

The following are suggested solutions to the problem questions on pages 234–235. They represent answers of an above average standard. The ILAC approach to problem-solving as set out in the ‘How to Answer Questions’ section of the preliminary pages of the *Criminal Law Guidebook Second Edition* has been used in devising these solutions.

Scenario 1 – Criminal liability of Brett and Paul

Paul

First, there is no evidence of any forensic analysis to determine what substances are contained in the two pills. It can be inferred from Paul’s lack of interest in trying ‘harder’ drugs, his secreting the pills in a cupboard at the time of the landlord’s inspection, and his subsequent charging by the police, that the ‘pills’ are illicit drugs¹. Second, there is no evidence of any admission made to the police by Paul as to his ownership or possession of the pills. Third, there is no evidence of the actual weight of the two pills. Noting the pills were contained in a small plastic bag and Paul has only been charged with ‘possession’, it is a logical inference that the combined weight of the pills does not exceed the traffickable quantity² applicable to the particular illicit drug.

To establish that Paul is in possession of the illicit drugs³, the prosecution must prove beyond reasonable doubt that Paul had exclusive physical custody or control of the pills, and that he intended to possess them with the knowledge or belief of the existence and nature of the illicit drug⁴. It is sufficient if Paul believed there was the likelihood, as in a ‘real or significant chance’, that the pills in his possession were illicit drugs⁵.

The pills were found in the kitchen cupboard of the house, which Paul rents with Brett, so it is arguable that Paul did not have exclusive access to them. The prosecution would have to exclude any other persons who had access to

¹ There are different terms used for illicit drugs in each jurisdiction, namely ‘prohibited drugs’ in *Drug Misuse and Trafficking Act 1985* (NSW) Schedule 1; ‘controlled drugs’ or ‘drugs of dependence’ in *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014* (SA) Schedule 1 Parts 1 and 2; and ‘drug of dependence’ in *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70 and Schedule 11. Hereafter the generic description ‘illicit drugs’ will be used when reference is being made to all three jurisdictions. Formal proof of the type of drug contained in the pills by a laboratory analysis would be required at any trial of the ‘possession’ charge.

² A traffickable quantity for each illicit drug is specified in the legislation of all three jurisdictions and where this quantity of an illicit drug is possessed by a person, then they are either deemed or presumed to have it in their possession for the purpose of supplying or trafficking the drug – *Drug Misuse and Trafficking Act 1985* (NSW) s 29 and Schedule 1; *Controlled Substances Act 1984* (SA) s 32(5) and *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014* (SA) Schedule 1 Parts 1 and 2; *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 73(2) and Schedule 11.

³ *Drug Misuse and Trafficking Act 1985* (NSW) s 10 (prohibited drug); *Controlled Substances Act 1984* (SA) s 33L (controlled drug); *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 73 (drug of dependence).

⁴ *Dib and Dib* (1991) 52 A Crim R 64; *Greatorex* (1994) 74 A Crim R 496; *Director of Public Prosecutions Reference No 1 of 2004*; *R v Nguyen* (2005) 12 VR 299.

⁵ *Kural v The Queen* (1987) 162 CLR 502; *Saad v The Queen* (1987) 70 ALR 667; *R v Yee Kam Lau* (1998) 105 A Crim R 167.

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the kitchen of the house⁶, as possessing the drugs, particularly Brett in these circumstances. There is evidence that Brett was aware of the existence of the pills after the graduation party, however, before he went overseas on holiday he had said to Paul, “I’m not into that sort of thing; do what you want with them.” This comment suggests that Brett believed that the pills were Paul’s to dispose of as he chose. Further, Brett is overseas when the pills are actually located in the kitchen cupboard, so it is certainly arguable that the prosecution could establish that Paul, as the only other tenant, had exclusive physical custody of, or control over, the pills.

