SUPREME COURT OF QUEENSLAND

CITATION:	*R v Harper* [2015] QCA 273
PARTIES:	**R** **v** **HARPER, Christopher John** (appellant)
FILE NO/S:	CA No 44 of 2014 SC No 6 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 21 February 2014 (Conviction); Unreported, 27 February 2014 (Sentence)
DELIVERED ON:	15 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2015
JUDGES:	Morrison JA, Mullins and Burns JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. It is ordered that these reasons for judgment may disclose publicly information that relates to the examination of witnesses before the Australian Crime Commission in 2004 and 2005 in connection with Mr Harper to the extent disclosed in these reasons.** **2. Exhibit CT1 (Australian Crime Commission transcripts comprising pages 2 to 213) to the affidavit of Christin Tom filed on 13 March 2015 in this appeal must be detached from the affidavit and placed in an envelope, and the envelope sealed and marked "Not to be opened except by the Order of the Court or Judge".** **3. Appeal against conviction dismissed.** **4. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where appellant was examined by the Australian Crime Commission (ACC) at two hearings prior to being charged – where police officers who were investigating the appellant for drug trafficking were present at the ACC hearings – where as a result of information given by the appellant at the first hearing, a search warrant was executed at the home of the appellant's mother – where glassware and chemicals were found at the home and tendered as evidence at the trial – where

the appellant gave further evidence at the ACC hearings about his use of hypophosphorous acid than was on end user declarations made in order to purchase the chemical – whether the evidence used against the appellant at the trial as a result of answers given by him at the ACC hearings resulted in a loss of forensic advantage in the trial and made the trial unfair

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where evidence had been given by a witness at the criminal trial of another person about visiting a property at Millmerran where methylamphetamine was being produced – where the appellant was imprisoned with this other person who disclosed the details of the witness' evidence – whether the prosecution had a duty to disclose this evidence from an unrelated police investigation – whether there was a miscarriage of justice from the prosecution's failure to disclose the witness' statement to the appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant was convicted of trafficking in methylamphetamine and acquitted of charges of producing methylamphetamine – whether the guilty verdict on the trafficking charge was unreasonable and not supported on the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where trial judge directed the jury in relation to lies told by the appellant in the proposed use of hypophosphorous acid inserted in the end user declarations signed by the appellant to purchase hypophosphorous acid – where the appellant's case was that the proposed use was legitimate and not a lie – whether the trial judge's direction on lies should have expanded on hypothetical reasons for lying

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where trial judge directed the jury on the elements of the charge of trafficking – whether direction explained adequately that more than occasional sales or transactions were required to prove the business of trafficking

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – whether the trial judge's findings of fact were consistent with the jury verdicts of not guilty of the two counts of production of methylamphetamine and the 12 counts of possession of

precursor chemicals (which had been based on the evidence of a witness who was sentenced beneficially on the basis of his giving evidence against the appellant) – whether the trial judge erred in finding the trafficking occurred over the period of 32 months particularised in the charge – whether the sentence was manifestly excessive where appellant committed large scale trafficking

Australian Crime Commission Act 2002 (Cth), s 25A, s 30
Criminal Code (Qld), s 590AE

Hamdan v Callanan; Younan v Callanan [2014] QCA 304, cited
Lee v The Queen (2014) 253 CLR 455; [2014] HCA 20, considered
R v Anderson (unreported, Douglas J, SC No 404 of 2013, 15 August 2013), considered
R v Gibson [2008] QCA 367, considered
R v Seller [2015] NSWCCA 76, considered
R v Sullivan [2009] QCA 344, considered
R v VI [2013] QCA 218, cited
X7 v Australian Crime Commission (2013) 248 CLR 92; [2013] HCA 29, considered

COUNSEL: S Di Carlo for the appellant
D C Boyle for the respondent

SOLICITORS: Grasso Searles Romano Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I agree with the orders proposed by Mullins J and the reasons given by her Honour.

[2] **MULLINS J:** Mr Harper was convicted on 21 February 2014 after trial by jury in the Supreme Court of one count of trafficking in the dangerous drug methylamphetamine (count 1) and three counts of possessing a thing for use in connection with producing a dangerous drug, namely hypophosphorous acid (counts 16 to 18). Mr Harper was acquitted of two counts of producing a dangerous drug in excess of two grams (counts 2 and 3) and 12 counts of possessing a thing for use in connection with producing a dangerous drug (counts 4 to 15). Mr Harper was sentenced on 27 February 2014 to imprisonment of 10 years for the trafficking offence and concurrent sentences of five years for each of the counts of possessing hypophosphorous acid. In respect of the sentence for the trafficking count, a declaration was made that Mr Harper was convicted of a serious violent offence.

[3] Mr Harper appeals against his conviction on the following grounds:

Ground 1 The trial miscarried by the admission of evidence arising from Mr Harper's compulsory examination.

Ground 2 The trial miscarried in that there was a failure to disclose evidence of and relating to the prosecution case against Mr Harper.

Ground 3 The verdicts were unreasonable and not supported by the evidence alone as it stood at trial and/or having regard to the fresh evidence.

Ground 4 The learned trial judge erred in failing to direct the jury properly as to lies.

Ground 5 The trial judge erred in failing to direct the jury properly on the elements of trafficking.

[4] Mr Harper also applies for leave to appeal against sentence on two grounds: first, the trial judge erred in the finding of facts on sentence concerning the appellant's role in the offending and, second, the sentences imposed were manifestly excessive.

[5] Count 1 was particularised that between 20 February 2001 and 31 October 2003 at Toowoomba Mr Harper carried on the business of unlawfully trafficking in the dangerous drug methylamphetamine. The prosecution gave further particulars of its case (exhibit 55) that Mr Harper was engaged in the business of producing and selling methylamphetamine as either his own business or as a party to the production and selling of methylamphetamine by others. The prosecution conducted its case on the basis that Mr Harper was involved in the business of trafficking methylamphetamine by being involved in all or any combination of the following things:

> "1. The sourcing or purchasing of chemicals required to manufacture methylamphetamine by the defendant himself.
> 2. Procuring others to source chemicals and other ingredients required to manufacture methylamphetamine.
> 3. [withdrawn from the jury]
> 4. Being involved in the production of methylamphetamine.
> 5 Selling methylamphetamine.
> 6. Procuring others to sell methylamphetamine."

[6] Literally, numbered paragraph 1 could be read as confined to the sourcing or purchasing of chemicals for manufacturing methylamphetamine that was undertaken by Mr Harper himself. Contrasting numbered paragraph 1 with numbered paragraph 2, however, suggests that numbered paragraph 1 was not so confined. That was how the prosecution case was presented at the trial and reflected in the trial judge's summing up. Numbered paragraph number 1 was treated as a reference to counts 16 to 18 which were based on the purchases of hypophosphorous acid by Mr Harper himself.

[7] Counts 16 to 18 concerned the possession of hypophosphorous acid and each was particularised by reference to the date of the delivery of hypophosphorous acid made as a result of Mr Harper signing an end user declaration on behalf of his business Advanced Logistics. Count 16 related to the purchase of four 30 kg drums (exhibit 94) collected on 19 February 2003. Count 17 related to the purchase of one 30 kg drum (exhibit 100) collected on 17 September 2003. Count 18 related to the purchase of three 30 kg drums (exhibit 103) collected on 22 October 2003.

[8] The prosecution case in respect of the count 2 production (particularised as occurring on 4 November 2002 at Millmerran) was that Mr Harper was present and assisted Mr Williams during the production. The prosecution case in respect of the productions the subject of count 3 was that they occurred after the production which was the subject of count 2 and between 4 November 2002 and 8 February 2003 at Millmerran and that Mr Harper aided Mr Williams either by his presence or by acts in obtaining precursor chemicals.

[9] Each of counts 4 to 15 involved the possession of a chemical for use in connection with the commission of the crime of producing a dangerous drug and those counts ranged in dates between 21 February 2001 and 9 December 2002 on the basis that Mr Harper procured Mr Williams to procure the chemicals for him and that Mr Williams was in possession of the chemicals at the request of Mr Harper.

Summary of the evidence at trial

[10] **Mrs Illing** operated a business out of Toowoomba manufacturing chocolate honeycomb and used Mr Harper's business Contrail Express Carriers between April 1999 and the end of 2000 for transport services. Mrs Illing was in debt to Mr Harper's business when around August 2000 he told her that "he knew a way to make some money and I said how's that and he said there's this cleaning chemical that you can get and he can sell it to the right people". He raised the same issue with her on another couple of occasions and she relented. Mr Harper then arrived at the factory with a filled in purchase order form which she signed (including the declaration as to use) and faxed it to Consolidated Chemicals (exhibit 105). Some days later Mr Harper told Mrs Illing that the shipment was delayed, she paid Mr Harper the money she owed him, and then she telephoned Consolidated Chemicals and cancelled the order. In cross-examination, she denied that it was Mr Williams who organised for her to purchase the hypophosphorous acid from Consolidated Chemicals. She admitted that the declaration as to use which she signed was false, she cooperated with the police, and she was not charged with any offence.

[11] **Mr Williams** was operating Queensland Tanker Services selling fuel in 1999/2000 when he met Mr Harper who purchased solvent from him. In about 2000 Mr Williams did some casual truck driving for Mr Harper. Mr Williams leased a property at Bligh Street, Millmerran (the Millmerran property) and started up a venture in 2002 called "Millmerran Oil" to recycle coal tar oil or waste oil into usable products such as oil and diesel. Mr Harper put some money into the venture, paid bills and helped with the project.

[12] Between 2000 and 2001 Mr Harper asked Mr Williams if he would buy hypophosphorous acid for him. Mr Harper told him he wanted to wash out the "fridge" vans. Mr Williams got onto Consolidated Chemical Company and they were able to supply hypophosphorous acid and Mr Williams had to give them an end user declaration. Mr Harper paid cash to Mr Williams for the purchase of the hypophosphorous acid who paid that to Consolidated Chemical Company. Mr Williams took delivery of the acid and then delivered it to Mr Harper's business in Toowoomba.

[13] Mr Williams identified the end user declarations and delivery dockets relating to purchases of hypophosphorous acid, crude iodine and benzaldehyde from Consolidated Chemical Company, all of which were signed by him, and for which purchases Mr Harper provided the funds (exhibits 2 to 18). The first end user declaration signed by Mr Williams (exhibit 2) on behalf of Queensland Tankers for hypophosphorous acid showed the proposed use as "For cleaning out road-tankers from chemical to spring water, milk, fat etc, diesel, petro, etc". The next end user declaration which Mr Williams signed as manager on behalf of Millmerran Oil for hypophosphorous acid (exhibit 3) showed the proposed use as "To be used to clean pipes lines of Petroleum Wax buildup after continued pumping of Hydrocarbon liquid". A similar proposed use is shown in the end user declarations (exhibits 6, 14 and 17) which were all made on behalf of Millmerran Oil.

[14] A couple of months after Mr Williams had dropped off hypophosphorous acid to Mr Harper's business, Mr Harper told Mr Williams that he was selling it to "speed cooks". Mr Harper gave some hypophosphorous acid to Mr Williams to sell. On occasion the hypophosphorous acid was stored at the Millmerran property where it was decanted into one litre bottles and onsold. Mr Williams sold some to one Mr Stewart – about 30, 40 or 50 litres. On one occasion Mr Williams saw hypophosphorous acid at Mr Harper's house, when Mr Harper was putting it into one litre bottles for onsale.

[15] Three or four months after Mr Williams had started getting the hypophosphorous acid, Mr Harper told him that a friend of his got put in gaol for cooking speed and Mr Harper asked Mr Williams to cook speed and gave him the recipe. The ephedrine was obtained from pseudoephedrine boxes (ie Sudafed, Telfast). Mr Williams got some boxes from chemists, as did Mr Harper and he saw Mr McClymont bring bags of boxes into the Toowoomba yard and give them to Mr Harper. Mr Hollis and a few others were also involved in getting the boxes. Mr Williams obtained iodine, acetone and methylated spirits. He purchased glassware that was mostly paid for by Mr Harper.

[16] Mr Williams did two or three cooks on his own in the tin shed at Millmerran and Mr Harper came out to the Millmerran property about four or five times when the cooks were on over about 12 to 14 months. The frequency of the cooks was every second or third week and Mr Williams was making from half an ounce to four or five ounces each cook. Apart from making it in the shed on the property at Millmerran, he made it in a workshop trailer that Mr Harper brought out from his yard. Mr Harper would take away the end product of the cooks or Mr Williams would take the end product to him. On about six occasions Mr Williams gave it to Mr Hollis or Ms Hollis and he was paid $500 upwards for an eight ball. Mr Williams was involved on two occasions in cooks at Mr Harper's place at Wellcamp in the shed, after Mr Williams had indicated he did not want to do it at the Millmerran property after he was arrested the first time. Mr Williams identified photographs of the Millmerran property, inside the shed on the property (including the trailer used to cook speed), and glassware, chemicals and other items used in connection with the cooks (exhibits 19 to 35) that were taken when the police first visited the Millmerran property on 4 November 2002.

[17] After the first police search of the Millmerran property, Mr Williams cooked speed again on two or three occasions at another property about 35 kms west of Millmerran on Gore Highway. Mr Harper was present at one or two of those cooks and took away what was produced. Mr Williams was also present at Mr Harper's place at Wellcamp for a cook. Mr Harper was also there and took the end result of the cook. The Millmerran property was searched again on 7 February 2003 and he went into custody for four months before he got bail.

[18] Between April and July 2000 Mr Williams was imprisoned after pleading guilty to a charge of not paying excise on diesel fuel. Mr Williams' business Queensland Tanker Services ceased to exist at this time. Mr Williams moved to the Millmerran property in early 2001.

[19] When Mr Williams made his first statement to police on 4 November 2002 at the time of the first search of the Millmerran property, he said that Mr Harper was not involved in producing amphetamines, because he did not want any repercussions for his family. Mr Williams changed his evidence about Mr Harper's involvement in a later statement and when he was sentenced in July 2007, he received the benefit of some 7.4 years less imprisonment.

[20] Mr Williams was cross-examined on whether he was involved with Mr Peter Stewart when he was manufacturing methylamphetamine at the Gore Highway property. Mr Williams denied manufacturing methylamphetamine with Mr Stewart.

[21] Mr Williams denied that Mr Hollis did work for him or distributed drugs for him. Mr Hollis was not involved in cooking drugs with him. Mr Hollis delivered Sudafed to him, but he never helped Mr William undertake the cooks.

