HIGH COURT OF AUSTRALIA

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Form 27A—Appellant's submissions

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **IAN MICHAEL MACDONALD**
Appellant

and

THE KING
Respondent

APPELLANT'S SUBMISSIONS

PART I INTERNET PUBLICATION

1. This submission is in a form suitable for publication on the internet.

PART II ISSUES

2. The issues in this appeal are as specified in Part II of the submissions of Moses Obeid in S89/2025.

PART III SECTION 78B NOTICE

3. Notice is not required.

PART IV DECISIONS BELOW

4. The decision of the Court of Criminal Appeal (**CCA**) is reported as *Macdonald v R; Obeid v R; Obeid v R* [2023] NSWCCA 250; 112 NSWLR 402; 412 ALR 167 (**J**) (note: paragraphs [99] to [560] are not included in the New South Wales Law Reports).

5. The primary judgment is reported as *R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 17)* [2021] NSWSC 858; (2021) 290 A Crim R 264 (**TJ**) (note: paragraphs [160] to [2045] are not included in the Australian Criminal Reports).

PART V RELEVANT FACTS

6. The Appellant (**Mr Macdonald**) adopts the factual summary given in Part V of the submissions of Moses Obeid in S89/2025.

PART VI ARGUMENT

A. Introduction

7. Mr Macdonald adopts the argument in Part VI of the submissions of Moses Obeid in S89/2025. These submissions are further to those submissions.

8. An agreement to do an unlawful act, whether that act is the object of the agreement or merely an agreed incident of achieving an otherwise lawful object, has long been understood to be the essence of a common law criminal conspiracy.

9. The Crown at trial was unambiguous that there was no particular act which was, or could have been, agreed upon by the Appellants. An acquittal should have followed. The CCA should have upheld Ground 1 (raised by all Appellants, but argued in particular by Moses Obeid), that there was no conspiracy as a matter of law: **ACAB 675[20]**. It erred in not doing so.

10. Acceptance that the Crown may prosecute a conspiracy based upon no agreed act amounts to an augmentation and enlargement of the common law offence, which should be resisted by this Court.

B. Common law conspiracy requires an agreement to do an unlawful act

11. In New South Wales, liability for conspiracy has no statutory foundation, other than *sui generis* conspiracies to commit certain prescribed statutory offences (of which there are few[1]). Those statutory offences do not enumerate the elements of a conspiracy, but rather borrow from the common law.

<u>The agreement</u>

12. Essential to any conspiracy is "*the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means*": *Rex v Jones* (1832) 110 ER 485 at 487 (Denman CJ); *Mulcahy v The Queen* (1868) LR 3 HL 306 at 317 (Willes J); *R v* ***Rogerson*** (1992)

[1] Conspiracy to murder (*Crimes Act 1900* (NSW) s 26), conspiracy to commit offences under the *Firearms Act 1996* (NSW) outside NSW (section 51C of that Act); conspiracy to commit offences under the *Drug Misuse and Trafficking Act 1985* (NSW) (section 26 of that Act).

174 CLR 268 at 280-281 (Brennan and Toohey JJ) (**the Denman antithesis**).

13. The gist of a conspiracy is an agreement to do an act: *The Poulterer's Case* (1611) 77 ER 813 at 815; *R v* ***Gerakiteys*** (1984) 153 CLR 317 at 334 (Deane J); see also at 327 (Brennan J). The identification of the act or acts agreed upon to carry out the object of the conspiracy is of fundamental importance in ascertaining the bounds of criminal liability for an alleged criminal conspirator: Peter **Gillies**, *The Law of Criminal Conspiracy* (The Federation Press 1990, 2nd ed), 22-23.

