HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **FRANK SAMUEL FARRUGIA**
Appellant

and

THE KING
Respondent

INTERVENER'S SUBMISSIONS
DIRECTOR OF PUBLIC PROSECUTIONS (NSW)

Part I: Certification

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

Part II: Statement of asserted basis of intervention

2. The Director of Public Prosecutions (NSW) (**Director**) seeks leave to intervene in support of the Respondent. The basis for intervention is limited to the construction of s 6(3) and s 12(2) of the *Criminal Appeal Act 1912* (NSW). Leave to intervene is sought to address two issues arising in the proceedings, namely:

   a. whether s 6(3) of the *Criminal Appeal Act* involves a threshold of materiality such that an established error must also be shown to be material before the "conditional re-sentencing obligation" in s 6(3) is enlivened;[1] and

   b. whether the power in s 12(2) of the *Criminal Appeal Act* is available for the purposes of remitting the proceedings to the District Court of New South Wales, as sought by the Appellant.

[1] *Betts v The Queen* (2016) 258 CLR 420 (***Betts***) at [18].

Part III: Statement as to why leave to intervene should be granted

3. The Director is responsible for the institution and conduct of appeals against sentences imposed for indictable offences by the Supreme Court and District Court of New South Wales.[2] Such appeals involve the application of s 5(1)(c) and s 6(3) of the *Criminal Appeal Act* and may involve the exercise of the Court's supplemental powers under s 12. The Director's interests in pending and future criminal appeals are directly affected by a decision in this proceeding to the extent it considers the construction of those provisions of the *Criminal Appeal Act*.[3]

4. In relation to the first issue in respect of which leave to intervene is sought (at [2.a] above), the question of whether it is appropriate to utilise a threshold of materiality in sentence appeals in light of this Court's decision in *Kentwell v The Queen*[4] has been the subject of conflicting views in New South Wales.[5] In this appeal, both the Appellant and Respondent propound tests of materiality derived from other types of appeals and areas of law.[6] The applicability of such tests is controversial and the arguments of each party involve a significant development in the law governing sentence appeals. The Director seeks to assist the Court through submissions that address the consistency of that proposed development with the authority of *Kentwell*.[7]

5. In relation to the second issue in respect of which leave to intervene is sought (at [2.b] above), this Court referred in *Betts* to the tension between the terms of s 6(3) of the *Criminal Appeal Act* and the power of remittal in s 12(2), but declined to determine "whether the Court of Criminal Appeal is empowered to remit the determination of an offender's sentence to the court of trial."[8] The Court's suggestion in *Betts* of possible legislative intervention has not been taken up. As a result, the Appellant seeks an order which is arguably beyond power, as the Court of Criminal Appeal noted.[9] The Director

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[2] *Director of Public Prosecutions Act 1986* (NSW), s 7(1)(b)-(c).
[3] *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* (2011) 248 CLR 37 (***Roadshow***) at [2].
[4] (2014) 252 CLR 601 (***Kentwell***) at [40]-[44] per French CJ, Hayne, Bell and Keane JJ.
[5] For example, see and compare *Martin v R* [2016] NSWCCA 104 at [3]-[4] per Bathurst CJ and *Newman (a pseudonym) v R* [2019] NSWCCA 157 at [11]-[13] per Basten JA.
[6] See Appellant's Submissions filed 23 October 2025 (**AS**) at [45]-[49]; Respondent's Submissions filed 20 November 2025 (**RS**) at [47].
[7] *Roadshow* (2011) 248 CLR 37 at [3].
[8] *Betts* (2016) 258 CLR 420 at [7], [17]-[19].
[9] *Farrugia v R* [2025] NSWCCA 49 (**Judgment**) at [41], [50]-[51] per Hamill J (Price AJA and Campbell J agreeing).

seeks to present that argument, in circumstances where the Respondent has addressed why a remittal order should not be made, but not why that order cannot be made.

