HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 12 Mar 2026 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:	C2/2026
File Title:	O'Connell v. Director of Public Prosecutions
Registry:	Canberra
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	12 Mar 2026

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.

C2/2026

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

BETWEEN: MICHAEL O'CONNELL
Appellant
and

THE KING
Respondent

APPELLANT'S SUBMISSIONS

Part I: Form of submissions

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

Part II: Concise statement of issues

2 The issues raised by this appeal are:

a. Whether s 37O(1)(d) *Supreme Court Act 1933* (ACT) (***SCA***) empowers the Court of Appeal of the Australian Capital Territory (**CA**) to enter a verdict of guilty to an alternative offence left to the jury where the jury convicted the person of the principal offence and that conviction was quashed and a verdict of acquittal entered in respect of that offence.

b. Whether it was open to the CA to enter a verdict of guilty to the alternative offence of manslaughter given the basis upon which the CA upheld the unreasonable verdict ground of the appellant's appeal against conviction.

c. Whether s 297 of the *Crimes Act 1900* (ACT) (***Crimes Act***) precludes the CA from entering a verdict of guilty to an alternative offence (left to the jury at trial) or making an order for a re-trial for the alternative offence in circumstances where the CA had entered a verdict of acquittal for the principal offence.

Part III: Section 78B *Judiciary Act 1903* notices

3 The appellant does not consider there is any need for notices under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: **Citation of the decision under appeal**

4 The medium neutral citation for the decision under appeal is *O'Connell v DPP (No 4)* [2025] ACTCA 41 (**Second J**). The decision under appeal followed from an earlier decision whereby the CA, by majority, upheld the appellant's appeal against his conviction for murder and ordered an acquittal for that offence. The medium neutral citation for that decision is *O'Connell v DPP* [2025] ACTCA 20 (**First J**).

Part V: **Relevant facts**

5 The appellant was convicted of the murder of Danielle Jordan after a trial by jury in the Supreme Court of the Australian Capital Territory concluding on 15 June 2023. The sole count on the Indictment was murder: Core Appeal Book (**CAB**) **6.** An alternative verdict of manslaughter was available pursuant to s 49 of the *Crimes Act* and was left to the jury.

6 The appellant and Ms Jordan were in a relationship at the time of offence. The appellant was at Ms Jordan's house in the early hours of 15 April 2022.

7 A 13-year-old witness referred to as Ms X was also at Ms Jordan's house. Ms X gave evidence that the appellant stayed at the house on the evening of 14 April 2022, and that he and Ms Jordan had an argument at about 2am. She witnessed the appellant attempt to leave the house during this argument and Ms Jordan holding on to him to try to make him stay: First J at [15], **CAB 77.** The appellant did eventually leave but returned at around 4am and a second argument between he and Ms Jordan ensued: First J at [15], [32] **CAB 77, 80**. The appellant attempted to leave again, and Ms Jordan and Ms X both followed him from the house to his vehicle outside.

8 According to Ms X, Ms Jordan did not want the appellant to leave and "jumped on the bonnet" of his car, a Mitsubishi Triton utility. Ms X said she told Ms Jordan to get off the car. Ms Jordan told the appellant to come inside because she wanted to talk to him. The appellant got out of the vehicle and Ms Jordan "dived in the window" to find a "vape" in the car. The appellant pulled her out of the car and she repeated her request for him to come inside. The appellant got into his vehicle again, and Ms Jordan got back onto the bonnet of the vehicle. Ms X was also, at some point on "the side" of the vehicle but got down as the appellant began driving: First J at [34] **CAB 81**. Ms X told Ms Jordan to get off the car but she did not. Ms X said that she (Ms X) stood in front of the car while the appellant started driving it slowly up Coutts Place, and towards the intersection of Coutts Place and Alfred Hill Drive: First J at [16], [34]-[35] **CAB 77, 81**.

9 The Crown case at trial, based on Ms X's evidence, was that Ms Jordan remained on the bonnet of the vehicle while the appellant drove a total distance of 266.8 metres from Ms Jordan's house. Ms Jordan was cross-legged on the bonnet holding the "lip" of the bonnet, under the windscreen wipers: First J at [327] **CAB 140**. It was alleged that the appellant drove slowly up Coutts Place with Ms X in front of the vehicle stopping at the intersection with Alfred Hill Drive, reversed back some distance down the road towards Ms Jordan's house, then accelerated back to the top of the street towards Ms X and turned left on Alfred Hill Drive. He was alleged to have continued down Alfred Hill drive for around 200 metres (First J at [327] **CAB 140**) when Ms Jordan fell from the bonnet of the vehicle and onto the road, sustaining fatal injuries to her head: First J at [1] [16], [35] **CAB 74, 77, 81**.

10 A small period of the vehicle's movements on Alfred Hill Drive were captured on CCTV from a house nearby. There was no CCTV showing the vehicle at the time Ms Jordan fell. Ms Jordan cannot be seen on the bonnet of the vehicle or on the back of the vehicle on the CCTV footage: First J at [57] **CAB 87**. Ms X said she heard a screech after the vehicle had turned left down Alfred Hill Drive: First J at [35] **CAB 81**. This could also be heard on the CCTV footage: First J at [53] **CAB 86**. It was not alleged that the appellant was driving over the speed limit: First J at [313] **CAB 138**. There was also no evidence establishing anything "remarkable or erratic about the manner of driving" nor anything in the CCTV consistent with any "dramatic escalation in the speed of the vehicle or in the manner of driving such that it appeared uncontrolled, erratic or more intense as to the risk it presented" after it turned onto Alfred Hill Drive: First J at 326] **CAB 140**. The prosecution did not rely on the appellant applying the brakes of the vehicle as demonstrative of an intention to dislodge Ms Jordan from the bonnet: First J at [323] **CAB 139**. A police expert estimated that at the time the vehicle was seen on the CCTV it was travelling at about 42.5 kilometres per hour, and that at the times the brakes were applied the vehicle was travelling at 63.1 kilometres per hour: First J at [316] **CAB 138**. However, the officer also gave evidence that the speed at the time of braking could have been 51.5 kilometres per hour allowing for margins of error: First J at [317]-[320] **CAB 138-139**.

