



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 20 Nov 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: S139/2025
File Title: Farrugia v. The King
Registry: Sydney
Document filed: Respondent's submissions
Filing party: Respondent
Date filed: 20 Nov 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

FRANK SAMUEL FARRUGIA
Appellant

and

THE KING
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1 These submissions are in a form suitable for publication on the internet.¹

PART II: STATEMENT OF ISSUES

2 Mr Farrugia (the **Appellant**) and Mr Kanmaz (the **Co-Offender**) were represented by the same senior counsel (**Senior Counsel**) in sentencing proceedings before the District Court of New South Wales. The Appellant sought leave to appeal his sentence to the Court of Criminal Appeal pursuant to s 5(1)(c) of the *Criminal Appeal Act 1912* (NSW), on the basis that the sentence proceedings miscarried because the Appellant and the Co-Offender were not separately represented: **CAB 32**. The Appellant sought that his sentence be quashed, and that the proceedings be remitted to the District Court for re-sentence. The Court of Criminal Appeal (Price AJA, Campbell and Hamill JJ) granted leave to appeal but dismissed the appeal. On appeal to this Court, the three issues that arise and the Respondent's position on those issues are:

First, did Senior Counsel breach the “conflict rule” by acting for both the Appellant and the Co-Offender, such that there was irregularity in the sentencing process?

The answer is no. The Appellant has not discharged his onus of establishing a breach of the conflict rule and, in any event, has failed to establish that he did not give fully informed consent to any conflict.

Second, if there was an irregularity in the sentencing process, was that irregularity “material”, such that the Appellant’s sentence ought to be quashed?

If there was any irregularity, it was not material. For an irregularity in the sentencing process to be material, it must be an irregularity that “could realistically” have affected the sentence that was imposed, which the Appellant has failed to establish.

Third, if the Court of Criminal Appeal quashes a sentence under s 6(3) of the *Criminal Appeal Act*, does s 12(2) of that Act empower the Court of Criminal Appeal to remit the proceedings to the District Court for re-sentence?

It is unnecessary for the Court to resolve this issue. If the appeal is dismissed, the question does not arise. If the appeal is allowed, the matter should be remitted to the Court of Criminal Appeal.

¹ As at the date of these submissions, the text of the judgment below is restricted on the NSW Caselaw website: (<https://www.caselaw.nsw.gov.au/decision/195f36d2e8f5688dad81b774>). That was done at the request of the Respondent, because of then-forthcoming trials of two co-accused (not the Appellant or the Co-Offender relevant to this appeal). One of those trials has now concluded; the other trial has been listed for July 2026. The text of the judgment extracted in these submissions is not relevant to that trial.

PART III: SECTION 78B NOTICE

3 Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: MATERIAL FACTS

4 On 8 December 2023, the Appellant and the Co-Offender were sentenced in the District Court (Berman SC ADCJ) for the offences referred to at AS [6], which are accurately described by the Appellant save that each of the proceeds of crime offences were taken into account pursuant to s 16BA of the *Crimes Act 1914* (Cth).

5 The co-offenders were sentenced on a set of common agreed facts, signed personally by each of them on 9 and 10 February 2023. The agreed facts stipulated that the Appellant's role was to "source[] drugs for and receive[] drugs from the group".² As part of his function as an intermediary between the conspiratorial group and drug suppliers, he communicated the quality of samples he obtained, conveyed the availability and prices of certain drugs, provided details regarding the funding of drug purchases, provided details concerning the collection of drugs, and instructed how he was to be reimbursed for drugs he had purchased.³ The Appellant also "supplied and received large amounts of cash."⁴ The proceeds of crime offence concerned six deposits into his account totalling \$957,217.58 derived from the proceeds of the group, a portion of which was subsequently dealt with further.⁵

6 With respect to the Co-Offender, it was an agreed fact that his role was to "store[] drugs and cash for the group" at locations to be "made available to other group members".⁶ As part of his role, the Co-Offender "prepar[ed] the drugs for sale at the request and direction of others"⁷, including to either "receive or make available or weigh" a particular quantity of drugs or "count an amount of cash". He also met a courier, made deliveries on request, and conducted stocktakes of the drugs and cash.⁸ He "was not a stakeholder in the drugs or cash that he stored".⁹ With respect to the proceeds of crime offence, the Co-Offender

² RBFM 5 at [9].

³ RBFM 6 - 8 at [14], [18]-[21], [25]-[28].

⁴ RBFM 13 at [51].

⁵ RBFM 13 - 14 at [52]-[53].

⁶ RBFM 5 at [8].

⁷ RBFM 8 at [30].

⁸ RBFM 8 at [33].

⁹ RBFM 8 at [30].

was involved in thirteen transactions of cash to associates, payments for overhead costs, and payment of his own wages.¹⁰

7 On 27 October 2023, more than eight months after the co-offenders signed the agreed facts, the sentence hearing commenced. Both co-offenders observed the proceedings by audio-visual link.¹¹ Senior Counsel acknowledged that based upon the agreed facts, the Appellant's offending was objectively more serious than the Co-Offender.¹² Counsel for the Respondent conceded that this was the appropriate characterisation of their respective roles, departing from prior written submissions.¹³ The matter was then adjourned part-heard to 23 November 2023, so that Senior Counsel could make further submissions in relation to the Appellant's case, particularly with respect to non-exculpatory duress. On this second occasion, the co-offenders again observed the proceedings, and the submissions on their respective roles, which were consistent with those made a month earlier.¹⁴

8 On 8 December 2023, the sentencing judge delivered his remarks on sentence. Consistent with the agreed facts, his Honour found that the roles of the co-offenders were "very different from each other, as were [their] positions in the drug supply hierarchy". The sentencing judge found that the Co-Offender "operated as a storeman" having set up "an apparently legitimate business ... which operated premises which were used to securely store drugs and cash".¹⁵ His Honour emphasised that the Co-Offender "did not obtain a share of the profits" and instead was "paid a wage", as matters relevant to "determining how high up the drug trafficking hierarchy he was".¹⁶ By contrast, the sentencing judge found the Appellant was "closer to the centre of this operation" and that the communications contained in the agreed facts demonstrated "how deeply involved [the Appellant] was" in the dealings with drugs and cash, concluding that his role in negotiating transactions demonstrated that the Appellant was "an important and trusted member of the conspiracy".¹⁷ In considering the principle of parity, the sentencing judge concluded that the Appellant was "more deeply involved" than the Co-Offender who did

¹⁰ **RBFM 11 - 13** at [45]-[49].

