

The Busy Practitioner's Quick Guide to Plea Traversals
Byron Bay Boutique CBD
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Introduction

1. Plea traversals raise considerations of:
 - a. Legal principle;
 - b. Ethical obligations; and
 - c. Procedural questions.
2. This paper is designed as a 'quickstart guide' to plea traversals. It aims to assist practitioners with recognising what issues arise when an accused person wishes to traverse their plea. It is not intended to be comprehensive, but to point practitioners in the right direction.
3. This paper does not consider cases in which an accused person enters a plea of guilty in a committal matter in the Local Court, but wishes to reverse that position in the District Court. In that situation, the accused person is not required to adhere to their plea of guilty and may simply advise the court and proceed to trial.¹

The Law of Plea Traversals

4. In late 2022, the Court of Criminal Appeal considered the case of a man who unexpectedly entered a plea of guilty when arraigned at the start of a pre-trial hearing ahead of his scheduled murder trial in *White v R* [2022] NSWCCA 241. In doing so, the Court held that different tests apply in cases where an accused person seeks to challenge their guilt following a plea of guilty, depending on the stage of the proceedings at which the accused seeks to do so:
 - i. In cases where the person is not yet convicted; the person may apply to withdraw their plea prior to being sentenced, and an *interests of justice* test applies;² and
 - ii. In cases where the person had been convicted; a conviction appeal is required, and a *miscarriage of justice* test applies on appeal.³
5. The miscarriage of justice test reflects the way that plea withdrawals prior to sentence have previously been approached by courts. The interests of justice test marks a substantial departure from the miscarriage of justice test that was previously applied in such matters.

¹ Section 103(1) *Criminal Procedure Act*. Note however this will have implications for the discount applicable for any later plea of guilty.

² *White v R* [2022] NSWCCA 241 at [60]-[61]

³ *White v R* [2022] NSWCCA 241 at [58], [62]-[63].

Has the person been convicted?

6. It is not always straightforward to determine whether someone has been convicted.⁴ In matters that are not jury trials, it will generally be the case that the accused is not convicted until the word 'convicted' is pronounced by the Magistrate or Judge in court. That order should then either appear on the court papers, or appear on the Justice Link court record. In situations of doubt, the principle of legality provides that the person should be considered not to have been convicted, and the interests of justice test should be applied rather than the miscarriage of justice test.
7. A person who enters a plea of guilty before a jury will be considered to have been convicted at the time the plea is accepted by the court. This is because it is the jury, not the judge, who has charge of the accused between empanelment and verdict; a judge does not then have jurisdiction to permit the plea to be withdrawn.⁵
8. Following this reasoning, a person who enters a plea of guilty halfway through a summary hearing, or judge-alone trial, is not convicted without further order of the court and may apply to withdraw their plea prior to sentencing. This is because the magistrate or judge retains the jurisdiction to permit the withdrawal of plea at all times prior to conviction.

Withdrawing a plea prior to conviction

9. A magistrate or judge has a broad discretion when applying the interests of justice test. It is wrong to say that the accused bears a 'substantial' or 'heavy' onus of proof, and it is also wrong to say that an order to withdraw a plea should only be granted 'in clear cases and very sparingly.' These concepts apply to the miscarriage of justice test on conviction appeal, and not to the interests of justice test that applies to withdrawal of plea prior to conviction.⁶
10. A person may plead guilty even if they are not.⁷ Therefore, whether the applicant is in fact guilty is not decisive of the question of whether their plea of guilty may be withdrawn. However, this does not mean the question of guilt is not relevant. A court must be '*vigilant to ensure that the plea in truth is being proffered in the interests of the person entering it. That will be most unlikely if the stated reasons for entering it are not rational or fully informed.*' The accused's intellectual capacity, and the extent of any advice they received and properly understood, may also be relevant.⁸

⁴ See generally *Maxwell v The Queen* (1996) 184 CLR 501; [1996] HCA 46

⁵ *Criminal Procedure Act* s157; *R v Chiron* [1980] 1 NSWLR 218 at 226–227.

⁶ *White v R* [2022] NSWCCA 241 at [68]–[69].

⁷ *Meissner v R* (1995) 184 CLR 132.

⁸ *White v R* [2022] NSWCCA 241 at [80].

11. A non-exhaustive list of factors that apply to the interests of justice test is annexed to this paper.

Appealing a conviction entered after plea of guilty

12. A non-exhaustive list of factors relevant to the miscarriage of justice test is annexed to this paper. For further examination of this test, cases considering going behind a plea of guilty on a conviction appeal are discussed in *White*.

Practical steps

Whether to withdraw

13. If a client for whom you have entered a plea of guilty expresses a wish to traverse the plea, the prudent course is to withdraw from the matter. This is because the conduct of an application to withdraw a plea very commonly involves the practitioner who entered the plea giving evidence, and the client and practitioner giving inconsistent accounts of the circumstances of the entry of the plea. The solicitor's rules, and barrister's rules, each restrain practitioners from acting as witnesses in their client's case, and require practitioners to act in the client's interests even against their own.⁹

Evidence from client

14. It is not a requirement on an application to withdraw a guilty plea that there be evidence from the accused person. However, the onus for an application to withdraw a plea of guilty rests upon the accused person.¹⁰ In most cases, it is difficult to discharge this onus without putting on evidence in support of the application.

