs

(1) A person who unlawfully has possession of a dangerous drug is guilty of a crime.

Maximum penalty—

(a) if the dangerous drug is a thing specified in the Drugs Misuse Regulation 1987, schedule 1 and the quantity of the thing is of or exceeds the quantity specified in the Drugs Misuse Regulation 1987, schedule 4 in respect of that thing—25 years imprisonment; or

(b) if the dangerous drug is a thing specified in the Drugs Misuse Regulation 1987, schedule 1 and the quantity of the thing is of or exceeds the quantity specified in the Drugs Misuse Regulation 1987, schedule 3 but is less than the quantity specified in the Drugs Misuse Regulation 1987, schedule 4 in respect of that thing and the person convicted—

(i) satisfies the judge constituting the court before which the person is convicted that when the person committed the offence the person was a drug dependent person—20 years imprisonment; or

(ii) does not so satisfy the judge constituting the court before which the person is convicted—25 years imprisonment.

In Western Australia, the equivalent legislation is found in the *Misuse of Drugs Act 1981* (WA). Cocaine is listed as a category 1 item in Schedule 1. Four grams of cocaine is the amount stated in Schedule 3 for determining the court of trial. Two grams of cocaine is the amount listed in Schedule 5 giving rise to a presumption of intention to sell or supply. A quantity of 28 grams of cocaine is specified in Schedule 7 for the purposes of drug trafficking.

In Western Australia trafficking is not a separate offence. The approach is to declare a person with a history of serious drug offences to be a trafficker: s 32A(1): ‘the court convicting the person of the serious drug offence ... shall on the application of the Director of Public Prosecutions or a police prosecutor declare the person to be a drug trafficker.’ The purpose of such a declaration is to expose the offender’s property to forfeiture under the *Criminal Property Confiscation Act 2000* (WA).

The 100 g of cocaine found hidden in Xavier’s room leaves open the possibility that in Western Australia Xavier might be charged with possession or supplying a prohibited drug.

14 Possession of certain substances or things

(1) A person who, without lawful excuse, has in the person's possession a substance that contains, or substances that together contain, a quantity of a category 1 item or a category 2 item that exceeds the quantity prescribed in relation to the item concerned commits a crime.

Penalty: \$20 000 or imprisonment for 5 years or both.

Summary conviction penalty: \$12 000 or imprisonment for 3 years or both.

6 Offences concerned with prohibited drugs generally

(1) Subject to subsection (3), a person who —

(a) with intent to sell or supply it to another, has in his possession a prohibited drug commits a crime.

11 Presumption of intent to sell or supply

For the purposes of —

(a) section 6(1)(a), a person shall, unless the contrary is proved, be deemed to have in his possession a prohibited drug with intent to sell or supply it to another if he has in his possession a quantity of the prohibited drug which is not less than the quantity specified in Schedule V in relation to the prohibited drug.

34 Penalties

(1) Subject to subsections (2) and (3), a person who is convicted of —

(a) a crime under section 6(1) or 7(1) is liable to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 25 years or both.

Thus, if Xavier cannot rebut the presumption of intent to sell or supply under s 11 of the *Misuse of Drugs Act 1981* (WA), he is liable under s 34(1)(a) above to a maximum penalty of a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 25 years or both.

(3) Whether Paul has knowingly permitted his house to be used for a drug offence

The issue is here is whether Paul as the owner/occupier has knowingly permitted a place (his house) to be used for a drug offence: s 11 of the *Drugs Misuse Act 1986* (Qld), and s 5(1)(a) and (b) of the *Misuse of Drugs Act 1981* (WA).

Drugs Misuse Act 1986 (Qld)

Section 11 Permitting use of place

(1) A person who, being the occupier or concerned in the management or control of a place, permits the place to be used for the commission of a crime defined in this part is guilty of a crime.

Misuse of Drugs Act 1981 (WA)

5 Offences concerned with prohibited drugs and prohibited plants in relation to premises and utensils

(1) A person who — (a) being the occupier of any premises, knowingly permits those premises to be used for the purpose of — (i) the manufacture or preparation of a prohibited drug or prohibited plant for use; or (ii) the manufacture, preparation, sale, supply or use of a prohibited drug or prohibited plant; or (b) being the owner or lessee of any premises, knowingly permits those premises to be used for the purpose of using a prohibited drug or prohibited plant ... commits a simple offence.