¹¹ **CAB 110** (T2.14-31).

¹² **CAB 120** (T12.10-35).

¹³ **CAB 129** (T21.30-37).

¹⁴ **CAB 141** (T5.49-6.6); **CAB 153** (T17.39-18.20); **CAB 163** (T27.12-13).

¹⁵ **CAB 13**.

¹⁶ **CAB 14**.

¹⁷ **CAB 18**.

not share in profits and was most at risk of detection — indicative of “his relatively lowly position in the hierarchy”.¹⁸ His Honour also had regard to their distinguishable subjective features and motivations.¹⁹

The Appellant’s position before the Court of Criminal Appeal

9 The Appellant submitted below that the sentence proceedings miscarried because the two co-offenders were not separately represented.²⁰ Counsel for the Appellant rejected a suggestion that an irregularity will nevertheless arise from the mere fact of common representation, and instead submitted that in cases where there was a “very stark difference on the facts between the culpability” of offenders it would be “unlikely that there will be a denial of procedural fairness or an irregularity”.²¹ However, given that characterisation of the co-offenders’ respective roles was “a contestable issue” in the present case, separate representation was said to be required.²² Nevertheless, counsel for the Appellant accepted the “record suggests that [the Appellant] acquiesced” to counsel below appearing for both co-offenders,²³ and further that the Court could proceed on the basis that “that [the Appellant] was informed transparently in advance” and “that there was transparency by the lawyers about the submission that would be put and about continuing to act for the [Co-Offender] and that [the Appellant] was informed about those issues”.²⁴ Moreover, counsel for the Appellant submitted that the Court could assume that “instructions were given in accordance with the submissions made to the sentencing judge”.²⁵

PART V: ARGUMENT

10 Section 5(1)(c) of the *Criminal Appeal Act* provides that a person convicted on indictment may appeal to the Court of Criminal Appeal²⁶ with the leave of the Court, “against the sentence passed on the person’s conviction”.²⁷

¹⁸ CAB 24.

¹⁹ CAB 24.

²⁰ CAB 32.

²¹ CAB 205 (T5.1-2); CAB 204 (T4.41-46).

²² CAB 213 (T41-49).

²³ CAB 202 (T2.17-18); CAB 204 (T4.10-11)

²⁴ CAB 228-229 (T23.48-29.6).

²⁵ CAB 230 (T30.26-31).

²⁶ *Criminal Appeal Act*, ss 2(1) (definition of “Court”), 3.

²⁷ A “sentence” is relevantly defined to include “any order made by the court of trial on convicting a person of an offence”, including any sentence of imprisonment imposed under Pt 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW); see *Criminal Appeal Act*, s 2(1) (definition of “Sentence”).

11 The determination of such an appeal is governed by s 6(3), which provides that the Court:
 if it is of opinion that some other sentence, whether more or less severe is warranted
 in law and should have been passed, shall quash the sentence and pass such other
 sentence in substitution therefor, and in any other case shall dismiss the appeal.

12 Notwithstanding the breadth of s 6(3) in terms, “the appellate court’s authority to
 intervene is dependent upon demonstration of error”.²⁸ If error is demonstrated, the Court
 must exercise the sentencing discretion afresh (subject to the possibility of remittal
 pursuant to s 12(2), addressed in Part C below).²⁹

13 One way in which an appellant may establish error is to demonstrate that the sentencing
 10 judge made an error of principle.

a) In such a case, “the inquiry on an appeal against sentence is identified in the
 well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House*
v The King, itself an appeal against sentence”.³⁰ That is the applicable standard of
 appellate review because “sentencing is a discretionary judgment that does not yield
 a single correct result”.³¹ The inquiry may reveal the existence of a specific error, or
 it may reveal that the outcome is “unreasonable or plainly unjust” (“manifestly
 excessive”) meaning the Court “will be able to infer that, in some unidentified way,
 there has been a failure to exercise the power properly”.³²

20 b) In a case involving specific error, the error must be “material”. That requirement has
 sometimes been expressed by reference to whether the error had “the capacity to
 infect the exercise of the sentencing discretion, regardless of whether it can be
 demonstrated that the error has in fact influenced the sentencing outcome”.³³ But,
 adopting the language of more recent authority in analogous contexts, the threshold
 will be met if the error “could realistically” have affected the sentencing exercise.

²⁸ *Kentwell v The Queen* (2014) 252 CLR 601 at [35] (French CJ, Hayne, Bell and Keane JJ).

²⁹ *R v Hatahet* (2024) 98 ALJR 863 at [69] (Beech-Jones J).

³⁰ *Markarian v The Queen* (2005) 228 CLR 357 at [25] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

³¹ See *Kentwell* (2014) 252 CLR 601 at [42]. See also *Bugmy v The Queen* (2013) 249 CLR 571 at [24] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Moore (a pseudonym) v The King* (2024) 98 ALJR 1119 at [15] (the Court).

³² *Dinsdale v The Queen* (2000) 202 CLR 321 at [59] (Kirby J). See also *Barbaro v The Queen* (2014) 253 CLR 58 at [26] (French CJ, Hayne, Kiefel and Bell JJ).

³³ See *Baxter v The Queen* (2007) 173 A Crim R 284 at [83]-[86] (Latham J); *Donaghey v The Queen* [2015] NSWCCA 119 at [20] (Bellew J, Bathurst CJ and Simpson J agreeing). See also *Andreata v The Queen* [2015] NSWCCA 239 at [26]-[28] (Beech-Jones J, Ward JA and Adams J agreeing); *Newman (a pseudonym) v The Queen* [2019] NSWCCA 157 at [11] (Basten JA); *Brown v The King* [2025] NSWCCA 30 at [35] (Stern JA, Bell CJ and Yehia J agreeing).

