HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	C2/2026
File Title:	O'Connell v. Director of Public Prosecutions
Registry:	Canberra
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	01 Apr 2026

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IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY No. C2 of 2026

BETWEEN:

MICHAEL O'CONNELL

Appellant

and

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DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES PRESENTED BY THE APPEAL

2. As a threshold matter, the issues presented by this appeal would only arise for the Court's determination in the event the Court dismisses the Director's appeal in C3/2026, which challenges the decision of the Court of Appeal to set aside the appellant's verdict of murder in *O'Connell v DPP* [2025] ACTCA 20 (**CA**). Thus, the Director's arguments in this appeal are advanced in the alternative and only in the event that the Court considered the verdict of murder should not be restored. In that event, the appellant in this appeal challenges the decision of the Court of Appeal (by majority) to enter an alternative verdict of manslaughter: *O'Connell v DPP (No 4)* [2025] ACTCA 41 (**CA2**).

3. The Director agrees with the statement of issues at paragraphs [(2)(a)-(c)] of the appellant's submissions (**AS**), save to say that a threshold issue is whether the appellant requires a grant of special leave to raise the issue at [2(a)] (it not being an issue raised in his Notice of Appeal or application for special leave), and whether special leave should be granted to raise the issue. The Director contends that (a) special leave is required, and (b) special leave would not be granted, on the basis the proposed argument lacks merit.

PART III: SECTION 78B NOTICE

4. The Director does not consider that notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: RELEVANT FACTS

5. The Director repeats the facts set out in Part V of her submissions in C3/2026 (**DS**). As for the appellant's statement of the facts set out at **AS Part V,** the following facts are contested.

6. In relation to the CCTV footage referenced at **AS [10]**, it is correct that Ms Jordan could not be seen in the footage on the bonnet of the car, nor on the back of the car. To the extent that summary of facts is intended to suggest that this was determinative of whether she *was* in fact on the car, that is not correct. As McCallum CJ noted, "[i]t is the fact that Ms Jordan ended up some 200m further down the road. She must either have been on the car or running behind it. But the video footage clearly shows Ms X running after the car and no other person can be seen crossing the screen on foot at any time", such that "[t]he

only rational explanation is that Ms Jordan was on the car as the appellant sped off" (**CA [57] JCAB 87**). The CCTV footage was simply equivocal as to whether she was on the bonnet or the back, but it supported the prosecution case that she was on the car.

7. As to the evidence of the speed of the vehicle at **AS [10]**, as set out at **DS fn 8,** the evidence at trial was that the car was travelling at a speed of 53 kilometres prior to braking.[1] The appellant expressly advanced that evidence as being the correct position before the jury in closing.[2] As to the submission that it was "not alleged that the appellant was driving over the speed limit", the appellant's counsel submitted to the jury in closing that "he is driving at 53 … in a – probably what is probably a 50 zone".[3]

8. As to **AS [11]**, and the submission that at "[a]t some point he said to Ms X 'I shouldn't have done it'", the evidence at trial as to the timing of this statement was that the appellant said this to Ms X while sitting on Ms Jordan's bed at around 6am at the house, having returned to the house after dropping Ms X at hospital, and that he said "I don't know what the fuck to do. Like I'm freaking out. I shouldn't have done it. Like, how did it get this far?".[4] (That is, there is no room for doubt about *when* the statement was made).

9. As to **AS [12]**, the version that the appellant invited the jury to accept was that he *was* driving the vehicle when Ms Jordan fell from it. That was not the version given in his interview with police (that he had stopped his vehicle, Ms Jordan had jumped on the back, he had gotten out of the vehicle to get her off and at that point she fell) but rather, the version given to his son from recorded goal calls (that Ms Jordan had jumped on the back of the vehicle without his knowledge, he noticed her and was decelerating at which point she "lost her footing" and fell, *after* which he slammed on the brakes[5]) (see **DS [14]**).

10. The Director agrees with the statement at the beginning of **AS [14]** that "the central issue in dispute at trial" was whether the prosecution could prove beyond reasonable doubt that the appellant drove the vehicle while Ms Jordan was on the bonnet. However contrary to the remaining portion of **AS [14]**, defence counsel did not submit that "on any view of the evidence" the relevant state of mind could not be established. This reference was from

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1 T333.24-29 (Leading Senior Constable Smorhun) (**Director's AFBM (C3/2026) 71**).
2 T533.33-35 (defence closing) (**Director's ABFM (C3/2026) 186)**; *cf* **CA [322]-[324] JCAB 139-140.**
3 T533.37.39 (defence closing) (**Director's ABFM (C3/2026 186**).
4 MFI #2 (Transcript of evidence-in-chief interview with Ms X on 17 April 2022) at Q/A216 (**Director's ABFM (C3/2026) 220**) (the recording of which was played to the jury at trial: **CA [26] JCAB 80**).
5 The version which defence counsel invited the jury to accept was the version given to the appellant's son on 22 April 2022: see MFI #18 (Transcript of AMC phone call dated 22 April 2022 (ABFM **293-295**) and T512.8-15 (**ABFM 179**); T567.1-32 (summing-up) (**JCAB 30**).