Paul is the person who found the pills after the party, and although he was not interested in trying them, it is strongly arguable that his actions with the pills, and accompanying state of mind, provide evidence that he possessed the illicit drugs. After speaking to Brett the day after finding the pills, Paul had the opportunity to discard the pills, or to make enquiries about ownership with the other people who attended the party, but he simply left them in the kitchen. It was then several days later that Paul moved them into a kitchen cupboard when the landlord’s inspection was imminent. During this time it is arguable that Paul knew that the pills were illicit drugs, or at least believed they were likely to be illicit drugs, as he didn’t want to try them; was aware of Brett’s reaction; and attempted to hide them from the landlord. The combination of circumstances points clearly to the inference that Paul knew the existence and nature of the illicit drugs, and that he intended to exercise control over them at the relevant time. Accordingly, it is strongly arguable that Paul is criminally liable for possession of the illicit drugs.

Brett

It is most unlikely that Brett would have any criminal responsibility for the pills. There is no evidence that Paul implicated Brett in ownership of the pills, and the facts are clear that Brett distanced himself from them when he was asked by Paul what he should do with them. From this conversation, we know that Brett has knowledge of the existence of the pills and that he shares the kitchen of the rental property where the pills were subsequently found with Paul. However, this evidence is not sufficient to establish joint possession of the pills with Paul, as it is arguable that Brett simply knows that the pills are present in the house and that they are in Paul’s possession⁷. Brett could not be said to have intended to exercise physical control over the pills even though he knew of their existence and nature. Rather, it is arguable that the prosecution would seek to exclude Brett from possessing the drugs, and would probably only want to interview him when he returns from overseas as a potential witness in the case against Paul.

Scenario 2 – Potential liability of Ray, Andrew, Michael and Sarah for supply or trafficking offences

New South Wales – Supply offences

⁶ *R v Filippetti* (1978) 13 A Crim R 335.

⁷ *R v Wan* [2003] NSWCCA 225; *Lee v The Queen* (2013) 232 A Crim R 337, 397.

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If this incident occurred in New South Wales, **Andrew** is potentially liable for supplying⁸ the cannabis⁹ he took to Sarah's house and shared with a few friends. Clearly Andrew had the cannabis in his possession. He had exclusive physical custody of the 'pot' expressly given just to him by Ray. Andrew's subsequent conversation with Michael shows that he intended to possess what he knew was cannabis, particularly when he said he'd 'come into some weed.'

By taking the cannabis to Sarah's party and sharing it with a few friends, however, Andrew has committed the actus reus of 'supplying' a prohibited drug. The definition of supply¹⁰ extends beyond commercial drug transactions, and retains its ordinary meaning of providing, furnishing or making available something that is sought¹¹. Thus, sharing drugs with others falls within conduct amounting to supply¹², and it is clear that Andrew had provided it to at least one of his friends who was caught smoking the cannabis by the police.

The mens rea of 'supply' is an intention to supply, which includes the knowledge that what is being supplied is a prohibited drug, or a belief that there is a significant or real chance that it contained a prohibited drug¹³. Although it is not necessary for the prosecution to prove that there is knowledge of the specific drug, Andrew knew he had received cannabis from Ray which is demonstrated by the use of the slang terms, 'pot' and 'weed', to describe the green vegetable matter in the bag which Ray gave to Andrew. Although Andrew expressed reservations to Michael about trying the cannabis, it is clear he knew what he possessed when he took it to Sarah's party and shared it with his friends. The existence of this knowledge is sufficient to infer that Andrew intended to supply cannabis¹⁴ through providing it to his friends, even though he observed Ray's injunction not to get involved in selling it. As the quantity of cannabis involved is less than the traffickable quantity applicable to the drug, Andrew is liable for supplying a small quantity of cannabis under *Drug Misuse and Trafficking Act 1985* (NSW) s 25(1).

It is strongly arguable that **Ray** is also liable for an offence of supplying a prohibited drug to Andrew. Even though Ray simply gave Andrew the small bag of 'pot' without any payment, this amounts to supply under the *Drug Misuse and Trafficking Act 1985* (NSW)¹⁵. Ray provided the cannabis to Andrew and encouraged him to 'smoke' it. It is clear from Ray's reference to the green vegetable matter as 'pot' that he knew what he was giving to

⁸ *Drug Misuse and Trafficking Act 1985* (NSW) s 25.

