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
CANBERRA REGISTRY

BETWEEN: **DIRECTOR OF PUBLIC PROSECUTIONS**
Appellant (C3/2026) / Respondent (C2/2026)
and
MICHAEL O'CONNELL
Respondent (C3/2026) / Appellant (C2/2026)

INTERVENER'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: BASIS OF INTERVENTION

2. The Director of Public Prosecutions (SA) ("**the Director**") seeks leave to intervene in support of the Appellant in C3/2026 and the Respondent in C2/2026.

3. Leave to intervene is sought on the basis of the impact that the appeals will have on the principles applied in determining the appropriate dispositions in appeals for which the Director is the prosecuting authority.

4. The principles this Court considers and determines in the appeals will govern the proper approach to appeals invoking the "first limb" of the common-form appeal provision[1] where it is contended a verdict is unreasonable or cannot be supported having regard to the evidence ("**the unreasonableness ground**") and the "special cases" in which it is contended an appeal court should substitute another verdict for a verdict of a tribunal of fact.

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[1] In South Australia, s 158(1)(a) of the *Criminal Procedure Act 1921* (SA); in the Australian Capital Territory, s 37O(2)(a)(i) of the *Supreme Court Act 1933* (ACT); in New South Wales, s 6(1) of the *Criminal Appeal Act 1912* (NSW); in the Northern Territory, s 411(1) of the *Criminal Code Act 1983* (NT); in Queensland, s 668E(1) of the *Criminal Code Act 1899* (Qld); in Tasmania, s 402(1) of the *Criminal Code Act 1924* (Tas); in Western Australia, s 30(3)(a) of the *Criminal Appeals Act 2004* (WA). Consistent with *Baini v The Queen* (2012) 246 CLR 469 at [15], see in Victoria, s 276(1)(a) of the *Criminal Procedure Act 2009* (Vic).

Part III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

5. The principles relating to non-party intervention in this Court are settled.[2] It must be demonstrated that the non-party's interests will be affected. Where the non-party has a direct legal interest, they are entitled to intervene to protect the interest likely to be affected.

6. The Director has a substantial indirect legal interest in the Court's determination of the questions raised in each appeal, as that determination will have a direct impact on all appeals in South Australia for which the Director is the prosecuting authority[3] involving the unreasonableness ground and the dispositive powers in special cases.[4]

7. The development and application of the principles raised in these appeals will affect every conviction appeal that raises the unreasonableness ground, and every conviction appeal in which the special powers on an appeal against conviction are engaged in South Australia.

8. This Court has recently considered the second and third limbs of the common form appeal provision to provide consistent guidance to intermediate appellate courts on the correct approach to appeals under those provisions.[5] These appeals present an opportunity to provide similar guidance on the approach to the unreasonableness ground, particularly relating to the parameters that apply to the appellate court's independent assessment of the evidence.

9. The Director's intervention, and position in these submissions, will not materially impact the parties' preparation for hearing or the length of the oral hearing itself. The Director has no direct legal interest in the issues joined between the parties, or in the factual circumstances attending the appeals. However, the intervention may assist the Court in analysing the functional application of the unreasonableness ground and dispositive powers in special cases, informing the determination of the questions raised by the appeals.[6]

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2 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, especially [2]-[6]; *Levy v Victoria* (1997) 189 CLR 579 at 600-605.

3 *Director of Public Prosecutions Act 1991* (SA), s 7(1)(g).

4 *Criminal Procedure Act 1921* (SA), ss 158(1)(a), 160.

5 *Brawn v The King* (2025) 99 ALJR 872; *MDP v The King* (2025) 99 ALJR 969.

6 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [4].

Part IV: INTERVENER'S SUBMISSIONS

10. The material facts are set out in the parties' submissions. The Director makes no submission on the application of the law to the facts of the appeals themselves. In respect of the power of substitution, the Director does not advance submissions on the construction of s 37O(1)(d) of the *Supreme Court Act 1933* (ACT), but advances submissions on the principles given that the Appellant in C2/2026 accepts that the test applicable to the common form provision allowing for substitution applies, if this Court finds the power exists.[7]

11. Given the root question on each appeal is one of statutory construction[8] requiring a consideration of the text, context and purpose of the relevant provisions,[9] the Director first sets out three contextual factors relevant to the interpretation of the provisions. Next, submissions on the principles attending the proper approach to the unreasonableness ground are made in light of these contextual factors. The principles guiding the exercise of dispositive powers in special cases are then similarly addressed.