Both s 11 of the *Drugs Misuse Act 1986* (Qld) and s 5 of the *Misuse of Drugs Act 1981* (WA) above specify ‘permits’ as an element of the offence. The meaning of ‘permits’ was considered in *R v Von Snarski* [2001] QCA 71, at [24], where the Queensland Court of Appeal (Thomas JA, Wilson and Douglas JJ) followed High Court authority on the statutory interpretation of ‘permission’.

[24] Mere inactivity by a person seeing others doing something does not establish permission. But neither is specific activity always necessary to prove ‘permitting’ in the case of someone who knows what another is doing, has the capability of preventing it, and stands by while the act is done. It is a question of fact in which degree and circumstance may affect the conclusion. This is confirmed by the following passage in the judgment of Gavan Duffy and Starke JJ in *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) CLR 481, 504.

‘Mere inactivity or failure to take some steps to prevent the performance of the work does not necessarily establish permission. Inactivity or ‘indifference, exhibited by acts of commission or omission, may reach a degree from which an authorisation or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorised the performance or permitted the use of a place of entertainment for the performance complained of.’

Thus, while ‘knowingly permits’ is the language used in the *Misuse of Drugs Act 1981* (WA), on the authority of *R v Von Snarski* [2001] QCA 71 above, the fault or mental element of knowledge is also required in s 11 of the *Drugs Misuse Act 1986* (Qld).

PUTTING THE FACTS INTO THE LAW

We are told that Xavier had a serious drug habit. For present purposes it will be assumed that the 100 g of cocaine was for his personal use, although in Western Australia he will have to prove on

the balance of probabilities that he did not intend to sell or supply the cocaine to another under s 11 of the *Misuse of Drugs Act 1981* (WA). Xavier would appear to satisfy both the physical and mental elements of possession, in that he had control and he had the necessary knowledge. Given the quantity of cocaine involved and Xavier's serious drug habit, the test for 'knowledge' is met in both Queensland (knowledge of the existence of the item in question but need not know its nature or character) and Western Australia (an awareness that the item is likely to be a prohibited drug).

As to penalty, the relevant section in Queensland is s 9(b)(i) of the *Drugs Misuse Act 1986* (Qld).

(b) if the dangerous drug is a thing specified in the Drugs Misuse Regulation 1987, schedule 1 and the quantity of the thing is of or exceeds the quantity specified in the Drugs Misuse Regulation 1987, schedule 3 but is less than the quantity specified in the Drugs Misuse Regulation 1987, schedule 4 in respect of that thing and the person convicted—

(i) satisfies the judge constituting the court before which the person is convicted that when the person committed the offence the person was a drug dependent person—20 years imprisonment

Provided Xavier can satisfy the judge he is a drug dependent person, he faces a maximum sentence of 20 years imprisonment in Queensland.

In Western Australia, assuming Xavier can discharge the rebuttable presumption that it was not his intention to use the 100 g of cocaine for supply under s 11 of the *Misuse of Drugs Act 1981* (WA), then s 14(1) applies.

14 Possession of certain substances or things

(1) A person who, without lawful excuse, has in the person's possession a substance that contains, or substances that together contain, a quantity of a category 1 item or a category 2 item that exceeds the quantity prescribed in relation to the item concerned commits a crime.

Penalty: \$20 000 or imprisonment for 5 years or both.

Summary conviction penalty: \$12 000 or imprisonment for 3 years or both.

Xavier's possession of 100 g of cocaine far exceeds the quantity prescribed. Two grams of cocaine is the amount listed in Schedule 5 giving rise to a presumption of intention to sell or supply.

As to Paul's criminal responsibility, we are told that Paul was completely unaware of Xavier's drug habit. Thus, the test of 'knowingly permits' has no application here: s 11 of the *Drugs Misuse Act 1986* (Qld), and s 5(1)(a) and (b) of the *Misuse of Drugs Act 1981* (WA); *R v Von Snarski* [2001] QCA 71.