14 Another way in which an appellant may establish error is to demonstrate the existence of a procedural error or irregularity. A sentencing court is “obliged to accord procedural fairness to parties to a proceeding”.³⁴ If an appellant establishes that there has been a breach of that obligation, and that the breach is “material” in the sense that the sentence “could realistically” have been different had the breach not occurred, an appellant will have established error for the purpose of s 6(3).³⁵ A denial of procedural fairness by a sentencing court has been described by this Court as involving a miscarriage of justice.³⁶ This Court has also said that the Court of Criminal Appeal may “receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice”, and that a failure to take into account such new evidence may itself occasion a miscarriage of justice.³⁷

15 The language of “miscarriage of justice” is the language of the third limb of the common form conviction appeal provision, found in s 6(1) of the *Criminal Appeal Act*. The terms of ss 5(1)(c) and 6(3) of that Act are silent about “miscarriages of justice”. Nonetheless, in addition to this Court having used that expression in the context of sentence appeals, a number of decisions of the Court of Criminal Appeal have adopted that formulation in the context of sentence appeals, at least in the context of sentencing appeals concerning allegations about the conduct of counsel for the offender.³⁸ “In effect, these decisions appear to treat a conclusion that a miscarriage of justice of this kind was occasioned by the conduct of an offender’s legal representative as equivalent to a finding that there was a denial of procedural fairness”.³⁹

16 Consistent with those authorities, cases concerning a miscarriage of justice in the context of a third limb conviction appeal shed light on the test for an asserted “miscarriage of justice” on a sentence appeal. So too does the explanation in *Brawn v The King*,⁴⁰ that there will be a “miscarriage of justice” on a conviction appeal where an appellant

³⁴ *HT v The Queen* (2019) 269 CLR 403 at [17] (Kiefel CJ, Bell and Keane JJ), see also at [64] (Gordon J); *Pantorno v The Queen* (1989) 166 CLR 466 at 474 (Mason CJ and Brennan J), 484 (Deane, Toohey and Gaudron JJ).

³⁵ See *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at [14]-[15] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ). See also *DL v The Queen* (2018) 265 CLR 215 at [40] (the Court): “It cannot be said that the error could not have made any difference to the outcome of the appeal”.

³⁶ See *DL* (2018) 265 CLR 215 at [39], [44] (the Court).

³⁷ *Betts v The Queen* (2016) 258 CLR 420 at [10] (the Court).

³⁸ *Tsiakas v The Queen* [2015] NSWCCA 187 at [43] (Beech-Jones J, Leeming JA and Johnson J agreeing); see also *Shortland v The King* [2024] NSWCCA 174 at [45]-[49] (Stern JA, Cavanagh and Sweeney JJ agreeing), and the cases cited therein.

³⁹ *Tsiakas* [2015] NSWCCA 187 at [43] (Beech-Jones J, Leeming JA and Johnson J agreeing).

⁴⁰ (2025) 99 ALJR 872 at [3], see also at [11] (the Court).

establishes, *first*, that there was an “error or irregularity”; and, *second*, that the error or irregularity was “material” in the sense that the “could realistically have affected the reasoning of the jury to its verdict”.⁴¹

17 Here, the Appellant expressly disavows any challenge to the conclusions of the Court of Criminal Appeal that the sentence was within an appropriate discretionary range, and that the Appellant’s sentence was not such as to give rise to a justifiable sense of grievance in light of the Co-Offender’s sentence: AS [21]-[22]. Nor does the Appellant challenge how the sentencing discretion was exercised: AS [22]. Rather, the Appellant asserts an irregularity in the sentencing process, where Senior Counsel is said to have had a conflict
10 in appearing for both offenders on sentence: AS [22]. The asserted conflict is said to be clear on the record of the proceedings on sentence, despite the Appellant declining to waive legal professional privilege in any respect: AS [18].

18 Applying the formulation from *Brawn*, the essence of the Appellant’s case is that there was an irregularity in the sentencing process because Senior Counsel had a conflict, and that irregularity was material because it could realistically have affected the outcome of the sentencing exercise: see AS [25], [47]. For the reasons explained below: the Appellant has failed to establish that there was a conflict; to the extent the Appellant has established that there was any conflict, he has failed to establish that he did not give fully informed consent to joint representation by Senior Counsel. In any event, any irregularity was not
20 “material”. The appeal should therefore be dismissed. If, contrary to this submission, the appeal were to be allowed, the proceeding should be remitted to the Court of Criminal Appeal for re-sentencing.

A WAS THERE A “CONFLICT”?

A.1 The “conflict rule”

19 The relationship between a lawyer and their client is fiduciary,⁴² including the relationship between barrister and client.⁴³ Such a relationship is “characterised by an

⁴¹ That is not an exhaustive statement of the circumstances in which there will be a “miscarriage of justice” in the conviction context. The explanation in *Brawn* also addressed “fundamental” errors, which do not have a ready analogy in the sentencing context, and was subject to a number of qualifications that are not presently relevant: see (2025) 99 ALJR 872 at [9], [13]-[16] (the Court).

⁴² See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 68 (Gibbs CJ), 96 (Mason J).

⁴³ See, eg, *Mammoth Investments v Donaldson* (2022) 60 WAR 1 at [28] (the Court); *Mokbel v The King* [2025] VSCA 243 at [189]-[194], [705] (McLeish, Kennedy and Kaye JJA); *Dyer v Chrysanthou (No 2) (Injunction)* [2021] FCA 641 at [81] (Thawley J).

undertaking of loyalty”.⁴⁴ Equity ensures that undertaking is protected, in a practical way, by imposing on the lawyer certain proscriptive obligations.⁴⁵ Those obligations include the “conflict rule”: that is, the “obligation upon the fiduciary not to put themselves in a position of actual or potential conflict between their duties to the principal and either their own interests or duties to others”.⁴⁶ In that context, the word “duties” describes the “function, the responsibility, the fiduciary has assumed or undertaken to perform for, or on behalf of, his or her beneficiary”.⁴⁷ What constitutes that function or responsibility is a question of fact.⁴⁸

20 Here, what is alleged is a conflict between competing duties: on the one hand, Senior
10 Counsel’s function of appearing at the sentencing hearing for the Appellant and, on the other hand, Senior Counsel’s function of appearing at the same sentencing hearing for the Co-Offender, where a comparison of each offender’s conduct and relative culpability is said to have been inevitable: **AS [23]**. The test for determining whether there has been a breach of the conflict rule, where a conflict of duty is asserted, is whether there is a “conflict or a real or substantial possibility of a conflict” between competing duties,⁴⁹ noting that “[i]t is not enough to identify ‘some conceivable possibility’ which may result in a conflict”.⁵⁰ The assessment is an objective one, “to be determined from the standpoint of the objective observer *with knowledge of all relevant facts and circumstances*”.⁵¹

21 However, before that assessment can occur, the moving party must precisely identify the
20 competing functions (duties) that the fiduciary has undertaken to perform.⁵² That must be done with specificity for three reasons:

⁴⁴ See also *Naaman v Jaken Properties Australia Pty Ltd* (2025) 99 ALJR 295 at [76] (Gordon, Edelman and Steward JJ), see also at [31] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

⁴⁵ *Breen v Williams* (1996) 186 CLR 71 at 108 (Gaudron and McHugh J). See also *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at [196]-[203] (the Court).