⁹ Cannabis leaf is a prohibited drug under the *Drug Misuse and Trafficking Act 1985* (NSW) Schedule 1.

¹⁰ *Drug Misuse and Trafficking Act 1985* (NSW) s 3.

¹¹ *R v Coles* [1984] 1 NSWLR 726; *R v Carey* (1990) 20 NSWLR 292, 294-297.

¹² *R v Trudgeon* (1988) 39 A Crim R 252, 254.

¹³ *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Kural v The Queen* (1987) 162 CLR 502; *Saad v The Queen* (1987) 70 ALR 667; *R v Yee Kam Lau* (1998) 105 A Crim R 167.

¹⁴ *Kural v The Queen* (1987) 162 CLR 502, 504; *Saad v The Queen* (1987) 70 ALR 667.

¹⁵ See above n 10.

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Andrew was cannabis, and on this basis an intention to supply the prohibited drug can be inferred¹⁶.

Michael's potential liability for a 'supply' offence lies in his encouragement of Andrew to 'bring it to Sarah's party on Friday night. We can all try it then.' Although there were no money transactions involved, it can be argued that the actus reus of 'supply' can be established in that Michael caused¹⁷ or incited Andrew to supply the cannabis, by requesting him to bring it to the party where they and others could try it¹⁸. This went beyond a request by Michael for drugs for himself, which does not amount to supply¹⁹, and extended to a division between Andrew, Michael and others, so that Michael 'caused' the supply to those others²⁰. The intention of Michael to supply a prohibited drug in this way can be established by his actual knowledge, or his belief of, a significant or real chance that Andrew had cannabis²¹. They had a conversation during which Andrew used the term 'weed' for cannabis, and it is apparent that Michael was aware of the meaning of this term, and thus, the nature of the prohibited drug. This knowledge, coupled with his encouragement to provide the cannabis to others at the party, is sufficient to establish Michael's intention to supply by causing Andrew to provide the drug to him and others²².

Sarah is potentially liable for a 'supply' offence on the basis of suffering or permitting²³ the supply of cannabis at her house. To establish supply on this basis, Sarah must know that an act of supply was taking place, or that it was probable it would take place, and she had a legal responsibility to attempt to stop it²⁴. If Sarah provided or allowed her premises to be used for supply, then this is also sufficient to constitute taking part in the supply of a prohibited drug²⁵. There is no evidence that Sarah was actually consulted by Andrew and Michael about the bringing of cannabis to her party. It is also not clear that Sarah was included in the few friends with which Andrew actually shared the cannabis at the party. On this basis there is insufficient evidence available to establish Sarah knew that an act of supply of cannabis was taking place at her party, or that it was probable that it would happen. Sarah could not be said to have knowingly provided or allowed her premises to be used for supplying prohibited drugs and she is unlikely to be liable for a 'supply' offence on the basis of the known facts.

¹⁶ See above n 14.

¹⁷ *Drug Misuse and Trafficking Act 1985* (NSW) s 3.

¹⁸ *R v Fisher* (Unreported, SC(NSW), 17 February 1989).

¹⁹ *Castle v Olen* (1985) 3 NSWLR 26.

²⁰ See above n 18.

²¹ *Kural v The Queen* (1987) 162 CLR 502; *Saad v The Queen* (1987) 70 ALR 667; *R v Yee Kam Lau* (1998) 105 A Crim R 167.

²² *Kural v The Queen* (1987) 162 CLR 502, 504.

²³ *Drug Misuse and Trafficking Act 1985* (NSW) s 3.

²⁴ *R v Jasper* (2003) 139 A Crim R 329.

²⁵ *Drug Misuse and Trafficking Act 1985* (NSW) s 6(c); *R v Ruiz-Avila* (2003) 142 A Crim R 459; *R v Sheen* (2007) 170 A Crim R 533.