CONCLUSION

Xavier is facing a term of imprisonment under either s 9(b)(i) of the *Drugs Misuse Act 1986* (Qld), or s 14(1) of the *Misuse of Drugs Act 1981* (WA). Paul is innocent of any wrongdoing.

SUPPLEMENTARY QUESTION

How would your answer differ if the police had merely found traces of cocaine on Xavier's clothes in his wardrobe and minute quantities of cocaine on Xavier's bedside table?

The answer would be completely different as Xavier would not be charged with any offence.

There is no minimum quantity of a drug specified in either the Queensland or Western Australian legislation, but common sense requires a pragmatic approach to prosecution. In *Williams v The Queen* (1978) 140 CLR 591, at 598 – 599, Gibbs and Mason JJ held that the prohibition was aimed 'not at the possession of a minute quantity of a drug incapable of discernment by the naked eye and detectable only by a scientific means, but at the possession of such a quantity of the drug as makes it reasonable to say as a matter of common sense and reality that it is the drug of which the person is in possession'.

The two stage test in *Williams* was applied in *Donnelly v Rose* [1995] 1 Qd R 148: (1) the drug is visible to the naked eye when separated from any other substances with which it is mixed; and, if so, then (2) the quantity of the drug is sufficient from a common sense perspective to reasonably state that the person is in possession.

On the facts, traces of cocaine on Xavier's clothes in his wardrobe and minute quantities of cocaine on Xavier's bedside table, would not satisfy the two stage test in *Williams* above.

PROBLEM QUESTION 2

ASSUME THE FOLLOWING FACTS

Ralph ran a courier service delivering letters and packages which was struggling financially. Ralph turned his business around by promoting his service as one that 'asked no questions, and delivered anything, anywhere, anytime'. Ralph made it his policy never to inquire about the contents of the items he delivered. After several years, Ralph came to the attention of the police as his client base included some of the State's most notorious criminals. The police raided Ralph's business premises and targeted Ralph's 'best' customers. Large quantities of heroin, cocaine and cannabis were discovered in an assortment of packages within Ralph's distribution chain.

Discuss Ralph's criminal liability.

THE ISSUES

This question raises four issues: (1) whether Ralph has permitted his business premises to be used for a drug offence: s 11 of the *Drugs Misuse Act 1986* (Qld), or s 5(1)(a) and (b) of the *Misuse of Drugs Act 1981* (WA); (2) whether Ralph has the necessary knowledge for possession; (3) whether Ralph comes within the doctrine of innocent agency; and (4) the evidentiary provisions in s 129(1)(c) and (d) of the *Drugs Misuse Act 1986* (Qld) and whether s 24 Mistake of fact is available to Ralph.

THE RELEVANT LAW

The critical factual information that directs the legal search is as follows:

Ralph turned his business around by promoting his service as one that ‘asked no questions, and delivered anything, anywhere, anytime’. Ralph made it his policy never to inquire about the contents of the items he delivered.

Thus, Ralph is (a) promoting a courier service that asked no questions, and (b) exhibiting wilful blindness as to the type of product his courier service could be carrying. Here, the focus is on dangerous or prohibited drugs, and whether Ralph falls within the physical and mental elements of any type of drug offence, such as possession or supply, and whether he has a defence.

Conceptually, is Ralph acting any differently from a truck driver who agrees to take a package for a fee and asks no questions as to the package’s contents? Indeed, is Ralph’s business essentially an integral part of a drug supply operation?

In Queensland, there two important evidentiary provisions that are relevant on the facts to be found in s 129(1)(c) and (d) of the *Drugs Misuse Act 1986* (Qld) below.

129 Evidentiary provisions

(1) In respect of a charge against a person of having committed an offence defined in part 2—

(c) proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person's possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place; and

(d) the operation of the Criminal Code, section 24 is excluded unless that person shows an honest and reasonable belief in the existence of any state of things material to the charge.

Thus, as Ralph was the manager and in control of his courier business, the drugs flowing through his supply chain will be taken to be in his possession unless he can show on the balance of probabilities that he 'neither knew nor had reason to suspect that the drug was in or on that place'.