the trial judge's summing up (**JCAB 42**). As noted at **DS [20]**, defence counsel's submission to the jury about the appellant lacking "murderous intent" was specifically linked to his submission that the appellant did not know Ms Jordan was on the vehicle. He did not advance a case embracing her presence on the bonnet but suggesting the appellant would not have foreseen the probability of death.

PART V: ARGUMENT

Ground (a): entering a verdict of guilty by manslaughter

The new argument: s 37O of the *Supreme Court Act 1933* (ACT)

11. The appellant fairly acknowledges that the first argument he seeks to raise — that the Court of Appeal of the ACT does not have the power to enter alternative verdicts — is not directly raised in his Notice of Appeal and was not an argument raised in his application for special leave to appeal (**AS [23]**). It follows that the appellant requires a grant of special leave to advance this new argument. The Director opposes the grant of such leave, on the basis that the proposed argument lacks merit. If leave were granted, the argument should be dismissed, on the same basis.

12. The implied limitation which the appellant seeks to read into s 37O — that "another verdict" in s 37O(1)(d) is to be read as limited to entering a verdict of "not guilty" — is inconsistent with the text, context and purpose, as well as the history of the statutory provision. It was correctly rejected by the unanimous Court of Appeal (**CA [46]-[57] JCAB 158-161** (McCallum CJ), **[69] JCAB 164** (Loukas-Karlsson and Taylor JJ agreeing)).

13. Section 37O of the *Supreme Court Act 1933* (ACT) is relevantly in the following terms:

> **37O Orders on appeal**
>
> (1) The Court of Appeal has the following powers in relation to the order appealed from:
>
> ….
>
> (d) 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;
>
> (e) to order a new trial, with or without jury, on any appropriate ground;
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> …
>
> (2) The Court of Appeal on an appeal against conviction must—
>
> (a) allow the appeal if it considers that—
>
> (i) the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence; or

(ii) the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law; or

(iii) on any other ground there was a miscarriage of justice; or

(b) dismiss the appeal.

(3) However, the Court of Appeal may also dismiss an appeal against conviction if it considers that—

(a) the point raised by the appeal might be decided in favour of the appellant; but

(b) no substantial miscarriage of justice has actually occurred.

…

14. The appellant's argument should be rejected, for the following reasons.

15. *First*, the text of s 37O(1)(d) is clear. It permits the Court to set aside the verdict in a *trial on indictment*, and order a verdict of *not guilty*, or *another verdict*. Where an alternative offence has been left to the jury (whether specifically charged on the indictment or not), it is put in issue by the indictment charging the accused with the primary offence.[6] Consistent with this understanding, a verdict of not guilty or another verdict plainly contemplates an entry of a verdict on the whole of the indictment, which includes any alternative offence joined on that indictment. The word "another" is used in contradistinction from the phrase "verdict of not guilty". It contemplates the entry of a *different* verdict from "not guilty": namely, *guilty.* In circumstances where the power only operates in the circumstance where the Court is setting aside a verdict of guilt for an offence, it has an obvious and natural operation of permitting the entry of a verdict of guilty for *another* offence, where alternative verdicts are available (whether by operation of statute[7] or at common law[8]).

16. *Second*, the practical effect of the appellant's construction — that a verdict for a different offence cannot be entered — is to deprive the power conferred on the Court to enter "another verdict" of any meaningful and substantive operation. As Gummow J observed in *Minister for Resources v Dover Fisheries Pty Ltd*, it is "improbable that the framers of legislation could have intended to insert a provision which has virtually no practical effect".[9] The appellant's prophylactic answer to this is to suggest the provision would still have the limited operation of "permitting the entry of another type of verdict for the offence" (**AS [26]**). The only verdict that the appellant points to would be a special verdict

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6 *AJS v The Queen* (2007) 235 CLR 505 at [19] (Gleeson CJ, Hayne, Heydon and Crennan JJ).
7 Here, by operation of s 49 of the *Crimes Act 1900* (ACT).
8 See *R v Cameron* [1983] 2 NSWLR 66 at 68 (Slattery, Maxwell and Hunt JJ).
9 (1993) 43 FCR 565 at 574, citing *AMP Inc v Utilux Pty Ltd* [1972] RPC 103 at 109.

of not guilty by reason of mental impairment. But such a verdict would amply be captured within the concept of a verdict of "not guilty" already because a verdict of "not guilty" by reason of mental impairment under the *Crimes Act 1900* (ACT) is, as a matter of substance, still a verdict of "not guilty";[10] it is not "another" verdict.