South Australia and Victoria – Trafficking or supply offences

In South Australia and Victoria, **Andrew** and **Ray** are potentially liable for trafficking²⁶ in a controlled drug²⁷ or drug of dependence²⁸. In contrast to supply, trafficking must have a commercial connotation²⁹ or take place within a commercial setting³⁰. Accordingly, a gift of drugs does not constitute trafficking³¹. There is no evidence of any exchange of money between Ray and Andrew for the cannabis, or later, between Andrew and his friends at the party. Accordingly, it cannot be ‘fairly inferred someone is making a profit’³² from those transactions, and on known facts, neither Ray nor Andrew is liable for trafficking in cannabis.

Further, the offence of supplying controlled drugs in South Australia, which encompasses providing or distributing³³ those drugs, specifically excludes cannabis³⁴. Therefore, even though the conduct of both Ray and Andrew would fall within the definition of ‘supply’, it is not an offence to supply cannabis by giving it to or sharing it with other people. In Victoria, there is no offence of supplying a drug of dependence³⁵. Overall then, in these jurisdictions, Ray and Andrew may be liable for possession of the cannabis, but not for supplying or trafficking in it.

The conduct of **Michael** as outlined above³⁶ would not constitute trafficking as there is no commercial connotation³⁷ in his getting Andrew to bring the cannabis to be shared among friends at Sarah’s party. The acts of Michael in causing or encouraging Andrew to share the cannabis with friends would arguably fall within the respective definitions of ‘supply’ in South Australia³⁸ and Victoria³⁹, but as these actions are related to cannabis there are no relevant supply offences committed by Michael. It is not even clear whether Michael had possession of the cannabis at any stage, so he has no potential criminal liability in these jurisdictions.

Finally, **Sarah** is also unlikely to be potentially liable for supply or trafficking offences in South Australia and Victoria. The facts do not clearly establish or allow us to infer the knowledge of Sarah in relation to the cannabis provided

²⁶ *Controlled Substances Act 1984* (SA) s 32(3) & (4); *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AC.

²⁷ Cannabis (plant material including leaves) is a controlled drug under the *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014* (SA) Schedule 1 Part 1.

²⁸ Cannabis leaf is a drug of dependence under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) Schedule 11 (Part 2).

²⁹ *Sassine v R* (1985) 18 A Crim R 178.

³⁰ *R v Holman* (1981) 4 A Crim R 446, 451.

³¹ *Matthews v Towers* [1922] VLR 476.

³² *R v Holman* (1981) 4 A Crim R 446, 451.

³³ *Controlled Substances Act 1984* (SA) s 4.

³⁴ *Controlled Substances Act 1984* (SA) s 33(1).

³⁵ *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 4, 70(2).

³⁶ See above at notes 17 and 18.

³⁷ See above n 29.

³⁸ See above n 33.

³⁹ *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 4.

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by Andrew at her party. It is also not clear how many people attended Sarah's party, although it may be inferred from the noise complaint that there were a large number of people in attendance. From this, it is arguable that Andrew simply brought the cannabis to the party at the urging of Michael and shared it with a 'few' friends and that Sarah was not even aware that it was being supplied and smoked. Overall on the basis of known facts, it is strongly arguable that Sarah has not been involved in any conduct that would fall within the definitions of trafficking or supply of cannabis, or allowing her premises to be used for those purposes.

Scenario 3 – Criminal liability of Garry and Jim for cultivation offences

Garry

The actus reus of the offence of cultivating⁴⁰ cannabis plants⁴¹ includes actions such as preparing soil, sowing, fertilising, tending and caring for the plants, and harvesting the crop⁴². In preparing the soil with the tractor in an isolated paddock at Jim's farm, Garry's conduct as observed by the police is sufficient proof of the actus reus of cultivation.

The difficulty for the prosecution would be to prove Garry had the relevant mens rea. It must be established that Garry had the intention to cultivate prohibited, controlled or narcotic plants⁴³. This can be done through proof that Garry knew that an illicit plant was involved, or that he was aware that there was a likelihood that it was and he persisted in his conduct⁴⁴. In South Australia, it is sufficient as an alternative to knowledge to prove that Garry was reckless as to the nature of the plant being cultivated⁴⁵. Recklessness in this context means that Garry was aware of the possibility that a controlled plant was being cultivated, but he went ahead regardless⁴⁶.