[22] Mr Williams had been told by police on 4 November 2002 that there was a real risk of his partner being charged with serious drug offences and Mr Williams then participated in a formal record of interview. On the second police search on 7 February 2003, Mr Williams realised he was in serious trouble, because he was charged with committing offences whilst on bail. He underwent a record of interview on 7 February 2003. He provided two further statements in December 2004 and July 2007.

[23] **Mr Errington** was a police officer when he executed a search warrant at the home of Mr Harper's mother on 7 October 2004. Some glassware was located in a box in a laundry at the back of the garage and some chemicals were located in the bedroom on the second floor.

[24] **Mr Stephen Watson** was employed by Safe Food Queensland from 2004 for about three and one-half years. He met Mr Harper on 4 June 2005 when he attended the business premises of Advanced Logistics to conduct an audit on his meat transport vehicle. Advanced Logistics had applied for accreditation for a meat transport vehicle on 15 October 2004 (exhibit 56). He issued a major corrective action request in relation to the vehicle to bring it up to standard. They had a conversation about Mr Harper's cleaning procedures and Mr Harper said he cleaned it once a week with detergent. Mr Watson said it was not satisfactory to use detergent, as a product had to be used that was marked suitable for use in the food industry. Mr Watson had over 35 years' experience in inspecting transport vehicles to deliver food and safe food practices and had never heard of hypophosphorous acid being used in relation to transporting or looking after food. The requirement was for the vehicle to be cleaned with an acceptable detergent, then sanitised with an acceptable sanitiser, and then rinsed clean to remove residue or chlorine, etc. The requirement was for the vehicle to be cleaned after each and every load to the degree where it prevented cross-contamination.

[25] **Mr Marcus Miller** was a diesel mechanic who was employed by Mr Harper in 2001 for about 18 months until early 2003, when he was made redundant. He worked on seven to eight trucks and trailers. By the time he finished working there, Mr Harper was down to one or two trucks. Mr Hollis was a welder who did a little bit of work with Mr Harper for one or two months in 2002. Mr Miller had known Mr Williams since 1995 and he used to see him attend the business premises of Contrail Express on a regular basis over a period of about six months. In cross-examination, he agreed that his statement showed that he commenced work in June 2000 through to January 2003 which was a period of two and one-half years. There was stainless and alloy and fibreglass involved in the construction of the fridge vans. Rod was one driver who used to do the fridge run and used to wash out the one van on a regular basis every weekend. He used some sort of food grade acid to clean out the van. It had a strong, irritating smell.

[26] **Mr McClymont** got to know Mr Harper when Mr Harper carted poultry in his semitrailers for Mr McClymont's parents' company. Mr McClymont was told by Mr Harper

"about 2000, 2001, something around then" that he would give Mr McClymont $25 for a box of 120 mgs Telfast tablets. Mr Harper wrote down "pseudoephedrine hydrochloride, 60 mg, 120 mg" and the brand "Chemist Own" and "Telfast" yellow box on a piece of paper (exhibit 58). Mr McClymont started buying the boxes two at a time each week and selling them to Mr Harper for the price he offered.

[27] Mr Harper started to talk to Mr McClymont about "truckie speed" and that Mr McClymont could buy it from Mr Harper for $125 for an eight ball and that he would be able to sell it for $175. Mr Harper sold methylamphetamine to Mr McClymont on a credit arrangement in 2001 until about 2002. Mr Harper sold him an eight ball at a time, then he was getting two eight balls, then it was four eight balls at a time, and then in ounce quantities for $1,000 per ounce. Mr McClymont took the methylamphetamine to a woman who would sell it for him and Mr McClymont took the money back to Mr Harper and would get the next supply. Mr McClymont made $400 profit out of an ounce. Mr McClymont did not see what Mr Harper did with the money he gave him for drugs. He did see cash in a clip seal bag in Mr Harper's briefcase with a pistol and Mr Harper told him it was $17,000 and it was his float for the day. The total quantity of speed which Mr McClymont sold for Mr Harper was five or six ounces.

[28] Mr McClymont started selling the methylamphetamine "about 2001, again, I think it was 2001". Mr McClymont was not selling speed at the same time as he was collecting the Telfast boxes. Apart from the woman to whom he supplied most of the speed for on selling, Mr McClymont sold to a couple of other people. Mr Harper told Mr McClymont that he was making the speed himself. At times Mr Harper told Mr McClymont that he did not have any speed and said "I'll have to go and cook and then get some". Mr Harper talked to Mr McClymont "about cooks at Millmerran". On one occasion around 2002 when Mr McClymont was at Mr Harper's premises at Wellcamp, Mr McClymont saw plasticware and crystals and Mr Harper said to him "that was the gear … from the cook at Millmerran". Mr Harper also told Mr McClymont about the fumes and smoke that were everywhere when they were doing the cook at Millmerran and "he had to go and straighten the guys out there because … it was bad for their health and they could get high and they might hurt themselves".

[29] On another occasion at Mr Harper's house, Mr McClymont saw two kegs cut in half, there was methylbenzaldehyde in the keg, and Mr Harper was tipping it into a plastic jar and told Mr McClymont "I'm getting my percentages on this so I can add chemicals in so I can make speed". Mr Harper told him that he put the chemicals in, put the lid on top and the fumes would come up and they would settle on the top of the lid and he would scrape pure speed off that.

[30] When Mr McClymont returned to Mr Harper's house a week later, everything was packed up including a grow lamp which Mr Harper said he was going to take to the dump. Mr McClymont said he would take it to the dump, but took "that stuff" back to the Bronco Motel which he was managing at the time.

[31] Mr Harper was Mr McClymont's only source of speed. Mr McClymont stopped selling speed when Mr Harper put the price up which was towards the end of 2003.

[32] Mr McClymont had conversations with Mr Harper about other chemicals and Mr McClymont made notes of what Mr Harper told him about the chemicals and their value in his diary (exhibit 59) and Mr Harper asked Mr McClymont if he could sell anything. On another occasion in November 2002 Mr Harper wrote down the website

address for Mr McClymont that had the instructions on how to make speed out of methylbenzaldehyde (exhibit 60). Mr Harper also gave him some recipes to make speed at one other time to show him how it was being made, but Mr McClymont never made speed.

[33] Mr McClymont met Mr Williams on three or four occasions. The first time was at Mr Harper's premises. The next time was when Mr McClymont was dealing in some speed and the last time was at the Contrail Express office where Mr Harper asked Mr McClymont to go with Mr Williams to pick up a 200 litre drum of methylbenzaldehyde which Mr McClymont did. There was one other occasion when Mr McClymont went out to the Contrail Express site by chance and Mr Harper came out and said they were doing a cook, making petrol. While Mr McClymont was talking with Mr Harper, Mr Peter Bennett and another man came out. Mr McClymont put his head around the corner and saw Mr Williams inside.

[34] After the police raids at Contrail Express in November 2002, Mr Harper told Mr McClymont that the police missed a bag of speed worth $17,000, a 20 litre drum of "water" used for making drugs, and his gun or pistol in his briefcase.

[35] In cross-examination, Mr McClymont confirmed that his father was managing director of McClymont Chickens and that Mr Harper had started out hauling live birds for the business and then got the refrigerated side, using large semitrailer fridge vans to carry the processed chicken meat. Hygiene was a big thing for the cartage of chicken meat products and the trucks had to be cleaned regularly.

[36] Mr McClymont agreed he supplied one Mr Mills with steroids on two occasions as a favour and that he was not dealing consistently with steroids.

[37] When the police searched on 8 July 2004, they found instructions to cook speed, a tick book that recorded his sales of drugs to various people, and the references in his diary to chemical products and their prices. The things that Mr Harper had at the shed that Mr McClymont had taken back to the Bronco Motel (when he said to Mr Harper that he would take them to the dump) had been moved into the garage at the back of his home, when he left the Bronco Motel. There was a Wild Turkey bottle that had methylated sprits in it and a Tang jar that had methylbenzaldehyde in it.

[38] Mr McClymont never attempted to produce methlyamphetamine. He sold methylamphetamine.

[39] Mr McClymont entered into an arrangement with the Attorney-General that gave him complete immunity against prosecution. He denied making up the evidence about Mr Harper telling him that the police missed a bag of speed worth $17,000. The evidence about going with Mr Williams to pick up the drum of methylbenzaldehyde was not in any statement and Mr McClymont was also challenged about this evidence. Mr McClymont also said that Mr Harper offered him (ecstasy) tablets at $17 which Mr McClymont remembered for the first time when he was being cross-examined.

[40] **Mr Hollis** met Mr Williams through the dealer who supplied him amphetamines. Mr Hollis is a boilermaker by trade and met Mr Harper through Mr Williams, because Mr Harper wanted Mr Hollis to do a conversion on a truck at his workshop at Toowoomba. Mr Hollis did this work for Mr Harper for a number of months around 2002/2003 and was paid in cash and amphetamines by Mr Williams. Mr Hollis' main contact was with Mr Williams. Mr Hollis received amphetamines from Mr Williams

to sell over a period of six to 12 months and on one occasion Mr Harper was present when he was handed the drugs by Mr Williams. Mr Harper never gave Mr Hollis amphetamines, but Mr Hollis did give money to Mr Harper from the proceeds from amphetamines, when Mr Williams asked him to give it to Mr Harper. Mr Hollis also deposited money into Mr Williams' girlfriend's account.

[41] Mr Hollis was involved with Mr Williams in moving all the equipment involved in the production of amphetamines from the Millmerran property to Mr Harper's house. Mr Hollis believed Mr Harper was there at the time.

[42] In cross-examination Mr Hollis conceded that, basically, the only evidence that he was giving about the involvement of Mr Harper in methylamphetamines came from what Mr Williams had told him.

[43] Mr Hollis did not recall ever meeting Mr Poulton.

[44] Mr Hollis received a reduced sentence for supplying information to the police and being willing to appear in court for the prosecution. He was sentenced to a head sentence of five years' imprisonment suspended after serving four years' imprisonment. He thought the sentence that would have been imposed, but for his cooperation, was a much longer period of imprisonment. That was clarified by an admission made later in the trial by the Crown (with the agreement of Mr Harper) that Mr Hollis was sentenced to five years' imprisonment suspended after serving four years' imprisonment for an operational period of five years; and, if he had not cooperated, he would have been sentenced to eight years' imprisonment with eligibility for parole after serving four years' imprisonment.

[45] **Mr Bennett** worked for Mr Harper at Contrail Express in 1999 or 2000 doing errands. When Contrail Express was wound up and became Advanced Logistics (which might have been 2002), he became the bookkeeper.

[46] Mr Bennett met Mr Williams through Mr Harper, as Mr Harper and Mr Williams were working on an oil recycling project out at Millmerran. Mr Hollis worked for Mr Williams doing up Mr Harper's truck in the shed. Mr Hollis was not paid by Advanced Logistics or Contrail Express.

[47] The first time Mr Bennett went to the Millmerran property was after the yard, Mr Harper's home and the Millmerran property had been raided by the police. Mr Bennett went there with Mr Harper and four other men who did work for Mr Harper, in order to retrieve Mr Harper's property. They loaded up four trucks and a ute with gear that was involved in the oil recycling project and it was taken back to the depot at Lewis Street, Toowoomba where it was stored in the back bays of the shed. Amongst the gear was a pallet with four drums on it. One was radiator coolant, one was Benzodrine, one was marked highly toxic and dangerous and the other Mr Harper told Mr Bennett was "water". Mr Harper told Mr Bennett that the contents of the drums could be used to make drugs. Mr Bennett was told by Mr Harper that the drum that contained "water" was taken to Brisbane to sell, so that they could get Mr Williams out on bail, but he was "ripped off" and never got paid for it. The other three drums disappeared over time. Some of the property that had been brought to the shed was claimed by Mr Williams and those items were eventually stored outside the shed across the yard away from the main building.

[48] Mr Bennett would buy acid from a chemical supply store in Toowoomba for cleaning trucks. It cost in the vicinity of $50 for a 20 litre drum. Mr Bennett saw invoices for glassware from Gem Glass for about $5,000 or $5,700. Mr Harper told him that it was for Mr Poulton who was going to carry on with the oil recycling in the shed. There was another glassware invoice and a chemical invoice which Mr Bennett queried with Mr Harper. The chemical invoice was for $7,000 for acid of some description and Mr Harper told him that he was going to use it on the fridge vans.

[49] Because of the police raids, Mr Bennett asked Mr Harper what was going on and Mr Harper told him that he had sold a small amount of speed to Mr McClymont and his only involvement was with Mr McClymont.

[50] Where the gear was stored in the back bays was where Mr Poulton then did some sort of chemical process, conducting oil experiments. After the property had been removed from the Millmerran property, it took some time for the experiments to get going, so that it was later in 2003 that Mr Poulton spent about three months at the shed on almost a daily basis.

[51] Advanced Logistics had two operational fridge vans, one that was not in operation and nine or ten trailers and dollies. Mr Bennett applied for permits for transportation of meat from Safe Food Queensland and was aware that regular cleaning was undertaken and sometimes after each trip a fridge van was used. Mr Bennett had heard that hypophosphorous acid was used to clean the fridge vans, but he never saw it used. It could take four to six hours to clean a fridge van after a load, depending on what they were carrying.

[52] **Mr William Scott** was the manager of Millmerran Hardware in 2002 when Mr Williams was a customer who on seven occasions purchased acetone and methylated spirits in 20 litre drums. He was the only customer who purchased those products in that quantity. The receipts were for purchases between 9 March and 17 August 2002 (exhibits 63 to 69). Mr Williams paid cash.

[53] **Mr Lionel Moore** owned the Millmerran property which he rented to Mr Williams in 2001 at $200 per month. Mr Williams paid $200 in advance and that was the only payment Mr Moore received. When Mr Moore chased Mr Williams, he told him he had no money and was working on refining crude oil to diesel or distillate and, when he started producing the distillate, he would pay Mr Moore. In late 2002 or early 2003 Mr Harper contacted Mr Moore about gaining access to the Millmerran property to recover goods, pumps and a compressor that were on the property and were his assets. When Mr Moore went to the property subsequently, there were four or five large fuel tanks, pumps, piping, tank equipment, a large dome and there were some 44 gallon drums and various pieces of machinery and tools in the shed.

[54] **Mr Peter Douglas** is the Queensland Sales Manager of Consolidated Chemical Company and has been employed as such since 1990, apart from the period between March 2000 and December 2001, when he worked for Consolidated Chemical Company in Sydney. While in Sydney, he took a telephone enquiry from Mr Williams about phosphorous acid on 29 August 2000 (exhibit 70). Mr Williams said he was with Queensland Tanker Services. Mr Douglas misunderstood which acid Mr Williams was after, but subsequently noted that he was looking for hypophosphorous acid. The enquiry was for a quantity of 300 kgs. Mr Douglas passed the enquiry onto the then Queensland Sales Manager, Mr Aboud, who sent a facsimile (exhibit 73) on 6 September

2000 to Queensland Tanker Services, noting that he had received the end user declaration from Maria at Central West Confectionery for her order for 50 kgs and requested Mr Williams' declaration for his order of 250 kgs. The first sale of hypophosphorous acid to Mr Williams was not until February 2001.