14. The "Denman antithesis" expressly employs the terminology of "acts". The caselaw is nonetheless replete with references to conspiracies having unlawful "objects" or "purposes". This should not be misunderstood. In cases where an agreement to do an "unlawful act" is alleged, the object or purpose of the agreement is the unlawful act or some object or purpose to which the unlawful act is intrinsic. In cases where an agreement is to do a "lawful act" by "unlawful means", it is the unlawful means deployed in pursuit of a lawful object which makes the conspiracy a crime. This case is one where the object of the conspiracy was the commission of an unlawful act.

15. In the present context, an "*unlawful*" act refers to an act constituting a criminal offence.

16. It is critical to distinguish, on the one hand, a mere expectation that the unlawful act occur, as opposed to the making of an agreement that such an act occur: *R v* ***Trudgeon*** (1988) 39 A Crim R 252 at 257 (Gleeson CJ) and 265 (Lee CJ at CL). Only the latter will ground a conspiracy.

17. It is not enough (of itself) to look at parties' unlawful activities and dealings and impute to them "*an agreement with each other and a mutual intention to achieve the general unlawful object suggested by the totality of their individual unlawful practices"*. Rather, agreement to achieve the object (being the commission of the unlawful act, or the achievement of a lawful act by unlawful means) must be shown: *Trudgeon* at 264 (Lee CJ at CL, Loveday J agreeing).

18. There is a distinction between those cases where parties are merely negotiating and those where parties have reached an agreement to do something (even conditionally). Where "*matters left outstanding and reserved are of a sufficiently substantial nature, it may well be that the case will fall on the other side of the fence, and it will be said that the matter is merely a matter of negotiation*": *R v* ***O'Brien*** (1974) 59 Cr App R 222 at 225-226 citing *R v* ***Mills*** (1963) 47 Cr App R 49 at 54.

The "mental element"

19. As agreement to do an act is the gist of the offence, it has been suggested that the distinction between the actus reus and the mental element is "*fraught, if not meaningless*": ***Peters*** *v The Queen* (1998) 194 CLR 202 at [54].

20. Nonetheless, "*the common law offence of conspiracy requires that an accused person know the facts that make the proposed act or acts unlawful*": *R v* ***LK*** (2010) 244 CLR 177 at [114] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also ***Giorgianni*** *v The Queen* (1985) 156 CLR 473 at 481 (Gibbs CJ) and 506-507 (Wilson, Deane and Dawson JJ). The proposed "*act or acts*" are those which are the subject of the agreement. Expressed differently, "*The question is, 'What did they agree to do? If what they agreed to do was, on the facts known to them, an unlawful act, they are guilty of conspiracy … If, on the facts known to them what they agreed to do was lawful, they are not rendered artificially guilty by the existence of other facts, not known to them, giving a different and criminal quality to the act agreed.*": ***Churchill*** *v Walton* [1967] 2 AC 224 at 237 (Viscount Dilhorne, with whom the balance of the Court agreed) (emphasis added).

21. Recklessness as to the matters rendering the agreed acts(s) unlawful is not sufficient: *Giorgianni* at 506 (Wilson, Deane and Dawson JJ); *LK* at [77] (French CJ) and [141] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

22. Where the conspiracy alleged has a crime as its object, the matters that make the proposed act unlawful include the act itself and all of the other facts which comprise the elements of the offence. A conspiracy to commit an armed robbery with a dangerous weapon (*Crimes Act 1900* (NSW) s 97) could not be made out unless the conspirators were aware a dangerous weapon would be used. A conspiracy to commit an aggravated break, enter and commit serious indictable offence (*Crimes Act 1900* (NSW) s 112(2)) could not be made out unless the conspirators were aware of the facts that would give rise to the "*circumstances of aggravation*".

23. Knowledge of those matters must also be accompanied by an intention that the agreement the subject of the conspiracy be carried into effect: *Gerakiteys* at 320 (Gibbs CJ), 323 (Murphy J), 327 (Brennan J) and 334 (Deane J); see also *Peters* at [55] (McHugh J).

24. The requirement of actual knowledge of the matters which render the agreed act unlawful directs attention to the agreed act itself, which is fundamental to the assessment

of the putative conspirators' state of mind.