⁴⁶ *Naaman* (2025) 99 ALJR 295 at [81] (Gordon, Edelman and Steward JJ). See also *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1 at [67]-[69] (Gageler J).

⁴⁷ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [179] (the Court).

⁴⁸ *Grimaldi* (2012) 200 FCR 296 at [179] (the Court).

⁴⁹ See *Howard* (2014) 253 CLR 83 at [59] (Hayne and Crennan JJ), citing *Pilmer v The Duke Group (in liq)* (2001) 207 CLR 165 at [78] (McHugh, Gummow, Hayne and Callinan JJ).

⁵⁰ *Beach Petroleum* (1999) 48 NSWLR 1 at [425] (the Court), quoting *Boardman v Phipps* [1967] 2 AC 46 at 124 (Lord Upjohn).

⁵¹ *Coope v LCM Litigation Fund Pty Ltd* (2016) 333 ALR 524 at [109] (Payne JA, Gleeson and Leeming JJA agreeing) (emphasis added). See also *Gunasegaram v Blue Visions Management Pty Ltd* [2018] NSWCA 179 at [55]-[62] (Meagher JA), [144]-[154] (Gleeson JA); *Mokbel v The King* [2025] VSCA 243 at [192] (the Court), quoting *Karam v The King* [2022] VSC 808 at [760] (Osborn JA).

⁵² See *Phipps v Boardman* [1967] 2 AC 46 at 127 (Lord Upjohn).

- a) The scope of the attendant fiduciary obligations (including the conflict rule) is “‘moulded’ by the particular detail of the undertaking by the fiduciary”.⁵³ In other words, “the actual function or responsibility assumed determines ‘[t]he subject matter over which the fiduciary obligations extend’ for ... conflict of duty and duty purposes.”⁵⁴
- b) A fiduciary’s undertaking to perform a particular function may give rise to a relationship to which the general law or statute attaches additional (non-fiduciary) obligations, the scope of which may also depend on the scope of the function or responsibility undertaken by the fiduciary.⁵⁵
- 10 c) Flowing on from these two points, unless the function or responsibility to be undertaken by a fiduciary is properly identified, no practical appraisal can be made of whether there is a conflict or a real and substantial possibility of conflict.⁵⁶

22 Each of these three points is significant for the resolution of this appeal.

A.2 Senior Counsel’s functions

23 Here, there is no evidence about the scope of the retainer between Senior Counsel and the Appellant, or between Senior Counsel and the Co-Offender.⁵⁷ Nor is there any evidence about whether the Appellant obtained legal advice from an independent third party at any relevant point, on the advice of Senior Counsel or otherwise. Furthermore, as pointed out by Hamill J (with whom Price AJA and Campbell J agreed) (**CAB 59 [65]**):

20 *There is no evidence as to the [Appellant’s] instructions to his solicitor and barrister, and no evidence as to the discussions between [the Appellant], his solicitor and senior counsel as to what [the Appellant] said about his role, and what submissions were to be made in relation to his role and objective criminality relative to [the Co-Offender] or otherwise. There is no evidence of the advice provided by counsel and nothing to suggest that the [Appellant] was not provided with advice as to his representation.*

24 Nonetheless, certain generalised inferences about Senior Counsel’s agreed functions can be drawn from the circumstances. It can be inferred that Senior Counsel was retained by

⁵³ *Naaman* (2025) 99 ALJR 295 at [81] (Gordon, Edelman and Steward JJ). See also *Beach Petroleum* (1999) 48 NSWLR 1 at [188] (the Court).

⁵⁴ *Grimaldi* (2012) 200 FCR 296 at [179] (the Court). See also *Howard* (2014) 253 CLR 83 at [34] (French and Keane JJ), [91] (Hayne and Crennan J), [110]-[111] (Gageler J).

⁵⁵ *Anderson v Canaccord Genuity Financial Ltd* (2023) 113 NSWLR 151 at [146] (the Court).

⁵⁶ See *Pilmer* (2001) 207 CLR 165 at [82]-[83] (McHugh, Gummow, Hayne and Callinan JJ); *Break Fast Investments Pty Ltd v Rigby Cooke Lawyers (a firm)* [2022] VSCA 118 at [55(d)] (the Court).

⁵⁷ See generally *Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq)* (No 2) [2024] NSWCA 232 at [27]-[35] (Stern JA, Kirk JA and Basten AJA agreeing). See also *Mokbel v The King* [2024] VSC 725 at [536]-[542] (Fullerton J).

the Appellant to, at least, appear on his behalf at his sentencing hearing. It can be also inferred that Senior Counsel was retained to do the same for the Co-Offender. From that starting point, it follows that, for each client, the retainer established a lawyer-client relationship, which gave rise not only to Senior Counsel's fiduciary obligation to comply with the conflict rule but also to additional obligations that were not fiduciary in nature. For example:

- a) On being retained by each client, Senior Counsel owed that client a duty of care in contract and in tort, "to exercise that degree of care and skill to be expected of a member of the profession having expertise appropriate to the undertaking specified in the retainer" (and, perhaps, to advise on "appurtenant legal risks").⁵⁸
- b) In providing legal services to each client, Senior Counsel was also obliged to comply with the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) ("Barristers Conduct Rules"),⁵⁹ including r 35. That rule provides that "[a] barrister must promote and protect fearlessly and by all *proper and lawful means* the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person" (AS [29], emphasis added).

At this point in the analysis, the dearth of any evidence — including about the scope of the lawyer-client relationships, and about whether the Appellant obtained independent legal advice and if so its content — poses a fundamental difficulty for the Appellant's case. The difficulty arises because "it is necessary to recognise, and give due weight to the fact, that different minds may reach different conclusions as to the presence or absence of a real possibility of conflict between ... duty and duty", such that the doctrine cannot "be inexorably applied and without regard to the particular circumstances of the situation".⁶⁰ Moreover, within his lawyer-client relationships with the Appellant and the Co-Offender, Senior Counsel was necessarily constrained by the facts that were agreed and the instructions he received (in the context of the available evidence) as to how he might discharge his duty of care and comply with his duties under the Barristers Conduct Rules. The following factual context illustrates the point.