[55] Mr Douglas compiled a table of purchases of chemicals from Consolidated Chemical Company by Mr Williams and Mr Harper (exhibit 75). The invoice date would usually coincide with the date of the payment for the order. The delivery docket date would, in most cases, precede the invoice date. Mr Douglas produced invoices and delivery documents for the orders invoiced to either Mr Williams or Millmerran Oil. Invoice 132418 dated 13 December 2002 issued to Millmerran Oil (Attention Greg Williams) was for two 50 kg drums of iodine crude for a total amount of $5,637.50 (exhibit 91).

[56] The invoice dated 28 February 2003 issued to Millmerran Oil for 120 kgs of hypophosphorous acid and 20 kgs of activated carbon was cancelled and reissued on 13 March 2003 to Advanced Logistics, as a result of a letter received by Consolidated Chemical Company from Advanced Logistics dated 10 March 2003 (exhibit 93) which gave the instruction to cancel the invoice 134576 dated 28 February 2003 and re-issue it for the goods supplied to Advanced Logistics that were the subject of that invoice. The letter which was signed by Mr Harper's mother advised that any purchases made by Mr Williams, past or present, were not for Advanced Logistics and Advanced Logistics would not be held responsible for any debt incurred by Mr Williams.

[57] In relation to the end user declaration (exhibit 94) for the hypophosphorous acid that had been the subject of invoice 134576, Mr Douglas wrote in the details of proposed use as "oil pipeline & tank cleaning – tanker alloys removal of organic wax build up". Mr Douglas took the proposed use from previous end user declarations for Millmerran Oil and prepared the document for signing before the customer came in and paid for the goods. Mr Douglas also wrote in the name of the company as "Advanced Logistics T/AS Millmerran Oil Project". The name of the person making the declaration was inserted in different handwriting as "Christopher J Harper" as "CEO" and the signature at the foot of the declaration was "C J Harper". Above the place for the signature was the content of the declaration made by the person signing the declaration which was in these terms "hereby declare that the above chemical product(s) will not be used for the manufacture of chemical weapons or drugs". The delivery docket that related to this supply (exhibit 96) which showed that the goods were to be collected on 19 February 2003 had the signature "C J Harper", as the signature of the customer who collected the goods. Consolidated Chemical Company then re-issued invoice 134990 dated 13 March 2003 (exhibit 97) in relation to that sale.

[58] The next sale by Consolidated Chemical Company to Advanced Logistics was recorded on invoice 140960 dated 22 September 2003 for a 30 kg drum of hypophosphorous acid (exhibit 99). It appeared the end user declaration (exhibit 100) had the details of the proposed use completed by the same person who signed "C J Harper". The proposed use was specified as "cleaning tankers alloy – stainless alloy??" with the last word being indecipherable. The delivery docket for this supply (exhibit 101) for the goods to be collected on 17 September 2003 was signed by "C J Harper".

[59] The third sale by Consolidated Chemical Company to Advanced Logistics was recorded on invoice 142050 dated 27 October 2003 for three drums each of 30 kgs of hypophosphorous acid (exhibit 102). Mr Douglas completed the proposed use on the end user declaration relating to this sale (exhibit 103) as "cleaning internals of alloy

tankers for removal of organic wax and other scum build up". The name of "Christopher John Harper" as "Manager" of "Advanced Logistics Pty Ltd" was also completed by Mr Douglas, but it was Mr Harper who came in to sign the declaration which is signed "C J Harper". The delivery docket for that supply (exhibit 104) showed that the client wanted to collect on 22 October 2003 and was signed by "C J Harper".

[60] Mr Douglas had met Mr Williams on several occasions when he was paying in cash for purchases before he picked up the goods. Mr Douglas also met Mr Harper when he attended to sign the end user declarations which was after he stopped seeing Mr Williams. (Mr Douglas identified Mr Harper from a photoboard.)

[61] **Mr Willis** was the general manager of McClymont Holdings from 2002 onwards. When he commenced with McClymonts, Mr Harper was contracted to transport frozen processed chicken product and fresh processed product. The frozen product was packaged in 20 kg cartons that were plastic lined, stacked, palletised and frozen and the whole pallet was then plastic wrapped. The fresh product was packaged in plastic crates, palletised and plastic wrapped for local distribution. Mr Willis had no recollection of Mr Harper's vehicles bringing live birds to the factory.

[62] **Detective Senior Sergeant Marsh** was in the Illicit Laboratory Investigation Team when he attended at Mrs Harper's mother's home on 7 October 2004 when police officers executed a search warrant. Detective Marsh identified glassware, chemicals and other items found in the search that were consistent with equipment for an illicit drug laboratory. All of the items "were quite old". One of the items was a plastic bottle and liquid that tested positive to hypophosphorous acid. Detective Marsh observed that hypophosphorous acid is used in the stainless steel industry, is a good cleaning product, and is a very strong acid.

[63] **Mr McCashney** was the environmental health officer and building surveyor at the Millmerran Shire Council in 2001 when he was visited by Mr Williams who sought information about the approvals required for the business proposed for the Millmerran property to convert waste oil into diesel. Mr Williams did not come back to apply for the approvals.

[64] **Ms Schmitt** had been a principal environmental officer with the Department of Environment and Heritage Protection since October 2004. Refining or processing any fuel or oil would require a development approval and a licence. She had made a search of records held by the Queensland Environment Protection Agency in relation to the Millmerran property and Mr Harper, Mr Williams, Contrail Express, Advanced Logistics and Millmerran Oil and was unable to find any records in relation to those names or that address. She did not search the name of Poulton.

[65] **Sergeant Youngberry** arrested Mr Williams on 4 November 2002. After Mr Neville (who was the arresting officer for Mr Harper) resigned from the police force Sergeant Youngberry also took over responsibility for the investigation against Mr Harper. Sergeant Youngberry identified from the photographs that were taken at the Millmerran property on 4 November 2002 the glassware, and other equipment that were found and the laboratory setup within the Pantech trailer. A number of packets of cold and flu tablets were located. There were large barrels of hydrochloric acid. There were a number of invoices from Consolidated Chemical Company dated 13 November 2001 (exhibit 157), 21 November 2001 (exhibit 158) and 12 June 2002 (exhibit 159) for purchases of hypophosphorous acid.

[66] After Mr Williams was arrested on 4 November 2002, he was released on bail. Sergeant Youngberry was then involved in a further search warrant for the Millmerran property on 7 February 2003. Sergeant Youngberry identified from the photographs how the Millmerran property appeared when the search on 7 February 2003 was conducted. There was new glassware and laboratory equipment located during the second search, as all items of that type had been seized during the 4 November 2002 search. Invoice 132418 dated 13 December 2002 from Consolidated Chemical Company (exhibit 175) was also located during the second search.

[67] **Mr Naylor** had worked for 26 years in several roles with Swire Frigmobile in its business of refrigerated transport, including as an operations trainer. The cleaning of refrigerated vans had to comply with the food grade standards. At Frigmobile, a standard detergent was used and hydrochloric acid which was diluted at 40 to 1 was used as needed or, if there was no carcass in the van, once every two or three weeks. Carcass meat was always held at the back of the van, because it was the first to be unloaded. The diluted acid was only used to clean the patch where blood needed removal. If one man was cleaning inside the fridge van, it would take 20 to 30 minutes to clean the van. If acid was used as well as detergent, it would take another 15 minutes to clean the van.

[68] **Mr John McCrae** was a senior sergeant in charge of the Illicit Laboratory Investigation Team when he attended at the Millmerran property on 4 November 2002 where there was an actual clandestine laboratory set up in a donga type building, shown on exhibit 30, although there was no active heat source operating at the time. Mr McCrae described the particular laboratory and other equipment as "a very large-scale clandestine lab with a lot of potential in the future to make large quantities of methylamphetamine". The staining on the ceiling of the trailer would be from the ordinary cooking from the clandestine laboratory and was possibly iodine type stains. The majority of the glassware appeared to be in a new condition and there was another laboratory set up in the shed, allegedly made for refining diesel from diesel oil. There were 116 items recorded in the exhibit books (exhibit 188) identified by Mr McCrae as part of the clandestine laboratory which he also identified in the relevant photographs. Mr McCrae was also present at the Millmerran property for the second search on 7 February 2003 and an exhibit book (exhibit 271) for 48 items associated with another clandestine laboratory was identified by Mr McCrae.

[69] **Mr Mark Aboud** was employed by Consolidated Chemical Company in Brisbane between 2000 and April 2002. He met Mr Williams on a few occasions. He left Consolidated Chemical Company for Fernz Chemicals where he also had dealings with Mr Williams. Mr Williams purchased chemicals from Fernz Chemicals on two or three occasions.

[70] Mr Aboud had worked for Castrol as an oil blender. On one occasion Mr Williams brought in a couple of samples of oil. Mr Williams on behalf of the Millmerran Oil Project engaged Mr Aboud to prepare quality control documents for testing the quality of the oil.

[71] **Mr Neville** executed a search warrant at Mr Harper's business premises at Lewis Street, Toowoomba on 15 December 2004. A search warrant was also executed on the same day at Mr Harper's residence at Wellcamp. Mr Neville was also present when the search warrant was executed on the Bronco Motel. No drugs were ever found on premises occupied by Mr Harper. No fingerprint analysis was undertaken

in respect of Mr McClymont. Mr Neville searched Mr Williams' home on 13 December 2004 at which time Mr Neville was in possession of the Consolidated Chemical Company invoices. Mr Williams participated in an electronic record of interview on 13 December 2004.

[72] Mr Neville executed a search warrant at the Westpac Bank in Toowoomba to obtain records in relation to the account of Advanced Logistics. The account was opened in the name of Mr Harper's mother trading as Advanced Logistics. Mr Harper and his mother were authorised to operate the account. Mr Neville obtained a number of cheques which had been made out to Consolidated Chemical Company and Gem Glass. One of them dated 20 February 2003 was drawn in favour of Consolidated Chemical Company in the amount of $5,637.50 and signed by Mr Harper's mother (exhibit 330).

[73] **Dr Blinderman** was employed by Linc Energy Ltd on its underground coal gasification project at Chinchilla when he met Mr Williams in 2000. Mr Williams wanted to buy coal tar oil which was a by-product of the gasification process. He purchased 35,000 litres (one oil tanker) of coal tar oil for $7,000. Subsequently he gave a sample of the processed oil to Dr Blinderman.

[74] **Detective Senior Sergeant Goan** was involved in the execution of the search warrant on the Bronco Motor Inn on 8 July 2004.

[75] On 7 February 2005 Detective Goan went with Mr Neville to Advanced Logistics' premises in Lewis Street and a number of swabs were taken in a particular area of the shed.

[76] **Dr Culshaw** is the supervising forensic chemist within the Clandestine Laboratory Group at Queensland Health Forensic and Scientific Services. The most commonly used method in Queensland for producing methylamphetamine involves taking pseudoephedrine found in cold and flu tablets and reacting it with iodine and hypophosphorous acid. The majority of the pseudoephedrine converts over to methylamphetamine. The methylamphetamine has to be recovered out of the reaction mixture through a distillation process that uses hypophosphorous acid to produce a salt which is methylamphetamine hydrochloride and the amount of methylamphetamine within that salt is about 80 to 85 per cent. The maximum theoretical quantity of methylamphetamine that can be made from 1,000 tablets, each containing 60 mgs, is about 44 to 45 grams. Typically 50 mls of hypophosphorous acid and 50 grams of iodine will bring about the conversion of 50 grams of pseudoephedrine to methylamphetamine. The theoretical amount of methylamphetamine that could be produced from 1,076 kgs of hypophosphorous acid is 2,421 kgs.

[77] Hypophosphorous acid is a controlled substance and can be bought only through a chemical supply company and not at a hardware store. It does not have widespread legitimate application. One of its main industrial uses is electrolysis plating. Dr Culshaw only had experience of it in an illicit environment. It would be possible to use it as a cleaning agent, but there are many other cleaning agents which may be preferable, such as detergents or cheaper acids such as hydrochloric acid or sulphuric acid. Wax is oil that is solid at room temperature and, as hypophosphorous acid predominantly contains water, wax would be relatively inert to the hypophosphorous acid.

[78] Dr Culshaw had prepared analyst's certificates for the purpose of the trial that were tendered pursuant to s 128 of the *Drugs Misuse Act* 1986 (Qld) (exhibits 352 to 356). Exhibit 352 dealt with the analysis of the 116 items relating to the clandestine laboratory

found at the Millmerran property on 4 November 2004. This certificate showed that item L15A was the contents of a large glass baking dish which contained 33.595 grams of a brown semi-solid substance which on analysis contained 13.269 grams of methylamphetamine which at slightly less than 50 per cent showed that it probably had not been a perfect distillation.

[79] **Mr Poulton** got to know Mr Williams through cleaning oil for him in 2001. He went to the Millmerran property on and off for about five to six weeks around August 2001, as they were trying to clean coal tar oil. It was not successful. They used some laboratory glass, flasks, column condensers, a collecting jar and a barbeque heater that was set up outside the shed. Mr Poulton's involvement with Mr Williams then ceased.

[80] Early in March 2003 Mr Poulton was telephoned by Mr Harper who asked him if he was interested in carrying on with the oil experiment in respect of waste oil. That was Mr Poulton's first contact with Mr Harper. In March 2003 Mr Poulton went to Mr Harper's workshop in Toowoomba and they discussed the glassware required to clean oil on the premises. After the glassware was picked up from Brisbane, Mr Poulton undertook the process of cleaning oil by heating up the column of oil and condensing it off. The system blew up after a week and was not successful. Oil went everywhere on the ceiling and the walls. Mr Poulton had received a bill from a chemical company for $5,000 and he did not know what it was for. He had not purchased anything himself from the chemical company. He went with Mr Harper to the chemical company and Mr Harper paid the bill in return for Mr Poulton doing those oil experiments for him. Mr Poulton went with Mr Harper to order more glassware from Gem Glass.

[81] Mr Williams' son visited Mr Poulton and Mr Harper and told them he had arranged to sell hypophosphorous acid for $37,000. At least two drums of the acid were loaded onto a truck at Mr Harper's workshop in Toowoomba and Mr Poulton went with Mr Harper and Mr Williams' son, when the acid was handed over on the side of the road in Woodridge or Browns Plains. Mr Williams' son collected $4,000 which Mr Poulton counted and put it in the glove box of the truck.

