



Précis Paper

The Approach to Analogue Drugs under the *Drugs Misuse and Trafficking Act 1985* (NSW)

This is a presentation by three experienced criminal lawyers about a topical issue in the prosecution of drug crimes.

Discussion Includes

- Overview and material facts
- Trial tactics and requirement for disclosure under the *Criminal Procedure Act 1986* (NSW)
- Analogue drugs provisions
- Conflict between *Drugs Misuse and Trafficking Act 1985* (NSW) and *Poisons and Therapeutic Drugs Act 1966* (NSW)
- Costs
- Approach under Commonwealth legislation

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The Approach to Analogue Drugs under the *Drugs Misuse and Trafficking Act 1985* (NSW)

1. In this edition of BenchTV, Michael McHugh SC (16 Wardell Chambers, Sydney), Michael Gleeson (Barrister, 16 Wardell Chambers, Sydney) and Andrew Tiedt (Partner, Armstrong Legal, Sydney) discuss the recent decision of *Woods v R* [2017] NSWCCA 5.

Overview and Material Facts

2. The defendant was arraigned in the District Court on a charge of knowingly take part in the supply of a prohibited drug, namely dextromethorphan, in an amount not less than a large commercial quantity.
3. The issue in the case related to the nature of the drug, dextromethorphan. Under the *Drugs Misuse and Trafficking Act 1985* (NSW) ("*DMT Act*"), a prohibited drug means a substance specified in Schedule 1 (s 3). Dextromethorphan, which is a cough suppressant found in common pharmaceutical products, is not a drug that is listed on Schedule 1, however the Prosecution sought to argue at trial that it was an isomer of methorphan, a dangerous opioid. Schedule 1 also contains a provision prohibiting analogue drugs, and provides in relevant part:

Prohibited plant or prohibited drug

Any substance that is an analogue of a drug prescribed in this Schedule is not separately specified in this Schedule and is, in relation to the drug, any of the following:

- (a) a structural isomer having the same constituent groups as the drug,*
- (b) a structural modification obtained in one or more of the following ways...*

4. The analogue provisions allow a drug which is not quite the same as a prohibited drug, but very similar, to be considered as a prohibited drug. This is a way to prohibit new drugs that may have a molecule that differs from a prohibited drug but have the same effect.
5. Before a jury was empanelled, the defendant asked Syme DCJ to quash the indictment. The application was founded on the submission that dextromethorphan was not a prohibited drug under the *DMT Act*. After hearing evidence and argument, the judge rejected the challenge to the indictment.
6. The applicant appealed against the interlocutory judgment under s 5F(3)(b) of the *Criminal Appeal Act 1912* (NSW). The sole ground of appeal was that the trial judge erred in finding that dextromethorphan is a prohibited drug under the *DMT Act*.

Tactical Issues before Trial

7. Dextromethorphan is also a restricted substance under the *Poisons and Therapeutic Goods Act 1966* (NSW) ("the *PTG Act*"). This means that a prescription is required to obtain the drug, but it is a legal drug to possess as long as several preconditions are met. The quantity possessed by Mr Woods exceeded the legal limit under the *PTG Act*.
8. If Mr Woods was charged under the *PTG Act*, he would be subject to a maximum penalty of two years' imprisonment. In contrast, the charge under the *DMT Act* attracted a maximum penalty of life imprisonment. Charges under the *PTG Act* had to be brought within two years.
9. The lawyers for Mr Wood therefore had to make a tactical determination whether to disclose their legal challenge early in the game. If the argument that dextromethorphan was not a prohibited drug under the *DMT Act* was brought to the attention of the prosecution immediately, Mr Woods would have been liable to recharging under the *PTG Act*. However, s 143 of the *Criminal Procedure Act 1986* (NSW) requires the defence to put on a notice setting out their defence, and so early disclosure was ultimately required.
10. The parties therefore agreed that the issue of whether dextromethorphan was a prohibited drug should be determined pre-trial.

Decision of the Court of Criminal Appeal

11. On appeal, the defendant sought to draw a distinction between methorphan – a dangerous opioid – and dextromethorphan – a cough suppressant.
12. Ultimately, the Crown conceded that dextromethorphan was not a prohibited drug under the *DMT Act* on the basis of interpretation of the definition of "prohibited drug" and "substance", and restrictions to the application of the analogue provisions in Sch 1. The Crown conceded that Mr Woods had been charged with an offence unknown to the law.
13. The issue then became one of costs. Mr Woods was privately funded and had undertaken significant expenditure in relation to the case. He was also a person of prior good character and had not been in trouble before. The defendant argued that costs should be paid from the time when the Crown first knew that the drug was dextromethorphan.
14. The Crown submitted that the Court needed to find that the applicant had been "discharged" in order for a certificate to be granted under the *Costs in Criminal Cases Act 1967* (NSW), because the applicant had not been acquitted nor had the Director of Public

Prosecutions directed that no further proceedings be taken. The Crown did not concede that the applicant had been "discharged" in accordance with the *Costs in Criminal Cases Act*.

15. The case of *DAO v R (No 3)* [2016] NSWCCA 282 helped to clarify that "discharge" was not limited to being discharged pre-committal, but included various other ways in which a matter could be terminated in a defendant's favour. The NSWCCA ultimately found that the quashing of the indictment and the disposal of the proceedings in the defendant's favour meant that he had been discharged in relation to the offence concerned, and costs were awarded in the defendant's favour.

BIOGRAPHY

Michael McHugh SC

6 Wardell Chambers, Sydney

Michael McHugh was called to the NSW Bar in 1999 and appointed silk in 2012. Michael maintains a wide ranging trial and appellate practice across civil and criminal jurisdictions. He acts regularly as a commercial arbitrator and is recommended as leading senior counsel in transport matters in Doyle's Guide. He has also enjoyed roles as secretary and treasurer of the NSW Bar Association and regularly publishes, including parts of the Thomson Reuters Loose-leaf: *NSW Civil Practice & Procedure*. Outside of the law Michael is motorcycling enthusiast.

Michael Gleeson

Barrister, 16 Wardell Chambers, Sydney

Michael Gleeson was called to the NSW Bar in 2010 and was previously a barrister at the UK Bar since 1999. Michael has developed a practice in common law, predominantly in the areas of crime, family, administrative law and personal injury. He specialises in heavyweight criminal law cases and has developed a well-balanced practice defending and as a prosecutor. Michael supplements his criminal practice with sports law, being the current Legal Director for Triathlon NSW, regularly delivering seminars on the topic and assisting in drafting the Triathlon NSW Child Protection Policy.

Andrew Tiedt

Partner, Armstrong Legal, Sydney

Andrew Tiedt was admitted to the profession in 2007. Andrew is a Partner in the Criminal Law team at Armstrong Legal and has handled cases across the entire spectrum, including prosecutions for murder, fraud, violence and drug offences. Andrew has also penned opinion pieces for various news outlets including the *ABC* and *The Guardian*.

BIBLIOGRAPHY

Focus Case

Woods v R [2017] NSWCCA 5

Benchmark Link

https://benchmarkinc.com.au/benchmark/weekly_criminal/benchmark_17-02-2017_weekly_criminal_law_review.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/58900db1e4b058596cba397b>

Cases

DAO v R (No 3) [2016] NSWCCA 282

Legislation

Drugs Misuse and Trafficking Act 1985 (NSW)
Poisons and Therapeutic Goods Act 1966 (NSW)

Criminal Appeal Act 1912 (NSW)
Criminal Procedure Act 1986 (NSW)
Costs in Criminal Cases Act 1967 (NSW)