12. For the reasons explained below, when an appeal court considers the unreasonableness ground, it must be persuaded by an appellant that, in connection with particular aspects of the evidence that the court is taken to in its independent assessment of the evidence, the verdict should be set aside. The independent assessment must focus on the sufficiency or quality of the relevant evidence bearing on the elements to be proved at trial and must have proper regard to the context of that evidence at trial. The provision does not confer a roving commission to consider aspects of the evidence stripped of their context, or matters not in evidence or not forming part of the "real issues" between the parties in the adversarial trial process such that they are fresh hypotheses, or matters not in dispute on appeal.

13. Further, where an appellant is successful on appeal in circumstances where there is a principled basis to substitute another verdict for a verdict of a tribunal of fact, for which an appellant could have been found guilty on the evidence, the

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7 C2/2026, appellant's written submissions at [32].

8 *Weiss v The Queen* (2005) 224 CLR 300 at [9]-[10].

9 See, for example, *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362 at [4]-[6].

powers to substitute an alternative verdict ought be exercised. Again, the appellate court's consideration of the evidence in its context is central to determining whether it is appropriate to substitute a verdict in a given case.

Trials, the remit of counsel, and the cardinal principle

14. This Court has repeatedly[10] emphasised that criminal trials are adversarial in nature and that a cardinal principle of criminal litigation is that, in general: "…parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue" ("**the cardinal principle**").[11]

15. As Barwick CJ explained in *Ratten v The Queen*, a criminal trial is not an inquisition. It is "…a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions in chief or cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility". On appeal, an appellant "…must bear the consequences of his own decision as to the calling and treatment of evidence at the trial".[12]

16. The cardinal principle is not to be pursued "at all costs" – there may be exceptions, including where there is "…no rational forensic justification" for a decision made by counsel.[13] The analysis of a particular forensic or considered decision is one that always has regard to the fundamental right to a fair trial and the impact, in the circumstances of the particular trial, of that decision.[14]

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10 See, for example, *Ratten v The Queen* (1974) 131 CLR 510, 517; *Doggett v The Queen* (2001) 208 CLR 343 at [1]-[2]; *Nudd v The Queen* (2006) 80 ALJR 614 at [9]; *R v Baden-Clay* (2016) 258 CLR 308 at [48]; *Craig v The Queen* (2018) 264 CLR 202 at [23]; *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at [54]; *Orreal v The Queen* (2021) 274 CLR 630 at [16].

11 *Nudd v The Queen* (2006) 80 ALJR 614 at [9].

12 *Ratten v The Queen* (1974) 131 CLR 150 at 517.

13 See: *Nudd v The Queen* (2006) 80 ALJR 614 at [9]; *Orreal v The Queen* (2021) 274 CLR 630 at [16]; *TKWJ v The Queen* (2002) 212 CLR 124 at [26]-[31], [97], [107]-[108]; *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at [49].

14 *Craig v The Queen* (2018) 264 CLR 202 at [33]-[34].

The appellate function

17. Appellate jurisdiction is a creature of statute, directed toward the identification and correction of error, as contended for by the parties, in accordance with the relevant statutory framework.[15] The important distinction between original and appellate jurisdiction has been repeatedly reinforced when construing provisions conferring appellate powers and duties.[16] While, given they are creatures of statute, no taxonomy of the various types of appeals is likely to be exhaustive,[17] it is convenient to note that appeals to intermediate appellate courts are generally by way of re-hearing, rather than strict appeals or appeals *de novo*.[18]

18. Appeals, like trials, are adversarial proceedings in which the parties mark out the issues.[19] To that extent, they are another species of proceeding in which the cardinal principle applies.