[82] Mr Poulton arranged to purchase the glassware for Mr Williams. There were no chemicals involved in processing the oil. Mr Poulton did go on one occasion with Mr Williams to the Breakfast Creek office of Consolidated Chemical Company. Mr Williams had access to a significant amount of coal tar oil and Mr Poulton hoped to extract mainly diesel. The name Millmerran Oils was registered in Mr Poulton's wife's name. Mr Poulton was successful at Millmerran in cleaning the coal tar oil to a clear product, but when it was put in the sunlight, it turned black again. There had to be another process to fix it, but they never got that far.

[83] There were rebates on offer from the Government for recycled oil that had been cleaned. Mr Poulton was assisting Mr Harper to recycle waste oil successfully with a view to selling it. There were meetings in which Mr Poulton and Mr Harper were involved with members of Government and business advisers to commercialise the process. They needed $30m to go ahead and that was out of everyone's reach. Mr Poulton spent time at Mr Harper's business premises. The only time Mr Poulton saw hypophosphorous acid being used at Mr Harper's premises for cleaning trucks was when Mr Harper did a demonstration one afternoon on his fridge van for Mr Poulton. Mr Harper splashed some acid on the floor of the fridge van which was very dirty and cleaned it up, so it came up "like … pretty new".

[84] **Ms McKinnon**, an investigative accountant with Queensland Police, did a financial analysis in respect of Mr Harper for the period between 1 November 2001 and 28 February 2003. The ASIC search of the company Contrail Express Pty Ltd (exhibit 358) showed that it was incorporated on 16 March 2000 and wound up on 16 October 2003. A business name search for Advanced Logistics (exhibit 359) showed that the business commenced trading on 15 September 2002, but the business name was removed on 16 December 2004. The person carrying on the business was shown as Mr Harper's mother. The nature of the business was described as heavy road transportation of a variety of goods, interstate, intrastate and locally.

[85] Ms McKinnon was provided with boxes of business records relating to Mr Harper's businesses and the Millmerran Oil Project. The profit and loss statement for the year ended 30 June 2002 for Contrail Express Pty Ltd (exhibit 362) noted in respect of the sundry income of $73,480 that it was for "Costs Offset – Millmerran Oil Project". Ms McKinnon assumed that they were formation costs for the Millmerran Oil Project that had been funded from Contrail Express that was included as income to offset expenditure that had been incurred by Contrail Express to that extent. Ms McKinnon undertook a reconstruction and consolidation of all known bank accounts (exhibit 363). The total deposits to accounts was $1,935,680.26 which allowing for transfers, redeposits and reversals resulted in total estimated receipts of $1,718,676.99. The amount of these receipts from unknown sources over the analysis period was calculated to be $15,086.83. This amount of unknown sourced income where the total deposits was $1.9m represented 0.8 per cent of the total deposits.

[86] **Mr Scott Mackay** was employed at Contrail Express from around 2000 or 2001 and worked there for about four or five years as a spray painter and yard hand. One of his tasks was to clean out the fridge vans which he did every day, depending on what was carried in the fridge vans. He would empty all the stuff out of it, get off all the excess meat and stuff that was thrown on the ground, and then spray with acids. He would scrub it all out over the floors and the walls and then gurney it all out. There were meat rails that carted beef and pork and also fridge vans that carted chickens and stuff from McClymonts that were in boxes. The acid was something like hypophosphorous acid which was "a pretty good chemical". The name of the acid was written on the white 20 litre drum. Sometimes it was a different coloured drum. The fridge vans went down to Brisbane on a daily basis and they had to be cleaned every day. He would go through about 20 litres of acid a week which was about three to four litres a day. He would wear a full paint suit, respirator, rubber gloves and gumboots.

[87] **Sergeant Horsburgh** was a scenes of crime officer who attended at the Millmerran property on 4 November 2002 and 7 February 2003. He located 16 fingerprints on glassware at the Millmerran property.

[88] **Sergeant Grounds** from the Fingerprint Bureau examined the fingerprints that were found on glassware at the Millmerran property. Eight fingerprints belonging to Mr Williams were identified on some of the glassware taken on 4 November 2002 and 7 February 2003. The unknown fingerprints found on the glassware were compared with the fingerprints of Mr Harper and none of Mr Harper's fingerprints matched those found at the Millmerran property.

[89] **Senior Constable Steinhardt** executed the search warrant at Mr Harper's residence on 4 November 2002. He seized a folder that was labelled "Harper C Millmerran Oil Project" that contained handwritten notes with financial figures (exhibit 366).

Mr Harper then participated in an electronic interview with Senior Constable Steinhardt. No search warrant was executed at Mr Harper's business premises (at Lewis Street) on 4 November 2002.

[90] The jury were played the record of interview (exhibit 367) that Mr Harper underwent with the police on 4 November 2002. He was asked to speak about his dealings with Millmerran Oils. He said it was started by Mr Williams who was a bankrupt who had no way of borrowing the money to set it up and that Mr Harper would be the shareholder of the company when it was set up. Mr Harper had been funding the capital for the venture and all they had done was a few tests and had 30,000 litres of oil sitting on the property. There were also concrete barriers, a couple of huts and a few tanks. There was also glassware, burners, acetones and cleaning agents. Millmerran Oils had been going for about 12 months. He had not set up a bank account for it yet. The estimated annual profit for the business (after it was set up) was $3m.

[91] It was put to Mr Harper that the police had located equipment and chemicals at the Millmerran property that they believed had been used in drug production. Mr Harper denied any knowledge of drug production and said he had never seen any. He had no idea that Mr Williams could possibly have been producing drugs. When Mr Williams visited Mr Harper's business, he brought oil in, bits and pieces that he had done, and paperwork. Mr Harper did not go out to the Millmerran property much. He did not know what Mr Williams did. The last time he had been there was four or five weeks ago. He had not paid wages to Mr Williams.

[92] **Senior Constable Burton** executed a search warrant at Mr Harper's business premises in December 2004. Apart from seizing a blue diary dated 2002, a green book and some personal papers in the office, no drugs or anything else of interest was located on the premises. A drug dog was used and a thorough search of the whole premises was conducted.

[93] **Dr Sadler** was a senior scientific adviser for about 18 years with the Government Chemical Laboratory before joining Griffith University in 2008. As a senior scientific adviser, he was involved in the remediation of coal gasworks sites that generated waste coal tar from the destructive distillation of coal. He also had experience dealing with waste oils. Waste oils are what remains after petroleum fuel and other oils have been distilled from the crude oil. Fractionating columns can be used to clean up waste oils. There is also a process than can be used to distil products from coal tar. Creosote, ammonia, naphthalene and phenols are examples of products that can be obtained from distilling coal tar. Hypophosphorous acid could be used as a reducing agent to increase the octane rating of petroleum produced in the distillation of coal tar oil. Hypophosphorous acid would not have any relevance in relation to the distillation of waste oil, as it would not be economically feasible to clean it up to produce a quality lubricant. Iodine and benzaldehyde do not have any relevance to distillation of waste oil. There were rebates for recycling coal tar oil in the late 1990's and early 2000's. Dr Sadler had never operated a business that recycled coal tar oil or waste oil. There had been no ongoing source of supply for good quality coal tar oil by way of the destructive distillation of coal since the 1970's.

The defence case at trial

[94] The defence case was that Mr Williams was running his own drug business which had nothing to do with Mr Harper and that Mr Harper had legitimate reasons to use

hypophosphorous acid. Mr Harper owned a number of prime mover trucks through his business Contrail Express which later went into liquidation, but continued as a new business Advanced Logistics. Both businesses had transport contracts for live chickens, carcasses of pork, beef and general abattoir goods. Mr Harper used hypophosphorous acid to clean the inside of his refrigeration trucks which were heavily soiled from transporting meat products and needed to be cleaned after each meat transport job.

[95] Mr Harper was also involved in what he thought was a legitimate start up business with Mr Williams for "Millmerran Oils" that recycled or converted coal tar oil into refined products that could be resold at a profit. The process of converting the coal tar oil into usable by-products used glassware equipment and chemicals similar to that used in the production of methamphetamine.

[96] The defence case was that some of the witnesses were lying in their evidence: Mr Williams, Mr Hollis, Mr McClymont and Mrs Illing.

Application for leave to adduce evidence

[97] For the purpose of the appeal, Mr Harper sought leave to file an affidavit from himself and relevantly affidavits from his current solicitor, Mr Christian Tom, and Mr Kelso of counsel who appeared at the trial. Mr Harper had also filed an affidavit of Mr Scott Mackay in which he had asserted that he had informed the prosecutor before he gave evidence at the trial of additional information about dealings with Mr Williams. Mr Harper ultimately did not seek to rely on Mr Mackay's affidavit. The respondent applied for leave to adduce evidence to respond to the appellant's affidavits. The respondent's affidavits were relevantly from Mr McDougall, Ms Farnden who was the prosecutor at the trial, Detective Senior Sergeant Goan, Mr Neville and Ms Duncan.

[98] Leave was given to both parties to file their respective affidavits at the hearing of the appeal, but the decision on admissibility and use of the evidence for the purpose of considering the grounds of appeal was reserved. There was no cross examination of the deponents.

[99] Mr Harper's affidavit shows that while in custody he had spoken to another prisoner Mr Charles Cannon and it emerged that in both Mr Harper's trial and Mr Cannon's trial there was a common witness in Mr McDougall and a common associate of Mr Harper and Mr Hooning in the same Mr Williams. Mr Cannon told Mr Harper that Mr Hooning had given evidence against him at his trial and Mr Hooning was connected to Millmerran and cooking "speed". Mr Cannon provided Mr Harper with transcripts from his trial of Mr Hooning's evidence with respect to his dealings with Mr Williams and one Mr Stewart at Millmerran. The transcript of Mr Hooning's evidence from the 2010 trial between the State of Queensland and Mr Cannon was also provided by Mr Cannon. At no stage prior to this information being received from Mr Cannon was Mr Harper aware of Mr Hooning or his involvement with Mr Williams.

[100] Mr Tom exhibits to his affidavit the transcript of Mr Hooning's evidence in Mr Cannon's criminal trial given on 26 and 27 October 2005. Mr Hooning's evidence was primarily directed at his dealings with Mr Cannon. The cross-examination of Mr Hooning was directed at showing his expertise and involvement in manufacturing methylamphetamine that had nothing to do with Mr Cannon which covered the following. Mr Hooning manufactured methylamphetamine, researched the chemistry

of doing so, and had some expertise in the process. Police searched his premises in February of 2002, they found glassware, and Mr Hooning was charged with production of methylamphetamine. In December 2002 Mr Hooning was present at premises at Northgate associated with Mr Stewart, when there was a police search. There was a clandestine laboratory in the premises next to the house where Mr Hooning was located. He had gone to that location at Mr Stewart's request to give advice in relation to the laboratory.

[101] Mr Hooning gave the police a statement as a result of being present at Northgate and was not charged in relation to the laboratory at Northgate. Mr Hooning had met Mr Williams through Mr Stewart. Both Mr Williams and Mr Stewart were involved with the production of methylamphetamine at Millmerran and Mr Williams had "something to do with Millmerran Oil". Both Mr Williams and Mr Stewart knew how to make methylamphetamine, but they wanted a way to make pseudoephedrine and that was what Mr Hooning was experimenting with. Mr Williams and Mr Stewart provided the glassware and chemicals. Mr Hooning had been out to Millmerran many times to see Mr Williams to discuss producing pseudoephedrine and described his own role as "supplying advice" and "supplying technical know-how". Mr Hooning saw Mr Williams make speed numerous times at Millmerran. When Mr Hooning spoke to the police in December 2002, they were not interested in the names of Mr Stewart and Mr Williams, as they already knew about them. Mr Williams had already been caught in the act of making speed. When Mr Hooning was asked whether he was an employee of Millmerran Oil, he answered "not really" and said that Mr Williams owned Millmerran Oil and he used to work for him. Mr Hooning had nothing to do with coal tar.

[102] Mr Tom also exhibits to his affidavit part of Mr McDougall's evidence from Mr Cannon's trial. Mr McDougall was recalled to give evidence immediately after Mr Hooning on 27 October 2005 which included the following. Mr McDougall first had dealings with Mr Hooning on 17 December 2002. Mr Hooning went with other police to Millmerran on 17 December 2002 and then returned. Mr Hooning was "on the periphery, at the very least," in relation to the matters at Millmerran and Northgate. He was not charged in relation to anything to do with Millmerran.

[103] Mr Tom also exhibits to his affidavit the transcripts of the two hearings at which Mr Harper gave evidence before the Australian Crime Commission (ACC) on 7 October 2004 and 10 March 2005 and the witness statements obtained by police from various witnesses who gave evidence at Mr Harper's trial. Mr Williams provided a statement to police on 19 December 2004. Mr McClymont provided his statement on 19 January 2005. Mr Poulton's statement is dated 10 March 2005. Ms Illing's statement is dated 18 January 2005. Mr Watson's statement was provided on 14 June 2005. Dr Sadler's statement was made on 21 October 2005. Mr Naylor's statement was made on 3 November 2005.

[104] Mr Kelso states in his affidavit that he cannot recall Mr Hooning being mentioned in any of the material he received from the solicitors who instructed him on behalf of Mr Harper for the trial. Mr Kelso also states that no information concerning Mr Hooning nor his connection to Mr Williams was disclosed to him by anyone prior to or during Mr Harper's trial.

[105] Mr Kelso acknowledges that for Mr Harper's trial, he was provided with transcripts of the evidence of various witnesses given in proceedings before the ACC including the transcripts of the evidence given by Mr Harper.

[106] Mr Neville in his affidavit explains that the drug operation in which Mr Harper became a person of interest resulted from information from a confidential informant that Mr McClymont was selling hypophosphorous acid which led to the searches of premises connected with Mr McClymont that uncovered a diary and other notes which included a reference to the Consolidated Chemical Company from which Mr Neville obtained the details of the purchases of precursor chemicals made by Mr Williams and Mr Harper. Mr Neville also obtained information from a confidential informant who advised that Mr Harper and Mr Williams were using the ruse of refining coal tar oil to conceal their methylamphetamine production at the Millmerran property. The statements obtained from Mr Williams on 19 December 2004 and Mr McClymont on 19 January 2005 implicated Mr Harper in committing drug offences. Although Mr Neville concedes that information from the first ACC examination of Mr Harper may have been used by him in obtaining the respective statements from Mr Williams and Mr McClymont, he states it only played a minimal role, because of information from the confidential informant, that obtained in searches and the information that each of Mr Williams and Mr McClymont was eager to volunteer about Mr Harper.