A related issue is the question of whether Ralph has permitted his business premises to be used for a drug offence: s 11 of the *Drugs Misuse Act 1986* (Qld), and s 5(1)(a) and (b) of the *Misuse of Drugs Act 1981* (WA).

Drugs Misuse Act 1986 (Qld)

Section 11 Permitting use of place

(1) A person who, being the occupier or concerned in the management or control of a place, permits the place to be used for the commission of a crime defined in this part is guilty of a crime.

Misuse of Drugs Act 1981 (WA)

5 Offences concerned with prohibited drugs and prohibited plants in relation to premises and utensils

(1) A person who — (a) being the occupier of any premises, knowingly permits those premises to be used for the purpose of — (i) the manufacture or preparation of a prohibited drug or prohibited plant for use; or (ii) the manufacture, preparation, sale, supply or use of a prohibited drug or prohibited plant; or (b) being the owner or lessee of any premises, knowingly permits those premises to be used for the purpose of using a prohibited drug or prohibited plant ... commits a simple offence.

Both s 11 of the *Drugs Misuse Act 1986* (Qld) and s 5 of the *Misuse of Drugs Act 1981* (WA) above specify 'permits' as an element of the offence. The meaning of 'permits' was considered in *R v Von Snarski* [2001] QCA 71, at [24], where the Queensland Court of Appeal (Thomas JA, Wilson and Douglas JJ) followed High Court authority on the statutory interpretation of 'permission'.

[24] Mere inactivity by a person seeing others doing something does not establish permission. But neither is specific activity always necessary to prove 'permitting' in the case of someone who knows what another is doing, has the capability of preventing it, and stands by while the act is done. It is a question of fact in which degree and circumstance may affect the conclusion. This is confirmed by the following passage in the judgment of Gavan Duffy and Starke JJ in *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) CLR 481, 504.

'Mere inactivity or failure to take some steps to prevent the performance of the work does not necessarily establish permission. Inactivity or 'indifference, exhibited by acts of commission or omission, may reach a degree from which an authorisation or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorised the performance or permitted the use of a place of entertainment for the performance complained of.'

Thus, while 'knowingly permits' is the language used in the *Misuse of Drugs Act 1981* (WA), on the authority of *R v Von Snarski* [2001] QCA 71 above, the fault or mental element of knowledge is also required in s 11 of the *Drugs Misuse Act 1986* (Qld).

The question here is whether Ralph knows what his courier business is being used for, has the capability of preventing the flow of drugs, and stands by while the acts are done.

Furthermore, s 129(1)(d) reverses the onus of proof for a person relying on s 24 Mistake of fact. In *R v Tabe* [2003] QCA 356 at [14] de Jersey CJ states that an offender can 'have recourse to s 129(1)(d) of the *Drugs Misuse Act* and seek to prove an honest and reasonable belief the parcel did not contain (or would not have contained) dangerous drugs'. In Western Australia, there is no equivalent provision to s 129(1)(d), and therefore s 24 requires an evidential burden only.

There are two cases on point with Ralph's situation: the first relating to possession (*The State of Western Australia v 'R'* [2007] WASCA 42), and the second relating to supply (*Pinkstone v The Queen* (2004) 219 CLR 444).

The critical mental element for possession of prohibited drugs or plants is knowledge. In Queensland, following *Clare v The Queen* [1994] 2 Qd R 619, it is sufficient if the person knows of the existence of the item in question but need not know its nature or character. By contrast, in Western Australia, following *The State of Western Australia v 'R'* [2007] WASCA 42, where a truck driver transported interstate a package which contained cannabis not knowing what was in the package although he suspected it might contain drugs, a majority of the Court of Appeal held that the mental element of 'knowledge' required an awareness that the item is likely to be a prohibited drug. In distinguishing the position in Western Australia, Steytler P at [67] held:

[I]t seems to me that knowledge (which might be equated with awareness, in this context) is established if there is proof of a belief by the accused in the likelihood (in the sense that there was a significant or real chance) that he or she had a prohibited drug in his or her physical possession or otherwise in his or her control or under his or her dominion. Whether the accused had such a belief is, of course, a question of fact, and whether or not it existed will ordinarily be a matter of inference from the circumstances surrounding the commission of the alleged offence, often a combination of suspicious circumstances and a failure to make enquiry. Whether or not that inference should be drawn in the circumstances of a particular case is a question for the jury, but, if the inference is to be drawn, it must be the only rational inference available.