Part IV: Submissions

Error required for purposes of s 6(3)

6. The jurisdiction of the Court of Criminal Appeal in relation to appeals against sentence by a person convicted on indictment arises from s 5(1)(c) of the *Criminal Appeal Act*. The power to determine such appeals is conferred by s 6(3) in the following terms:

> "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."

7. As this Court observed in *Betts*:[10]

> "Notwithstanding its [i.e. s 6(3)] wide terms, it is well settled that the Court of Criminal Appeal's power to intervene is not enlivened unless error in any of the ways explained in *House v The King* [(1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ] is established."

8. Such error may be specifically identified or inferred.[11] If error is established, it then becomes the appellate court's "duty to re-sentence, unless in the separate and independent exercise of its discretion it concludes that no different sentence should be passed".[12] In *Betts*, the Court referred to this as the "conditional re-sentencing obligation imposed by s 6(3)".[13] Of course, where error in the form of manifest excess has been established, the condition is fulfilled, it being implicit in the error that another sentence is warranted in law.

9. Thus, as was observed by Spigelman CJ in *R v Simpson*,[14] while demonstration of error is required, the "statutory trigger for the quashing of a sentence" is not whether error has

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[10] (2016) 258 CLR 420 at [10]. See also *Kentwell* (2014) 252 CLR 601 at [35] per French CJ, Hayne, Bell and Keane JJ; *Dinsdale v The Queen* (2000) 202 CLR 321 at [3], [5] per Gleeson CJ and Hayne J, [21] per Gaudron and Gummow JJ, [58] per Kirby J. See generally *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at [11], [49]-[50], [61]-[62] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[11] See *AB v The Queen* (1999) 198 CLR 111 at [129]-[130] per Hayne J.
[12] *Kentwell* (2014) 252 CLR 601 at [35] per French CJ, Hayne, Bell and Keane JJ.
[13] (2016) 258 CLR 420 at [18]. See also *DL v The Queen* (2018) 265 CLR 215 at [9].
[14] (2001) 53 NSWLR 704 at [79] (Mason P, Grove J and Newman AJ agreeing); see also at [99]-[100] per Sully J; *Douar v The Queen* (2005) 159 A Crim R 154 at [115]-[117] per Johnson J (McClellan CJ at CL and Adams J agreeing).

occurred in the sentencing process; it is whether "some other sentence … is warranted in law and should have been passed". The import of this observation was considered by this Court in *Kentwell*,[15] by reference to *Baxter v The Queen*.[16]

10. In *Baxter*, Spigelman CJ explained that s 6(3) is directed to ensuring that the Court of Criminal Appeal does not proceed as if "the identification of error created an entitlement on the part of an Applicant to a new sentence, for example, by merely adjusting the sentence actually passed to allow for the error identified": to do so "would be to proceed on the assumption that the sentencing judge was presumptively correct, when the Court has determined that the exercise of the discretion … miscarried."[17] In *Kentwell*, French CJ, Hayne, Bell and Keane JJ accepted this analysis.[18] In doing so, their Honours did not accept the "differing views respecting the interpretation of s 6(3)" expressed by Kirby and Latham JJ in *Baxter*. Specifically:

    a. Kirby J had analysed whether the applicant established "material error", in the sense of an error that "may, as a matter of inference, have infected the reasoning of the sentencing judge such that, absent error, some other and lesser sentence may have been imposed";[19] and

    b. Latham J had required that the analysis of Spigelman CJ be confined to "material error", being error that "has 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".[20]

11. Justice Gageler (as his Honour then was) expressly reserved consideration of the differences between the members of the Court in *Baxter*.[21]

12. The joint judgment in *Kentwell* continued:[22]

> "When a judge acts upon wrong principle, allows extraneous or irrelevant matters to guide or affect the determination, mistakes the facts or does not take into account some material consideration, the Court of Criminal Appeal does not assess whether and to what degree the error influenced the outcome. The discretion in such a case has miscarried and it is the duty of the Court of

[15] (2014) 252 CLR 601 at [38]-[42].
[16] (2007) 173 A Crim R 284 (***Baxter***).
[17] *Baxter* (2007) 173 A Crim R 284 at [19].
[18] (2014) 252 CLR 601 at [42].
[19] *Baxter* (2007) 173 A Crim R 284 at [60].
[20] *Baxter* (2007) 173 A Crim R 284 at [83].
[21] *Kentwell* (2014) 252 CLR 601 at [48].
[22] (2014) 252 CLR 601 at [42].