[107] Detective Goan in his affidavit confirms that both he and Mr Neville were present during the ACC examination of Mr Harper on 7 October 2004.

[108] Ms Farnden's affidavit deals with her decision not to seek access to Mr Harper's evidence given in any ACC hearings. Ms Farnden never saw a transcript of the evidence given by Mr Harper at the ACC hearings.

[109] Mr McDougall was formerly a police officer who between 2001 and 2003 was the leading investigator whilst seconded to the National Crime Authority (which became the ACC in January 2003) in relation to an operation in respect of which Mr Cannon was a target. Mr McDougall resigned from the Queensland Police Service in 2004. He had qualified as a lawyer and was employed as counsel at the ACC where his primary role was the conduct of coercive examinations. Mr McDougall appeared as counsel assisting the ACC on the dates of the hearings in which Mr Harper gave evidence before the ACC. He was also counsel assisting in the examination of a number of other witnesses in connection with the same operation.

[110] Mr McDougall had been present when Mr Hooning provided the statement against Mr Cannon in 2002 and was aware that Mr Hooning gave evidence at Mr Cannon's trial, although he was not in the courtroom when Mr Hooning gave his evidence.

[111] Mr McDougall states in his affidavit that he has "no recollection of there being a connection between the Hooning's evidence in Cannon's trial and the appellant's matters". Mr McDougall further states:

> "At no stage was I aware that the evidence that Hooning gave in relation to the prosecution of Cannon was in any way relevant to the investigation and prosecution of the appellant."

[112] For the purpose of dealing with grounds 1 and 2 of Mr Harper's appeal against conviction, it is necessary to consider the affidavits filed for the purpose of the appeal by both Mr Harper and the respondent that relate to those grounds.

[113] A variation of the non-public directions given at the ACC examinations of Mr Harper and related witnesses was made for the purpose of facilitating Mr Harper's criminal trial and publication of any relevant information was subject to the condition that

public release may not occur, except as may be ordered by a court hearing the proceedings. The hearing of this appeal is a proceeding in connection with the prosecution of Mr Harper. During the hearing of the appeal an order was made "that the court can access and use the material at the hearings for the purpose of considering this matter and writing its reasons". It is prudent to make an order that covers the publication of these reasons in the following terms:

> "It is ordered that these reasons for judgment may disclose publicly information that relates to the examination of witnesses before the Australian Crime Commission in 2004 and 2005 in connection with Mr Harper to the extent disclosed in these reasons."

[114] As the ACC transcripts of Mr Harper's examination on 7 October 2004 and 10 March 2005 are exhibited in full to the affidavit of Mr Tom, an order should be made that results in that exhibit being sealed in an envelope which will prevent the transcripts from being searched, unless an order of the court or a judge is made.

Ground 1 Miscarriage by the admission of evidence arising from the appellant's compulsory examination

[115] Before Mr Harper was charged with the offences that were the subject of the trial, he was examined by the ACC. There are two main aspects of evidence arising from Mr Harper's compulsory examination at the ACC that are now relied on in relation to this ground.

[116] The first aspect concerns evidence located as a result of an answer given by Mr Harper in the examination. Queensland police officers (including Mr Neville and Detective Goan) who were investigating Mr Harper in relation to suspected involvement in production of and trafficking in methylamphetamine were present at the hearings conducted on 7 October 2004 and 10 March 2005. As a result of something that was said by Mr Harper in the course of the first examination, a search warrant was procured by one of the investigating police officers in respect of the home of Mr Harper's mother and executed the same day. What was found at Mr Harper's mother's home was the glassware in a box and some chemicals about which Mr Errington and Detective Marsh gave evidence at the trial.

[117] The second aspect concerns Mr Harper's disclosure during the compulsory examination of his ultimate defence that the hypophosphorous acid was used for cleaning his trucks from meat transport which was more information than that disclosed on the end user declaration forms.

[118] It is contended by Mr Harper that the use made by the investigating police officers of his evidence at the compulsory examinations in obtaining evidence for the prosecution case against him resulted in the loss of a forensic advantage that an accused person is entitled to in a criminal trial and that made the prosecution case unfair. In particular, Mr Harper submits that evidence would not have been obtained by the prosecution from expert witnesses to contradict the use of hypophosphorous acid as a cleaner specifically for refrigerated transport, but for the answers given at the compulsory examinations.

[119] The respondent submits that the Queensland police in using the information provided by Mr Harper about the location of glassware at his mother's home were acting lawfully. The solicitors who acted for Mr Harper for the purpose of the ACC examinations

were also his solicitors at the trial. A solicitor on behalf of Mr Harper at the second examination objected to the use made of information from the first examination to procure the search warrant of Mr Harper's mother's home. The respondent relies on the fact that no application was made for the purpose of the trial, however, to exclude the evidence that was obtained as a result of that search warrant or any evidence that could be said to have its genesis in the information obtained from the examinations by the ACC.

[120] The respondent also submits the fact that Mr McClymont and Mr Williams gave statements to the police independent of the ACC examinations had the practical consequence that the evidence given by witnesses at the ACC hearings was known to the police and that it cannot be shown that, as a result of the ACC hearings involving Mr Harper, the police followed a line of inquiry not previously known to them.

[121] Both parties made submissions by reference to *X7 v Australian Crime Commission* (2013) 248 CLR 92 and *Lee v The Queen* (2014) 253 CLR 455.

[122] The examination of Mr Harper at the ACC was conducted under s 25A of the *Australian Crime Commission Act* 2002 (Cth). Subsection (9) provided:

> "An examiner may direct that:
> (a) any evidence given before the examiner; or
> (b) the contents of any document, or a description of any thing, produced to the examiner; or
> (c) any information that might enable a person who has given evidence before the examiner to be identified; or
> (d) the fact that any person has given or may be about to give evidence at an examination;
>
> must not be published, or must not be published except in such manner, and to such persons, as the examiner specifies. The examiner must give such a direction if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence."

[123] The examiner explained to Mr Harper his obligation to answer the questions and the use immunity that was available, if self-incrimination were claimed. Mr Harper claimed the benefit of self-incrimination. As a result, s 30(5) of the Act applied to his answers:

> "The answer, or the document or thing, is not admissible in evidence against the person in:
> (a) a criminal proceeding; or
> (b) a proceeding for the imposition of a penalty; other than:
> (c) confiscation proceedings; or
> (d) a proceeding in respect of:
> (i) in the case of an answer – the falsity of the answer; or
> (ii) in the case of the production of a document – the falsity of any statement contained in the document."

[124] At the end of each ACC examination of Mr Harper, the examiner made a non-publication direction that applied to the evidence given by him that it not be published, except for chief executive officers, examiners, and members of staff at the Commission, members of law enforcement agencies including the State, Territory and Federal Police for any matters within their jurisdictions arising from this investigation and prosecution authorities and their staff of such authorities for any matters which they are responsible arising in this investigation.

[125] Apart from the fact that the examiner permitted Queensland police officers to be present at the examination of Mr Harper, Mr Neville and Detective Goan were persons to whom the examiner permitted the examination evidence of Mr Harper to be published.

[126] Mr Di Carlo of counsel on behalf of Mr Harper relied on statements in the judgments in both *X7* and *Lee* that he submitted could be applied to the police conduct arising out of Mr Harper's examination at the ACC to conclude that such substantial prejudice was caused to Mr Harper's defence of the charges that the verdicts should be quashed.

[127] The issue in *X7* was whether the *Australian Crime Commission Act* 2002 (Cth) empowered an examiner appointed under s 46B(1) of that Act to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerned the subject matter of the offence so charged. The joint judgment of Hayne and Bell JJ (with whose reasons Kiefel J substantially agreed) explained the accusatorial process of criminal justice and concluded, as a matter of statutory construction, that the Act did not authorise an examiner to require a person charged with a Commonwealth indictable offence to answer questions about the subject matter of the charged offence.

[128] Hayne and Bell JJ observed at [124] about the impact on the accusatorial process of the compulsory examination of a person charged with an offence:

> "Even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according *only* to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge."

[129] The focus of *X7* was on post-charge questioning, as discussed by Muir JA in the analysis of that case in *Hamdan v Callanan; Younan v Callanan* [2014] QCA 304 at [35]-[42].

[130] In *Lee*, the appellants were a father and son who were required for examination by the New South Wales Crime Commission. The Commission was required by s 13(9) of the *New South Wales Crime Commission Act* 1985 (NSW) to make a direction prohibiting the publication of evidence given before it where publication might prejudice the fair trial of a person who may be charged with an offence. The father was examined by the Commission on 26 November and 1 December 2009 before he had been charged with any offences. The police executed a search warrant on 7 December

2009 at premises where the son was present. A firearm, a quantity of white powder and a substantial quantity of cash were found. The father was charged with possession of prohibited firearms and an offence in the nature of money laundering in respect of the cash found on the premises. There was a strong suspicion the powder was drugs, but charges would not be laid until the powder was tested. The son was examined before the Commission on 16 December 2009, when charges against both appellants relating to the supply of drugs were anticipated. At each of the examinations of the father, the Commissioner gave a direction prohibiting the publication of the fact that the father had given evidence or any of the evidence, except in the manner and to such persons as specified by the Commission. Such a direction was not given at the conclusion of the son's evidence before the Commission, but it was accepted that such a direction ought to have been made.

[131] The transcripts of the appellants' evidence before the Commission were published by the Commission to the police and to the DPP, but the focus of the appeals (identified in [39]) was on the publication of the transcripts directly to the DPP and indirectly to the DPP through the police and, in particular, the prosecutor who conducted the trial of the appellants. The solicitor with the DPP had requested the transcripts from the Commission to ascertain whether the defence of the appellants was that they did not know the powder was drugs.

[132] The judgment of the court focused on the nature of a criminal trial, noting at [32]:

> "Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in *X7*. The principle is so fundamental that 'no attempt to whittle it down can be entertained' albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice." (*footnotes omitted*)

[133] It was held at [34] that the protective purpose of s 13(9) of the relevant Act would usually require the Commission to quarantine evidence given by a person to be charged from persons involved in the prosecution of those charges and the failure of the Commission to do so had the consequence that the appellants' trial differed in a fundamental respect from that which the criminal justice system seeks to provide.

[134] The issue identified at [39] was whether, as a result of the prosecution being armed with the appellants' evidence, there had been a miscarriage of justice. The essence of the decision in *Lee* is set out in [43]:

> "These appeals do not fall to be decided by reference to whether there can be shown to be some 'practical unfairness' in the conduct of the appellants' defence affecting the result of the trial. This is a case concerning the very nature of a criminal trial and its requirements in our system of criminal justice. The appellants' trial was altered in a fundamental respect by the prosecution having the appellants' evidence before the Commission in its possession."

[135] The court noted at [44] that it was not relevant that the appellants' lawyers did not object or seek a stay of the trial, when they knew that the prosecution brief included

the appellants' evidence given before the Commission. The court at [44] did not rule out the possibility that another prosecutor, not privy to the evidence before the Commission, could be engaged to conduct the prosecution case at the appellants' trial.

[136] The court stated at [46]:

> "It is a breach of the principle of the common law, and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have, for the prosecution to be armed with the evidence of an accused person obtained under compulsion concerning matters the subject of the charges."

[137] The court concluded at [51]:

> "Rather, these appeals concern the effect of the prosecution being armed with the appellants' evidence. It is not necessary to resort to questions of policy to determine whether a miscarriage of justice has occurred. What occurred in this case affected this criminal trial in a fundamental respect, because it altered the position of the prosecution vis-à-vis the accused. There was no legislative authority for that alteration. Indeed, it occurred contrary to the evident purpose of s 13(9) of the NSWCC Act, directed to protecting the fair trial of examined persons."

[138] The appeals in *Lee* were allowed, the appellants' convictions were quashed, and a new trial was ordered.

[139] *Lee* was therefore decided by reference to the departure in a fundamental respect by the prosecution from the requirements for a criminal trial by the prosecutor having access to the appellants' evidence before the New South Wales Commission. The police access to the same evidence did not preclude the ordering of a new trial.

[140] *Lee* was applied in *R v Seller* [2015] NSWCCA 76 where Mr Seller and Mr McCarthy were being prosecuted for conspiracy to dishonestly influence the Commissioner of Taxation and the presence of Mr Tang (an officer from the Australian Taxation Office who had been seconded to the ACC) during the ACC examination of the defendants (for which they claimed privilege against self-incrimination) before they were charged and the access by Mr Tang to compulsorily acquired material of the defendants and the transcripts of the examinations (some of which had been wrongly provided to the prosecution) were held to justify the exclusion of Mr Tang's proposed evidence from the trial. Mr Tang had prepared statements for the purpose of the prosecution that summarised the documents and transactions that were part of the prosecution case and it was through him the prosecution proposed to lead a good part of its documentary case against the defendants. Mr Tang conceded that the compulsorily acquired material and the evidence the defendants had given in the ACC examinations may have assisted him in understanding the defendants' involvement in the relevant taxation schemes. The primary judge had concluded that Mr Tang's understanding of the schemes was informed to a "not insubstantial degree" by the access to the compulsorily acquired material. Bathurst CJ stated at [122]:

> "Further, it cannot be stated with any certainty that the respondents will not be hindered in challenging any aspect of the Crown case in cross-examination of Mr Tang. Although it is correct that the evidence of Mr Tang is largely a review and reconciliation of documentary records, it does not follow that the cross-examination will necessarily be

> limited to challenging Mr Tang's calculations and reconciliation. The course of cross-examination cannot be predicted with certainty. In these circumstances, the possibility that the respondents will be limited or hindered in their cross-examination of Mr Tang by the evidence given at the compulsory examinations cannot be excluded. The possibility that such questions may be asked of other witnesses, as the Crown suggested, does not seem to me to be an answer to this difficulty."

[141] Bathurst CJ (with whom Fullerton and Bellew JJ agreed) therefore concluded at [123] that if Mr Tang were to adduce the evidence which he proposed to give, that would alter the accusatorial process inherent in a criminal trial in the fundamental sense described in *X7* and *Lee*. It is apparent in *Seller* that the assistance that Mr Tang obtained from the ACC examinations of the defendants and related materials had the potential to impact on the trial process itself.

[142] The prosecutor in Mr Harper's trial very properly did not obtain the transcripts of Mr Harper's evidence before the ACC. The permission by the examiner to the Queensland police officers who were investigating Mr Harper's role in suspected drug production and trafficking to be present when Mr Harper was examined in the ACC hearing and to have access to the evidence may have given Mr Harper cause to challenge the examiner's directions at the time, but that by itself did not affect Mr Harper's criminal trial in a fundamental respect.