17. *Third*, even assuming that it was "another verdict", the appellant offers no basis in principle for preferring such a narrow construction of the grant of power in s 37O(1)(d). It is inconsistent with longstanding authority on the construction of provisions conferring judicial power, which "should be construed liberally and without the making of implications or the imposition of limitations not found in the words used by the legislature".[11] It is also inconsistent with the purposive approach to statutory construction,[12] producing as it would an inconvenient and improbable result in relation to the powers of the Court in determining criminal appeals in the ACT.[13] By contrast, the appellant points to no principle of statutory construction, nor legislative purpose that would be served, by preferring the narrow construction he advances.

18. *Fourth*, the legislative history reinforces the correctness of the Court of Appeal's construction of s 37O(1)(d). Section 37O was introduced into the *Supreme Court Act* by the enactment of the *Supreme Court Amendment Act (No 2)* (ACT), which introduced Part 2A of the Act, establishing and conferring jurisdiction and powers on the ACT Court of Appeal. Prior to the enactment of Part 2A, appeals from the ACT Supreme Court (including criminal appeals) lay to the Federal Court of Australia. Section 28(1)(e) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) provided that the Court may "set aside the verdict and judgment in a trial on indictment and order a verdict of not guilty or other appropriate verdict to be entered". As McCallum CJ observed, s 37O was modelled on s 28 of the FCA Act rather than the criminal appeal statutes of other States, and did not originally contain the "common form" appeal provision which is now found in s 37O(2)-(3) (**CA2 [50] JCAB 159**). Thus, the explanatory statement observed that the

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10 See *Crimes Act 1900* (ACT), ss 321-324; *Criminal Code 2002* (ACT), s 28(7). Compare *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), Part 3, which replaces the verdict of "not guilty" by reason of mental impairment with a special verdict of "act proven but not criminally responsible". See also *R v Steurer* (2009) 3 ACTLR 272 at [31] (Penfold J); *R v Porter* (1933) 55 CLR 182 at 185 (Dixon J).

11 *CDJ v VAJ* (1998) 197 CLR 182 at [110] (McHugh, Gummow and Callinan JJ), see also at [53] (Gaudron J); *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

12 See *Legislation Act 2001* (ACT), s 139(1).

13 *Cf CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson Toohey and Gummow JJ).

proposed bill retained "a number of provisions already applicable to appeals from the ACT Supreme Court in the Federal Court".[14] The accompanying note to s 37O observed that the section "sets out the broad powers of the Court on appeal".[15]

19. There are three relevant considerations arising out of this history. First, when adopting similar language to that (then) contained in s 28(1) of the FCA Act, the legislature in fact adopted an arguably *wider* expression of the power conferred on the Court, by using the language of "another verdict" rather than "other appropriate verdict". That reinforces the principle of statutory construction which would prefer a liberal construction of the grant of power in issue. Second, and in any event, as the plurality observed in *R v* ***Hillier*** (2007) 228 CLR 618 at [24], the powers granted in s 37O in respect of appeals from convictions were "not relevantly different" from those which had previously been given to the Federal Court of Australia. A verdict of "not guilty" is plainly encompassed within the concept of "other appropriate verdict", even more-so "another verdict". Third, it renders the comparison which the appellant seeks to invoke with the criminal appeal statutes in other states even more clearly irrelevant than it otherwise would be. That is, there is no basis for ascribing any significance in the exercise of construction to the difference between s 37O(1)(d) and s 7(2) of the *Criminal Appeal Act 1912* (NSW) (or indeed any difference between it and any other state/territory statute). The ACT statute was modelled on the far more general provisions contained in the *Federal Court of Australia Act 1976* (Cth). That is the explanation for the difference, not some implied choice to limit the powers of the ACT Court of Appeal.

20. *Fifth*, even absent this legislative history, the approach to construction which the appellant urges on the Court is wrong in principle, because the criminal appeal statutes of *other* jurisdictions are an unlikely source of guidance for the proper construction of *this* statute. Such statutes are not part of the text or the context of this statute.

21. *Sixth,* the appellant suggests at **AS [27]** that because s 37O(1)(d) does not (like other criminal appeal statutes) "prescribe the circumstances" in which "another verdict" might be entered (unlike other States/Territories), this suggests it does not extend to permit substitution of another verdict. As a matter of principle, it suggests the opposite. That the legislature has *not* expressly circumscribed the circumstances in which another verdict

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[14] Explanatory Statement, Supreme Court Amendment Bill 2001 (ACT) at 3.
[15] Explanatory Statement, Supreme Court Amendment Bill 2001 (ACT) at 6.

can be entered (unlike other States/Territories) rather tends to suggest it was conferring a wide discretion on the Court in such circumstances, not the opposite. Having regard to the legislative history, that s 37O does not prescribe the conditions for the exercise of the power is unsurprising (*cf* **AS [31]**).