⁵⁸ *Badenach v Calvert* (2016) 257 CLR 440 at [57], see also at [81] (Gordon J).

⁵⁹ See *Legal Profession Uniform Law 2014* (NSW), s 6(1) (definitions of "Uniform Rules" and "Legal Profession Conduct Rules"), 32-33(1), 420(1)(d), 423; Barristers Conduct Rules, r 1.

⁶⁰ *Howard* (2014) 253 CLR 83 at [60] (Hayne and Crennan JJ), quoting *Phelan v Middle States Oil Corporation* 220 F 2d 593 at 602 (1955) (Judge Learned Hand).

26 During the police investigation of the syndicate, detailed ledgers and a Blackberry belonging to the group’s “record keeper” were seized. Those ledgers recorded “the money and drug transactions ‘against the codename of individual members [of the group]’”: **CAB 42 [18]**. In other words, detailed accounting ledgers concerning the group’s drug importation and trafficking activities were available to investigators, together with numerous communications between members of the group including the Appellant. These unusually detailed records contributed to the significant amount of detail in the agreed facts, including as to the Appellant and the Co-Offender’s conduct and their respective roles: **CAB 42-44 [16]-[26]**.

10 27 The requirements of Senior Counsel’s duty of care and his ethical duties under the Barristers Conduct Rules must be seen in light of that factual context. It would be inconsistent with r 35 and Senior Counsel’s paramount duty to the court for him to submit that the Appellant should be sentenced on a basis contrary to the facts.

28 The Appellant’s assertion that Senior Counsel breached the conflict rule is a serious allegation that carries the risk of the “stigma of an adverse finding of breach of fiduciary duty”,⁶¹ not least when it is made against one who owes duties to the court as one of its officers.⁶² There is no evidence as to the scope of Senior Counsel’s retainer, the Appellant’s instructions, the advice he received, whether he obtained independent legal advice (on the recommendation of Senior Counsel or otherwise), the content of any such advice, or any instructions subsequently given by the Appellant. Evidence of such matters would bear directly on how Senior Counsel was required to exercise the necessary care and skill, and on the “proper and lawful means” available to him to promote and protect the Appellant’s best interests. The particular circumstances, of which the instructions given and the advice received are an important part, necessarily inform whether there was a real possibility of conflict between duty and duty.

20

29 In the circumstances, the Appellant has not discharged his onus of demonstrating that there was a breach of the conflict rule. Accordingly, he has not established there was an irregularity in the sentencing process because of such a breach. And, in the absence of any such breach, there is no basis to conclude that there was any departure from the requirements of procedural fairness. The appeal should be dismissed on that basis.

30

⁶¹ *Macguire v Makaronis* (1997) 188 CLR 449 at 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

⁶² *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 at 89 (Richardson J).

A.3 Fully informed consent

30 Even if, contrary to those submissions, the Court finds that there was an apparent breach of the conflict rule, that in itself is insufficient for the Appellant to establish that there was an irregularity in the sentencing process. The conflict rule is not absolute: the existence of “fully informed consent” negates what would otherwise be a breach of the duty.⁶³ What is required for fully informed consent “is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given”.⁶⁴ The relevant question is whether the client has been “fully informed of his rights ‘and of all the material facts and circumstances of the case’”.⁶⁵ The Appellant’s position appears to be that the conflict rule cannot be negated by consent: **AS [43]**. As a general proposition, that is wrong. And there is no support in the authority for any special rule in the context of criminal proceedings.

31 At least in a civil proceeding where a beneficiary seeks relief against a fiduciary, it is for the fiduciary to raise the existence of consent as a defence, and to discharge the persuasive onus of proving any contested issues of fact relevant to that defence.⁶⁶ That is because the fiduciary relationship itself “imposes on the party bound to fidelity *the obligation of justifying any private advantage he obtains ... by reason of an interest conflicting or possibly conflicting with his duty*”.⁶⁷ It also consistent with the general position that a “proven wrongdoer” ordinarily bears the evidentiary onus of proving contested facts relevant to excusing or mitigating the “wrong”.⁶⁸ In a civil proceeding between fiduciary and beneficiary, the fact that the onus rests on the fiduciary presents little practical difficulty. At the very least, the fiduciary will necessarily be aware of the circumstances in which consent may have been given, they will have sufficient information to decide whether to plead the defence and, subject to claims of privilege, will ordinarily be in a position to adduce evidence of those circumstances.

⁶³ *Maguire* (1997) 188 CLR 449 at 466-467 (Brennan CJ, Gaudron, McHugh and Gummow JJ). See also *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1 at [108] (Besanko J).

⁶⁴ *Maguire* (1997) 188 CLR 449 at 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ). See also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [107] (the Court).

⁶⁵ *Rahme v Benjamin & Khoury Pty Ltd* (2019) 100 NSWLR 550 at [100] (Macfarlan JA, Bathurst CJ and McCallum JA agreeing).

⁶⁶ See *Maguire* (1997) 188 CLR 449 at 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Ancient Order* (2018) 265 CLR 1 at [13] (Kiefel CJ, Keane and Edelman JJ), [91] (Gageler J); *Blackmagic* (2011) 191 FCR 1 at [105]-[108] (Besanko J).

⁶⁷ *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384 at 398 (Isaacs J) (emphasis added).

⁶⁸ *Ancient Order* (2018) 265 CLR 1 at [91] (Gageler J).

32 That is not the case here. By its very nature — and by contrast with proceedings between
a fiduciary and beneficiary — a criminal appeal is a case “in which the adverse litigants
are, so to speak, strangers, and unconnected by any relation which begins by creating an
obligation”.⁶⁹ The prosecution is not a “wrongdoer” in any relevant sense, because the
prosecution has not breached any fiduciary duty. And the prosecution is not privy to any
of the communications that may have passed between an appellant and their lawyer that
may be relevant to whether that appellant gave informed consent to any breach of the
conflict rule. The content of those communications (if not the fact that they occurred)
would ordinarily be subject to legal professional privilege. Absent a waiver of privilege,
10 the evidence available to the prosecution to demonstrate the existence of any consent to
a breach of the conflict rule is severely confined, and may rest on bare inference.