11 Ms X did not see Ms Jordan fall from the vehicle but saw her immediately after on the road at the rear of the vehicle. The medical evidence showed no signs she had been run over by the vehicle: First J at [83] **CAB 92**. Ms X said that she saw the appellant pick her up and put her in the passenger seat of his vehicle, and that he said "I'm sorry, mate, I didn't mean to do it" and "I'm sorry bub, I'm so sorry, I didn't mean to do that" and/or "I'm so sorry

baby, I love you": First J at [35]-[36] **CAB 81-82**, sentencing judgment at [15] **CAB 53**. At some point he said to Ms X "I shouldn't have done it": First J at [270] **CAB 129-130**. He drove Ms Jordan to hospital and arrived at 4.51am: First J at [28] **CAB 80**.

12 The appellant took part in a police interview on 16 April 2022: summarised First J at [58]-[74] **CAB 87-90**. He said that as he was leaving Ms Jordan's house she "jumped onto" the vehicle and "bent [his]…windscreen wiper back": First J at [59] **CAB 87**. He described her getting off and then back onto the vehicle when he was attempting to leave. He said he was able to drive up the road "a bit" at a point where Ms Jordan had gotten off the back of the vehicle, but then she "caught up and jumped back on the car again". He said that he then stopped the vehicle and got out, at which point she "tripped and…hit her head". The effect of his version was that he was not driving the vehicle when Ms Jordan fell from it, and that she was on the back of the vehicle not the bonnet. The appellant also said in a recorded phone calls from gaol that Ms Jordan was not on the bonnet of the car when she fell: SU 567.1-.19 **CAB 30**. The Crown case was that the jury should reject his account because he had admitted to lying when he told the hospital staff that she had fallen down some stairs, there were inconsistencies between the version in his interview and his version in the recorded gaol calls and that it was inconsistent with the CCTV footage: T473.25-474.25 Appellant's Book of Further Materials (**ABFM**) **31-32**.

13 The Crown case at trial for murder was that the appellant deliberately drove his vehicle with Ms Jordan on the bonnet: T490.37-.38 **ABFM 48**. It was alleged that this was the deliberate act and the act which caused Ms Jordan's death: T490.37-.39, T491.4-.9 **ABFM 48-49**. The Crown relied on reckless indifference as the requisite state of mind for murder. The Crown case was that the appellant foresaw or realised that his act would probably cause Ms Jordan's death but continued to commit the act regardless of that consequence: T491.14-18 **ABFM 49**. In relation to manslaughter as a statutory alternative, the Crown relied upon manslaughter by unlawful and dangerous act: T492 **ABFM 50**. The deliberate act and act causing death was the same as for murder: T492.20-.35 **ABFM 50**. The Crown alleged the act was unlawful because it constituted an assault, which meant that the prosecution was required to establish that the appellant "intentionally drove the vehicle with the intention that Ms Jordan would fall from it and collide with the roadway": T492.39-.42 **ABFM 50**. The Crown alleged the act was dangerous because a reasonable person in the appellant's position would have realised that he was exposing Ms Jordan to an appreciable risk of serious injury: T493.29-.32 **ABFM 51**.

14 The central issue in dispute at trial was whether the prosecution could prove beyond reasonable doubt that he drove the vehicle while Ms Jordan was on the bonnet: T495.40-.45 **ABFM 53.** The defence case was that Ms X was unreliable and that the prosecution's evidence did not establish that Ms Jordan was on the bonnet prior to falling from the vehicle. Defence counsel also submitted that "on any view of the evidence" the appellant did not have a reckless state of mind nor an intention to cause Ms Jordan to fall off the vehicle and strike the roadway: **SU** 591.1-.20 **CAB 42**; T544.28-35 **ABFM 87**.

The jury directions

15 The jury were directed that they could not convict the appellant unless they were satisfied beyond reasonable doubt that Ms Jordan was on the bonnet of the vehicle at the time she fell onto the roadway. They were further directed that it was necessary for them to be satisfied beyond reasonable doubt that Ms X was an honest and accurate witness: SU 561.27-562.40 **CAB 24-25.**

16 The jury were directed both in the trial judge's summing up (SU 553.30-.38 **CAB 16**) and in written directions (MFI 31, **ABFM 89)** that the act relied upon for the murder charge was the appellant deliberately driving his vehicle with Ms Jordan on the bonnet, knowing that she was on the bonnet. The jury were directed that they could be satisfied that the appellant acted with reckless difference if at the time that he committed the act causing death he "foresaw or realised that this act would probably cause the death of Ms Jordan, but…continued to commit that act regardless of that consequence": SU 554.17-24 **CAB 17.**

17 With respect to the alternative charge of manslaughter, the jury were directed that the act relied on by the Crown was "the same act" as for murder: SU 554.26-.40 **CAB 17**. The jury were further directed that to convict the appellant of manslaughter they needed to be satisfied that this act was unlawful. In this respect, the jury were told that the prosecution case was that "the accused intentionally drove the vehicle *with the intention that Ms Jordan would fall from the vehicle and collide with the roadway"* (emphasis added): SU 554.47-555.12 **CAB 18.** The jury were directed that driving the vehicle with that intention would constitute an assault and therefore an unlawful act, and that it was important for them to "carefully consider that question of whether [they were] satisfied beyond reasonable doubt that the accused intentionally drove the vehicle with the intention that Ms Jordan would fall from the vehicle and collide with the roadway": SU 555.5-.12 **CAB 18.** The jury were

further directed on the need for the act to be (objectively) dangerous: SU 555.14-.29 **CAB 18.**