> Criminal Appeal to exercise the discretion afresh …. A sentence that happens to be within the range but that has been imposed as the result of a legally flawed determination is not 'warranted in law' unless, in the exercise of its independent discretion, the Court of Criminal Appeal determines that it is the appropriate sentence for the offender and the offence. This is not to say that all errors in the sentencing of offenders vitiate the exercise of the sentencer's discretion."

As an example of an error that "[w]ithout more … does not affect the exercise of the sentencer's discretion", their Honours referred to breaching a statutory provision which requires a non-parole period to be set prior to the setting of the balance of the term.

13. Error having been established in *Kentwell*, the joint judgment concluded:[23]

> "The appellant is entitled to be sentenced according to law. The issue for the Court's consideration was whether upon the hearing of the appeal it might conclude, taking into account the full range of factors including the evidence of the appellant's progress in custody and current mental state, that a lesser sentence is warranted in law."

14. Accepting that not all errors in sentencing vitiate the exercise of the sentencing discretion, it is not consistent with *Kentwell* to impose a requirement of materiality on errors that otherwise engage the conditional re-sentencing obligation in s 6(3). It is acknowledged that, occasionally, the descriptor "material" is used to indicate or emphasise a conclusion that a sentencing proceeding was affected by error or that the exercise of a sentencing discretion miscarried.[24] But, unlike in administrative law and conviction appeals, this is not a threshold applied *subsequent* to the establishment of error (cf AS [25], [47], [49]; RS [16], [47]). Once error is established, the appellate court must exercise the sentencing discretion afresh and form an opinion as to whether "some other sentence … is warranted in law and should have been passed". As emphasised by Beech-Jones J in *R v Hatahet*:[25]

> "*Kentwell* held that, once any error on the part of the sentencing judge is established, the court must exercise the sentencing discretion afresh. If the exercise of that discretion results in a conclusion that a lesser sentence is 'warranted in law', then the court must re-sentence the offender. The independent exercise of the sentencing discretion that the court is obliged to undertake if it finds error cannot be performed by 'merely adjusting the sentence actually passed to allow for the error identified'."

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[23] (2014) 252 CLR 601 at [44].
[24] See *Andreata v R* [2015] NSWCCA 239 at [26]-[28] per Beech-Jones J (Ward JA and Adams J agreeing). For example, his Honour emphasised that *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ spoke of a case where "the judge *acts upon* a wrong principle" (emphasis added).
[25] (2024) 98 ALJR 863 at [69] (citations omitted).

15. A separate threshold of materiality is inapposite in sentence appeals because the Court's power to quash a sentence and proceed to re-sentencing is already conditioned by the formation of the opinion expressly referred to in s 6(3). No departure from, or addition to, the approach to sentence appeals explained in *Kentwell* should be accepted.

16. The determination that "some other sentence … is warranted in law and should have been passed" is generally made on the basis of the material before the sentencing court and any relevant evidence of post-sentence conduct.[26] While an appellant is not usually "permitted to run a new and different case" for this purpose, that "does not deny that an appellate court has the flexibility to receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice".[27] Given that flexibility, it is unlikely that an appellant would consider an appellant to be bound by forensic decisions made in the course of a sentencing proceeding which relevantly miscarried due to unfairness (cf AS [54]).