33 Prior to the hearing of his application for leave to appeal, the prosecution asked the
Appellant if he would waive his legal professional privilege, in circumstances where the
Crown was considering obtaining evidence from the Appellant’s lawyers for the purposes
of the appeal: see **CAB 50 [37]**. The Appellant refused. That was a forensic decision for
which he bore the consequences on appeal, given that he bore the onus of demonstrating
an error or irregularity in the sentencing process. The result in this Court, as in the Court
of Criminal Appeal, is an absence of evidence about whether or not informed consent was
given. As Hamill J put it, “the failure to waive privilege may leave the court with little or
no evidence of the matters which are said to have caused the proceedings to miscarry”:
20 **CAB 59 [62]**. Where privilege is maintained and the evidence is accordingly silent about
consent the same may be said about the prosecution’s ability to rebut an assertion that
sentence proceedings were infected by a miscarriage of justice.

34 Were the Court to proceed on the basis that all the Appellant must do is demonstrate an
apparent breach of the conflict rule, without more, the Appellant could benefit from
factual findings that may be known to him to be incorrect: for example, a finding that any
conflict of duties was not waived, where the Appellant may have provided fully informed
consent. In such a situation, the conduct of Senior Counsel could be unfairly impugned,
given that the Appellant’s claim of legal professional privilege shields relevant
30 circumstances from interrogation by the Court. Such a result would be inimical to the due
administration of justice.

⁶⁹ Cf *Birtchnell* (1929) 42 CLR 384 at 398 (Isaacs J).

35 To avoid that outcome, in any case where an appellant asserts that a sentence — or, for that matter, a conviction — should be set aside because of a material irregularity arising from a breach of the conflict rule, the Court should hold that the appellant bears the onus of establishing both: a) the existence of the conflict; and b) that they did not give fully informed consent to the conflict.

36 In the Court of Criminal Appeal, the Appellant adduced no evidence. In those circumstances, the Appellant’s counsel in that court was correct to acknowledge that the court was not in a position to choose between “an inference that counsel had a conflict of interest” and “an inference that [the Appellant] was *fully advised* as to how the case was
10 to proceed and ‘had no complaint about it’”: **CAB 57 [57]** (emphasis added). Counsel for the Appellant was also correct to submit that the Court was (**CAB 57 [57]**):

entitled to proceed on the assumption that there was transparency by the lawyers about the submission that would be put and about continuing to act for the other offender and that [the Appellant] was informed about those issues.

37 That submission was reinforced by the concession made by counsel for the Appellant during oral argument, that the Court could assume that “instructions were given in accordance with the submissions made to the sentencing judge”: **CAB 230, 126-31**.

38 This Court is entitled to proceed on that same assumption, which finds support in the procedural history, noting that the Appellant observed each stage of the sentence proceedings over a period of ten months and made no objection to the submissions that
20 were made by Senior Counsel (including on the second occasion after the adjournment): see paragraphs 5 to 8 above. The procedural history is also consistent with the Appellant’s written submission in the Court below, that the Court could infer the Appellant received advice that his criminality would be pitched at a higher level than that of the Co-Offender and that he “acquiesced” in that course: **CAB 178 [37]**.

39 The appeal can accordingly be dismissed on this alternative basis: even if there was an apparent breach of the conflict rule, in the absence of evidence concerning the question of consent the Appellant has failed to establish he did not give fully informed consent.

A.4 An inapplicable test

40 The Appellant overlooks the orthodox principles for identifying a breach of the conflict rule. Instead, he contends that the test is (AS [38]; see also AS [26], [34]-[37]):

Whether a fair-minded, reasonably informed member of the public might conclude that the proper administration of justice requires that a practitioner be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice.

41 Regardless of whether that test should refer to “might” or “would”,⁷⁰ this is not the test for determining whether there has been a breach of the conflict rule. Rather, it is the applicable test when a superior court’s inherent jurisdiction is invoked to protect the integrity of the judicial process and the due administration of justice, by an order that the court restrain a practitioner from acting for a particular client.⁷¹ That power may be exercised in circumstances where a practitioner is also in breach of the conflict rule, but that is not a necessary requirement.⁷² The power rests on a distinct juridical foundation: the administration of justice, rather than a fiduciary’s undertaking of loyalty.⁷³ There is no basis to transpose the inquiry from one context to another.

42 The test propounded by the Appellant has no role in this appeal. It is doubtful whether the District Court of New South Wales, as an inferior court, has an implied power to restrain a practitioner from acting for a party appearing before it.⁷⁴ To the extent the administration of justice requires a practitioner be restrained from acting for a party in any inferior court in New South Wales, any necessary order could be made by the Supreme Court in the exercise of its inherent jurisdiction.⁷⁵

43 In any event, even if the District Court possesses a power to restrain a practitioner from acting, neither the Appellant nor the Co-Offender applied for a restraining order from the District Court (or from the Supreme Court, for that matter). In particular, the Appellant did not seek any such order prior to hearing resuming after the adjournment, before the submissions about his role were confirmed and elaborated. Whilst in some circumstances,

⁷⁰ See *Maclean v Brylewski* [2025] FCAFC 133 at [24] (Jackson and Moore JJ).

⁷¹ See *Grimwade v Meagher* [1995] 1 VR 446 at 452-453 (Mandie J); *Kallinicos v Hunt* (2005) 64 NSWLR 561 at [76] (Brereton J); *Ismail-Zai v Western Australia* (2007) 34 WAR 379 at [30]-[35] (Steytler P); *Maclean* [2025] FCAFC 133 at [13]-[24] (Jackson and Moore JJ).

⁷² See *Kallinicos v Hunt* (2005) 64 NSWLR 561 at [76] (Brereton J), approved in *Porter v Dyer* [2022] FCAFC 116 at [113]-[114] (Lee J).

⁷³ See *Ismail-Zai* (2007) 34 WAR 379 at [19] (Steytler P).

⁷⁴ Cf *Maclean* [2025] FCAFC 133 at [13] (Jackson and Moore JJ). See generally *Grassby v The Queen* (1989) 168 CLR 1 at 15-17 (Dawson J).