15. An affidavit from the client is a practical and efficient way of putting relevant matters in evidence before the court.

16. Bear in mind that an affidavit is evidence, and a client may be cross-examined on their affidavit in the same way as if they gave the evidence in the witness box. This means that the affidavit should:

- a. Be in the client's words as much as possible; and
- b. Focus on evidence that is relevant to whether it is in the interests of justice to allow the plea to be withdrawn.

17. Where the accused has not yet been convicted, there are very likely to be scenarios in which a court may be satisfied that an accused should be

⁹See Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, Rules 4, 12, 27; Legal Profession Uniform Conduct (Barristers) Rules 2015 Rules 13, 35, 101, 120.

¹⁰ *White v R* [2022] NSWCCA 241 at [68].

given leave to withdraw their plea without formal evidence. This has not been tested in reported cases in the short time since the Court of Criminal Appeal's decision in *White*.

Evidence of former representatives

18. It is not a requirement on an application to withdraw a guilty plea that there be evidence from the legal representative who entered the plea.
19. Where an accused seeks to point to poor advice by their legal representative, confusion on their part about the advice they received, or a related matter, a prosecutor resisting the application of an accused person to withdraw a plea of guilty may seek to rebut such evidence by calling evidence from the legal representative who entered the plea.
20. The legal representative who entered the plea must not breach client legal privilege by disclosing such matters without the client's authority. The prosecutor may seek that the accused person waive legal privilege, such that the representative would be permitted to disclose matters relating to the entry of the plea.¹¹ They would do so by requesting that the accused provide a waiver of legal privilege for their former legal representative via their current representative.
21. The accused is not obliged to provide such a waiver. However, refusal to provide authority may affect whether the court is satisfied that the accused person has satisfied the court to grant the application to withdraw the plea.
22. Where a practitioner receives a written waiver of legal privilege from a former client, the practitioner should carefully consider the terms of the waiver before responding to requests from a prosecutor for an affidavit regarding the circumstances of the entry of the plea. Waivers vary in their terms, and practitioners must be careful not to divulge information not covered by the waiver.
23. Where the practitioner is satisfied a waiver authorises them to disclose the information sought, the practitioner should comply with a request for the information. This is consistent with a practitioner's duty to the court and the administration of justice.¹² The affidavit should be focused, and as concise as the circumstances will allow.
24. As with any affidavit, the former representative may be required for cross-examination on the application.

¹¹ Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, Rule 9; Legal Profession Uniform Conduct (Barristers) Rules 2015 Rule 114.

¹² *Momoa v R* [2020] NSWCCA 328 at [4]-[12].

Argument

25. Submissions should be directed to whether it is in the interests of justice to allow the plea to be withdrawn, or whether the entry of the plea caused a miscarriage of justice, depending on the test applicable.

26. The court is not limited to evidence provided by the parties in determining this question.

Further questions

27. I can be contacted at caitlin.akthar@forbeschambers.com.au for questions relating to this paper, or my others.

Caitlin Akthar
Barrister, Forbes Chambers

Annexure 1: Factors relevant to whether it is in the interests of justice to grant an application to withdraw a plea prior to conviction

Taken from White v R [2022] NSWCCA 241 at [65]. This list is non-exhaustive.

1. the circumstances in which the plea was given;
2. the nature and formality of the plea, involving as it does the admission of all the formal elements of the offence;
3. the importance of the role of trial by jury in the criminal justice system;
4. the time between the entry of the plea and the application for its withdrawal;
5. any prejudice to the prosecution that might arise from the withdrawal of the plea;
6. the complexity of the elements of the charged offence;
7. whether all of the relevant facts upon which the prosecutor intended to rely were fully known to the accused;
8. the nature and extent of legal advice received by the accused before entering the plea;
9. the seriousness of the alleged offending and thus the likely consequences in terms of penalty;
10. the subjective circumstances of the accused;
11. any intellectual or cognitive impairment suffered by the accused, notwithstanding their fitness to plead;
12. any reason to suppose that the accused was not thoroughly aware of what they were doing;
13. any extraneous factors that bore upon the making of the plea at the time it was made, including inducement by threats, fraud or other impropriety;
14. whether the accused has been persuaded to enter a plea by reason of imprudent and inappropriate advice tendered by their legal representatives;
15. any explanation that has been proffered by the accused for the application to withdraw their guilty plea;
16. any consequences to victims, witnesses or third parties that might arise from the withdrawal of the plea; and
17. whether, on the material before the Court, there is a real question about the accused's guilt to the charge in respect of which the plea has been entered.

Annexure 2: Factors relevant to whether a miscarriage of justice was occasioned by the entry of a plea of guilty

Taken from White v R [2022] NSWCCA 241 at [70]. This list is non-exhaustive. These matters may also be relevant to cases where the interests of justice test applies.

1. the nature of the charge to which the plea has been entered is not appreciated;
2. the plea is not “a free and voluntary confession”;
3. the “plea [is] not really attributable to a genuine consciousness of guilt”;
4. there has been a “mistake or other circumstances affecting the integrity of the plea as an admission of guilt”;
5. the plea has been “induced by threats or other impropriety” and the applicant would not otherwise have pleaded guilty;
6. the plea is not unequivocal or is made in circumstances suggesting it is not a true admission of guilt; and
7. “the person who entered the plea was not in possession of all of the facts and did not entertain a genuine consciousness of guilt”.