19. The role of an appellate court is to approach and decide impartially the issues put before the court by the parties for determination.[20] It is not the function of an appellate court to "trawl through" the record in search of error.[21] The exercise of appellate jurisdiction is distinct from original jurisdiction and does not involve a completely fresh hearing by the appellate court of all of the evidence.[22] An appellant must identify and persuade the appellate court of the relevant error with that distinction in mind, and direct argument and submissions accordingly, rather than inviting an appeal court to in effect conduct a re-trial "on the papers".

20. This Court has emphasised that in discharging its functions and carrying out its duties, an appellate court must not overlook the unique positions of tribunals of

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15 See *Conway v The Queen* (2002) 209 CLR 203 at [7]ff.

16 See: *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [11]; *Achurch v The Queen* (2014) 253 CLR 141 at [16]. See also *Fox v Percy* (2003) 214 CLR 118 at [25], [82].

17 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [57].

18 *Warren v Coombes* (1979) 142 CLR 531 at 537. See also Leeming, *Authority to Decide* (2nd ed, 2020) at 9.5, esp pages 286-288.

19 *Giannarelli v Wraith* (1988) 165 CLR 543; *Pantorno v The Queen* (1989) 166 CLR 466 at 472-473; *Gipp v The Queen* (1998) 194 CLR 106 at [52], [130]-[133].

20 *Gipp v The Queen* (1998) 194 CLR 106 at [48]. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [22], [79]-[81].

21 *Gipp v The Queen* (1998) 194 CLR 106 at [49]-[55], [100].

22 *Fox v Percy* (2003) 214 CLR 118 at [22].

fact and the "natural limitations" that exist where an appellate court proceeds wholly or substantially on the record.[23]

21. Although principles of appellate restraint apply generally, a jury verdict attracts a "special authority and legitimacy" due to the fundamental and historic role that the jury plays in the administration of the criminal justice system.[24] A jury's verdict is arrived at unanimously, to the criminal standard, after shared assessments of the evidence, and applying its collective wisdom and experience.[25]

22. The advantages enjoyed by a tribunal of fact extend beyond the assessment of the demeanour of witnesses. A fact-finder is exposed to the atmosphere or feeling of the trial, having received and considered the entirety of the evidence, and reflected upon that evidence as it has unfolded.[26]

The principle of finality and criminal appeals

23. As this Court observed in *D'Orta-Ekenaike v Victoria Legal Aid*, "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances."[27] A jury verdict in a serious criminal case has been recognised as attracting a special authority and finality.[28]

24. Chief Justice Gleeson, considering the nature of this Court's power to grant special leave to appeal, outlined in *Crampton v The Queen* a number of factors that underpin the importance of finality in the context of criminal proceedings.[29] He emphasised that a trial ought not be regarded "…as a preliminary skirmish in a battle destined to reach finality before a group of appellate judges"[30] and observed that the trial process is opaque, and much of counsel's decision-

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23 *Fox v Percy* (2003) 214 CLR 118 at [23]; *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 100 ALJR 170 at [75], [207]-[208], [394], [414].

24 *MFA v The Queen* (2002) 213 CLR 606 at [48]-[49].

25 *MFA v The Queen* (2002) 213 CLR 606 at [48]-[49]; *Pell v The Queen* (2020) 268 CLR 123 at [37]; *R v ZT* (2025) 281 CLR 137 at [9]-[10]; *Doney v The Queen* (1990) 171 CLR 207 at 214.

26 *Whitehorn v The Queen* (1983) 152 CLR 657 at 687.

27 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [34].

28 *MFA v The Queen* (2002) 213 CLR 606 at [48]. See also Glanville Williams, *Textbook of Criminal Law* (3rd ed, 2012) at 2-067, page 75.

29 *Crampton v The Queen* (2000) 206 CLR 161 at [14]-[20].