Court of Appeal decisions

18 The appellant appealed against his conviction on various grounds including that the jury's verdict on murder was unreasonable and could not be supported having regard to the evidence: First J at [5] **CAB 74-75.** The Court of Appeal by majority (Taylor J, Loukas-Karlsson J agreeing; McCallum CJ dissenting) upheld the unreasonable verdict ground, ordered a verdict of not guilty to murder and reserved on the question of whether to substitute another verdict: First J at [257], [346] **CAB 126, 145, 146**. McCallum CJ would have dismissed the appeal: First J at [256] **CAB 126**. Each member of the CA concluded that it was open to the jury to be satisfied beyond reasonable doubt that the appellant drove the vehicle while Ms Jordan was on the bonnet: First J at [105], [257], [265] **CAB 96**, **126, 128**. Taylor J concluded that it was not open to the jury to be satisfied beyond reasonable doubt of murder because the prosecution had not excluded the reasonable inference that when the appellant drove the vehicle with Ms Jordan on the bonnet he did not know or realise her death was probable: First J at [345] **CAB 144** see also [271] and [305] **CAB 130, 136**.

19 Taylor J had regard to four matters in particular in arriving at that conclusion. First, the fact the statement "I shouldn't have done it", relied on by the prosecution as an admission, was neutral with respect to the appellant's state of mind for murder: First J [312] **CAB 137-138**. Second, the nature and manner of the driving including the appellant's speed which her Honour considered was significant because of the absence of any other features such as swerving or driving erratically supporting "an inference as to his intention to dislodge Ms Jordan" for manslaughter: First J [323] **CAB 139**. Third, the fact that Ms Jordan had been on the bonnet of the vehicle for a period of time and had been able to remain in her position without falling (First J [327] **CAB 140-141**) and that the risk of probable death was dependent on variable circumstances like the speed of the vehicle and the height of the bonnet: First J at [331] **CAB 141-142**. Fourth, although there was evidence suggesting the appellant was angry and frustrated at Ms Jordan stopping him from leaving, that anger could not be substituted for the specific state of mind necessary to establish murder: First J [336]-[340] **CAB 142-143**. Finally, the appellant's reaction in the immediate aftermath of Ms Jordan falling was not consistent with an awareness that his act would probably cause her death: First J [342]-[345] **CAB 144**.

20 McCallum CJ concluded that the hypothesis that the appellant did not foresee the probability of death was not a reasonable hypothesis on the evidence and was excluded by the appellant's versions of events: First J at [232] **CAB 120-121**.

21 The Court heard further submissions from the parties on the question of whether another verdict should be entered. McCallum CJ (Loukas-Karlsson and Taylor JJ agreeing) held that the CA had the power under s 37O(1)(d) of the *SCA* to enter a verdict of guilty for a lesser alternative where it can be concluded the jury must have been satisfied beyond reasonable doubt as to the elements of the lesser offence, having regard to the nature of the successful ground of appeal: Second J at [56]-[57], [61]; [69] **CAB 160-162, 164**. McCallum CJ (Loukas-Karlsson and Taylor JJ agreeing) also concluded that s 297 of the *Crimes Act* did not preclude the CA from entering a verdict of guilty to manslaughter or from ordering a new trial for the offence of manslaughter: Second J at [24] **CAB 153**.

22 Loukas-Karlsson and Taylor JJ concluded that the jury must have been satisfied of the facts constituting manslaughter and made an order that a verdict of guilty be entered on the alternative offence of manslaughter: Second J at [110], [113], **CAB 172-173**. McCallum CJ dissented and would have made an order for a new trial for the offence of manslaughter: Second J at [67]-[68] **CAB 163**. Her Honour concluded that a different mental element was required for manslaughter namely, an intention to dislodge the deceased from the bonnet of the vehicle) and that no jury had determined that issue adversely to the appellant: Second J at [62] **CAB 162**.

Part VI: Argument

Ground (a): The power to enter "another verdict" in s 37O(1)(d) of the *SCA*

23 Ground (a) as framed in the Notice of Appeal (**CAB 184**) does not directly allege the CA erred in entering a verdict of guilty of manslaughter because there was no power to enter a verdict of guilty for an alternative offence under s 37O(1)(d) of the *SCA*. However, ground (a) is framed broadly and alleges the CA erred in entering a verdict of guilty by manslaughter which is capable of encapsulating an argument that there was no power to do so. It is acknowledged at the outset that this argument was not raised in the application for special leave to appeal.

24 The orders the CA can make (in all types of appeal) are set out in s 37O of the *SCA* which lists (disjunctively) various orders that the CA can make. In the context of criminal appeals,

the CA has the power to "set aside the verdict and order in a trial on indictment and order a verdict of not guilty (*or another verdict*) to be entered" (emphasis added): s 37O(1)(d) *SCA*. The CA also has the power to order "a new trial, with or without jury, on any appropriate ground": s 37(1)(e) *SCA*. Section 37O(2) provides that, subject to the application of a "proviso" in subsection (3), the CA on an appeal against conviction must allow the appeal where it considers that the jury's verdict is unreasonable or cannot be supported having regard to the evidence; that the judgment should be set aside on the ground of a wrong decision on a question of law; or that there was otherwise a miscarriage of justice. The powers in subsection (1) with respect to criminal appeals are enlivened where an appeal is allowed under subsection (2). Section 37P makes further provision for "new trials" (not limited to criminal trials) and permits the Court, where it orders a new trial, to also order that "the new trial be conducted generally, or on particular issues" or to "impose any conditions that it considers appropriate".

25 McCallum CJ held that under s 37O(1)(d) of the *SCA* the CA had the power to enter a verdict of guilty in respect a lesser alternative offence, here manslaughter, where it can be concluded that the jury must have been satisfied beyond reasonable doubt of the elements of the lesser offence and taking into account the nature of the successful ground of appeal: Second J at [46], [56],-[57] and [61] **CAB 158, 160-161, 164**. This conclusion was erroneous and the CA did not (and does not) have the power to make an order entering a verdict for a lesser alternative offence. Nor does s 37O(1)(d) of the *SCA* incorporate or pick up the provision enabling the jury to return an alternative verdict under s 49 of the *Crimes Act*.