22. The majority was correct not to read into s 37O(1)(d) the constraints for which the appellant contends. As a matter of ordinary language, "another verdict" is apt to include a verdict for an alternative offence in respect of which the jury could on the indictment have found the appellant guilty.

23. As to the test which should be applied by the appellate court to substituting a verdict under s 37O(1)(d), it is common ground on this appeal that if available, the power would be exercised in circumstances at least as wide as those described by the High Court in *Spies v The Queen* (2000) 201 CLR 603 (**AS [31]**) (this being a matter conceded by the Director before the Court of Appeal). As observed by Murrell CJ and Mossop J in *R v Ralston*, because of the "spare" nature of the appeal provisions in the Territory "there is more room for judicial determination on the operation of those provisions in specific contexts".[16] Application of the test in *Spies* is consistent with the approach of this Court on previous occasions to the criminal appeal provisions applicable in the ACT (and previously the Northern Territory), and with the statutory text and context of s 37O(1)(d) itself.

24. This Court has had previous occasion to consider the proper interpretation of the "spare" criminal appeal provisions which have historically applied in the Territories.[17] In *Stokes v The Queen* (1960) 105 CLR 279 at 285 (Dixon CJ, Fullagar and Kitto JJ), the Court considered the appeal provision in (then) s 52 of the *Australian Capital Territory Supreme Court Act 1933-1959*, which provided a right of appeal from a conviction on indictment before the Supreme Court to the High Court on "any ground of appeal which involves a question of law alone". The Court there determined it should be interpreted as being conditioned by principles equivalent to the proviso found in the common form appeal provisions.[18]

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16 (2020) 285 A Crim R 159 at [44].
17 *R v Hillier* (2007) 228 CLR 618 at [25] (Gummow, Hayne and Crennan JJ).
18 (1960) 105 CLR 279 at 285 (Dixon CJ, Fullagar and Kitto JJ). See also *R v Ralston* (2020) 285 A Crim R 159 at [43] (Murrell CJ and Mossop J).

25. Subsequently, in ***Chamberlain*** *v The Queen (No 2)* (1984) 153 CLR 521 the Court considered the power conferred on the Federal Court of Australia by s 28 of the FCA Act in the context of criminal appeals from the Supreme Court of the Northern Territory. The issue was whether the Court had the power to allow an appeal on the ground that the verdicts were unsafe, unsatisfactory or dangerous. At that time, s 28 did not contain any "common form" appeal provision (as is now found in s 37O(2)-(3), and s 30AJ of the FCA Act). The Court rejected a submission that the power conferred by s 28 was constrained by the common law in respect of new trials in criminal cases.

26. Chief Justice Gibbs and Mason J reasoned that "[t]he true position, in our opinion, is that when the Parliament departed from the usual legislative model, and failed to state the grounds or principles on which the Federal Court is to determine criminal appeals, it conferred on that court a wide discretion to ensure that justice is done in criminal cases".[19] Their Honours went to observe that:[20]

> Since it cannot be supposed that the Parliament intended to make available to the citizens of the Territories an inferior sort of justice, or to require that the Federal Court should affirm a criminal conviction notwithstanding that it had reached the conclusion that a miscarriage of justice had occurred, it must be concluded that the power of the Federal Court, unfettered in terms as it is, was intended to extend at least as widely as those of the State Courts of Criminal Appeal, and thus to enable the Federal Court to set aside a verdict whenever it is of opinion that there has been a miscarriage of justice.

27. Finally, in *R v Hillier* (2007) 228 CLR 618, the Court considered the form of s 37O prior to the amendments which introduced what is now s 37O(2)-(3) (the common form appeal provisions), and concluded that there was no persuasive reason to "read the provisions of Pt 2A of the Act, spare as they are, as giving to the Court of Appeal of the Australian Capital Territory duties and powers in criminal appeals narrower than those described in *Davies and Cody* [(1937) 57 CLR 17] and held in *Chamberlain [No 2]* [(1984) 153 CLR 521] to apply in criminal appeals from Territories regulated by earlier, equally spare, legislative provisions".[21]

28. In those circumstances, and analogously to *Chamberlain,* the unfettered power of the Supreme Court to enter "another verdict" extends *at least* as widely as the power of the

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19 (1984) 153 CLR 521 at 529 (Gibbs CJ and Mason J), 569-570 (Murphy J agreeing), see also 615-616 (Deane J).
20 (1984) 153 CLR 521 at 529 (Gibbs CJ and Mason J).
21 (2007) 228 CLR 618 at [25].