The evidence of Garry's knowledge is based on the conversations he allegedly had with Jim, and his later observations of the paddock at Jim's farm. In Garry's version of the conversations with Jim, he was never expressly told of Jim's possession of 'hundreds of cannabis seeds and cuttings watered and ready to go'. There are no facts to suggest that Jim will give the police a different version of these conversations with Garry. Thus the prosecution would have to rely on evidence of what Garry saw, and the belief he formed

⁴⁰ *Drug Misuse and Trafficking Act 1985* (NSW) s 23; *Controlled Substances Act 1984* (SA) ss 33B, 33K; *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 72-72B.

⁴¹ Cannabis is: a prohibited plant under *Drug Misuse and Trafficking Act 1985* (NSW) Schedule 1; a controlled plant under *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014* (SA) Schedule 3 Part 2; a narcotic plant under *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70 and Schedule 11 (Part 2).

⁴² *R v Giorgi and Romeo* (1981) 7 A Crim R 305. Also see the definitions of 'cultivate' in *Drug Misuse and Trafficking Act 1985* (NSW) s 3; *Controlled Substances Act 1984* (SA) s 4; and *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70(1).

⁴³ The applicable generic label will depend on the jurisdiction – see above n 41.

⁴⁴ *R v Baird* (1985) 3 NSWLR 331; *Dunn v R* (1988) 32 A Crim R 203.

⁴⁵ *Controlled Substances Act 1984* (SA) s 33P.

⁴⁶ *Fisher v Police* [2004] SASC 232, [21] and [35].

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from this, to infer that he had knowledge that a prohibited or controlled plant was going to be cultivated in the paddock.

There is an argument that Garry was wilfully blind to circumstances that raised a strong suspicion that Jim was going to plant illicit crops. It is clear that when Garry attended the farm after the initial discussion with Jim about planting olive trees and the availability of labouring work, he became suspicious about the need for camouflage netting and an electric fence around the isolated paddock where the crop was to be planted. Wilful blindness is not equivalent to knowledge, but it is evidence that may be used in making an inference⁴⁷ that Garry knew about the nature of the plants to be cultivated in Jim's paddock. This must be the only rational inference available from the circumstantial evidence of Garry's knowledge, and the prosecution must establish it beyond reasonable doubt⁴⁸. Jim's response to Garry in laughing and saying that the netting and fence is 'no big deal; that just keeps the birds off and the cows away', provides another inference, namely that Jim was going to plant legal crops such as olive trees in this location. Garry seemingly accepted this explanation and his suspicions may have been negated, so his knowledge that illicit plants were to be cultivated cannot be established beyond reasonable doubt.

On the other hand, the prosecution may argue that Garry did realise from the netting and the fence that it was at least likely that illicit plants were going to be cultivated in the paddock, and that in his desperation for work he decided he would not further question Jim, but just try to start the work and get it done quickly. Garry was eager to get the work started, as he called Jim a week later and started work the next day, after receiving the keys to the tractor. On this basis, intention to cultivate could be proved beyond reasonable doubt. There are alternative arguments open based on the facts, and the relative strengths of these arguments may ultimately depend on whether Garry gives evidence, and on the credibility of his version of events in what he understood from his conversations with Jim and his observations at the farm.

In South Australia, the prosecution could rely on the alternative mental state of 'recklessness' in seeking to prove Garry's criminal liability for cultivation of cannabis⁴⁹. The prosecution would argue that from his conversations with Jim and his observations of the netting and electric fence around the isolated paddock, Garry was aware of the possibility that a controlled plant was going to be cultivated. Arguably, this mental state would be easier to prove than the knowledge equivalent of an awareness of the likelihood that a controlled plant was going to be cultivated. Certainly, Garry's question to Jim about the netting and the fence demonstrates that he was suspicious, and that there was a possibility of Jim intending to plant something that was illegal in the soil that he was going to prepare as part of his labouring work for Jim.

Jim

⁴⁷ *Pereira v DPP* (1988) 82 ALR 217, 219.

⁴⁸ *Ibid* and *R v Schipanski* (1989) 17 NSWLR 618, 620.

⁴⁹ See above notes 45 and 46.