⁷⁵ See *Lyons v Legalese Pty Ltd* (2016) 126 SASR 232 at [45]-[47] (Hinton J).

a court may be obliged to make a restraining order to protect the administration of justice on its own motion,⁷⁶ there was no basis here for the District Court to infer that Senior Counsel was acting in breach of any fiduciary or any other obligation that he owed to either the Appellant or Co-Offender. As with the Court of Criminal Appeal, the District Court was “entitled to proceed on the assumption that there was transparency by the lawyers about the submission that would be put and about continuing to act for the other offender and that [the Appellant] was informed about those issues”: **CAB 57 [57]**.

44 It follows that the test on which the Appellant relies is not applicable to this appeal.

A.5 Rule 119 of the Barristers Conduct Rules

10 45 Rule 119 of the Barristers Conduct Rules does not assist the Appellant: cf **AS [29], [39]-[40]**. That rule provides that a “barrister who is briefed to appear for two or more parties in any case *must determine* as soon as possible *whether the interests of the clients may, as a real possibility, conflict* and, *if so*, the barrister must then return the brief for: (a) all the clients in the case of confidentiality to which r 114 would apply, or (b) one or more of the clients so as to remove that possibility of conflict” (emphasis added). In terms, the rule contemplates that a barrister may be briefed to appear for more than one client in a particular case (relevantly, “the litigation or proceedings in which the barrister in question is briefed to appear”).⁷⁷ However, as is clear from the inclusion of the phrase “real possibility”, the rule gives practical direction to barristers about how to avoid breaching the “conflict rule” in circumstances where they are briefed for more than one party: *first*, by requiring them to turn their mind to whether a possible conflict exists; and *second*, if there is a real possibility of a conflict, by identifying the steps required to avoid that possibility.

20 46 The problem for the Appellant is that there is no evidence as to whether Senior Counsel breached the rule. The obligation to return a brief (or briefs) is contingent on a barrister *determining* that “the interests of the clients may, as a real possibility, conflict”: cf **AS [43]**. As the Court of Criminal Appeal correctly observed, the Appellant did not adduce any evidence as to whether Senior Counsel did not or did not make such a determination: **CAB 59 [63]**. At a conceptual level, there are a variety of possibilities as to the steps
30 Senior Counsel may have taken in regard to r 119. They include, at least, that Senior Counsel did not make a determination at all; that Senior Counsel determined that there

⁷⁶ See *Maclean* [2025] FCAFC 133 at [11] (Jackson and Moore JJ).

⁷⁷ Barristers Conduct Rules, r 125.

was a real possibility of conflict, but then did not comply with the obligation in r 119 to return at least one of the briefs; or that Senior Counsel determined that there was no possibility of conflict in the particular circumstances and, therefore, that r 119 did not oblige him to return either of the briefs. In the absence of evidence, any finding as to these possibilities would involve speculation and conjecture.⁷⁸ The first two possibilities raise serious conduct matters that would ordinarily require something approaching “clear or cogent or strict proof”.⁷⁹ The third possibility reflects the fact that the existence of a conflict is a matter on which reasonable minds might differ (recalling that Senior Counsel had instructions and information of which the Court is unaware). But it is unnecessary for the Court to resolve that issue, in circumstances where there is no evidence that Senior Counsel made a determination that would have engaged r 119.

B MATERIALITY

Consistent with the Court’s approach to “materiality” in the context of civil trials,⁸⁰ conviction appeals⁸¹ and jurisdictional errors,⁸² the Court should adopt the same threshold in the context of sentence appeals. This would be consistent with the approach regularly adopted by the Court of Criminal Appeal, where a specific error in the exercise of the sentencing discretion has been alleged: see paragraph 13b) above.

The relevant questions are whether the Appellant has established: *first*, that there was a conflict of duty (to which the Appellant did not give fully informed consent) and, therefore, an irregularity in the sentence proceedings; and, *second*, that the irregularity could realistically have affected the sentencing outcome in a way that was adverse to the Appellant. Where the Appellant’s complaint might be understood as one involving a denial of procedural fairness, it is important to recall that the “materiality” threshold reflects the concern of the law to avoid “practical injustice”.⁸³

⁷⁸ See *Re Day (No 1)* (2017) 91 ALJR 262 at [15]-[18] (Gordon J).

⁷⁹ See *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171 (Mason CJ, Brennan, Deane and Gaudron JJ).

⁸⁰ See *Nobarani v Mariconte* (2018) 265 CLR 236 at [38] (the Court).

⁸¹ *Brawn* (2025) 99 ALJR 872 at [10]-[11] (the Court); *MDP v The King* (2025) 99 ALJR 969 at [3] (Gageler CJ), [9] (Gordon and Steward JJ), [61]-[66] (Edelman J), [78], [107], [109]-[110] (Gleeson, Jagot and Beech-Jones JJ).

⁸² *LPDT* (2024) 280 CLR 321 at [14] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

⁸³ *Tsiakas* [2015] NSWCCA 197 at [44] (Beech-Jones J), citing *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37] (Gleeson CJ). See also *LPDT* (2024) 280 CLR 321 at [15] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ); *MDP* (2025) 99 ALJR 969 at [61]-[64] (Edelman J).

49 To establish materiality, the Appellant must demonstrate, at least, that there was an argument that counsel acting on his behalf could legitimately and ethically have advanced in support of the proposition that the Co-Offender's offending was objectively more serious than the Appellant's. Despite initially advancing such a proposition, at the plea hearing the Crown conceded that the proposition was not correct: see **AS [12], [15]**. On the agreed facts that had been personally signed by the Appellant, the Co-Offender was a "wage-earner" — Senior Counsel described that position as "categoric", and he was correct to do so: see **AS [16]**. Equally categoric was the Appellant's status as a "profit sharer". As the sentencing judge found, consistently with the agreed facts (**CAB 44 [24]-[25]**):

The roles played by the two offenders were different with [the Appellant] being more deeply involved than [the Co-Offender], the latter of whom was not a profit sharer, merely being paid a wage, albeit a substantial one. ... [T]he fact that [the Co-Offender] was responsible for storing the drugs and money demonstrates his relatively lowly position in the hierarchy. In contrast, [the Appellant] was getting his share of the profits.