The question here is whether Ralph comes under either the Qld or WA definition of knowledge, thereby fulfilling the mental element for possession of dangerous or prohibited drugs.

In the second case, *Pinkstone v The Queen* (2004) 219 CLR 444, the appellant sent two boxes from Sydney to Perth as air cargo with Ansett. These boxes were subsequently recovered and found to contain large quantities of prohibited drugs. The appellant was convicted of supplying a prohibited

drug under s 6(1)(c) of the *Misuse of Drugs Act 1981* (WA). McHugh and Gummow JJ at 463 [53] held:

It follows that a person is liable under s 6(1)(c) for sending a prohibited drug to another person once he or she has knowingly placed the drug in a mail delivery system with the intention that it be received by that person at a particular place. Whether or not the drug in question ultimately reaches the intended recipient once it has arrived at its intended destination is, for this purpose, irrelevant. For these reasons, the actions of the appellant in arranging for the delivery of a prohibited drug with the intention that the drug would be received by Mr Yanko at Perth Airport, when combined with the actions of Ansett in causing the drug to reach, and be unloaded at, Perth Airport, amounted to the 'supply' of that drug to another within the meaning of s 6(1)(c) of the Drugs Act. As will appear later in these reasons, it was accepted by each party before this Court that the actions of Ansett may be imputed to the appellant by virtue of the doctrine sometimes termed 'innocent agency'.

McHugh and Gummow JJ at [59] went on to explain the doctrine of innocent agency.

The doctrine of 'innocent agency' is a means by which the common law attaches criminal liability to a person who does not physically undertake some or all of the elements of the offence with which he is charged. The doctrine was developed, as a 'rule of necessity'. This was to solve the logical difficulty that the liability of a secondary party was ordinarily dependent upon that of the principal in the first degree. In circumstances where the act of an 'offender' was prohibited, but liability did not arise due to a lack of mens rea or some other excuse, application of strict logic would have led to the result that a person who procured that act escaped liability. The Law Commission for England and Wales has usefully described the doctrine as follows:

'A person acts through an innocent agent when he intentionally causes the external elements of the offence to be committed by (or partly by) a person who is himself innocent of the offence charged by reason of lack of a required fault element, or lack of capacity.'

The obvious question here is whether Ralph comes within the doctrine of innocent agency.

PUTTING THE FACTS INTO THE LAW

Ralph is more likely to be convicted in Queensland than in Western Australia because (a) the evidentiary provisions in s 129(1)(c) and (d) of the *Drugs Misuse Act 1986* (Qld) reverse the onus of proof; and (b) the mental element of 'knowledge' which is the mental element for possession is lower in Queensland than in Western Australia. That said, Ralph is also facing conviction in Western Australia as under s 11 of the *Misuse of Drugs Act 1981* (WA) there is a rebuttable presumption (unless the contrary is proved) of intent to sell or supply for the purposes of s 6(1)(a) and s 7(1)(a), where the minimum quantity provisions in Schedules V and VI respectively are satisfied. Overall, Ralph is likely to face multiple charges, any one of which could lead to a substantial term of imprisonment.

Permits the place to be used for the commission of a crime

Both s 11 of the *Drugs Misuse Act 1986* (Qld) and s 5 of the *Misuse of Drugs Act 1981* (WA) above specify 'permits' as an element of the offence. Knowledge is the fault element: *R v Von Snarski* [2001] QCA 71. The test applied in *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) CLR 481, 504, is whether Ralph knows what his courier business is being used for, has the capability of preventing the flow of drugs, and stands by while the acts are done. On the facts, Ralph's inactivity or indifference exhibited by acts of omission appear to have reached such a degree that authorisation or permission can be inferred.