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Jim was found by the police to be in possession of cannabis seeds and cuttings, watered and ready to be planted. This shows that Jim had prepared and tended to the seeds and cuttings, in anticipation of them being planted in the soil of the paddock that he had arranged for Garry to prepare with the tractor. Even though Jim had not sown or scattered the seeds, it is apparent that he had grown cuttings and had tended to these plants⁵⁰. Further, the setting up of the camouflage netting and electric fence are actions by Jim in preparation of the cannabis crop. Accordingly, the prosecution could establish beyond reasonable doubt that Jim had carried out conduct amounting to the actus reus of cultivation of illicit plants.

As to mens rea, Jim's possession of cannabis seeds and cuttings ready to plant is strong evidence of his intention to cultivate illicit plants, in that he clearly had knowledge of the type of plants in his possession⁵¹ and that they were to be planted in the soil being prepared by Garry. Further, the prosecution may argue that in his conversations with Garry, Jim was deliberately vague and deceptive, as he knew that he was going to plant cannabis and not olive trees and he had to ensure that Garry would still do the labouring work for him. Overall, on the known facts, there is quite a strong prosecution case for cultivation of cannabis against Jim.

In South Australia, consideration may be given to prosecuting Jim under *Controlled Substances Act 1984* (SA) s 33K(1)(c) if there is proof the cannabis plants are to be cultivated with the intention to sell them or their products, or at least in the belief that another person intends to do so. It seems that Jim was found with 'hundreds of cannabis seeds and cuttings', and he had gone to some trouble and expense to protect the paddock where the seeds and cuttings were to be planted. Thus, it is certainly arguable that Jim was intending to cultivate the cannabis to sell to others in a commercial operation.

Scenario 5 – Nadine's criminal liability for importation and/or possessing border controlled drugs

It is apparent from a later forensic analysis that the white powder found in Nadine's backpack was heroin, and it is a 'border controlled drug' under the *Criminal Code* (Cth) and the associated regulations.⁵² The total weight of the white powder found to contain heroin was 278 grams, which exceeds the marketable quantity of 2 grams, but does not reach the commercial quantity of 1.5 kilograms⁵³. Under Part 9.1 of the *Criminal Code* (Cth), any incremental criminal liability for quantities of border controlled drugs is determined on the basis of the amount of the pure drug⁵⁴. The amount of pure heroin in the ziplock bags is not clear in the facts, but given the overall quantity of 278 grams, it is likely to be more than the marketable quantity of 2 grams.

⁵⁰ See above n 42.

⁵¹ See above n 44.

⁵² *Criminal Code* (Cth) s 301.4; *Criminal Code Regulations 2002* (Cth) reg 5D, Schedule 4.

⁵³ *Criminal Code Regulations 2002* (Cth), reg 5D, Schedule 4.

⁵⁴ *Criminal Code* (Cth) s 312.1(3).

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As to Nadine's criminal liability for importation and/or possession of the marketable quantity of border controlled drugs⁵⁵, it is certainly arguable that Nadine had the ziplock bags of heroin in her possession, as they were found in a locked compartment of her backpack and she produced the key to that compartment from the pocket of her clothing. Nadine thus had physical custody of, or control over, the heroin to the exclusion of others⁵⁶, which satisfies the legal requirements of the actus reus of possession. In relation to the 'possession' offence, the border controlled drugs must have been unlawfully imported⁵⁷, which overlaps to some extent with the actus reus requirements for the importation offence under *Criminal Code* (Cth) s 307.2. Nadine's action of bringing the heroin into Australia from Thailand amounts to the physical act of importation by bringing the substance into Australia.⁵⁸ Importation requires that the goods be brought into Australia with the intention of landing or discharging them⁵⁹ and it is apparent that Nadine was not travelling on to another country, but had arrived 'home' in Australia. The actus reus of importation can be established on known facts and the drugs have the status of being unlawfully imported for the 'possession' offence.