other State and Territory Courts of Criminal Appeal, since it should not be supposed the legislature intended to make available to the citizens of the ACT "an inferior sort of justice". This construction is consistent with the principle that a power conferred on a Court is to be governed by the requirement that it be exercised "judicially and consistently with the judicial process",[22] and in the context of a criminal appeal, consistent with the conferral of a power "to ensure that justice is done in criminal cases".[23] It is also consistent with the statutory text and context of s 37O(1)(d), noting that Part 7 of the *Supreme Court Act* provides in s 68A for trials on indictment to be by jury, except in a case where the accused person consents consistently with s 68B of the Act. That is, that the test in *Spies* would govern the circumstances in which the appellate Court will substitute an alternative verdict is consistent with the right conferred by s 68A on an accused person to a trial by jury, except where the accused person elects otherwise (see also **CA2 [61] JCAB 161** (McCallum CJ)).

The original argument: whether it was open to the CA to enter the verdict

29. This was an appropriate case for the power conferred by s 37O(1)(d) to be exercised, because it is a case where "given the evidence at trial and what was common ground, the conviction verdict demonstrates that the jury were affirmatively satisfied of those facts which constitute the other offence".[24] The jury's conviction of the appellant of the offence of murder necessarily entails that the jury was affirmatively satisfied of the facts which constitute the offence of manslaughter. The setting aside of the verdict of murder on the limited basis found by the majority to give rise to a reasonable hypothesis as to innocence does not stand in the way of that conclusion, for the reasons which follow.

30. In respect of the offence of manslaughter, the jury was (correctly) instructed that the prosecution was required to establish:[25]

    1. The accused deliberately did an act;
    2. The act caused the death of Danielle Jordan;
    3. The act of the accused was unlawful; and

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22 See *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 (Gaudron J); *PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 (Brennan CJ, Gaudron and McHugh JJ); *Oshlack v Richmond River Council* (1998) 72 ALJR 578 at 582 (Gaudron and Gummow JJ), 591 (McHugh J, Brennan CJ agreeing on this point).

23 *Chamberlain* (1984) 153 CLR 521 at 529 (Gibbs CJ and Mason J).

24 *Spies v The Queen* (2000) 201 CLR 603 at [27] (Gaudron, McHugh, Gummow and Hayne JJ).

25 MFI #31 (written directions provided to jury): **ABFM (C2/2026) 91**.

4. The act of the accused was dangerous in the sense that the circumstances were such that a reasonable person in the accused's position would have realised that he was exposing Ms Jordan to an appreciable risk of serious injury.

31. The "act" relied on was that the appellant "deliberately drove the vehicle with Ms Jordan on the vehicle's bonnet, knowing of Ms Jordan's presence on the bonnet".[26] The "unlawful" aspect of that act was that the appellant "intentionally drove the vehicle with the intention that Ms Jordan would fall from the vehicle and collide with the roadway".[27] It was the conduct of driving the vehicle with the requisite intention that was said to comprise the "unlawful" act, because this would amount to an assault.[28] "The difference between the case for murder and the case for manslaughter was the difference between the appellant driving with Ms Jordan on the bonnet of the vehicle knowing that her death was probable and a determination by him to drive regardless (murder) and the appellant driving with Ms Jordan on the bonnet with the intention of dislodging her from the vehicle (manslaughter)" (**CA2 [82] JCAB 166**).

32. The majority was correct to conclude that although the state of mind which the prosecution was required to prove for the alternative offences was different, "the circumstances of this case dictated that satisfaction with respect to reckless indifference encompassed the unlawful intention necessary for proof of manslaughter" (**CA2 [82] JCAB 166**). That is because it was a necessary and inherent as a step along the way of the jury's finding that Ms Jordan's death was *probable* that the jury found he was driving with an intention to dislodge her from the vehicle. The jury therefore "must have been satisfied" of the facts comprising the elements of manslaughter in reaching its conclusion on murder.

33. The majority did not err in finding that the intention required to establish the unlawfulness of the act was subsumed by the *mens rea* for murder (cf **AS [36]**). In other cases that may be the case. But in the context of the facts of this case, the jury's satisfaction that the appellant had turned his mind to the probability of Ms Jordan's death necessarily implies satisfaction beyond a reasonable doubt that the appellant intentionally drove with Ms Jordan on the bonnet and intended her to come off the bonnet. This is because satisfaction that the appellant had realised the probability of death necessarily carries with

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26 T554.39-40 (summing up) (**JCAB 17**).
27 T555.1-4 (summing up) **(JCAB 18**).
28 T555.6-8 (summing up) (**JCAB 18**).

it the anterior and logical satisfaction that the appellant intended by his conduct that Ms Jordan would come off the bonnet and collide with the roadway.