Under s 11(1) of the *Drugs Misuse Act 1986* (Qld), Ralph is liable to a maximum penalty of 15 years imprisonment. Under s 34(1)(d) of the *Misuse of Drugs Act 1981* (WA) Ralph is liable to a fine not exceeding \$3 000 or to imprisonment for a term not exceeding 3 years or both.

Possession

Ralph is also open to conviction of possession of dangerous or prohibited drugs. Applying the higher test in *The State of Western Australia v 'R'* [2007] WASCA 42 of proof of a belief by the accused in the likelihood (in the sense that there was a significant or real chance) that Ralph had a prohibited drug in his physical possession or otherwise in his control, inference of such a belief can reasonably be drawn from a combination of suspicious circumstances and a failure to make enquiry. Here it would appear to be the only rational inference available.

Furthermore, in Queensland, Ralph faces the rebuttable presumption in s 129(1)(c) of the *Drugs Misuse Act 1986* (Qld). As Ralph was the manager and in control of his courier business, the drugs flowing through his supply chain will be taken to be in his possession unless he can show on the balance of probabilities that he 'neither knew nor had reason to suspect that the drug was in or on that place'.

Under s 9(1)(a) of the *Drugs Misuse Act 1986* (Qld), Ralph is liable to a maximum penalty of 25 years imprisonment. Under s 34(1)(a) of the *Misuse of Drugs Act 1981* (WA) Ralph is liable to a fine not exceeding \$100 000 or to imprisonment for a term not exceeding 25 years or both.

Supply

In order to avoid conviction for supply, Ralph needs to come under the doctrine of innocent agency as with Ansett in *Pinkstone v The Queen* (2004) 219 CLR 444. Arguably, Ralph's case can be distinguished from Ansett's situation, as Ralph has effectively hung out a shingle inviting his courier business to be used by anybody with no questions asked. The Crown will portray Ralph's business as an integral cog in a criminal supply chain, as evidenced by his customer list.

Ralph's position in Western Australia is particularly dire as under s 11 of the *Misuse of Drugs Act 1981* (WA) there is a rebuttable presumption (unless the contrary is proved) of intent to sell or supply for the purposes of s 6(1)(a) if he has in his possession a quantity of the prohibited drug



which is not less than the quantity specified in Schedule V in relation to the prohibited drug. On the facts, the quantity condition is satisfied.

Under s 9B of the *Drugs Misuse Act 1986* (Qld), Ralph is liable to a maximum penalty of 15 years imprisonment. Under s 34(1)(a) of the *Misuse of Drugs Act 1981* (WA) Ralph is liable to a fine not exceeding \$100 000 or to imprisonment for a term not exceeding 25 years or both.

Mistake of fact

Under s 129(1)(d) of the *Drugs Misuse Act 1986* (Qld) the onus of proof is reversed for a person relying on s 24 Mistake of fact. On the authority of *R v Tabe* [2003] QCA 356 at [14], Ralph can seek to prove an honest and reasonable belief the parcels flowing through his business did not contain (or would not have contained) dangerous drugs. In Western Australia, there is no equivalent provision to s 129(1)(d), and therefore s 24 of the *Criminal Code 1913* (WA) requires an evidential burden only.

24 Mistake of fact

(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

(2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

In Queensland, s 24(2) of the *Criminal Code 1899* (Qld) in conjunction with s 129(1)(d) of the *Drugs Misuse Act 1986* (Qld), place the legal onus on Ralph. In Western Australia, assuming Ralph satisfies the evidential burden, the Crown will have to negative beyond reasonable doubt that Ralph's mistaken belief was either honest or reasonable. Under the circumstances, the Crown is likely to succeed.

CONCLUSION

Ralph is likely to be convicted of committing a number of drug offences in either Queensland or Western Australia, and faces a substantial term of imprisonment. The essential reasons for this outcome are (1) the manner in which Ralph operated his courier business amounts to wilful blindness as to the contents of the packages and parcels flowing through the business, which equates to the mental element of knowledge: *He Kaw Teh v The Queen* (1985) 157 CLR 523; and (2) the rebuttable presumptions contained in the *Drugs Misuse Act 1986* (Qld) and *Misuse of Drugs Act 1981* (WA), thereby placing a legal onus on Ralph which under the circumstances he would be unlikely to be able to discharge.