C. The CCA's decision enlarges the offence of conspiracy

25. Having regard to the now uncontroversial elements of conspiracy, the Crown's approach to the prosecution of this alleged conspiracy could only be correct if this Court were to enlarge the offence of conspiracy to accommodate circumstances where not only is no agreed act alleged, but it is accepted that no act could have been agreed.

26. The Crown "*expressly disavowed any case that at the time the agreement was forged the accused (including Mr Macdonald) knew or could have known how or by what manner he would commit the offence*": TJ[105]; **ACAB 44[105]**. This was unorthodox. Instead, it was alleged that the Appellants had agreed upon the commission of the offence of misconduct in public office (an offence with multiple elements, including an evaluative one, which could be committed in any number of ways) by Mr Macdonald, but without reference as to how he was to do it.

27. The CCA acknowledged that (a) the conspiracy alleged in this case was an "*unusual*" one: J[4]; **ACAB 668[4]**; (b) the Respondent "*did not particularise any acts of either Edward Obeid (Mr Obeid Snr) or Mr Moses Obeid in furtherance of the conspiracy*": J[4]; **ACAB 668[4]**; and (c) there was no agreement to commit any particular act averred on the face of the indictment, with the Crown instead relying on "*establishing an agreement to undertake acts falling within the cumulative elements of the charge*": J[14]; **ACAB 671[14]**.

28. Before the CCA, the Appellants contended that there was no conspiracy as a matter of law. The CCA held it was open to find the offence proven on the basis of an agreement for Mr Macdonald to commit the offence of misconduct in public office *simpliciter* without the need for any consensus between the Appellants as to the acts that he would do comprising the apparently agreed offence: J[39] **ACAB 687[39]**.

29. No authority has been cited which supported the availability of such an approach. The Crown relied upon ***Aston*** *v R* (1987) 26 A Crim R 128 at trial. *Aston* did not involve a conspiracy to commit an offence and in any event involved an allegation as to a consensus on how the conspiracy was to be carried out (see at 129 and 132). Before the CCA, the Crown called in aid *HKSAR v* ***Hui Rafael*** *Junior* (2017) 20 HKCFAR 264. The agreed conduct in *Hui Rafael* involved, explicitly, the maintenance of an ongoing and unconditional favourable disposition towards persons who bribed the accused

before he became a public official. There was no evidence of any bribes in this case, nor was it alleged that Mr Macdonald was to unconditionally favour the Obeids. Neither case supports the proposition that an agreement to commit an offence *simpliciter* without any agreement as to the acts that would comprise the offence is one which can be properly alleged as a criminal conspiracy.

30. Having regard to the way in which the case was prosecuted, and the CCA's reasons, the CCA's judgment dispenses with the need for the Crown to prove an agreement to do an unlawful act. This represents a substantial, unprincipled and unnecessary development of the law of criminal conspiracy.

D. Reasons for requiring the allegation of an agreed act

The mental element of conspiracy requires that the unlawful act(s) be alleged

31. The repeated statements by this Court (and final appellate courts elsewhere: see, eg, *Churchill* at 237 and *R v* ***Saik*** [2007] 1 AC 18 (England and Wales)) that actual knowledge is required of all the matters which make the agreed upon act unlawful draws into sharp focus the need to identify the unlawful act said to have been agreed upon.

32. The offence of conspiracy is complete at the time of agreement. That is the point at which the tribunal of fact is required to assess the state of mind of the accused person to determine whether or not the offence is made out. The relevant matters which an alleged conspirator is required to know in order for the mental element of the conspiracy to be made good will depend in every case on what the Crown alleges has been agreed: see *Churchill* at 237 (Viscount Dilhorne).