30 *Crampton v The Queen* (2000) 206 CLR 161 at [16].

making is based upon confidential material and tactical considerations, in a context where generally litigants are bound by the conduct of their counsel.[31]

25. The principal qualification to the general principle of finality is provided by the appellate system.[32] However, that system recognises the impact that undoing finality may have in a criminal context, including the potential adverse effects on victims, witnesses and the community more broadly.[33] Further, this Court has emphasised that the principle of finality "…serves as the sharpest spur to all participants in the judicial process, judges, parties and lawyers alike, to get it right the first time."[34]

The unreasonableness ground

26. Bearing each of the above contextual factors in mind, it is convenient to address the principles that, in the Director's submission, ought govern an appellate court's consideration of a ground of appeal that contends a verdict is unreasonable or unsupported by the evidence. The text of the first limb must be understood in its context, with regard to its purpose;[35] each of the matters above bears on the proper construction of and approach to the first limb. Further, the reference to "the evidence" in the provision, and throughout the authorities, is to be understood as the relevant evidence admitted in proof of intermediate facts and elements of a relevant offence that ultimately led to conviction.[36]

M v The Queen

27. The approach to the "first limb" of the common-form appeal provision is controlled by the test stated by Mason CJ, Deane, Dawson and Toohey JJ in their joint judgment in *M v The Queen*,[37] ("**M**") which has been repeatedly accepted and applied by this Court.[38] Consistent with the text of the provision,

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31 *Crampton v The Queen* (2000) 206 CLR 161 at [17]-[18].
32 *Burrell v The Queen* (2008) 238 CLR 218 at [15].
33 *Kentwell v The Queen* (2014) 252 CLR 601 at [29], [32].
34 *Burrell v The Queen* (2008) 238 CLR 218 at [16].
35 *Weiss v The Queen* (2005) 224 CLR 300 at [9].
36 See *Smith v The Queen* (2001) 206 CLR 650 at [6]-[7].
37 *M v The Queen* (1994) 181 CLR 487.
38 See *MFA v The Queen* (2002) 213 CLR 606; *SKA v The Queen* (2011) 243 CLR 400; *Pell v The Queen* (2020) 268 CLR 123; *Dansie v The Queen* (2022) 274 CLR 651; *R v ZT* (2025) 281 CLR 137.

which requires an evaluation of the reasonableness of the verdict or the extent of its support in the evidence, the task requires the appellate court to make an "independent assessment of the evidence, both as to its sufficiency and its quality"[39] to determine whether, "upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".[40]

28. The authoritative guidance provided by the joint judgment in *M*, at least in part, clarified and overtook the more diffuse views that had previously been held about the proper approach.[41] The joint judgment in *M* clarified that the appellate court's independent assessment was not limited to whether, as a matter of law, there was evidence available to the jury for it to convict.[42]

The focus of the unreasonableness ground and significance of the verdict

29. On the unreasonableness ground the analysis of the evidence at trial is undertaken on the foundation that the evidence must prove relevant intermediate facts and ultimately elements of the relevant offence. That is the controversy between the parties at trial,[43] providing all elements are "real issues" in the trial.[44] The focus of the unreasonableness ground is not whether there is evidence capable of supporting the verdict. Where there is no evidence capable of supporting the verdict, there is no case to answer.[45] This is consistent with the emphasis this Court has placed on requiring an analysis of the sufficiency and quality of the evidence on the unreasonableness ground. Put another way – an appellant must be able to articulate expressly and precisely what particular evidence or aspect of the evidence has the effect that the evidence is not sufficiently cogent for a tribunal of fact to have acted reasonably in returning the verdict of guilty. It also informs that, consistent with *M*, the focus is on more

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39 *Morris v The Queen* (1987) 163 CLR 454 at 473; *SKA v The Queen* (2011) 243 CLR 400 at [14]; *R v ZT* (2025) 281 CLR 137 at [11].

40 *M v The Queen* (1994) 181 CLR 487 at 493.

41 *Dansie v The Queen* (2022) 274 CLR 651 at [10].

42 See, for example, *Morris v The Queen* (1987) 163 CLR 454; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521; *Chidiac v The Queen* (1991) 171 CLR 432; *M v The Queen* (1994) 181 CLR 487.

43 See *Lipohar v The Queen* (1999) 200 CLR 485; *Nicholas v The Queen* (1998) 193 CLR 173 at [156], [249], [255].

44 *Huynh v The Queen* (2013) 87 ALJR 434 at [31].