26 The terms of s 37O(1)(d) of the *SCA* permit the CA to set aside a verdict and order a verdict of not guilty (*or another verdict*). The terms of the provision do not extend to allow for the entry of a verdict for *another offence*. The terms of the provision indicate there must be a connection between "the verdict", being the verdict that is to be "set aside" and the verdict of not guilty "or another verdict". Put another way, these terms all relate to the verdict for the offence that is the subject of the conviction appeal. Here, the verdict set aside was the verdict of guilty of murder and a verdict of not guilty of murder was entered. The provision did not then extend to permit the making of a further order namely, an order of guilty for manslaughter, which was a different offence. The provision uses the word "or" another verdict not "and" another verdict. The provision is limited to permitting the entry of

another type of verdict for the offence the subject of the appeal such as not guilty by reason of mental illness.

27 Section 37O(1)(d) does not prescribe the circumstances in which "another verdict" might be entered once a verdict is set aside. This further suggests that the provision does not (and was not intended to) extend to permit the substitution of a verdict for an alternative (i.e. a different offence). This is to be contrasted with provisions in other criminal appeal statutes in Australia which are prescriptive as to the circumstances in which a substituted verdict may be entered by an appellate court.[1] For example, s 7(2) of the *Criminal Appeal Act 1912* (NSW) (***Criminal Appeal Act***), provides:

> Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the [Court of Criminal Appeal] may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity… (extracted at Second J [53], **CAB 160**).

28 The difference between s 37O(1)(d) of the *SCA* and s 7(2) of the *Criminal Appeal Act* (NSW) is significant. Section 7(2) expressly refers to the circumstance where the jury "could on the indictment have found the appellant guilty of some other offence" before the power to substitute a verdict for an alternative offence is enlivened which is stated in express terms. Those words in s 7(2) of the *Criminal Appeal Act* are apt to pick up alternative offences pleaded on the indictment as well as statutory and common law alternative offences. No such words are used in s 37O(1)(d) of the *SCA*.

29 The provision permitting the jury to return an alternative verdict of manslaughter in the appellants case was s 49 of the *Crimes Act*, which also sets out a list of statutory alternatives

[1] See s 7(2) *Criminal Appeal Act 1912* (NSW); s 668F(2) of the *Criminal Code Act 1899* (Qld); s 160(3) of the *Criminal Procedure Act 1921* (SA); s 403(2) *Criminal Code Act 1924* (Tas), and s 412(1) *Criminal Code Act 1983* (NT) each of which are in similar but not identical terms. The equivalent powers in Victoria and Western Australia are structured differently, but also require the appellate court to be "satisfied that the jury…must have been satisfied of facts that prove the appellant was guilty" of the offence to be substituted: s 277 *Criminal Procedure Act 2009* (Vic); s 30 *Criminal Appeals Act 2004* (WA). Section 30BB(3) of the *Federal Court of Australia 1976* likewise requires the Court to be satisfied that "the jury "must" have been satisfied of the facts proving an alternative offence before it can be substituted.

available in the ACT for offences against the person. Section 49 applies only to "a trial" and its effect is limited to permitting the jury to return a verdict of guilty for an alternative offence if the jury is not satisfied that the accused is guilty of the principal offence. Section 49 of the *Crimes Act* does not apply to an appellate court considering the appropriate orders following a conviction appeal. Nor is it possible to read s 49 of the *Crimes Act* together with s 37O(1)(d) of the *SCA* as providing the appellate court with the power to enter a verdict of guilty for an alternative offence.

30 McCallum CJ observed the power of the trial judge to leave alternative verdicts has long been recognised at common law and that appeals were creatures of statute: Second J at [55] **CAB 160**. Her Honour considered it would be "unsurprising" to construe the appeal statute so as to acknowledge the appellate court's power to enter a verdict of guilty for a lesser alternative in circumstances where it can be concluded that the jury must have been satisfied of the lesser offence beyond reasonable doubt: Second J at [56] **CAB 160**. However, given that appeals are creatures of statute and the powers of an appellate court are statutorily defined, the source of the power to substitute must be clearly identified in the statute. Whilst it is open to a jury at common law to return a verdict of guilty for a lesser alternative, it does not follow from this that an appellate court has the power to substitute a verdict in the absence of a specific statutory power to do so.

Ground (a): the test for substituting a verdict and its application in the appellant's case

31 McCallum CJ held that the test to be applied by the appellate court in considering whether to exercise the power to substitute a verdict for a lesser offence under s 37O(1)(d) of the *SCA* was similar to the conditions which govern the exercise of the power in s 7(2) of the *Criminal Appeal Act* (NSW) as set out in *Spies v The Queen* (2000) 201 CLR 603 (***Spies***): Second J at [59]-[61] **CAB 161-162**. This was so notwithstanding the fact that s 37O(1)(d) contains no exposition of the circumstances in which the power to substitute can be exercised: Second J at [58]-[59] **CAB 161**. The majority appear to have agreed with McCallum CJ's formulation of the circumstances in which the power could be exercised: Second J at [69], [85], [88]-[89] **CAB 164, 166-168**.

32 In the event the Court finds there is a power to enter a substituted verdict for a different alternative offence under s 37O(1)(d) of the *SCA*, the appellant accepts the test in *Spies* is the appropriate test for the reasons McCallum CJ identified at Second J [59]-[61] **CAB 161-162**. In order to substitute a verdict for an alternative offence, the appellate court must be satisfied that the jury must have been satisfied of the elements of the alternative offence

which must be determined having regard to the nature of the successful ground of appeal: Second J at [59]-[60] **CAB 161**; see *Spies* at [27], [43], [49]-[50]. The Court in *Spies* at [43]-[44], [50] made plain that the question of what the jury must have been satisfied of must be considered in light of the successful ground of appeal. The Court said at [50]

> Moreover, s 7(2) only operates where the jury have been satisfied of those facts on evidence properly admitted, and where the jury have been properly directed as to the facts which are to be used as the basis of entering a conviction in respect of the other offence. If any of the facts of which the jury must have been satisfied is the product of evidence wrongly admitted, or has or may have been influenced by a misdirection, non-direction or other error on the part of the trial judge, s 7(2) cannot operate. The words "must have been satisfied of facts" mean that the jury must have been properly satisfied of facts proved by admissible evidence in accordance with proper directions.