33. If the Crown makes no allegation as to any particular unlawful act agreed upon (or, as in this case, accepts that it cannot), it is not possible for the jury to assess the state of mind of the accused to ascertain whether it is satisfied beyond reasonable doubt that the accused was aware of all of the matters that made what was agreed criminal.

34. In other words, without an alleged agreement upon what is to be done (as opposed to the legal character of it), it is impossible to prove the offence of conspiracy. "*To have the necessary knowledge for conspiracy a person must know what he is supposed to have agreed to do*": *R v Gemmell* [1985] 2 NZLR 740 at 744 (McMullin J for the Court). The substance of what is agreed need not be expressed in granular detail, but it must be expressed with at least enough specificity to enable an assessment of the states of mind of the alleged conspirators at the time the conspiracy is said to have been formed. If an

agreement to commit an offence, independently of any agreement about the acts to be committed, is sufficient, that would represent a substantial relaxation of the mental element of a conspiracy.

The requirement for an agreed act is an important limitation to the offence

35. While the crime of conspiracy is an extremely important one, the courts must be careful to ensure that it does not extend beyond its legitimate and fair objectives, and that where apparently overt acts are established, the antecedent agreement to which they are alleged to relate is properly established: *O'Brien* at 226. For a conspiracy, the question is what was agreed – not what was ultimately done: cf *Grunewald v United States* 353 US 392 (1956) at 405-406 (Harlan J for the Court). Any overt acts must be sufficiently connected to the alleged conspiracy: *R v Partridge* (1930) 30 SR(NSW) 410 at 412 (Ferguson J). Even where the substantive offence has been committed, that does not mean the individuals guilty of it are also guilty of conspiracy: *Saik* at [93] (Baroness Hale *obiter*).

36. The purpose of overt acts is to enable the trier of fact to infer the existence of an agreement from the fact that those acts occurred: *Rogerson* at 281 (Brennan and Toohey JJ). The process of reasoning is akin to inferring the existence and/or terms of a contract from the conduct of the putative parties.

37. If it is accepted that an agreement which involves no consensus as to an act that is to be committed pursuant to it, and which is instead framed by (as here) the elements of an agreed upon offence with some broad limitations on its subject matter, amounts to a criminal conspiracy this represents an inappropriate expansion of the scope of the offence.

38. A Crown case based on an agreement which involves no agreement as to an actual act to be committed risks bringing about the very circumstance warned against in *Trudgeon* at 264 (Lee CJ at CL, Loveday J agreeing) – inviting a jury to find an agreement as to a "*general unlawful object*" which is "*suggested by the totality of [the putative conspirators'] individual unlawful practices*".

The fairness of the criminal process demands precision as to the agreed unlawful act(s)

39. Where some conspiracy is proven on the evidence, but not the conspiracy alleged, a conviction cannot be entered: *Gerakiteys* at 320-321 (Gibbs CJ), 323 (Murphy J), 327 (Brennan J), 333-335 (Deane J); see also *O'Connell v The Queen* (1844) 11 Cl & F 155;

8 ER 1061 and *R v Ongley* (1940) 57 WN (NSW) 116 at 117.

40. Unless the unlawful acts or unlawful means said to be the object of the conspiracy are specifically alleged by the Crown, it is impossible to know what conspiracy the jury is being asked to find. If a sufficiently particular agreement is not alleged, conviction on the basis of some different conspiracy supported by the evidence is left open: see *Gerakiteys* at 323 (Murphy J). This problem is exacerbated where, as here, the offence which was said to be agreed is capable of being committed in multiple ways, and in ways which would not – of necessity – involve the commission of an offence.