[143] Although the glassware and chemicals were located in the execution of the search warrant issued on 7 October 2004, the evidence adduced at the trial of what the police found in the search of Mr Harper's mother's home was peripheral to the issues at the trial. The results of the search were not the subject of a specific charge and the date of the possession of that glassware and chemicals was almost one year after the end of the period particularised in the trafficking count. The evidence was not referred to at all in the trial judge's summing up which is consistent with its insignificance, as it turned out, to the prosecution case at trial. The seizure of the glassware and chemicals by the police effectively in conjunction with the ACC examination of Mr Harper was inconsequential in the conduct of his criminal trial and in no way altered the fundamental nature of the criminal trial.

[144] The defence based on the use of hypophosphorous acid in connection with the refining of coal tar oil was anticipated by the end user declarations made by Mr Harper. The additional purpose of using hypophosphorous acid for cleaning the refrigerated vans was also anticipated by Mr Williams' statement to the police that was signed on 19 December 2004. In that statement, Mr Williams had said that Mr Harper approached him in about August 2000 to see if he could get hypophosphorous acid for him through the tanker service and stated "He told me that he wanted it to clean his fridge vans". Mr Williams also dealt in his statement with Mr Harper's request of him in July or August 2001 to get some more hypophosphorous acid. When Mr Williams dealt with picking up the hypophosphorous acid and delivering it to Mr Harper, he stated:

> "Chris would always keep a bottle of Hypo at his work shop and told me that he did this just in case he got raided so he could tell the police that he used it to clean his fridge vans."

[145] Apart from the disclosure by Mr Harper at the ACC hearing on 7 October 2004 about the use of hypophosphorous acid for cleaning their refrigerated vans, the police had a willing source outside that answer in Mr Williams that warranted their pursuing

evidence on the use of hypophosphorous acid for cleaning refrigerated vans. As Mr Neville explained in his affidavit, there were many sources of inquiry for the police investigating Mr Harper independently of the ACC examinations. In the circumstances, there was no loss of forensic advantage to Mr Harper arising from the ACC hearings by the prosecution preparing for the defence contention that there was a legitimate use for hypophosphorous acid in Mr Harper's transport business. The presence of the investigating police officers at Mr Harper's examination at the ACC hearings did not alter in any fundamental respect the course of Mr Harper's criminal trial.

[146] This first ground of appeal cannot succeed.

Ground 2 Miscarriage by the failure to disclose evidence relating to the prosecution case against Mr Harper

[147] During the hearing of the appeal, it was suggested it was relevant that Mr Hooning in his evidence at the trial of Mr Cannon mentioned people he had seen at the Millmerran property and did not mention Mr Harper. As the statement was taken from Mr Hooning for the purpose of the investigation against Mr Cannon, nothing can be inferred from the mere lack of reference in Mr Hooning's evidence to Mr Harper.

[148] It is submitted on behalf of Mr Harper that the evidence of Mr Hooning would have been relevant in Mr Harper's trial in challenging Mr Williams' evidence that he was cooking methylamphetamine for Mr Harper and that Mr Stewart did not produce speed with Mr Williams at Millmerran.

[149] It was coincidence that Mr McDougall, as a police officer, was present when Mr Hooning provided a statement against Mr Cannon in 2002 in which he referred to the Millmerran property and Mr Williams and then, after Mr McDougall left the police service, he was the counsel employed at the ACC when Mr Harper was examined in 2004 and 2005. Mr McDougall was employed by the ACC when it was possible for him to make a connection between the subject matter of the examination of Mr Harper and the references made by Mr Hooning in his police statement against Mr Cannon that he had attended Millmerran as an adviser to Mr Williams when productions of methylamphetamine were taking place. The fact is that Mr McDougall did not make the connection in such a way that he appreciated that Mr Hooning's evidence for the purpose of Mr Cannon's trial may have had relevance for the prosecution of Mr Harper. The police investigation of Mr Cannon was unrelated to the subsequent police investigation of Mr Harper.

[150] As Mr Boyle of counsel on behalf of the respondent submits, the statement of Mr Hooning was not material that was in possession of the prosecution as defined under s 590AE of the *Criminal Code* (Qld) for the purpose of the prosecutor's disclosure obligation. The statement of Mr Hooning was not a thing, the existence of which either the arresting officer or the prosecutor was aware, as required by s 590AE(3) for the statement to be the subject of the disclosure obligation.

[151] Reference was made in the course of submissions to the characterisation of evidence not adduced at the trial as either fresh evidence or new evidence: *R v VI* [2013] QCA 218 at [65]-[66].

[152] Even if Mr Hooning's evidence is treated as relevant to impugning the prosecution case against Mr Harper, its relevance was primarily in respect of the production counts against Mr Harper and the possession counts for the purchases of precursor chemicals

by Mr Williams alleged to have been procured by Mr Harper (counts 4 to 15) of which he was acquitted. As Mr Hooning was a visitor to the Millmerran property prior to December 2002 and was a witness to Mr Williams' production of methylamphetamine, the availability of Mr Hooning's statement and evidence given at the criminal trial of Mr Cannon would have been of relevance to the approach of Mr Harper's defence to discrediting Mr Williams. The verdicts on counts 2 to 15 show that, in any case, the jury were either not persuaded by or rejected Mr Williams' evidence.

[153] Even if Mr Hooning's statement were treated as either fresh or new evidence for the purpose of this appeal, the problem for Mr Harper is that it is difficult to see how any miscarriage of justice has occurred, when the purpose for which the defence would have used the evidence was achieved without it.

[154] There was no miscarriage of justice arising from Mr Harper not being provided with Mr Hooning's statement given in 2002 for the purpose of the prosecution of Mr Cannon or the evidence of Mr Hooning at Mr Cannon's criminal trial.

Ground 3 Verdicts were unreasonable and not supported by the evidence

[155] A preliminary submission was made that as the prosecution case was particularised in exhibit 55 that Mr Harper was engaged in the business of producing and selling methylamphetamine, he could not have been convicted on the trafficking charge when the jury acquitted him on the two production charges.

[156] That is a literal interpretation of the particulars. The prosecution case was not conducted at trial on the basis that, if the jury acquitted on the production counts, it followed that Mr Harper could not be found guilty of trafficking. In fact, the trial judge directed the jury in respect of the more detailed particulars of the conduct relied on by the prosecution set out in exhibit 55, namely the five activities that remained (after numbered paragraph 3 was withdrawn from the jury), by reference to the evidence and the respective cases of the prosecution and defence. The trial judge directed the jury appropriately that to bring back a guilty verdict on the trafficking count, the jury must be satisfied beyond reasonable doubt of a common factual basis for the verdict, stating:

> "But you must agree, in common, that some activities have been proved beyond reasonable doubt and that these common activities, that you do agree that have been proved beyond reasonable doubt, are enough to amount to carrying on the business of trafficking, having regard to what I've explained that means."

[157] In relation to numbered paragraph 1 (the defendant's sourcing or purchasing of chemicals required to manufacture methylamphetamine), the trial judge explained to the jury that was a reference to counts 16 to 18. The purchases of hypophosphorous acid were subsequent to the periods particularised for the productions of methylamphetamine on which Mr Harper was acquitted.

[158] The trial judge directed the jury that numbered paragraph 2 (procuring others to source chemicals and other ingredients required to manufacture methylamphetamine) encompassed the other possession counts (counts 4 to 15), but in addition there was the evidence about procuring people to get pseudoephedrine, in particular Mr McClymont. That means that the acquittals on counts 4 to 15 still left some evidence relevant to numbered paragraph 2 for the jury to consider on count 1. The trial judge directed the jury that even if they accepted Mrs Illing's evidence, it concerned procuring her

to source chemicals outside the period of trafficking and that they could not use any evidence they were inclined to accept from Mrs Illing about her being asked by Mr Harper to obtain hypophosphorous acid as evidence to support the trafficking charge directly as a particular of it. The jury were told that they could use Mrs Illing's evidence only to assist in their general understanding of the evidence.

[159] In relation to numbered paragraph 4 (being involved in the production of methylamphetamine), the jury was directed it would encompass counts 2 and 3, but in addition the prosecution was relying on the evidence from Mr Williams that Mr Harper gave him recipes to make methylamphetamine and, depending on the view they took of the evidence, the trailer that was taken out to the Millmerran property by Mr Harper could be regarded as being involved in the production of methylamphetamine. As the jury either rejected Mr Williams' evidence or had a reasonable doubt about it, the acquittals on counts 2 and 3 meant that the only evidence in support of numbered paragraph 4 was the trailer being taken out to the Millmerran property by Mr Harper which, by itself, could not support a finding beyond reasonable doubt of his involvement in the production of methylamphetamine, as a particular of trafficking.

[160] Numbered paragraphs 5 and 6 covered selling and procuring others to sell methylamphetamine and the jury was directed that the prosecution case was based on the evidence of Mr McClymont that there were sales or onsales (depending on how they viewed the evidence) by him to others or from Mr Harper to him.

[161] When the trial judge directed the jury on the prosecution case in respect of these activities relied on to prove the trafficking count, the jury were also reminded of the defence case that where those activities relied on the evidence of Mr McClymont, the jury would reject his evidence or, at least, have a reasonable doubt about his evidence.

[162] In considering whether the guilty verdicts were unreasonable and not supported by the evidence, the evidence the prosecution relied on that related directly to Mr Harper's participation in the events that were the subject of counts 2 to 15 on which Mr Harper was acquitted should not be relied on for the purpose of evaluating the verdicts of guilty on counts 1 and 16 to 18.

[163] In considering each of counts 16 to 18, there was overwhelming evidence that Mr Harper was in possession of the hypophosphorous acid that was the subject of each count. The other element of the offence was that his possession of the chemical was for use in connection with the commission of the crime of producing a dangerous drug. The trial judge gave the directions on the charge of possessing a thing for use in connection with producing a dangerous drug by reference to all of counts 4 to 18. The trial judge directed the jury on the element "for use in connection with" in terms that either of two uses, producing methylamphetamine or selling the chemical to speed cooks who would be anticipated to produce methylamphetamine, would satisfy the "for use in connection with" element of the offence of possession of the hypophosphorous acid. The trial judge reminded the jury of the alternative innocent uses raised by the defence and the evidence about cleaning the refrigerated trucks with acid and the oil experiments.

[164] Although there was evidence adduced that supported the use of hypophosphorous acid as a cleaner of refrigerated vans at Lewis Street from Mr Miller and Mr Mackay and the demonstration observed by Mr Poulton and Detective Marsh had observed that hypophosphorous acid was a good cleaning product, particularly for stainless

steel, there was other evidence that supported the prosecution case that hypophosphorous acid was not routinely used as a cleaner by Mr Harper. The prosecution relied on Mr Bennett's evidence that he purchased acid for cleaning the refrigerated vans in Toowoomba (which would not have been through the Consolidated Chemical Company). The prosecution submission was that such an unusual and expensive acid would not be used as a routine cleaner. It was a jury question as to whether or not they were satisfied beyond reasonable doubt that the possession by Mr Harper of the hypophosphorous acid on each of the occasions reflected by counts 16 to 18 was for use in connection with producing dangerous drugs. Mr Harper's acquittals on counts 2 and 3 which related to his participation in specific productions of methylamphetamine preceding the purchases that are the subject of counts 16 to 18 had no bearing on the reasonableness of the verdicts on counts 16 to 18. It was not unreasonable, in light of all the evidence about the possible uses of hypophosphorous acid, for the jury to conclude beyond reasonable doubt that, even if not satisfied beyond reasonable doubt that Mr Harper himself was involved in the earlier specific productions of methylamphetamine that were the subject of counts 2 and 3, his purchase of the hypophosphorous acid was either for productions of methylamphetamine or for passing it on to others who would use it to produce methylamphetamine. It was open to the jury to find Mr Harper guilty beyond reasonable doubt of each of counts 16 to 18 on the whole of the evidence relating to each of those counts.

[165] Even allowing for the jury's rejection of Mr Williams' evidence that he was producing methylamphetamine or purchasing precursor chemicals at the request of Mr Harper, there was other evidence to support the particulars of trafficking (numbered paragraphs 1, 2, 5 and 6) relied on in the prosecution case. It was a jury question whether Mr McClymont's evidence was accepted and his evidence made it an overwhelming case against Mr Harper on trafficking. The jury's verdict of guilty on count 1 was not unreasonable.

Ground 4 The trial judge erred in failing to direct the jury properly as to lies

[166] The trial judge directed the jury that it was part of the prosecution case that what was written on the end user declaration forms signed by Mr Harper was adopted by him by signing the form and was a false statement or a lie as to the use of the hypophosphorous acid and the fact that such a lie would be told was evidence of a consciousness of guilt, as the form had to be signed to say that the chemicals are not to be used for illegal purposes and drugs is one such purpose. It was implicit from the summing up that the direction related to counts 16 to 18 and the lie alleged from the signing of each form related only to the charge based on possession of the hypophosphorous acid obtained on the basis of the particular form.

[167] The jury were directed that they had to decide whether as a matter of fact Mr Harper did lie in signing each of those three forms, but that if they did decide there was a lie, it could be used as indicative of a consciousness of guilt only if they were satisfied of the three things on which the trial judge then directed them:

> "The first thing you must be satisfied is that the defendant told the lie, told the untruth deliberately and there's a difference between mere rejection of a person's account of events and a finding that the person has lied deliberately. Quite often, there's a departure from the truth but it may not be possible to say that a deliberate lie has been told. There might be reasons such as confusion or other reasons that might prevent you from finding that the defendant deliberately told an untruth in signing those forms.

> The second thing that you must be satisfied about is that the lie is connected with some circumstance or event connected with the offence. Now, in this case, it is a form that has to be signed, really, before someone can take possession of the chemical. But you can only use – if you find that there was a deliberate untruth on those forms, you can only use it against the defendant as consciousness of guilt if you are satisfied that it reveals a knowledge of the offence or some aspect of it.
>
> And thirdly, you must be satisfied that any lie constituted by signing those forms was told because the defendant knew that the truth of the matter would implicate him in the commission of an offence, that is, the defendant must be lying because he's conscious that the truth could convict him or implicate him in an offence. And again, people lie for all kinds of reasons. There's reasons for lying apart from the fact that you realise you might be guilty of an offence if you tell the truth, so you have to think about that. So as I say, in thinking about how you use what's on those forms signed by the defendant, if you want to use that information as material that shows a consciousness of guilt, you've really got to consider those three steps."