45 *Doney v The Queen* (1990) 171 CLR 207 at 214-215.

than the availability of the evidence. It involves a substantive consideration of the evidence itself. This places a significant burden on an appellant.[46]

30. The task on the unreasonableness ground is one for the appellate court, which it must undertake conscious of the distinction between its role and the role of the tribunal of fact,[47] and the unique advantage that the tribunal of fact has in seeing and hearing the evidence in a trial being given, in the atmosphere of the trial itself.[48]

31. In that connection, this Court has emphasised the importance of making full allowance for the tribunal of fact's advantage,[49] which may be impacted by the nature of the trial and the evidence adduced at trial,[50] but remains significant given the constitutional and statutory differences in the roles between a tribunal of fact and an appellate court. Just as the boundaries of the reasonableness within which the jury's function are not to be narrowed in a "hard and fast way" by considerations expressed in the reasons of an appellate court,[51] there is not a hard and fast rule that where a case involves circumstantial evidence, or the drawing of inferences, the advantage of a tribunal of fact is always diminished. Proof of a circumstance may, for example, be dependent on the credibility or reliability of a witness.

32. It also must be borne in mind that the tribunal of fact can consider aspects of the evidence in a way bringing to bear a breadth of understanding that a judge on appeal may not have.[52] Further, the verdict actually returned has significance, including in cases turning on a particular witness's evidence, as underpinning

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46 The Director notes intermediate appellate courts have made attempts to ensure an appellant's arguments on the unreasonableness ground are appropriately directed. See, for example: *Joint Criminal Rules 2022* (SA), r 203.2(4); *Supreme Court (Court of Appeal) Rules 2005* (WA), r 32(4)-(4A); Supreme Court of Victoria, *Practice Note SC CA 1 Criminal Appeals*, 8.2(c), 14.1(c); Supreme Court of Queensland, *Practice Direction 3 of 2013*, [34](2); Supreme Court of Tasmania, *Practice Direction No 3 of 2022*, 'Written submissions to the Full Court and Court of Criminal Appeal' [2.4] page 8.

47 *Pell v The Queen* (2020) 268 CLR 123 at [38].

48 *Whitehorn v The Queen* (1983) 152 CLR 657 at 687; *MFA v The Queen* (2002) 213 CLR 606 at [51].

49 *R v ZT* (2025) 281 CLR 137 at [7].

50 See, for example, *Dansie v The Queen* (2022) 274 CLR 651.

51 *R v Baden-Clay* (2016) 258 CLR 308 at [65].

52 *R v ZT* (2025) 281 CLR 137 at [10].

the assumption that the jury assessed that evidence as credible and reliable.[53] Similarly, where an appellant has given evidence consistent with innocence, the implied rejection of that account does not mean it is simply disregarded altogether; it remains important as it may bear on the reasonableness of hypotheses otherwise arising (or not arising) in the circumstances of a given case.[54] In the event a verdict necessarily implies rejection of an appellant's evidence it may mean they were not regarded as truthful and reliable such as to exclude or give rise to a reasonable possibility bearing on a particular hypothesis in the trial.

The nature of the appellate court's task on the unreasonableness ground

33. The assessment is independent but is not inquisitorial because it remains an aspect of an adversarial appeal, in which it is "…for the parties to identify the evidence that the appellate court must review and assess and the features of that evidence that support their respective cases on appeal".[55] The unreasonableness ground does not confer, and an appellant should not invite, a roving commission by the appeal court, nor does it collapse the function between the original and appellate criminal jurisdictions.

34. Again, consistent with the text of the provision being centred on an evaluation of the verdict and the evidence supporting it, an appellate court's independent assessment must be of the evidence;[56] it does not confer a broader function in which the assessment may go beyond the parameters marked by the parties in order to address irregularities that otherwise reveal there has been a miscarriage of justice. That is the province of the "dragnet" ground in the third limb of the common-form provision.[57]

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53 *Pell v The Queen* (2020) 268 CLR 123 at [39].

54 *R v Baden-Clay* (2016) 258 CLR 308 at [57]-[58].

55 *R v ZT* (2025) 281 CLR 137 at [11]-[12].