41. The failure to allege a sufficiently particular agreement also gives rise to the problem of procedural fairness adverted to in *R v* ***Mok*** (1987) 27 NSWLR 438. It is a basic principle of procedural fairness that an accused person have "*identified with precision the transaction upon which the Crown relies ... and the particular act, matter or thing alleged as the foundation of the charge*": *Mok* at 441 (Hunt J, with whom the balance of the Court agreed) citing *Johnson v Miller* (1937) 59 CLR 467 at 489 (Dixon J), 495 (Evatt J), and 501-502 (McTiernan J). In a conspiracy case this includes "*precise particulars of ... the specific scope of the conspiracy alleged*": *Mok* at 441. Whether or not particulars are sought, the Crown case must be made clear from the beginning of the trial and the Crown must not left to "*select from [the] evidence the conspiracy which seems to be the strongest*": *Mok* at 441-442.

42. Indeed, in some cases the breadth of the alleged agreement may be such that it could not be properly said that there was an agreement at all (Gillies, 36) but rather a general inclination that something unlawful was to occur: cf *Trudgeon* at 264 (Lee CJ at CL, Loveday J agreeing); *O'Brien* at 225-226 citing *Mills* at 54.

<u>Development of inchoate offences should be towards a closer connection between moral culpability and legal responsibility</u>

43. The harshness of conspiracy as an inchoate offence, capable of being charged without any positive act by an accused (Baroness Hale has referred to it as a "*thought crime*": *Saik* at [95]), requires rigour in its enforcement in order to ensure that there is no extension of legal responsibility where the moral culpability of the offending does not justify it: cf *Mitchell v The King* (2023) 276 CLR 299 at [29]-[30] (Kiefel CJ) and [30] (Gageler, Gleeson and Jagot JJ).

44. The common law imposes liability for inchoate offending in three respects: attempt,

incitement and conspiracy: New South Wales Law Reform Commission, *Complicity*, (2010) Report 129 (***NSW Complicity Report***), [2.58].

45. An attempt is punishable upon proof of an intention to commit the subject offence and the commission of some act towards the commission of the crime going beyond mere preparation which cannot reasonably be regarded as having any purpose other than the commission of the crime: *R v Mai* (1992) 26 NSWLR 371 at 381-382 (Hunt CJ at CL with whom the balance of the Court agreed). Incitement requires the inciting of another to commit a criminal offence: *R v Whitehouse* [1977] QB 868 at 873 (Scarman LJ giving the judgment of the Court). There is no need for the intended offence to be committed.

46. The relative disconnect between the legal responsibility imposed by inchoate offences from the moral culpability that inheres in the offender is clear. None of these offences, in and of themselves, require the offender to commit any injurious act – let alone one that in fact brings about an undesirable consequence. Undoubtedly there are situations in which a prosecution for an inchoate offence follows on from, or alongside, a prosecution for an incited or agreed substantive offence, but that is not essential.

47. Furthermore, each of the inchoate offences impose criminal liability irrespective of a subsequent decision by the accused to not see the substantive crime through. A conspiratorial agreement that is subsequently voided before any act is taken pursuant to it remains criminal: *NSW Complicity Report*, [6.48]. Similarly, the incitement of a crime that the offender subsequently discourages before any offence is committed remains a criminal incitement: *NSW Complicity Report*, [7.104]. Self-evidently, one cannot withdraw from an attempt by later changing one's mind about the commission of the substantive offence. The inability to withdraw points powerfully to the need for clarity and rigour as to (a) what is actually agreed; and (b) the knowledge and intention of the putative conspirators (which can only be assessed against the terms of the agreement).

48. Particular caution is required with respect to conspiracy. Conspiracy is already arguably the inchoate offence where liability is most detached from moral culpability. This is so for two reasons.

49. *First*, unlike incitement and attempt, there is no requirement for a conspirator to do any act. An accused who incites must communicate the encouragement. An accused who attempts must take some step beyond mere preparation towards the commission of the subject offence. Conspiracy requires nothing more than agreement. At common law,

there is no requirement for proof of the commission of any overt act (cf. for example, conspiracy under the *Criminal Code* (Cth) s 11.5). The absence of any requirement for an act in furtherance of the agreement permits a conviction for conduct that is substantially less morally culpable than that associated with an attempt or incitement.