Fault elements must also be proved for both offences, so that Nadine must have intended to possess and/or import the border controlled substance.⁶⁰ This intention can be established by Nadine's knowledge at the relevant time, that she had the substance in her possession or was importing the substance. The mental element required in relation to knowledge that the substance was a border controlled drug is recklessness⁶¹. In this context, 'recklessness' means that Nadine is aware of a substantial risk that she possesses, or is importing, border controlled drugs and she unjustifiably takes that risk⁶².

As Nadine denies any knowledge of the cloth and the ziplock bags containing the white powder, the prosecution will seek to prove her intention to import and possess the drugs together with her awareness that there was a substantial risk they were border controlled drugs by rational inference from circumstantial evidence. The prosecution would argue that the way the ziplock bags of heroin were rolled tightly together in a brightly coloured cloth and sealed with packing tape, demonstrates an intention to conceal the contents and thus knowledge, or at least awareness, of a substantial risk that the package contained border controlled drugs. Further, the prosecution would contend that as Nadine stated that she had packed her backpack before leaving Thailand; she had locked the bottom compartment of her backpack where the border controlled drugs were found; and she is the only person who has a key to that compartment of the backpack, then it is a rational inference

⁵⁵ *Criminal Code* (Cth) s 307.2 (importation) and s 307.6 (possession).

⁵⁶ *Criminal Code* (Cth) s 300.2; *R v Filippetti* (1978) 13 A Crim R 335; and *R v Delon* (1992) 29 NSWLR 29.

⁵⁷ *Criminal Code* (Cth) s 307.6(1)(b).

⁵⁸ *Criminal Code* (Cth) s 300.2.

⁵⁹ *R v Bull* (1974) 131 CLR 203. Also, see *R v Campbell* (2008) 73 NSWLR 272, 294.

⁶⁰ *Criminal Code* (Cth) ss 307.2(1) and 307.6(1). Also, see *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Kural v The Queen* (1987) 162 CLR 502; *Saad v The Queen* (1987) 70 ALR 667; *R v Saengsai-Or* [2004] NSWCCA 108, [71]-[72].

⁶¹ *Criminal Code* (Cth) s 307.2(1)(b) & (2); and s 307.6(1)(c) & (3).

⁶² *Criminal Code* (Cth) s 5.4(1); *R v Toe* (2010) 106 SASR 203.

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that she placed the substance in her backpack and knew of its existence, or at least of the likelihood that it existed⁶³.

The defence would argue that the other rational inference from the circumstances is that another person was able to access the locked compartment of Nadine's backpack after she had packed it in Thailand, probably during her flight to Australia. Accordingly, the prosecution could not prove Nadine's knowledge of the existence of the substance and her intention to possess or import border controlled drugs beyond reasonable doubt. The defence only has to raise a doubt about whether Nadine had the requisite knowledge, and it is possible that she may not be found criminally liable for importing and/or possessing border controlled drugs.

The strongest argument in all the circumstances is that Nadine does have knowledge of the existence of the substance or, depending on whether it was given to her by another person, at least an awareness of a substantial risk that she was in possession of and importing border controlled drugs. The strength of this argument is found in the way the drugs were carefully concealed in a locked compartment of Nadine's backpack, to which she had the only known key. It is not clear whether Nadine checked her backpack in as luggage or whether she carried it with her on the plane flight to Australia, but either way, the location of the drugs in the locked compartment to which she had exclusive access is arguably the most persuasive fact in drawing an inference as to the existence of Nadine's intention and knowledge. It is likely that Nadine will be found criminally liable for importing and possessing border controlled drugs under the *Criminal Code* (Cth). An accused charged with an importation offence in relation to any quantity of border-controlled drugs is deemed to intend them to be used for commercial supply,⁶⁴ however, as Nadine would be charged with importing a marketable quantity of heroin she has a partial defence open if she can prove a lack of intent to sell the drugs.⁶⁵ If this defence were successful, which is difficult to predict on known facts, Nadine would still be liable for an importation offence but would be liable to a significantly lower penalty.⁶⁶

⁶³ See above n 44.

⁶⁴ *Criminal Code* (Cth) s 307.2

⁶⁵ *Criminal Code* (Cth) ss 307.2(4) and 13(4).

⁶⁶ *Criminal Code* (Cth) s 307.4