17. Section 6(3) of the *Criminal Appeal Act* does not risk leaving miscarriages of justice without a remedy because, before an appeal may be dismissed, the Court of Criminal Appeal must conclude either that the sentencing discretion did not miscarry or that, upon fresh exercise of the sentencing discretion, no lesser sentence is warranted in law. Thus, a sentence that is warranted in law will either have been imposed by the sentencing judge or will be imposed by the Court of Criminal Appeal, in the independent re-exercise of the sentencing discretion. In that way also, s 6(3) leaves no room for remittal. By way of illustration, it was formerly accepted in Victoria that its analogue to s 6(3)[28] did not involve a power of remittal (including in cases of fundamental procedural irregularities and denials of procedural fairness).[29] The absence of such power was overcome by a legislative amendment inserting power to "quash the sentence passed at the trial and remit the matter to the trial court", which power was expressed to be available "despite" the

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[26] *Betts* (2016) 258 CLR 420 at [2], [14]; *DL v The Queen* (2018) 265 CLR 215 at [9].
[27] *Betts* (2016) 258 CLR 420 at [2].
[28] At the relevant time, *Crimes Act 1958* (Vic), s 568(4) provided: "On an appeal against sentence the Full Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal".
[29] See *R v Henderson* [1966] VR 41 at 43-44 per Winneke CJ (Hudson and Gillard JJ agreeing); *R v Webber* (1996) 86 A Crim R 361 at 365 per Winneke P (Callaway JA and Smith AJA agreeing); *R v Bishop* [1998] 1 VR 531 at 536 per Ormiston JA (Harper AJA agreeing), 537-538 per Charles JA (Harper AJA agreeing). See also *Leo v The Queen (No 2)* (2014) 34 NTLR 15.

analogue to s 6(3).[30] An issue in this case is whether, as the Appellant submits, s 12(2) of the *Criminal Appeal Act* has a similar effect, despite its different and more general drafting.

Availability of power to remit in s 12(2)

18. Aside from the determination of a sentence appeal pursuant to s 6(3), other powers which may be relevant to a Court hearing an appeal pursuant to s 5(1)(c) are contained in s 7(1A) and s 12(1) of the *Criminal Appeal Act*. Section 12(1) empowers the Court *inter alia* to make orders for the production of documents (s 12(1)(a)); the examination of witnesses (s 12(1)(b)-(c)); and the provision of assistance to the Court in relation to factual matters by a commissioner or assessor (s 12(1)(d)-(e)).[31] The closing words of s 12(1) ("[p]rovided that in no case shall any sentence be increased by reason of, or in consideration of any evidence that was not given at the trial") contemplate that these powers may be exercised in a sentence appeal. Section 12(1) was contained in the *Criminal Appeal Act* on enactment and has not been substantively amended.[32]

19. Section 12(2) of the *Criminal Appeal Act* confers a general power on the Court of Criminal Appeal to "remit a matter or issue to a court of trial for determination and … in doing so, [to] give any directions subject to which the determination is to be made." It was inserted by the *Criminal Appeal (Amendment) Act 1987* (NSW). The explanatory note in relation to the Bill proposing this amendment referred to "enable[ing] the Court of Criminal Appeal to remit particular matters or issues for determination of the Court of first instance". In the second reading of the Bill, the Attorney General said:[33]

> "Item (3) of schedule 1 to the bill will amend section 12 of the principal Act, dealing with supplemental powers of the Court of Criminal Appeal, to give the court a general power to remit matters or issues to a trial court for determination either generally or subject to such directions as the Court of Criminal Appeal

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[30] *Sentencing and Other Acts (Amendment) Act 1997* (Vic), inserting sub-s (5) of s 568 of the *Crimes Act*. See now, s 282 of the *Criminal Procedure Act 2009* (Vic).
[31] As noted in *Betts* (2016) 258 CLR 420 at [15] fn 34, s 12(1) is modelled on s 9 of the *Criminal Appeal Act 1907* (UK), which also gave the Court "very wide powers" and the history of which was discussed in Pattenden, *English Criminal Appeals: 1844-1994* (1996) at 130-131.
[32] The *Justices Legislation Repeal and Amendment Act 2001* (NSW) omitted the reference to a "justice" (in colocation with "the court") in s 12(1)(b).
[33] Legislative Assembly, *Hansard*, 17 November 1987 at 16088-16089. The Bill also proposed the insertion of what is now s 5F of the *Criminal Appeal Act*, allowing for appeals against interlocutory judgments or orders. The Supreme Court (Appeals) Amendment Bill 1987 was considered at the same time. It added matters arising in the criminal jurisdiction of the District Court to those matters in respect of which the Supreme Court's powers were limited by s 17 and the Third Schedule of the *Supreme Court Act 1970* (NSW).