[168] It was argued on behalf of Mr Harper that the direction did not comply with the instruction given in the Benchbook Direction – Lies Told By The Defendant (Consciousness of Guilt) at No 38.2 after directing the jury they must be satisfied that the lie was told because the defendant knew the truth of the matter would implicate him in the commission of the offence. The instruction is that "The judge should direct attention to any innocent explanation that may account for the telling of a lie." and a number of examples then follow such as "in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal embarrassing or disgraceful behaviour … out of panic, or confusion, or to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence".

[169] Mr Harper's complaint is that after the trial judge stated to the jury that "there's reasons for lying apart from the fact that you realise you might be guilty of an offence if you tell the truth … ", the trial judge did not list other possible reasons for lying by Mr Harper and did not remind the jury of Mr Harper's case that there was no lie, as the acid was to be used for cleaning, or that the matter had to be considered in the light of the proposed use of the acid on two of the forms being filled out by an employee of Consolidated Chemical Company.

[170] Even though the proposed use on two of the forms had been completed by Mr Douglas, each of those forms was signed by Mr Harper. The provision of the end user declaration was essential to obtain the supply of the hypophosphorous acid and it was dependent on a legitimate proposed use being specified in the form. By signing the two forms completed by Mr Douglas, Mr Harper adopted what was inserted in those forms as the purpose for the proposed use.

[171] The defence case was that there was not a lie in any of the three forms, as the purpose for the purchase was as set out in the form. On the facts of this matter, if the jury was satisfied beyond reasonable doubt that Mr Harper lied about the purpose for which the hypophosphorous acid was being purchased, then there was no other legitimate purpose for it. It would not have been a true reflection of Mr Harper's case for the

trial judge to elaborate on hypothetical reasons for lying, when dealing with the third condition of the Benchbook Direction. The particular direction on "Lies Told By The Defendant (Consciousness of Guilt)" is an aid and not prescriptive, and must be adapted to the facts of the particular case.

[172] Mr Harper cannot succeed on this ground.

Ground 5 Trial judge erred in failing to direct the jury properly on the elements of trafficking

[173] The trial judge summed up on trafficking in conjunction with exhibit 55 in which trafficking was explained in the following terms:

> "'Carrying on the business' of trafficking includes all acts which are part of such a business and is not confined to sales of the substance. Activities such as advertising or promoting the product, setting up lines of production or supply, negotiating terms of prices and terms of payment, soliciting and receiving orders, arranging for delivery and so on can indicate that a business is being carried on."

[174] The trial judge then added a further explanation that expressly covered the point that is now made on behalf of Mr Harper that the jury were not told properly that the "business" of trafficking had to be more than mere occasional sales or transactions:

> "So to carry on a business, there must be more than a few isolated transactions. The idea of carrying on a business connotes a continuous course of conduct engaged in for the purpose of retaining – sorry, engaged in for the purpose of obtaining a reward of a commercial character. So proof of carrying on a business requires the prosecution to establish several activities done for the purpose of making a financial gain over more than a brief interval. Repetition of acts and activities of a commercial nature, possessing something in the kind of a permanent character are the hallmarks of a business being carried on. But, of course, a person need not intend to trade indefinitely before a person can be said to carry on a business. Nor, indeed, must the venture be profitable before it fairly answers the description of a business. And it's not essential to the identification of a venture as a business but it has more than one customer."

[175] The trial judge then summarised the five remaining activities relied by the prosecution to prove the offence of trafficking. The jury were then directed that before they could convict Mr Harper of trafficking, they had to be satisfied beyond reasonable doubt that he was carrying on a business of trafficking in methylamphetamine and they had to be satisfied beyond reasonable doubt of the same factual basis of the trafficking in order to convict.

[176] There is no substance in the complaint made about that the direction on trafficking that it did not explain to the jury that more than occasional sales or transactions was required. It was also submitted on behalf of Mr Harper that the jury were, in effect, directed that if they were satisfied of any of the other counts or conduct they would be satisfied of the trafficking count, as there was no proper separation of the counts and the evidence. That complaint is not a proper characterisation of the summing up by the trial judge that carefully delineated counts, grouping them where appropriate,

and summarised the relevant evidence and the respective cases of the prosecution and defence. It is apparent from the submissions made by counsel for Mr Harper on the appeal (who was not the trial counsel) that counsel did not appreciate the trial judge's reference to "activities" in the summing up on trafficking was a reference to the five activities listed in exhibit 55 as particulars of the trafficking. The judge had directed the jury to look at the five numbered paragraphs in exhibit 55, as the evidence was summed up in respect of each of the five activities.

[177] Another complaint made on behalf of Mr Harper was that the trafficking case on which he was convicted was in substance one of trafficking in a precursor chemical. That was, in fact, why numbered paragraph 3 (selling ingredients required to make methylamphetamine to third parties) was withdrawn from the jury. During the course of the summing up, the trial judge reminded the jury about Mr Williams' evidence that he saw Mr Harper decanting hypophosphorous acid into containers and that Mr Harper said to him that he was selling it to speed cooks. The trial judge stated:

> "I'm directing you, as a matter of law, that that couldn't be something which could be part of carrying on a business of trafficking in methylamphetamine. That might be carrying on a business of selling acid, hypophosphorous acid, but that's not what's charged. …
>
> And I'm directing you as a matter of law that even if you find that you accept that evidence, selling hypophosphorous acid is not an activity which could constitute, or be part of activities that constitute, unlawfully carrying on a business of trafficking in methylamphetamine."

[178] Mr Harper also cannot succeed on ground 5.

Conclusion on the appeal against conviction

[179] Mr Harper has failed on all grounds of appeal against the conviction. The appeal must be dismissed.

Findings of fact on the sentence

[180] In order to deal with the first ground relied on for the application to leave against sentence of errors in the findings of fact made by the trial judge concerning Mr Harper's role in the offending, it is necessary to refer to the findings of fact that were made by the trial judge.

[181] The trial judge inferred from the jury's verdicts of not guilty on counts 2 to 15 that the jury rejected Mr Williams' evidence or at least had a reasonable doubt about the reliability of his evidence. That meant that the jury had rejected as a basis for action Mr Williams' evidence that he was acting at Mr Harper's behest in the extensive production and trafficking operation. The trial judge impliedly accepted that Mr Williams' productions and trafficking of methylamphetamine were extensive.

[182] The trial judge noted in relation to counts 16 to 18 the following. The total amount of hypophosphorous acid of which Mr Harper was in possession was 240 kgs. The acquisition of the chemical "involved lies to defeat the purpose of the legislation which tries to allow legitimate use of the chemical and not illegitimate use". The amount of precursor chemical would theoretically be able to produce 535 kgs of methylamphetamine. By reference to evidence at the trial about the amount of methylamphetamine found in fluid in glassware after a cook to make methylamphetamine

where a quantity of methylamphetamine was unable to be extracted from the fluid, the amount of methylamphetamine that could in practical terms have been produced from the 240 kgs of hypophosphorous acid should not be as large as the theoretical quantity. That had to be counterbalanced with the fact that there was evidence the drug would be cut around four times before it was sold at street level.

[183] The evidence relied on to constitute the trafficking (beyond the facts caught up by counts 16 to 18) was mainly that of Mr McClymont and also identified by the trial judge as:

(a) the evidence of Mr Poulton that after the February 2003 police search of the Millmerran property, Mr Harper organised for the chemicals and equipment stored there to be collected and taken back to his premises, and Mr Harper told others that the equipment and chemicals were to be used in the production of dangerous drugs;

(b) the evidence of Mr Poulton and Mr Bennett that Mr Harper set about selling one drum of hypophosphorous acid from the collection removed from the Millmerran property, and the sale of that on the side of the road where Mr Harper acknowledged that he hoped to make $37,000 from the sale, but received only an amount of $4,000;

(c) the evidence of Mr Hollis that he assisted in moving drug related equipment and chemicals from the Millmerran property to Mr Harper's Wellcamp home and that Mr Harper was there when that happened;

(d) Mr Harper paid for the precursor chemical that was the subject of count 15.

[184] The trial judge concluded that, notwithstanding that the jury rejected that Mr Harper procured Mr Williams to come into possession of the chemicals which were the subject of counts 4 to 15 and notwithstanding the jury's acquittals in respect of counts 2 and 3, those four pieces of evidence showed an involvement of Mr Harper "at some level" in the business of production and trafficking at the Millmerran property and "it also shows a continuity in your involvement over the period of time alleged in count 1 on the indictment".

[185] The trial judge also observed in respect of these four pieces of evidence:

> "… these four rather miscellaneous pieces of evidence are not in themselves terribly significant, but I think that they could be used in support of the verdict on count 1, and I think they're important because they show, as I say, continuous behaviour during quite a period of time encompassed by count 1."

[186] The trial judge accepted that Mr Hollis was a witness of truth, but that his evidence had little bearing on implicating Mr Harper in the offence of trafficking. The trial judge did not act on the hearsay evidence from Mr Hollis about Mr Harper, as Mr Williams was the source of that hearsay. In particular, the trial judge did not act on the circumstantial evidence from Mr Hollis about drugs at Mr Harper's Toowoomba workplace and the occasion when Mr Williams gave Mr Hollis money to give to Mr Harper. The trial judge was sceptical of the evidence given by each of Mr Poulton and Mr Bennett on the basis that each minimised Mr Harper's wrongdoing, so that when either of them did give evidence against Mr Harper's interests, the trial judge had no hesitation in accepting it. Except where Mr McClymont's evidence was inconsistent

with the jury verdicts, the trial judge accepted his evidence. The trial judge therefore found that Mr Harper brought up the topic with Mr McClymont about buying pseudoephedrine tablets for him and that Mr McClymont bought the tablets at $15 per box for which Mr Harper would then pay him $25 per box.

[187] The other findings the trial judge made on the basis of Mr McClymont's evidence were as follows. Mr Harper introduced Mr McClymont to selling methylamphetamine which Mr Harper provided on credit to him, with the quantity that Mr Harper provided to him increasing to ounce quantities. Mr McClymont onsold it or arranged for it to be onsold. Mr Harper told Mr McClymont on one occasion that the amount of cash in his briefcase was the day's float and was $17,000. There was also a gun in the briefcase. Mr Harper admitted to Mr McClymont that he was making methylamphetamine himself and the supply to Mr McClymont of methylamphetamine would sometimes be delayed for a short period, because Mr Harper had to organise "a cook" or "go and do a cook". Mr Harper told Mr McClymont about "cooks" having taken place at the Millmerran property. Mr Harper provided Mr McClymont with directions to navigate to a website where there were recipes to make drugs and provided him with the piece of paper containing the name of the cold and flu tablets containing pseudoephedrine.

[188] The trial judge summarised the findings on trafficking in these terms:

> "So in summary as to the trafficking, I find that in addition to the factual matters comprised in count 16, 17 and 18 on the indictment, you did have some involvement in the business operated by Gregory Williams, but the evidence is that that was a lesser involvement than Mr Williams and I certainly could not find that you were even equally culpable in that business for the purpose of sentencing you."

[189] The trial judge found that the trafficking occurred over the period particularised in the charge between 20 February 2001 and 31 October 2003 (which was a period of about 32 months). It is apparent from the sentencing remarks that the trial judge characterised Mr Harper's trafficking as "large scale offending".

Was there an error in the fact finding on sentence?

[190] The ultimate submission made on behalf of Mr Harper as to the facts to be found in respect of the trafficking is that the period of the trafficking must be limited to the period over which Mr Harper purchased the hypophosphorous acid which is the subject of counts 16 to 18 (between February and October 2003), Mr Harper had no involvement with the production business or the sale, supply or distribution of methylamphetamine beyond that period of eight months, and there was no real profit made by him, as the only unexplained income was the sum of $15,000 over a total period of 18 months.

[191] The first issue is whether the acquittals on counts 2 and 3 (which was based on Mr Williams' production of methylamphetamine during the period between 4 November 2002 and 8 February 2003) and the acquittals on counts 4 to 15 (which were based on Mr Williams' evidence that he procured the precursors for the production of methylamphetamine at Mr Harper's request) precluded the trial judge from proceeding to sentence for the trafficking on the basis that Mr Harper had some involvement in Mr Williams' production and/or trafficking of methylamphetamine.

[192] Trafficking includes obtaining the drugs from their source of production. The jury's acquittals on counts 2 and 3 did not preclude the trial judge from proceeding on the basis that Mr Williams was a source to Mr Harper of the methylamphetamine which he sold. As the prosecution case for counts 2 and 3 had been confined to those productions at which Mr Williams had alleged that Mr Harper was present, the acquittals in respect of those counts did not preclude the trial judge from acting on the evidence of Mr McClymont about the statements that were made to him by Mr Harper that were consistent with Mr Harper obtaining methylamphetamine from productions undertaken by Mr Williams or at the Millmerran property. As the jury must have accepted most of Mr McClymont's evidence to bring in the guilty verdict on count 1, it was open to the trial judge (who had the advantage of having seen and heard Mr McClymont) to act also on the evidence of Mr McClymont for the purpose of sentencing, except where it was inconsistent with the jury verdicts. It was also consistent with the jury's verdicts that the trial judge did not sentence Mr Harper on the basis that Mr Williams was acting under his direction in producing and trafficking in methylamphetamine. The quantity of the drugs sourced by Mr Harper from Mr Williams could therefore not be related directly to the purchases of precursor chemicals by Mr Williams, as that would be inconsistent with the jury verdicts on counts 4 to 15, but the trial judge did not proceed on that basis. The trial judge could not elaborate on the precise nature or the extent of the involvement of Mr Harper in Mr Williams' business, other than identifying the four miscellaneous pieces of evidence together with Mr McClymont's evidence which included Mr Harper's admissions to him to the effect that he sourced methylamphetamine from the Millmerran property, as supporting the verdict on count 1. Mr Harper's involvement with Mr Williams' business supported the trial judge's characterisation of Mr Harper's trafficking as large scale.

[193] In dealing with the theoretical calculation of the amount of methylamphetamine that could be produced from the purchases of hypophosphorous acid that were the subject of counts 16 to 18, the trial judge did refer to the trial evidence that showed what was produced at the production on 4 November 2002 resulted in a yield of methylamphetamine at slightly less than 50 per cent. Mr Harper complains that evidence was connected to Mr Williams as part of count 2 on which Mr Harper was acquitted. The reference to that evidence was done by the trial judge to illustrate the point about the difficulty in achieving the theoretical maximum production of methylamphetamine from the chemical reaction and was not attributing responsibility for that production to Mr Harper.