33 It is not sufficient to enliven the power to substitute for the appellate court to consider that the jury would or might have convicted the appellant of the other offence: *Spies* at [43]. The "most likely" scenario for the exercise of the power in s 7(2) *Criminal Appeal Act* is where the offence to be substituted is "wholly within the ultimate facts of the offence" for which the conviction is set aside, with a "classic case" being where a conviction for assault occasioning actual bodily harm is set aside because actual bodily harm is not established on the evidence, but a common assault is substituted instead: *Spies* at [23].

34 The majority erred in its application of the test in *Spies* to the circumstances of the appellant's case. It was erroneous for the majority to conclude that the jury necessarily found that "the appellant drove the vehicle intending that Ms Jordan would be dislodged from it and collide with the roadway": Second J at [108] **CAB 172**, see also [84] and [109] **CAB 166, 172**. The majority's conclusion that the jury necessarily made this finding was based on the fact that the jury were satisfied beyond reasonable doubt that he acted with reckless indifference to her life: Second J at [83]-[85], [96] [108]-[110] **CAB 166, 169, 172**. However, the majority had found in the first decision that it was not open to the jury to be satisfied beyond reasonable doubt of this element: First J at [345] **CAB 144**. This was contrary to *Spies* because it failed to have regard to the successful ground of appeal and how that affected the question of what facts the jury must have found. The majority's analysis of what the jury must have found was also contrary to *Spies* as the analysis did

not confront the differences in the way the Crown put its case against the appellant for murder and manslaughter.

35 As set out above, the deliberate act and the act causing death relied upon by the Crown in relation to its case against the appellant for murder and manslaughter was the appellant's act of driving the vehicle with Ms Jordan on the bonnet. The only finding made by the jury that could properly be characterised as unaffected by the successful ground of appeal was that the appellant did the physical act alleged by the Crown, that is, drove with Ms Jordan on the bonnet of his vehicle: Second J at [78] **CAB 165**. However, that finding was insufficient to establish the offence of manslaughter given the requirement for the act to be unlawful and dangerous in the way particularised by the Crown.

36 Different states of mind were relied upon in proof of the Crown case on murder and manslaughter. For murder, the Crown alleged that the appellant knew or realised that Ms Jordan's death was probable but he continued regardless of that consequence. For manslaughter, in order to establish an unlawful act, the Crown alleged the accused drove the vehicle with the intention that Ms Jordan would be dislodged from the vehicle and collide with the roadway. The majority recognised this distinction in their judgment at [74]-[77], [79], [82] **CAB 164-165, 166**. Despite this, the majority went on to conclude that their earlier conclusion that the murder verdict was unreasonable "did not impugn the finding that the appellant possessed the intention to dislodge Ms Jordan from the vehicle": Second J at [109] **CAB 172**, see also [96], [108] **CAB 169, 172**. However, the jury never made such a finding as part of their consideration of the case on murder (see directions set out above): cf. Second J at [95] **CAB 169**. The specific intention required to establish unlawfulness of the act was not subsumed by the different state of mind required to prove the murder charge notwithstanding the potential for overlap in the evidence going to each matter. As McCallum CJ held, this distinction was essentially determinative of the question of whether to substitute a verdict for manslaughter: Second J at [62] **CAB 162**. The jury had never determined adversely to the appellant the issue of whether he had an intention to dislodge Ms Jordan from the vehicle: Second J at [62] **CAB 162**. Nor had the jury concluded adversely to the appellant the issue of whether the act was dangerous.

37 The majority was wrong to reason that the jury must have been satisfied of the appellant's "intention to dislodge" Ms Jordan because it was satisfied (by virtue of their verdict for murder) that he acted with reckless indifference to her life: Second J at [83]-[85], [96] [108]-[110] **CAB 166, 169, 172**. This reasoning was flawed because it involved the

majority taking into account the jury's verdict to the extent that it went to the appellant's state of mind, notwithstanding its earlier conclusion that the jury's finding as to the appellant's state of mind was unreasonable and not supported by the evidence. This was contrary to *Spies* at [43] and [50] which required the CA to examine the question of what the jury must have found in light of the successful ground of appeal. McCallum CJ, with respect, correctly identified that the finding the jury "*must* have made as to the mental element of either offence is necessarily and unassailably impugned by the earlier decision of the majority as being a finding that is unreasonable or unsupportable": emphasis in the original, Second J at [62] **CAB 162**.

38 There was a further difficulty with the reasoning. The majority said that the jury's finding as to reckless indifference meant that the appellant knew that by continuing to drive Ms Jordan would be dislodged from the vehicle and fall onto the roadway: Second J at [84] **CAB 166**. This was the basis for the further conclusion that the jury therefore must have been satisfied that he intended she would be dislodged from the vehicle and collide with the roadway: Second J at [84] **CAB 166**. However, as McCallum CJ noted, foresight and intention are different things: Second J at [62] **CAB 162**. A person may foresee the possibility of a particular consequence of their actions without intending that to be the consequence: *Zaburoni v The Queen* (2016) 256 CLR 482 at 489, [10]. Further, and in any event, there was nothing about the appellant's driving that indicated an intention to dislodge: see above at [10], [18].

39 It was not correct to say that the appellant at trial had not contested that the act would be dangerous if Ms Jordan was found to be on the bonnet of the car: cf. Second J at [80]-[81] **CAB 165-166**. At the conclusion of defence counsel's closing address the submission was made that the jury would have a doubt that the appellant "deliberately did a dangerous act": T545.33 **ABFM 88**. In any event, in the circumstances of this case, in order for the appellant's act to be unlawful he must have driven with the intention of dislodging her. This was the act which also had to be proved to be dangerous: *Burns v The Queen* (2012) 246 CLR 334 at [88].