> might give. This power will be of great assistance in matters where, for example, there are deficiencies in the evidence or where there are further matters to be considered which can be better attended to before a first-instance judge. These bills are a rationalization of existing avenues of appeal from interlocutory applications in criminal proceedings on indictment in the District Court and the Supreme Court, while ensuring that issues can be dealt with which justice requires should be resolved prior to the completion of a trial."

20. In *Betts*, the Court observed that:[34]

> "To the extent … the extrinsic material affords any assistance in identifying the object of the inclusion of the general power of remittal, it does not provide support for the conclusion that s 12(2) qualifies the conditional re-sentencing obligation imposed by s 6(3)."

21. The Appellant's submission as to the construction of s 12(2) of the *Criminal Appeal Act* appears to be that it offers a free-standing basis on which to determine an appeal brought pursuant to s 5(1). He submits that the power to remit in s 12(2) carries with it power to set aside orders in order to facilitate a determination by the trial court on remittal (AS [52]). This presumably includes power to set aside a conviction and to quash a sentence. On this view, there is no need to resort to s 6 and, accordingly, no need to establish error in the exercise of a sentencing discretion; nor that a lesser sentence is warranted in law. Adherence to this view may be why the Appellant has not addressed what was said in *Kentwell* about the task of an appellate court in determining a sentence appeal.

22. This Court should not accept that s 12(2) provides a complete alternative to s 6 as a means of determining an appeal. Section 6 places important conditions on the determination of appeals. For example, a conviction appeal will not succeed if the proviso in s 6(1) is made out. There is no basis to conclude that s 12(2) was intended to allow an appellant to bypass those fundamental requirements. Section 12(2) was intended to supplement the powers of the court, not to fundamentally alter its task when determining appeals. This is supported by the extrinsic material referred to above and the co-location of s 12(2) with s 12(1), as the powers in s 12(1) fall to be exercised in the course of determining an appeal pursuant to s 6. Further, it is unlikely that the legislature would leave such important powers – to set aside convictions and quash sentences – to implication for the

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[34] (2016) 258 CLR 420 at [18]. See also *Environment Protection Authority v Wollondilly Abattoirs Pty Ltd & Davis* [2019] NSWCCA 312 (***Wollondilly)*** at [86] per Brereton JA (Bellew J agreeing).

purposes of s 12(2), particularly in circumstances where those powers are expressly conferred, with limitations, by s 6.

23. The power in s 12(2) is conferred in general and permissive terms. By contrast, s 6(3) pertains only to appeals against sentence under s 5(1) and uses mandatory language. As explained above, s 6(3) leaves no room for remittal. This does not involve an unduly literal construction of s 6(3).[35] Rather, it reflects the role and obligation of the appellate court to re-sentence an appellant where the sentencing discretion has miscarried.[36]

24. It may be accepted that there are cases in which re-sentencing is rendered more difficult due to procedural irregularities in the sentencing proceeding under appeal and a power of remittal may have utility in such cases.[37] But the appellate court has expansive powers to receive evidence and inform itself, pursuant to s 12(1). The court need not be thwarted in determining an appropriate sentence. It may be unusual, but it is not unfeasible, for an appellate court to receive evidence to remedy some procedural unfairness that occurred in the court below. *R v Bishop* provides an example.[38] Moreover, as illustrated by this case, it will often be straightforward for an appellate court to resolve unfairness on re-sentencing through receipt of further submissions (see Judgment [52]). The unavailability of s 12(2) in appeals that fall to be determined by reference to s 6(3) does not "deny an applicant the right to an effective appeal against sentence".[39]