34. It is to be borne in mind that the offence of manslaughter and the underlying offence of common assault (which was the particularised unlawful act) were not offences to which the *Criminal Code 2002* (ACT) generally applies.[29] The elements of the offences are thus determined by the common law. In this regard, the direction to the jury that they must be satisfied of the appellant's "intention" to dislodge Ms Jordan onto the roadway, in the context of the common law offence of assault, encapsulated a finding either that the appellant's purpose was to achieve the result, or that he knew that it was probable or likely that the result would occur as a consequence of his act (as the trial judge later observed in reasons for judgment on sentence: see *DPP v O'Connell (No 6)* [2025] ACTSC 529 at [24]-[38] (Baker J)). The discussion of "intention" in *Zaburoni v The Queen* (2016) 256 CLR 482 (see **AS [38]**)[30] does not assist as they concern the proper interpretation of the word "intent" in a particular statutory context in which it was specifically accepted that the common law concepts of foreseeability did not apply.[31]

35. The majority's decision on the unreasonableness of the finding with respect to that element was limited to the further finding that the appellant knew, having been dislodged from the vehicle, her death was "probable": see **CA [341] JCAB 166.** That is, the majority allowed the conviction appeal on a narrow basis of the "reasonable inference that when the appellant drove the vehicle with Ms Jordan on the bonnet, he did not know or realise that her death was probable" (**CA [345] JCAB 144**). That was the inference consistent with innocence that had not been excluded, and that is the only aspect of the jury's satisfaction of facts that the majority held to be unreasonable. That conclusion left untouched the jury's satisfaction of the fact that the appellant was driving with the intention of dislodging Ms Jordan from the vehicle (a step along the way to reaching its conclusion on the *mens rea* for murder). That is clear from the majority's explanation of their own finding at **CA2 [109] JCAB 172:**

> To be clear, our previous holding did not impugn the jury's finding that the appellant drove the vehicle with Ms Jordan on the bonnet, in the circumstances

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29 Chapter 2 of the *Criminal Code 2002* (ACT) only applies to an offence enacted after 2003: see s 8. Only the "applied provisions" apply to the offences of manslaughter and assault: s 10. The "applied principles" do not include the principles of criminal responsibility found in Chapter 2 of the *Criminal Code*, specifically "intention" as defined in s 18.

30 See also *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [27].

31 *Zaburoni v The Queen* (2016) 256 CLR 482 at [13].

> established by the evidence identified at [270]. Our conclusion that the verdict for murder was unreasonable or could not be supported by the evidence was only with respect to proof of his knowledge that in continuing to drive her death was probable. Proof of something less than that fell short of what was necessary to establish the offence of murder. Proof of an intention to dislodge Ms Jordan from the vehicle in the circumstances of this case did not prove knowledge that her death was probable. Our conclusion on the verdict for murder does not impugn the finding that the appellant possessed the intention to dislodge Ms Jordan from the vehicle.

36. As was recognised in *Spies,* where the Court "thinks that the jury's finding on one element of an offence was unreasonable, it may often be open to find the appellant guilty of a lesser offence".[32] *A fortiori,* in a case where the jury's finding on only *one aspect* of an element was unreasonable (here, the finding as to knowledge of probability of death). The majority's approach did not involve impermissibly taking into account the jury's finding which the majority had concluded was unreasonable (cf **AS [37]**), because the only aspect of the finding that considered to be unreasonable was knowledge of the probability that *death* would result from his act.

37. In any event, in the specific circumstances of this case, the appellant's knowledge or awareness as to death being a probable consequence of his actions inherently and necessarily included his intention (whether purpose or foresight as to consequence) for Ms Jordan to come off the vehicle onto the roadway. In other words, the appellant could not have been recklessly indifferent as to Ms Jordan's death unless he possessed at least the foresight as to consequence of her to coming off the bonnet (as a separate and logically anterior matter to foresight of probability of death). The jury's verdict on murder necessarily provided their satisfaction as to the applicant's intent for the offence of manslaughter.

38. The effect of the majority's earlier decision was that the jury ought to have entertained a doubt that, at the time the appellant drove his vehicle with Ms Jordan on the bonnet, he knew or realised that by his conduct, death was probable. The majority decision in this regard did not disturb the fact that the appellant "intended" that Ms Jordan would come off the bonnet and onto the roadway, whether that intention was satisfied by reason of purpose or foresight. The only fact which was affected was the realisation that death would occur as a result of the appellant's action. In other words, whilst the majority found the element of reckless indifference to be unreasonable, it was not on a basis which

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[32] (2000) 201 CLR 603 at [43]

rendered the *mens rea* for manslaughter similarly unreasonable and not on a basis which disturbed the jury's satisfaction of the facts of that offence.