50. *Second*, although not arising in this case, there is a question as to whether the common law offence of conspiracy continues to criminalise acts which are unlawful but not criminal. No such question arises in the case of attempt or incitement.

51. Any relaxation of the requirement to allege an agreement to do an unlawful act in the context of a conspiracy has the capacity to further detach the moral culpability for a potential conspiracy offence from the legal responsibility attributed thereto.

Coherence of inchoate offences with common law complicity doctrines

52. Inchoate offences form part of the common law's general framework of criminal liability. Any consideration of the scope and nature of such offences cannot be had without regard to the doctrines of complicity which operate to attribute responsibility for completed substantive offences. They perform different functions but there is substantial overlap. The balance struck by the common law is not one that should be disturbed by piecemeal intervention without consideration of the broader picture: cf ***Clayton*** *v The Queen* (2006) 81 ALJR 439 at [19]-[20] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ);; ***Miller*** *v The Queen* (2016) 259 CLR 380 at [41]-[43] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

53. By way of example, a person who encourages the commission of an offence may be guilty of incitement. However, if the subject offence is committed, the inciter may be derivatively liable for the subject offence as an accessory before the fact. Similarly, a person who agrees to commit an unlawful act constituting an offence may be guilty of conspiracy without more. If the agreed upon offence is committed and they participate in any way in its commission, they would likely be liable for that offence as part of a joint criminal enterprise: cf *Hunyh v The Queen* (2013) 87 ALJR 434 at [37].

54. Further, the idea of demanding strict proof of what an accused agreed to do before attributing criminal liability at common law for an act according to an agreement is orthodox: ***Gillard*** *v The Queen* (2003) 219 CLR 1 at [124] (Hayne J); *Mitchell* at [13]-[14] (Kiefel CJ), [54]-[55] (Gordon, Edelman and Steward JJ); ***McAuliffe*** *v The Queen* (1995) 183 CLR 108 at 111-112 (the Court); *Osland v The Queen* (1998) 197 CLR 316

at [72]-[73] (McHugh J).

55. The doctrine of joint criminal enterprise will only operate to attribute responsibility where the act in question is either the act constituting the "*agreed crime*" or an act which is "*within the scope of the agreement*": see *Mitchell* at [54] (Gordon, Edelman and Steward JJ) citing *Miller* at [4] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), *McAuliffe* at 114; and *Gillard* at [111] (Hayne J). It is therefore "*essential*" to identify "*the acts and omissions the parties agreed upon*": *Mitchell* at [54] (Gordon, Edelman and Steward JJ), citing *Gillard* at [124] (Hayne J). Relevantly, those acts and omissions must be ones which are "*subjectively appreciated by the accused*": *Mitchell* at [54] (Gordon, Edelman and Steward JJ), citing *McAuliffe* at 114 (the Court).

56. The "*critical question*" in determining liability for a crime committed as an incident of a common purpose is whether the subjective state of mind of the accused "*extend[ed] to the commission of the act constituting the offence charged?*": *Johns v The Queen* (1980) 143 CLR 108 at 125 (Mason, Murphy and Wilson JJ).

57. The requirement of an agreement to commit certain acts or omissions and the need for those acts or omissions to be subjectively appreciated by the accused is not materially different to the physical and mental elements of common law conspiracy. It has been argued that a joint criminal enterprise is in fact no more than a consummated conspiracy: D J Baker, 'Reinterpreting the Mental Element in Criminal Complicity: Change in Normative Position Theory Cannot Rationalize the Current Law (2015) 40 *Law and Psychology Review* 1, 64; see also D Lanham, 'Complicity, Concert and Conspiracy' [1984] 4 *Criminal Law Journal* 276.