56 Cf *R v Baden-Clay* (2016) 258 CLR 308 at [55].

57 Which would need to be pleaded and argued in the ordinary way. *Brawn v The King* (2025) 99 ALJR 872. The third limb has been described as the "greatest innovation" of the *Criminal Appeal Act*: *Hargan v The King* (1919) 27 CLR 13 at 23. See also: *TKWJ v The Queen* (2002) 212 CLR 124 at [72]; *Cesan v The Queen* (2008) 236 CLR 358 at [79].

35. The independent assessment required by the unreasonableness ground involves a question of fact,[58] which must be determined, amongst other things, giving appropriate weight to the "…facts and circumstances of the particular case."[59] This reflects that the facts and circumstances of the particular case may have meant certain issues are properly understood as the "real issues" between the parties, and that the sufficiency of certain factual matters in the case may require particular attention.[60]

36. Two examples illustrate the task of an appellant, in practice, when contending a verdict is unreasonable or cannot be supported having regard to the evidence:

    a. In a case involving or substantially turning on the credibility and reliability of a witness (such as an uncorroborated complainant in a case of sexual abuse), on the assumption that the evidence was accepted as credible and reliable,[61] it is incumbent on an appellant to point to specific aspects of the evidence that justify the conclusion that the jury must have had a doubt.[62] That doubt must be one such that the tribunal of fact could not have been satisfied of one or more of the elements of the offence beyond reasonable doubt. In such a case, it is for the appellant to identify with sufficient specificity the particular inconsistencies, discrepancies or inadequacies in the complainant's evidence, or the conflict between the complainant's evidence and that of unchallenged, incontrovertible facts, such as to warrant a finding that the verdict was unreasonable.

    b. In a circumstantial case, bearing in mind that the evidence cannot be approached piecemeal,[63] an appellant must articulate, notwithstanding the combined force of all of the relevant circumstances, why the jury

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58 *Whitehorn v The Queen* (1983) 152 CLR 657; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521; *Morris v The Queen* (1987) 163 CLR 454; *Chidiac v The Queen* (1991) 171 CLR 432; *M v The Queen* (1994) 181 CLR 487.

59 *MFA v The Queen* (2002) 213 CLR 606 at [34]; *M v The Queen* (1994) 181 CLR 487 at 525.

60 See, for example, *Alford v Magee* (1952) 85 CLR 437 at 466; *Melbourne v The Queen* (1999) 198 CLR 1 at [143]-[144]; *Morris v The Queen* (1987) 163 CLR 454 at 463-464, 473; *M v The Queen* (1994) 181 CLR 487 at 493, 494; *Dansie v The Queen* (2022) 274 CLR 651 at [17]; *R v ZT* (2025) 281 CLR 137 at [74].

61 *Pell v The Queen* (2020) 268 CLR 123 at [39].

62 *Libke v The Queen* (2007) 230 CLR 559 at [113]; *Pell v The Queen* (2020) 268 CLR 123 at [45].

63 *R v Hillier* (2007) 228 CLR 618 at [48].

must have had a doubt with precise reference to the relevant evidence said to compel that conclusion, having regard to its sufficiency and quality. Again, the doubt must be one that materially bears on proof beyond reasonable doubt of the elements of the charged offence.

"Unsafe and unsatisfactory" does not form part of the statutory test

37. The careful guidance provided by the joint judgment in *M* was directed toward the task for a court of appeal in determining the unreasonableness ground.[64] To the extent it refers to the formulation of a verdict being "unsafe and unsatisfactory" for reasons that sit outside whether it is unreasonable or against the weight of the evidence, the Director respectfully contends that it does not purport to bind courts to a particular approach to the third limb and what might otherwise constitute a miscarriage of justice.[65] This reflects this Court's more recent insistence upon close attention to the statutory language of the applicable legislation in preference to other formulations or expositions.[66]

38. Finally, it is useful to observe that the nature and extent of the assessment on the first limb has been recognised in this Court as having parallels with the one required by the common-form proviso.[67]

Dispositive powers in special cases

39. The powers of an appeal court in "special cases"[68] form part of the innovation of common form appeal provisions.[69] They provide for flexible remedies in circumstances where certain error requires correction but temper orders otherwise requiring acquittal, re-trial or re-sentence.[70]

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64 As repeatedly re-iterated by this Court, including in *Pell v The Queen* (2020) 268 CLR 123 and *Dansie v The Queen* (2022) 274 CLR 651.