39. As for **AS [41]**, the complaint that the majority went on to consider whether a verdict of manslaughter would have been unreasonable goes nowhere, because as the appellant frankly acknowledges, this analysis was done in response to a submission *by the appellant* that a verdict of guilty for manslaughter should *not* be entered on that precise basis. There was no error in considering and rejecting this argument (because plainly enough the Court should not enter a verdict or order a new trial on an offence that it would find to be unreasonable on an appeal against conviction[33]). The reasons do not demonstrate that the Court applied the test of whether the verdict would be unreasonable in substitution of a consideration of the test in *Spies* (cf **AS [41]**). So much is clear from the conclusion reached at **CA2 [85] JCAB 166** that the jury "must have" determined the question of the intention required for manslaughter adversely to the appellant, *before* the majority went on to consider the argument put by the appellant that entry of a guilty verdict would be to give effect to an unreasonable verdict: **CA2 [87] JCAB 167.**

40. In the circumstances, it was well open for the majority to be satisfied "to the point of certitude"[34] that the jury's verdict necessarily carried with it the findings which as a matter of law, made the accused guilty of the other offence. The present case was an appropriate matter for the exercise of such a power. Having regard to the jury's findings, the appellant's guilt on the alternative offence was established beyond a reasonable doubt. Entering the substituted verdict in the circumstances had the "result in the saving of time and expense and avoid[ing] the inconvenience and worry of victims and witnesses having to testify once again before a jury".[35]

Ground (b): the construction of s 297 of the *Crimes Act 1900* (ACT)

41. Section 297 of the *Crimes Act* did not preclude the Court of Appeal from entering a verdict of guilty for manslaughter, nor would it have precluded an order for a retrial on the offence of manslaughter. That provision is in the following terms:

> **297 After trial for offence, if alternative verdict possible, no further**

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33 See *R v PL* (2009) 199 A Crim R 199 at [90].
34 *Spies* (2000) 201 CLR 603 at [49].
35 *Spies* (2000) 201 CLR 603 at [47].

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.

42. The purpose of s 297 is to give effect to the principle of *autrefois acquit* in the context of alternative offences. The way the provision works to give effect to that statutory purpose is to prevent the Crown from proffering an indictment against an accused in a new prosecution for the alternative offence. The entry of an alternative verdict, or the making of an order for a retrial after a successful appeal, is not to render the person "liable to prosecution" for the other offence. Rather, as recognised in ***AJS*** *v The Queen* (2007) 235 CLR 505 at [5], it is instead a "continuation of so much of the original prosecution as remained alive after the Court of Appeal's determination of the appeal". The Court of Appeal were correct to conclude (**CA2 [24] JCAB 153**) that s 297 did not preclude the the making of either an order for the entry of a verdict of guilty of manslaughter or an order for a new trial for the offence of manslaughter in the circumstances of this case, for the reasons explained at **CA2 [10]-[24] JCAB 150-153**. The following points warrant emphasis.

43. *First,* the ordinary meaning of the text of s 297 confirms that it is concerned with events *after* the trial of a person is complete; so much is clear from the temporal language of the person having been "tried for an offence". It stands in contrast to the contextual provisions ss 296, 298 and 299 which are concerned with a person who is "on trial" for an offence. The appellant's contention that the majority's construction involved any implication of words into the statute (**AS [45]**) is a red herring. The operation of the provision is clear from the opening words; it applies when the prosecution of the person for the offence is *complete* — the person has been "tried" for an offence. No additional words are necessary.

44. As was made clear in *AJS,* where a verdict of acquittal has been entered on the primary offence, the balance of the prosecution for the alternative offence remains "alive" and the entry of a verdict of guilty or an order for a new trial is the continuation of that (same) prosecution. It is not correct to suggest the appellate process was "complete" on the entry of the verdict of acquittal (cf **AS [55]**); so much is clear from the fact the Court by order expressly reserved the question of whether "another verdict should be entered" (**JCAB 146**). Nor does the appellant derive assistance from the statutes of Tasmania or

Western Australia (cf **AS [48]**): the proper construction of this statute having regard to its text and context is not usefully informed by the text of different statutes from different jurisdictions.