58. Given the overlap between conspiracy and joint criminal enterprise, there is a risk that any relaxation of the requirement to allege an agreed unlawful act in conspiracy will have unintended consequences for complicity. It would be undesirable, for example, for the scope of joint criminal enterprise to extend to attributing responsibility for acts not subjectively contemplated and agreed upon. But if a conspiracy can extend that far, it is difficult to understand what the principled justification for restraining joint criminal enterprise would be. Moreover, if a vague and amorphous agreement (such as the kind alleged in this case) were able to be deployed as the foundational agreement for an extended joint criminal enterprise, it would permit liability for serious offences subjectively foreseen, but not agreed, where the underlying agreement itself was nothing more than that a co-venturer would misconduct himself in ways and circumstances

which were not only not known or understood by the other party, but could not be known or understood by them. The expansion of criminal liability to a circumstance where moral culpability was so diminished would not be a principled development of the law: cf *Mitchell* at [29]-[30] (Kiefel CJ) and [30] (Gageler, Gleeson and Jagot JJ).

Any change to the requirement for an agreed lawful act is a matter for Parliament

59. A conspiracy has (since at least *The Poulterer's Case* in 1611) required the allegation of an unlawful act which is either the object of the agreement or the unlawful means by which the lawful purpose of the agreement is to be achieved: see paragraphs 12-16 above. The principles are now (at least in this regard) well-settled.

60. Acceptance that a conspiratorial agreement can be made without any consensus as to the actual conduct that would be involved (i.e. the facts and circumstances that would render the unknown conduct unlawful) would amount to a substantial augmentation of the scope and requirements of a common law criminal conspiracy. Such an extension should be resisted. Any reform to the common law offence of conspiracy (particularly one which would expand its reach) is a matter for the legislature.

61. Over the course of the twentieth and twenty-first centuries there have been multiple reviews of the law of conspiracy and other inchoate offences across a range of common law jurisdictions.[2] As a consequence, the offence has been abolished and codified in England and Wales. At a Commonwealth level, and in Victoria, the Australian Capital Territory and the Northern Territory, the elements of a criminal conspiracy are codified. Not so in New South Wales. Five successive parliaments in NSW have declined to act upon the Law Reform Commission's recommendation to modify and codify conspiracy.[3] No change to inchoate offences (or indeed the closely related principles of complicity) can, or should, be effected piecemeal by courts. That is a task for parliaments and law reform commissions: cf *Clayton* at [19]-[20] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); *Miller* at [41]-[43] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

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[2] See, eg, Law Commission of England and Wales, *Report on Conspiracy and Criminal Law Reform* (1976), Law Com No 76; Victorian Criminal Law Working Group, *Report on Conspiracy* (1982); Commonwealth Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters Interim Report* (1990); Law Commission of England and Wales, *Conspiracy and Attempts* (2009) Law Com No 318; Ireland Law Reform Commission, *Inchoate Offences* (2010) LRC 99; *NSW Complicity Report*.

[3] New South Wales Law Reform Commission, *Complicity*, (2010) Report 129, xiii.

E. Conclusion

62. There are good reasons of practice, principle and legal policy that suggest that the offence of conspiracy should not be augmented or enlarged in ways that would facilitate the Crown case in this matter. The appeal should be allowed, the conviction quashed, and a verdict of acquittal entered.

PART VII ORDERS SOUGHT

63. Mr Macdonald seeks the following orders:
    a. Appeal allowed.
    b. Set aside the orders made by the CCA on 6 October 2023 and quash the conviction.
    c. Verdict of acquittal be entered.

PART VIII ESTIMATE OF DURATION OF ORAL ARGUMENT

64. Mr Macdonald anticipates that 45 minutes will be required, including any reply.

Dated: 31 July 2025

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Criminal Code Act 1995* (Cth)	Version C167 (8 February 2025, current)	s 11.5 of Schedule '*Criminal Code*'	For illustrative purposes only – codified Commonwealth offence of conspiracy	Not applicable
2	*Crimes Act 1900* (NSW)	11 June 2025, current	ss 97, 112(2)	For illustrative purposes only – see AWS [22].	Not applicable