65 *M v The Queen* (1994) 181 CLR 487 at 492-493; cf *Brawn v The King* (2025) 99 ALJR 872.

66 *MFA v The Queen* (2002) 213 CLR 606 at [46]; *Weiss v The Queen* (2005) 224 CLR 300 at [9]-[10], [33].

67 *R v ZT* (2025) 281 CLR 137 at [74].

68 *Criminal Procedure Act 1921* (SA), s 160; *Criminal Appeal Act 1912* (NSW), s 7; *Criminal Code Act 1983* (NT), s 412; *Criminal Code Act 1899* (Qld), s 668F; *Criminal Code Act 1924* (Tas), s 403; *Criminal Appeals Act 2004* (WA), s 30(5)-(6). See also *Criminal Procedure Act 2009* (Vic), s 277(1).

69 See *Conway v The Queen* (2002) 209 CLR 203. See also Glanville Williams, *Textbook of Criminal Law* (3rd ed, 2012) at 2-069, pages 75-76.

70 See *Ryan v The Queen* (1982) 149 CLR 1; *McL v The Queen* (2000) 203 CLR 452 at [70].

40. The common form provisions also include a power of substitution. This Court has said that, consistent with the principles attending alternative verdicts at common law,[71] to justify use of the power, there must be "certitude" of factual matters implicit from jury verdict, evidence and trial.[72] An appeal court is not to exercise its power unless it appears, to the point of certitude, that the jury did find certain elements that, as a matter of law, made the accused guilty of the substituted offence.[73] The requirement of "certitude" as to the jury's findings reflects the distinct functions of the Court of Appeal and the jury.[74] This also reflects the nature of the appellate function, where the focus is on the particular identifiable error in a given case.

The proper approach to substitution

41. In considering the power of substitution, and determining what factual findings can be inferred to the requisite standard, an appeal court must have regard to the nature of the forensic contest at trial. This is also consistent with the approach to alternative verdicts.

42. While the jury is the ultimate arbiter of the facts, and is not bound by counsel's submissions, imputing factual findings about matters which did not form part of the actual contest at trial risks substitution of "trial by an appeal court for trial by jury".[75] Forensic choices at trial may foreclose the consideration of factual issues by the jury and, in the result, the invocation of the substitution power on appeal.[76]

43. For the same reasons that it is a "serious step" to overturn a jury's verdict on an unreasonableness ground, the court's substitution power is to be exercised with great caution.[77] This again reflects the need to ensure that in construing the dispositive powers on appeal in special cases the distinction between original

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71 See *R v Cameron* (1983) 2 NSWLR 66 at 67-69; *R v Winner* (1989) 39 A Crim R 180 at 181-182; *James v The Queen* (2014) 253 CLR 475, including in relation to murder and manslaughter at [17]-[20].

72 *Spies v The Queen* (2000) 201 CLR 603 at [22]-[30].

73 *Spies v The Queen* (2000) 201 CLR 603 at [49].

74 *Spies v The Queen* (2000) 201 CLR 603 at [49].

75 *R v Baden-Clay* (2016) 258 CLR 308 at [66].

76 See *Spies v The Queen* (2000) 201 CLR 603 at [101].

77 *R v Baden-Clay* (2016) 258 CLR 308 at [65]; *MFA v The Queen* (2000) 213 CLR 606 at [48]-[49]; *Spies v The Queen* (2000) 201 CLR 603 at [47], [49].

and appellate jurisdiction is maintained.[78] As this Court explained in *Spies*, the "function of the [appellate court] is not to find facts, but to give legal effect to the findings of fact that the jury have expressly made or which are necessarily involved in the verdict of guilty which they have returned".[79]

44. The Court's power to substitute a verdict is further confined by the nature of the successful ground of appeal and any implications of the success of that ground.[80] The power to substitute a verdict is only enlivened where the jury have been satisfied of the critical 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 substituted offence.[81]