50 In the Court of Criminal Appeal, counsel for the Appellant disavowed any error in those findings (**CAB 210, [24-30]**), Senior Counsel having described the respective roles of the Co-Offender and the Appellant as "wage-earner" and "profit-sharer" respectively. The arguments available for any counsel acting for the Appellant at first instance were necessarily constrained by the agreed facts. No counsel, acting in accordance with their duties to the Court, could have advanced any proposition inconsistent with them.

51 In the Court of Criminal Appeal, the Appellant hypothesised a number of arguments that counsel *could* have advanced in the absence of a conflict: see **CAB 48 [33]**. Those arguments are referenced by the Appellant in this Court (**AS [48]**), but he has not elaborated upon them in a way that explains how they were available to be advanced by responsible counsel in a manner that is consistent with the agreed facts and available inferences. For example, contrary to the Appellant's submission, counsel acting responsibly and in accordance with their duties could not have advanced the proposition that the objective seriousness of the Appellant and Co-Offender's offending was "around the same level", given their respective roles in the enterprise. In those circumstances, the Appellant has not discharged his burden of demonstrating that any irregularity was "material".

C REMITTAL

52 In *Betts*, this Court recognised the “evident” utility of remittal under s 12(2) of the *Criminal Appeal Act* in cases where “the sentence hearing has been tainted by procedural irregularity”. The Court of Criminal Appeal has relied on s 12(2), on many occasions, to remit proceedings back to the original sentencing court: see **CAB 51 [42]**. However, this Court has not resolved the question of “whether the general power conferred by s 12(2) applies to the determination of an appeal under s 6(3)”.⁸⁴ The answer to that question is “controversial” because “there is a tension between the terms of s 6(3) and recourse to the power of remittal” in s 12(2).⁸⁵ That tension is heightened by the Court’s reasoning in *Kentwell*. There, the Court explained that, even if an error is established, that does not necessarily mean the Court “must quash the sentence” under s 6(3).⁸⁶ Rather, once error is established, the next step for the Court is to re-exercise the sentencing discretion for itself and form its own view about the sentence to be imposed. There are then two alternative possibilities:

- a) If, upon re-exercising the discretion, the Court concludes that the same sentence as the original sentence should be passed, then the Court will *not* be of the “opinion that some other sentence ... is warranted in law and should have been passed”. The Court will therefore not be obliged to “quash the sentence” but will instead be obliged to “dismiss the appeal”.
- 20 b) Alternatively, if, on re-exercising the discretion, the Court concludes that a different sentence to the original sentence should be passed, the Court will be of the “opinion that some other sentence ... is warranted in law and should have been passed”, meaning it must quash the original sentence and pass that “other sentence in substitution thereof”.

53 On that approach to s 6(3), there is no room in the process for the Court to “quash” the original sentence and remit the re-exercise of the discretion to a different court. As Hamill J put it, “the power to quash the sentence derives from s 6(3) which requires a finding that a different sentence is warranted”: **CAB 56 [51]**. The Appellant’s proposed solution to that problem is to say that the power in s 12(2) “carries with it a power to set aside orders to facilitate” the determination of the appropriate sentence: **AS [52]**.

⁸⁴ See *Betts* (2016) 258 CLR 420 at [7] (the Court).

⁸⁵ *Betts* (2016) 258 CLR 420 at [17]-[18] (the Court).

⁸⁶ See *Kentwell* (2014) 252 CLR 601 at [35] (French CJ, Hayne, Bell and Keane JJ).

However, as suggested in *Betts*, the tension between s 6(3) and s 12(2) “might be a matter for consideration by the legislature”.⁸⁷ To the extent this Court might have a role to play in deciding the issue, this appeal does not present a suitable vehicle.

54 If the appeal is dismissed, as it was in *Betts*, it would be “inappropriate to determine whether the Court of Criminal Appeal is empowered to remit the determination of an offender’s sentence to the court of trial”.⁸⁸ Conversely, if the appeal is allowed, the appropriate orders would be: a) appeal allowed; b) set aside Order 2 of the Court of Criminal Appeal made on 9 April 2025; and c) remit the proceeding to the Court of Criminal Appeal for determination of the appeal against sentence.

10 55 There is no contra-indication to the last order: Hamill J considered the case to be one where the Court of Criminal Appeal would be in a position to sentence afresh on the material before it (namely, the evidence tendered “on the usual basis”), there being no “significant dispute about that evidence” or any “suggestion that additional evidence is to be called if the matter is remitted”: **CAB 56 [52]**. The Appellant has not contested that analysis. He has simply submitted that remittal to the District Court is “appropriate” because, on the hypothesis that there was an irregularity in the sentencing process, he is yet to receive a fair hearing on sentence: **AS [50]**. However, in light of the uncontested evidentiary position, there is no reason why the matter should not be remitted to the Court of Criminal Appeal to exercise the sentencing discretion afresh.

20 **PART V: ESTIMATE OF TIME**

56 The Respondent estimates that 1.75 hours will be required for oral argument.

Dated: 20 November 2025



Raelene Sharp
DPP (Cth)
03 9605 4377
raelene.sharp@cdpp.gov.au



Michelle England
02 9224 5600
mengland@7gbc.com.au

Thomas Wood
03 9225 6078

twood@vicbar.com.au

Edward McGinness
02 9224 5600

mcginness@7gbc.com.au

⁸⁷ *Betts* (2016) 258 CLR 420 at [19] (the Court).

⁸⁸ *Betts* (2016) 258 CLR 420 at [7] (the Court).

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

FRANK SAMUEL FARRUGIA
Appellant

and

THE KING
Respondent

ANNEXURE TO THE RESPONDENTS' SUBMISSIONS

Pursuant to Practice Direction No 1 of 2024, the Respondent sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions

No.	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1	<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW)	Historical version for 14 July 2023 to 30 June 2024	Part 2	In force at the time of sentence	8 December 2023
2	<i>Criminal Appeal Act 1912</i> (NSW)	Current	ss 2, 5, 6, 12	In force at the time of the Court of Criminal Appeal judgment	9 April 2025
3	<i>Legal Profession Uniform Law 2014</i> (NSW)	Current	ss 6, 32, 33, 420, 423	In force at the time of the sentence hearings and judgment	27 October 2023, 23 November 2023, 8 December 2023
4	<i>Legal Profession Uniform Conduct (Barristers) Rules 2015</i> (NSW)	Current	rr 1, 35, 114, 119, 125	In force at the time of the sentence hearings and judgment	27 October 2023, 23 November 2023, 8 December 2023