40 Nor was it correct for the majority to conclude that the dangerous element was "necessarily encompassed" by the jury's finding that Ms Jordan was on the bonnet of the moving vehicle when she fell from it: cf. Second J at [81] **CAB 166**. To the extent that a finding that the appellant realised Ms Jordan's death was a probable consequence of driving while she was on the bonnet of the vehicle could inform the question of the dangerousness of the

act, that finding was necessarily impugned by the majority's earlier conclusion that the verdict was unreasonable because the prosecution had not proved reckless indifference beyond reasonable doubt.

41 Finally, the majority considered whether entry of a verdict of manslaughter would be unreasonable: Second J at [97]-[106] **CAB 169-171**. It is acknowledged that the majority considered that this analysis responded to a submission put by the appellant in the court below: Second J at [97] **CAB 169**. However, the appellant's submission as to the capacity of the evidence to establish the mental element for manslaughter was directed to persuading the court not to order a re-trial: Second J at [8] **CAB 150**. The majority appeared to rely on its finding that a verdict of guilty to manslaughter would not be unreasonable in support of its decision to enter a verdict of guilty to manslaughter: Second J at [108]-[110] **CAB 172**. The question of whether a verdict of guilty for an alternative offence would be unreasonable does not determine the test for substitution. It would not be open to an appellate court to substitute a verdict to a lesser offence in circumstances where that verdict would be unreasonable. However, even if an appellate court concludes the verdict would not be unreasonable, that is insufficient to enliven the power to substitute: *Spies* at [43]. The analysis conducted by the majority in this respect tended to subvert the constitutional role of the jury as the tribunal of fact and ignored the appellate task required by *Spies*: Second J at [96]-[107] **CAB 169-171**.

Ground (b): Section 297 of the *Crimes Act*

42 Section 297 of the *Crimes Act* precluded the Court from entering a verdict of guilty for manslaughter or from making an order for a new trial for the offence of manslaughter. It was erroneous for McCallum CJ to hold otherwise: Second J at [24] **CAB 153**; Loukas-Karlsson and Taylor JJ agreeing at [69] **CAB 164**. McCallum CJ (erroneously) accepted the Crown's submission in the court below that s 297 of the *Crimes Act* "is confined to preventing the prosecution from presenting an indictment against an accused person on an alternative offence which was not relied upon in the original trial": Second J at [13] **CAB 150-151**. Her Honour also erred in concluding that s 297 did not impose a constraint on the disposition of an appeal: Second J at [14] **CAB 151**.

43 Section 297 of the *Crimes Act* provides:

After trial for offence, if alternative verdict possible, no further prosecution

> No person tried for an offence, in any case where under this Act he or she may be acquitted of the offence but be found guilty of some other offence, shall be liable to prosecution on the same facts for the other offence.

44 Section 297 operates to prohibit the CA from ordering a new trial for an alternative offence where a verdict of not guilty has been returned for the principal offence. The provision applies after trial and prohibits a subsequent prosecution for the alternative offence. It is clear from the terms of s 297 and the fact that it appears in the *Crimes Act* that the provision is not directly concerned with the orders that the CA can make in an appeal against conviction. However, it does not follow from this that the CA is not constrained by this provision in the orders it can make following a successful appeal against conviction: cf. Second J at [43] **CAB 157**. It is a specific provision addressed to a particular situation and therefore applies to limit the orders that the CA can make under s 37O(1) of the *SCA*. The provision also operates to prohibit the CA from entering a verdict of guilty for an alternative offence. This is because it follows from the prohibition on a "prosecution" for the alternative offence that there is also a prohibition on a conviction for the alternative offence.

45 As McCallum CJ acknowledged, one construction of s 297 of the *Crimes Act* is that "it prohibits the Court from ordering a new trial for a statutory alternative offence": Second J at [12] **CAB 150**. Notwithstanding this, her Honour construed s 297 as only applying to prevent the presentation of an indictment for an alternative offence not relied upon in the original trial: Second J at [13] **CAB 150-151**. There was no textual or contextual basis for placing this limitation on the provision which effectively involved replacing the words "for the other offence" with the words "another offence not relied upon in the original trial". The heading to the provision, which refers to "alternative verdict possible" suggests that the provision does indeed refer to the circumstance where an alternative verdict was possible and relied upon. The conditions for implying words into a statute set out in *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 (***Taylor***) at [21]-[25], [37]-[38] were not met. Even if those conditions were met, the alteration to the plain language of the provision by the insertion of the words was "too far-reaching": *Taylor* at [38]-[40].

46 McCallum CJ construed s 297 as directed only to circumstances in which a plea of *autrefois acquit* could be raised (Second J [13], [19], [22], [43] **CAB 150-151, 152-153, 157**), *autrefois acquit* being "the species of estoppel by which the Crown is precluded from reasserting the guilt of the accused when that question has previously been determined

against it.": *Island Maritime Limited v Filipowski* (2006) 226 CLR 328 at 343, [43] per Gummow and Hayne JJ, quoting Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata,* 3rd ed (1996), p 311. Her Honour relied on *AJS v The Queen* (2007) 235 CLR 505 (***AJS***) for the proposition that no question of double jeopardy (more specifically *autrefois acquit*) arises where a retrial is ordered for an alternative offence that was left to a jury but not the subject of a verdict: Second J [22] **CAB 152-153**.