25. The Appellant submits that his construction of s 12(2) promotes the purpose of the *Criminal Appeal Act*, which he identifies as being "to confer power on the CCA to provide a remedy for miscarriages of justice" (AS [51]). For the reasons given, s 6(3) does not stand in the way of such remedies. The terms of s 6(3) should be given effect and those terms preclude remittal. In any event, as to the purpose of the *Criminal Appeal Act*, it is clear from s 6 that it was not intended that an appellate court could intervene in respect of convictions and sentences wherever a complaint as to the proceedings below is made out. The Appellant's construction of s 12(2) as a free-standing basis on which to determine an appeal has that effect. Questions of materiality assume importance in the

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[35] Cf *O'Neil-Shaw v R* [2010] NSWCCA 42 at [30] per Basten JA (Howie and Johnson JJ agreeing).
[36] As to the role expected of the Court of Criminal Appeal historically in connection with s 4(3) of the *Criminal Appeal Act 1907* (UK), see Pattenden, *English Criminal Appeals 1844-1994* (1996) at 255-256.
[37] *Betts* (2016) 258 CLR 420 at [19].
[38] [1998] 1 VR 531 at 536 per Ormiston JA.
[39] Cf *O'Neil-Shaw v R* [2010] NSWCCA 42 at [30] per Basten JA (Howie and Johnson JJ agreeing).

Appellant's argument because of the expansiveness of the power to intervene that s 12(2) confers on his construction.

26. If the Court does not accept that s 12(2) is unavailable in respect of appeals falling to be determined under s 6(3) (being the Director's primary argument), the Court should still not accept the Appellant's construction of s 12(2) as outlined above. In the alternative, the Director submits that if s 12(2) is available at all, it is only available after the requirements of s 6(3) are met and the Court's power to quash the sentence is enlivened; that is, after error is established and the Court has formed the opinion that another sentence is warranted in law and should have been passed. This construction gives both s 6(3) and s 12(2) work to do in respect of sentence appeals brought pursuant to s 5(1). But it encounters the difficulty (which informs the Director's primary argument) of not giving effect to that part of the mandate in s 6(3) that involves the Court "pass[ing] such other sentence" as is warranted in law.

27. As the Court of Criminal Appeal noted in this case, where that Court has utilised the power in s 12(2) in sentence appeals, as a matter of practice, it has tended to do so after forming the opinion referred to in s 6(3) (Judgment [41]). The Appellant relies on decisions of the Court of Criminal Appeal where that was not the case, or not obviously the case. Not all of those decisions involved in s 6(3).[40] The conditional re-sentencing obligation in s 6(3) is central to the argument here advanced. In any event, there are other decisions of the Court of Criminal Appeal that have equally expressed doubts about the availability of the power to remit in similar circumstances.[41] The matter now arises for determination by this Court, by reason of the relief sought by the Appellant if his appeal succeeds.

[40] See, for example, *R v Jacobs Group* [2023] NSWCCA 280, where the Court reasoned that there was no obligation in s 5D of the *Criminal Appeal Act* for the Court to resentence and relied on the power in s 12(2): see at [15]-[21]. No consideration of s 6(3) was necessary in that case. Further, as acknowledged by the Appellant at AS [55], *Maclean v Brylewski* [2025] FCAFC 133 involved a different statutory scheme.
[41] See, for example, *Wollondilly* [2019] NSWCCA 312 at [86] per Brereton JA (Bellew J agreeing).

Part V: Estimate of time

28. The Director estimates that one hour will be required for presentation of her oral argument.

Dated: 4 December 2025



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The Director is represented by the Solicitor for Public Prosecutions (NSW).

ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date
1	*Criminal Appeal Act 1912* (NSW)	Current	ss 5, 6, 7, 12	As in force at the time of the Court of Criminal Appeal's decision	9 April 2025
2	*Director of Public Prosecutions Act 1986* (NSW),	Current	s 7	Sets out the Director's current functions	4 December 2025
3	*Crimes Act 1958* (Vic)	Version 215	s 568	For illustrative purposes only	
4	*Criminal Procedure Act 2009* (Vic)	Current	s 282	For illustrative purposes only	
5	*Criminal Appeal Act 1907* (UK)	As enacted	s 4, 9	For illustrative purposes only	