[194] Mr Harper also complains that in the sentencing the trial judge took into account the evidence of Mrs Illing on the trafficking after telling the jury they could not. In dealing with the jury's verdict on counts 16 to 18, the trial judge noted that the verdicts were "on the basis of a Crown case that the drugs were in your possession because you would either use them yourself to produce methylamphetamine or you would sell them to others who would produce methylamphetamine from them". The trial judge then noted that in relation to the sale of the hypophosphorous acid to others, there was the evidence of Mr Williams that Mr Harper had told him that he sold hypophosphorous acid to speed cooks, but that was corroborated by Mr McClymont's evidence, as well as the evidence of Mr Bennett and Mr Poulton. It was in that context that the trial judge then stated "And even the evidence of Mrs Illing was broadly corroborative of that idea". It was a reference in passing to Mrs Illing's evidence that did not add anything to what the trial judge had noted, in any case, from the evidence which the trial judge accepted of Mr McClymont, Mr Bennett and Mr Poulton.

[195] It is submitted on behalf of Mr Harper that the trial judge wrongly took into account that he paid for the precursor chemicals the subject of count 15 when Mr Harper was

acquitted of that count. There was incontrovertible evidence that Advanced Logistics paid for the invoice that related to count 15 on 20 February 2003 (exhibit 330) which was around the time the purchase by Mr Harper that was the subject of count 16 was made from Consolidated Chemical Company which was for delivery on 19 February 2003 (exhibit 95). It may be a fact which did not add much to the other evidence that provided a link between Mr Harper and the methylamphetamine produced by Mr Williams. It was a proved fact that was not inconsistent with the acquittal on count 15, as the payment was made on 20 February 2003 in respect of a delivery that had been made on 9 December 2002.

[196] Mr Harper also submitted that the trial judge erred in accepting Mr McClymont's evidence that Mr Harper procured Mr McClymont to buy pseudoephedrine tablets for him which Mr McClymont did and was paid by Mr Harper. The submission is based on an incorrect characterisation of the prosecution case on counts 2 and 3. Those counts did not cover the activity of procuring the pseudoephedrine tablets by Mr Harper.

[197] Mr McClymont's evidence had Mr Harper either procuring pseudoephedrine tablets from him or selling methylamphetamine to him over the period from 2001 to 2003. Mr McClymont's evidence therefore supported in general terms the period of the trafficking particularised for count 1 with the latter part of the period also coincident with the offending that was the subject of counts 16 to 18. Mr Williams was a source of methylamphetamine from mid 2001 until 7 February 2003. Mr Harper's purchases between February and October 2003 of large quantities of hypophosphorous acid was also consistent with seeking to ensure a sizable line of supply of methylamphetamine.

[198] The sentencing remarks showed the trial judge made careful findings of fact that reconciled the evidence which could be relied on for the purpose of sentencing with the jury verdicts. There were no errors by the trial judge in the fact finding on sentence on which Mr Harper could succeed in an appeal. It therefore is necessary to consider whether the sentences imposed by the trial judge were manifestly excessive.

Mr Harper's antecedents

[199] Mr Harper was born in April 1959. He had no relevant prior criminal history. He was convicted of two weapon offences that were detected on 4 November 2002 for which no conviction was recorded and he was fined $560. He was also dealt with in the District Court for an unlawful possession of a motor vehicle (a stolen truck) that was committed on 12 December 2004 for which no conviction was recorded and he was fined $2,000. He was also convicted and fined on 10 November 2009 for a Commonwealth offence of failing to make, file, statement of affairs in relation to his bankruptcy. The trial judge took into account expressly that Mr Harper had first been charged in October 2005 and there was an unusually long delay until the trial, of which only the last year of the delay was due to issues raised by the defence, and Mr Harper was therefore entitled to consideration that "he had these charges hanging over your head, perhaps, for five years longer than would normally be the case". The trial judge noted as relevant Mr Harper's lack of offending both before and after the offending for which he was being sentenced.

[200] At the time of the offending, Mr Harper was self-employed and operating a transport business of some magnitude and he continued working in that business until 2008. Subsequently he worked in a business providing services to the mining industry. He was married with one adult child. There was no evidence of his being drug dependent

at the time of the offending or using drugs. The motives for the offending were "cynical and financial". The trial lasted for two and a half weeks and the prosecution was put to proof on every point. As the trial judge observed when sentencing, there was nothing to indicate any remorse for the offending.

[201] The trial judge took into account there was no evidence of any opulent or excessive life style enjoyed by Mr Harper "which sometimes accompanies large scale offending" and observed that "The question of what money you made from your offending is rather vexed". The trial judge noted the financial analysis for unexplained income showed there was nothing significant and unexplained in Mr Harper's income which indicated that it was probable there were transactions in cash outside the books which would not expect to be caught by such analysis. (In fact, that was reflected by Mr McClymont's evidence of seeing the cash "float" of $17,000 in Mr Harper's briefcase.)

Comparable sentences

[202] It was common ground before the trial judge that, even though methylamphetamine changed from a schedule 2 to a schedule 1 drug on 21 September 2001, the maximum penalty for count 1 remained 20 years' imprisonment.

[203] The trial judge found that the sentence imposed on Mr Hollis was not particularly relevant in sentencing Mr Harper as there was very little overlap between the offending to which Mr Hollis pleaded guilty and the offending of which Mr Harper was found guilty. The trial judge accepted in some respects there ought to be some parity with the sentence imposed on Mr Williams, but concluded that, for a number of factors, it was dangerous to proceed on the basis that Mr Williams' sentence was "a particularly comparable sentence" to that which should be imposed on Mr Harper. These factors were that the sentencing was proceeding on a different factual basis than that Mr Williams was working in Mr Harper's operation in producing and trafficking methylamphetamine, because of the jury's rejection of Mr Williams' evidence; and Mr Williams pleaded guilty and cooperated for the benefit on sentencing under s 13A of the *Penalties and Sentences Act* 1992 (Qld).

[204] Mr Williams was sentenced on 20 July 2007 (unreported, Toowoomba Supreme Court, Ann Lyons J) for trafficking in methylamphetamine between 1 May 2001 and 8 February 2003 (about 21 months) to imprisonment for nine years with an eligibility for parole date fixed after he served three years. He was also sentenced to concurrent sentences for two counts of production of methylamphetamine and other related charges. He was sentenced on the basis that he produced methylamphetamine at the Millmerran property every two or three weeks where each cook would produce one to five ounces of pure methylamphetamine that would be cut in a ratio of one to six and onsold by other people and by Mr Williams himself. It was an aggravating feature that the search warrant executed on 4 November 2002 did not stop the productions, and more glassware was found when the next warrant was executed on 7 February 2003. The notional head sentence for trafficking, but for Mr Williams' undertaking for the purpose of s 13A of the *Penalties and Sentences Act* 1992 (Qld), was imprisonment of 12 years.

[205] The trial judge found two comparative sentences useful: *R v Gibson* [2008] QCA 367 and *R v Anderson* (unreported, Douglas J, SC No 404 of 2013, 15 August 2013).

[206] An application for leave to appeal in *Gibson* by each of two brothers against a sentence of imprisonment of 11 years (with a serious violent offence declaration) after guilty pleas for trafficking in methylamphetamine between March 2004 and January 2005

was refused. One brother was 52 years old when the offences occurred and the other was 49 years old. Neither had any relevant criminal history. Their co-offender introduced them to the amphetamine trade and they organised finance for production of methylamphetamine, sourcing precursor chemicals, glassware and other equipment and engaging their co-offender as cook and assistant. There were three cooks, each of which produced about 450 grams of methylamphetamine and the police interrupted the fourth cook. Over the course of the business regular supplies of methylamphetamine were made to the co-offender who was a vendor to street dealers. The brothers' ground of appeal was that the sentences imposed on them was substantially greater than those imposed upon their co-offender who was sentenced to imprisonment of nine years with a recommendation for parole after serving six years. The Court of Appeal held there was no error in the conclusion of the sentencing judge that the brothers' position in the hierarchy was superior to their co-offender.

[207] Because the jury in Mr Harper's trial had rejected the prosecution case that Mr Williams was producing methylamphetamine at the request of Mr Harper, the trial judge treated *Gibson* as a favourable comparative sentence on the basis that the brothers were at a high level of organising other people to make drugs for them on a wholesale basis, but as unfavourable to the extent there were only three cooks in *Gibson*, where the facts which the trial judge found in relation to Mr Harper showed a much longer period of involvement in trafficking.

[208] In *Anderson*, the defendant pleaded guilty to two counts of production of methylamphetamine that took place over the period between 14 February 2010 and 7 June 2011, two counts of supplying dangerous drugs and possession of things associated with the production of the drugs. The defendant adopted aliases, made enquiries of laboratory and equipment supply stores, and purchased for more than $40,000 a large quantity of precursor chemicals and equipment used in the production of amphetamines, including methylamphetamine and MDMA. A realistic yield from the production of the substances that were located was 750 grams of methylamphetamine. The defendant had a significant drug history and his primary motivation in engaging in the criminal conduct was to gain access to drugs of dependence. He was sentenced to imprisonment of six and one-half years. A suspended sentence of 12 months was activated cumulative upon the sentence and parole eligibility was fixed after one-third of the sentence was served, taking into account the pre-sentence custody.

[209] The trial judge distinguished *Anderson* on the basis the defendant in that matter had a significant drug history, was younger than Mr Harper, and put before the court considerable material as to the adverse circumstances in which he grew up and the efforts he had made to rehabilitate himself.

[210] On this application, Mr Harper relied on *R v Sullivan* [2009] QCA 344 where Mr Sullivan was re-sentenced on appeal to six and one-half years' imprisonment with a date for eligibility for parole after serving two and one-half years' imprisonment after pleading guilty to trafficking in MDMA between 14 December 2000 and 17 February 2005. As a result of an error in a factual finding made by the sentencing judge in taking into account Mr Sullivan's activities preparatory to the manufacture and sale by him of MDMA tablets as part of the trafficking, the re-sentencing took place on the basis of the supply of MDMA powder to Mr Sullivan's brother-in-law for $15,000 in May 2001, the obtaining of the pill press, the setting up of the laboratory and the production of approximately 6,000 MDMA pills, the supply of those pills to the brother-in-law in 2002 and 2003, the payment by the brother-in-law of $42,500 to

Mr Sullivan and the brother-in-law's debt of $70,000 to Mr Sullivan arising out of the supply of the pills. Mr Sullivan was in Thailand between 28 December 2002 and 26 March 2004 and the only relevant trafficking activity during that period was his receipt of moneys on account of past sales of the pills. The sentencing was complicated by the fact that Mr Sullivan was sentenced in New South Wales on 24 February 2009 to a term of six years' imprisonment for manufacturing not less than a commercial quantity of MDMA between 1 and 3 December 2002. Both the Crown and Mr Sullivan's counsel had agreed at the sentence that four and one-half years of custody already served in New South Wales should be deducted from the head sentence for the trafficking imposed in Queensland. Mr Sullivan was 51 years old when sentenced and had a criminal history which included convictions for relatively minor drug offences in 1990, apart from the New South Wales conviction. He pleaded guilty and co-operated with authorities, as a result of which he was in protective custody. He had health problems which made his imprisonment more onerous than usual. Muir JA on the basis of the comparable sentences analysed at [34]-[43] would have sentenced Mr Sullivan to a head sentence of 11 years' imprisonment and arrived at the ultimate sentence of six and one-half years by deducting the agreed amount of four and one-half years for the New South Wales custody.

[211] Although Mr Harper relied on the sentence imposed on Mr Sullivan to support the contention that the appropriate sentence for count 1 was imprisonment between seven years to nine years, the submission overlooked that the sentence of six and one-half years for Mr Sullivan was the result of reducing what otherwise would have been the head sentence of 11 years' imprisonment for trafficking by the period of time that had been served in New South Wales for related offending and the head sentence of 11 years was for a guilty plea. Although the trafficking count against Mr Sullivan was particularised in respect of a period of over four years, most of the trafficking took place in the first two years of the period.

[212] On the hearing of this application Mr Harper also relied on *R v Bayeh* [2008] VSC 636 and *Rawlings v R* [2006] NSWCCA 84 as comparable sentences where the offending was concerned with precursor chemicals, rather than trafficking in methylamphetamine consistent with the approach of counsel for Mr Harper to endeavour to confine the factual basis for the sentencing to the purchases of hypophosphorous acid which were the subject of counts 16 to 18. As that is not the factual basis on which the trial judge sentenced or in respect of which the issue of manifest excessiveness of the sentences falls to be considered, there is little point in analysing these sentences.

Were the sentences manifestly excessive?

[213] It was a relevant consideration that Mr Harper was being sentenced after trial. It was argued on behalf of Mr Harper that as he was acquitted of 14 charges, there was a legitimate forensic purpose in his matters proceeding to trial. That argument carries no weight, when it was not suggested that prior to trial Mr Harper had offered to plead guilty to the charges of which he was found guilty, so that he could say he was otherwise proceeding to trial on the charges of which he was ultimately acquitted.

[214] It was an aggravating feature that Mr Harper was not dissuaded from trafficking in methylamphetamine by each of Mr Williams' arrests or his own interview with the police on 4 November 2002.

[215] The trial judge was cognisant of the consequence of imposing a sentence of 10 years' imprisonment for trafficking in triggering an automatic declaration of conviction of a serious violent offence.

[216] Large scale trafficking in what was then a schedule 2 drug over a period more in the vicinity of a couple of years than a few months by a mature offender who was not drug dependent and could be motivated only by financial reward must attract a substantial term of imprisonment. As Mr Harper was being sentenced after trial, the sentence of 10 years' imprisonment sits well with the notional sentence of 12 years' imprisonment for Mr Williams and with the comparable sentences of *Gibson* and *Sullivan* (before the reduction was made for the custody in New South Wales). The sentence of 10 years' imprisonment for trafficking reflected a sound exercise of the sentencing discretion. The concurrent sentence of five years' imprisonment for each of counts 16 to 18 where the maximum penalty was 15 years' imprisonment was also appropriate in the circumstances, particularly the total quantity of hypophosphorous acid covered by these three counts. The application cannot succeed on the ground the sentences were manifestly excessive.

Orders

[217] The orders which should be made are:

1. It is ordered that these reasons for judgment may disclose publicly information that relates to the examination of witnesses before the Australian Crime Commission in 2004 and 2005 in connection with Mr Harper to the extent disclosed in these reasons.
2. Exhibit CT1 (Australian Crime Commission transcripts comprising pages 2 to 213) to the affidavit of Christin Tom filed on 13 March 2015 in this appeal must be detached from the affidavit and placed in an envelope, and the envelope sealed and marked "Not to be opened except by the Order of the Court or Judge".
3. Appeal against conviction dismissed.
4. Application for leave to appeal against sentence refused.

[218] **BURNS J:** I agree with the reasons of, and the orders proposed by, Mullins J.