47 The appellant in *AJS* had been convicted of an incest offence at his trial in Victoria involving sexual penetration of a child, with a statutory alternative offence of committing an indecent act with a child also left to the jury. The Victorian Court of Appeal considered
10 that the evidence did not establish the act of penetration alleged and entered a verdict of acquittal on the primary offence. This Court held at [5] that the verdict of acquittal did not engage any principle of estoppel or issue of double jeopardy, and that any new trial on the alterative offence would not be a second or subsequent prosecution, but a "continuation of so much of the original prosecution as remained alive after the Court of Appeal's determination of the appeal". However, *AJS* did not consider a provision like s 297 of the *Crimes Act* or its potential affect on the orders an intermediate appellate court can make in a criminal appeal where an acquittal is ordered for a primary offence and an alternative offence remains unresolved (see *Crane v R* [2024] NSWCCA 112 (***Crane***) at [147]). Nor was the NSW equivalent of s 297 considered in *Sio v The Queen* (2016) 259 CLR 47 (***Sio***).
20 Moreover, in *Sio* the Court did not make an order acquitting the appellant in that case of the principal offence: cf. *Crane* at [147]. Rather, the Court simply quashed the conviction and ordered a new trial confined to the offence of armed robbery. As set out immediately below, whilst there may be no double jeopardy considerations that arise in the circumstances considered in *AJS*, the provision in s 297 of the *Crimes Act* is not confined to being simply a statutory reflection of the principles against double jeopardy and *autrefois acquit*.

48 There is nothing in the terms of s 297 or its context that suggests that its sole purpose was to reflect the principle of *autrefois acquit*. This is to be contrasted with ss 355 and 358 *Criminal Code Act 1924* (Tas) and s 17 *Criminal Code Act Compilation Act 1913* (WA)
30 which, on their terms are much more clearly directed to that end. Moreover, s 297 would be unnecessary if its purpose was *only* to give effect to double jeopardy and principles concerning *autrefois acquit* given that other remedies such as the quashing of an indictment, a plea in bar or a permanent stay could address those issues as they arise in any

given case. Section 297 operates beyond the traditional bounds of *autrefois acquit*, including to prevent a subsequent prosecution for an offence not relied upon in the original trial (as found by McCallum CJ at [13] **CAB 150-151**). However, as set out above, the language is not limited to that circumstance and is suggestive of an intention to promote finality in criminal proceedings regardless of whether a jury reached the point of considering the alternative verdict. It is also suggestive of an intention to prevent an accused from being "twice vexed" and to prevent a subsequent prosecution from bringing the administration of justice into disrepute: *Pearce v The Queen* (1998) 194 CLR 610 at [116], *R v PL* (2009) 199 A Crim R 199 at [88]-[89].

10 49 The reasoning in *Murrell* (2001) 123 A Crim R 54 supports the appellant's construction of s 297 of the *Crimes Act*. In *Murrell*, the NSW Court of Criminal Appeal declined to enter an acquittal or order a re-trial on manslaughter alone and instead quashed the conviction for murder and ordered a re-trial. This was because the Court considered at [42] it would be "prudent to avoid any residual question of autrefois acquit arising, in this case, it being one in which the original jury obviously did not consider manslaughter, and being one in which I am of the view that the Crown should be permitted, in the interests of the proper administration of justice, to re-indict the appellant for that offence, or for the offence of accessary after the fact to murder." The Court referred to the decision of *Quinn* (1952) 53 SR (NSW) 21 at 25-26 where Herron J referred to the plea of autrefois acquit and said "If,
20 therefore, he has been acquitted, ie, found to be not guilty of the offence, by a court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaughter." (quoted in *Murrell* at [40]; cf. Second J at [44] **CAB 157-158**. The Court in *Murrell* observed at [41] this was reflected in the then NSW equivalent to s 297 of the *Crimes Act* – s 125 of the *Criminal Procedure Act 1986* (NSW), now s 163 of that Act.

50 Once an acquittal is entered for an offence, as occurred in the appellant's case, then s 297
30 of the *Crimes Act* operated to preclude the entry of a verdict of guilty for manslaughter or a re-trial for manslaughter. This is in contrast to what occurred in *Sio v The Queen* where this Court did not order an acquittal on the offence charged on the indictment and instead simply quashed the conviction for that offence and ordered a re-trial for the alternative

offence. This was also the course adopted in *Grogan v R* [2016] NSWCCA 168 at [88] where the NSW Court of Criminal Appeal held the conviction for murder was unreasonable, quashed the conviction for murder and ordered there be a re-trial limited to the issue of manslaughter. The approach taken in *Murrell*, *Sio* and *Grogan* is consistent with *R v A2* (2019) 269 CLR 507 (***A2***) at [76] where the plurality held that under ss 6 and 8 of the *Criminal Appeal Act* (NSW), the Court was required to order either an acquittal or order a re-trial.

51 In *Smith v R* [2025] NSWCCA 158 at [121] Adamson JA doubted the reasoning in *Murrell* noting that the decision was framed in terms of prudence as opposed to principle. Her Honour also relied upon the decision of *R v PL* where the NSW Court of Criminal Appeal, on an appeal against a directed verdict of acquittal, affirmed the acquittal for murder, quashed the acquittal for manslaughter and ordered a re-trial limited to manslaughter. Her Honour considered at [120] that *R v PL* superseded *Murrell* and that *R v PL* was not materially distinguishable from an appeal against conviction. However, the Court in *R v PL* did not address the NSW equivalent to s 297 of the *Crimes Act* or its interplay with s 107 of the *Crimes (Appeal and Review) Act 2001* (NSW). *R v PL* was materially distinguishable from *Murrell* as the Court in *R v PL* was exercising jurisdiction under s 107 of the *Crimes (Appeal and Review) Act 2001* (extracted in *R v PL* at [3]), which itself is a (partial) abrogation of the principle of double jeopardy. Under s 107, the appellate court must first consider whether to affirm or quash the acquittal under subsection (5) and under subsection (6) then consider whether to order a new trial if the acquittal is quashed. This is materially different from ss 6 and 8 of the *Criminal Appeal Act* (NSW) on an appeal against conviction where the Court must order an acquittal unless the power to order a re-trial is exercised: *A2 v The Queen* at [76]. Further, these powers only arise if the Court *allows* the appeal against conviction whereas the power to affirm or quash the acquittal appealed against in s 107(5) of the *Crimes (Appeal and Review) Act* is not dependent on whether the Court allows the appeal.