45. Therefore, in a given case a verdict may be unreasonable or against the weight of the evidence for reasons an appellant is able to articulate, but it is only where those reasons do not touch elements of the offence constituting an alternative offence that the power to substitute a verdict may be exercised.[82]

Conclusion

The court's function on the unreasonableness ground is directed to the cogency of the evidence, in its context

46. While the unreasonableness ground requires an independent assessment of the evidence at trial, that independence does not mean the assessment is an inquisitorial one, or one undertaken without regard to the conduct of the trial. Just as evidence that may be of beguiling sufficiency or quality requires careful scrutiny on an independent assessment, evidence that was insignificant or peripheral at trial because of deliberate decisions taken by counsel to shape the "real issues" ought not be given emphasis on an independent assessment under the unreasonableness ground.

47. The character of an appeal court as an impartial arbiter of the issues raised by the parties confines the scope of the analysis to be undertaken on the

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78 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [51]; *Achurch v The Queen* (2014) 253 CLR 141 at [16].

79 *Spies v The Queen* (2000) 201 CLR 603 at [49].

80 *Spies v The Queen* (2000) 201 CLR 603 at [50].

81 *Spies v The Queen* (2000) 201 CLR 603 at [50], [101].

82 *Spies v The Queen* (2000) 201 CLR 603 at [43].

unreasonableness ground. While it may be accepted that an appellate court's duty to correct error is not formalistic,[83] it is exercised in an adversarial proceeding. An appellate court does not err in failing to identify an error or irregularity that is not raised by the parties as its duty does not require it to trawl independently through the record[84] and review avenues of relief not put before it for determination by the parties.

48. Consistent with the text of the first limb, read in its context, it is for an appellant to identify precisely the discrepancies, inadequacies or weaknesses in the sufficiency and quality of the evidence led in support of the intermediate facts and elements that demonstrate the verdict was unreasonable or cannot be supported having regard to the evidence.

The power of substitution should be construed consistently

49. It is appropriate that the construction of the common form provision, and the common form power of substitution, be coherent. An appeal court's assessment of what factual findings can be inferred with the relevant "certitude" so as to justify the exercise of the power of substitution must be informed by the forensic contest at trial and on appeal.

Part V: TIME ESTIMATE

50. The Director estimates that 15 minutes would be required for the presentation of his oral argument.

Dated 26 March 2026

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M G Hinton KC
Director of Public Prosecutions (SA)
(08) 7322 7055
martin.hinton@sa.gov.au

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W M Scobie
Crown Solicitor's Office (SA)
(08) 7322 7055
william.scobie@sa.gov.au

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83 See, for example, *Joint Criminal Rules 2022* (SA), r 204.2(2); *Supreme Court Act 1933* (ACT), 37O(5); *Supreme Court Act 1970* (NSW), s 75A(10); *Criminal Appeals Act 2004* (WA), s 40(1)(k). See also *Ah Yick v Lehmert* (1905) 2 CLR 593 at 601.

84 *Gipp v The Queen* (1998) 194 CLR 106 at [100].

ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Criminal Procedure Act 1921* (SA)	Current	ss 158, 160	Act currently in force.	NA
2	*Supreme Court Act 1933* (ACT)	Current	s 37O	Act currently in force.	NA
3	*Criminal Appeal Act 1912* (NSW)	Current	ss 6, 7	Act currently in force.	NA
4	*Criminal Code Act 1983* (NT)	Current	ss 411, 412	Act currently in force.	NA
5	*Criminal Code Act 1899* (Qld)	Current	ss 668E, 668F	Act currently in force.	NA
6	*Criminal Code Act 1924* (Tas)	Current	ss 402, 403	Act currently in force.	NA
7	*Criminal Procedure Act 2009* (Vic)	Current	ss 276, 277	Act currently in force.	NA
8	*Criminal Appeals Act 2004* (WA)	Current	ss 30, 40	Act currently in force.	NA
9	*Joint Criminal Rules 2022* (SA)	Current	rr 203.2, 204.2	Act currently in force.	NA
10	*Supreme Court Act 1970* (NSW)	Current	s 75A	Act currently in force.	NA
11	*Supreme Court (Court of Appeal) Rules 2005* (WA)	Current	r 32	Act currently in force.	NA