52 Adamson JA in *Smith* at [90] found that the current NSW equivalent to s 297 of the *Crimes Act* was limited to circumstances where an indictment has been finally dealt with and was not applicable where the Court has adopted one of the courses open to it under ss 6 and 8 of the *Criminal Appeal Act* to direct an acquittal or order a re-trial. Her Honour said "Were s 163 to apply in such a case, ss 6 and 8 would have little, if any, operation where a conviction for a more serious offence has been quashed, a verdict of acquittal entered and

a re-trial ordered on a less serious offence." However, this is not an accurate reflection of *Murrell* and the appropriate orders to make in any given case. As can be seen from the orders in *Sio* and *Grogan*, it is open to the Court in exercising the powers under ss 6 and 8 of the *Criminal Appeal Act* in accordance with *A2* to quash the conviction, make no order for acquittal, and make an order limiting the re-trial to a particular offence. *AJS* does not speak against such an outcome in circumstances where there was no equivalent provision to s 297 of the *Crimes Act* (or s 163 of the *Criminal Procedure Act*) and no consideration given to the effect of such a provision on the powers of the appellate court on an appeal against conviction.

53 Interpreting s 297 of the *Crimes Act* as preventing the substitution of a verdict for an alternative offence or a retrial (a further prosecution) on the same facts even where the trial is for an alternative offence left in the first instance does not lead to a conflict with s 37O of the *SCA*. This is because s 37O is not specifically addressed to the orders that might be made after a conviction has been found to be unreasonable or unsafe, nor is it specifically aimed at criminal appeals (unlike ss 6-8 of the *Criminal Appeal Act* (NSW)). If the appellant's construction is accepted, the power to order a new trial in s 37O(1)(e) of the *SCA* could still be exercised where an appeal against conviction is allowed under s 37O(2) because of a wrong decision on any question of law or a miscarriage of justice (or in respect of trials in civil proceedings). Any potential incongruence between the provisions would be limited to the very narrow circumstances of a case such as the appellant's where a verdict has been found to be unreasonable and the question is whether to order a re-trial on an alternative charge. That incongruence can be explained by both a concern by the legislature to guard against double jeopardy and an interest in finality.

54 The appellant's construction of s 297 of the *Crimes Act* does not frustrate s 49 of the *Crimes Act*: cf. Second J at [23] **CAB 153**. The Crown could still rely on a statutory alternative and the jury could consider the statutory alternative in the initial trial or where the conviction for the principal offence has been quashed on appeal and a re-trial ordered in respect of the principal offence.

55 As set out above McCallum CJ construed the words "tried for an offence" as not being reached until the appeal process was complete: Second J at [20] **CAB 152**. In the appellant's case, the CA made orders allowing the appellant's appeal against his conviction for murder and acquitting him of that offence on 27 June 2025. The appeal process was complete by the time the CA came to make an order to substitute a verdict of guilty for

manslaughter. The entry of the acquittal for murder determined the appeal notwithstanding the Court reserved on the question of whether to substitute a verdict of manslaughter or order a re-trial. Having followed the course of entering a verdict of not guilty to murder, the CA was bound by s 297 of the *Crimes Act* and should have determined that neither a re-trial nor a verdict of guilty to manslaughter was available.

Part VII: Orders sought

56 If the Court upholds ground (a) of the appeal but not ground (b), the appropriate orders are to:

a. Allow the appeal;

b. Set aside the orders made by the Court of Appeal on 29 September 2025; and

c. In place of those orders, order a new trial confined to the charge of manslaughter.

57 If the Court upholds ground (b) of the appeal, the appropriate orders are to:

a. Allow the appeal; and

b. Set aside the orders made by the Court of Appeal on 29 September 2025.

c. In place of those orders, order that there be no further order for the disposition of the appeal.

Part VIII: Estimated time required

58 The appellant estimates that 1.5 hours will be required for the presentation of the appellant's oral argument.

Dated: 12 March 2026

Bret Walker
Fifth Floor St James' Hall
(02) 8257 2527
caroline.davoren@stjames.net.au

Georgia Huxley
Forbes Chambers
(02) 9390 7777
ghuxley@forbeschambers.com.au

Chelsea Brain
Maurice Byers Chambers
(02) 8233 0300
c.brain@mauricebyers.com

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	*Supreme Court Act 1933* (ACT)	Version R71 (15/05/24-25/11/25)	ss 37O, 37P	Provisions in force on the dates of the relevant Court of Appeal decisions. Still in force.	June-September 2025: Dates of the relevant Court of Appeal decisions.
2	*Crimes Act 1900* (ACT)	Version R153 (1/07/25-15/11/25)	Part 12	Provisions in force on the date of the second Court of Appeal decision. Still in force.	29 September 2025: Date of the second Court of Appeal decision.
		Version R152 (13/05/25-30/06/25)	s 49	Provision in force on the date of the trial and on the date of the second Court of Appeal decision. Still in force.	15 June 2023: Date of finding of guilty by jury. 29 September 2025: Date of the second Court of Appeal decision.
		Version R135 (11/11/21-11/05/22)	ss 12, 15	Provisions in force on the date of the offence. s 12 still in force. s 15 amendments not presently relevant.	14-18 April 2022: Date of the offence.
3	*Criminal Appeal Act 1912* (NSW)	Current	ss 6-8	For illustrative purposes and considered in authorities discussed by McCallum CJ in the decision under appeal.	N/A.
4	*Criminal Procedure Act 1986* (NSW)	Current	s 163	For illustrative purposes and considered in authorities discussed by McCallum CJ in the decision under appeal.	N/A.
5	*Criminal Procedure Act 1986* (NSW)	Historical version for 23 February 2001 to 30 June 2001	s 125	For illustrative purposes and considered in authorities discussed by McCallum CJ in the decision under appeal.	June 2001: date of decision in *Murrell* (2001) 123 A Crim R 54.