45. It is, however, usefully informed by s 37O of the *Supreme Court Act,* being the relevant criminal appeal statute enacted by the legislature to work in conjunction (and it can be presumed, harmoniously[36]) with the provisions of Part 12 of the *Crimes Act.* The appellant is wrong to suggest that s 37O is not addressed to the orders that might be made after a verdict has been found to be unreasonable (**AS [53]**), the presence of s 37O(2)-(3) (the common form provision) demonstrates s 37O(1) is concerned with the orders that might be made after the verdict of the jury has been set aside on the ground contained in s 37O(2)(a)(i). Having allowed the appeal on the basis the verdict of the jury should be set aside for unreasonableness (s 37O(2)(a)(i)), the provision plainly contemplates that the Court would exercise the power in s 37O(1)(d) to in fact set aside the verdict, enter a verdict of not guilty or another verdict, or exercise the power in s 37O(1)(e) to "order a new trial". As the appellant acknowledges at **AS [53],** his construction would have the effect of confining the exercise of power to order a new trial in s 37O(1)(e) to only the circumstance where an appeal against conviction is allowed under s 37O(2)(a)(ii)-(iii). Nothing in the text of s 37O warrants that construction, and it is contrary to the principle that provisions conferring judicial power should be construed liberally (see paragraph 17 above).

46. *Second,* the appellant's preferred construction would have the absurd consequence that whether or not a verdict of guilty for an alternative offence could be entered, or a retrial ordered, would depend on the Court of Appeal first *refraining* from entering a verdict of acquittal in relation to a verdict it has found to be unreasonable (**AS [50]**). That is, the appellant does not ultimately appear to contend that the Court could not substantively achieve the same result as it did in this case consistently with s 297. Rather, the argument devolves to the submission that in order to do so, it simply needed to have not first entered a verdict of acquittal on the charge of murder. That is clear from the appellant's apparent acceptance (**AS [50]**) that it would have been appropriate to take the course 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

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[36] *NSW Commissioner of Police v Cottle* (2022) 276 CLR 62 at [23] (Kiefel CJ, Keane, Gordon and Steward JJ); *Commissioner of Police v Eaton* (2013) 252 CLR 1 at [78] (Crennan, Kiefel and Bell JJ).

there be a re-trial limited to the issue of manslaughter. That is an unlikely construction of the provision, which leads to the arbitrary result that a person is denied the entry of a verdict of acquittal on a charge in respect of which the only verdict the jury could have rationally returned was one of "not guilty". As Adamson JA concluded in respect of the cognate provision in NSW in ***Smith*** *v The King* [2025] NSWCCA 158 at [119], this consequence would be "neither rational, nor just".

47. *Third,* the argument is not assisted by recourse to vague notions of preventing the accused from being "twice vexed". The entry of a verdict of guilty to an alternative offence does not result in any further prosecution of an accused person, nor does the ordering of a new trial only on that part of the indictment that has not been fully discharged (that is, in respect of the alternative offence). The passage from *R v PL* (2009) 199 A Crim R 199 at [88]-[89] on which the appellant places reliance at **AS [48]** is made in the context of considering, in the very next paragraph (at [90]) the situation where a Court should decline to exercise its discretion to order a retrial where it is of the opinion that a conviction appeal against any subsequent verdict of guilty would be upheld. Read in context, *R v PL* does not support a conclusion that the Court's power to order a retrial should be circumscribed in the manner the appellant contends. Indeed, the Court in that case in fact made orders which acquitted the accused on the charge of murder and ordered a new trial limited to the charge of manslaughter.[37]

48. As to the reliance placed on *Pearce the Queen* (1998) 194 CLR 610 (**AS [48]**), as the plurality observed in *AJS* (2007) 235 CLR 305 at [19]:

> The proceedings commenced by the prosecution against the appellant were, as the Court of Appeal's orders recognised, only partly determined by that Court's disposition of the appeal. The second of the offences now under consideration (the offence of committing an indecent act) was a statutory alternative to the first. There has been and would be no double prosecution of the kind considered in *Pearce.*

49. *Fourth,* the legislative history confirms the correctness of the Court of Appeal's construction. The provision was previously s 426 of the *Crimes Act 1900* (NSW), which applied in the ACT prior to self-government.[38] In New South Wales, s 426 was

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37 *R v PL* (2009) 199 A Crim R 199 at [96].

38 *Seat of Government Acceptance Act 1909* (Cth), s 6(1); *Seat of Government (Administration) Act 1910* (Cth), s 4.

subsequently transferred to s 125 of the *Criminal Procedure Act 1986* (NSW),[39] and amended to read "If under any Act a person who is tried for a serious indictable offence may be acquitted of that offence but found guilty of some other offence, the person is not liable to further prosecution on the same facts for that other offence".[40] The explanatory note records that "in substance" the provisions relating to criminal procedure which were transferred "remain basically unchanged".[41] That this provision is concerned with new prosecutions for the uncharged alternative is clear from the language of "further prosecution". It is not apt to include the prosecution which remains ongoing until the appellate process is complete.

10 50. In *Smith,* the Court of Criminal Appeal considered the language of the NSW provision (which is now s 163 of the *Criminal Procedure Act*) and concluded that it should be construed in the same way as the Court of Appeal in this case construed s 297 of the *Crimes Act* — "limited to circumstances where an indictment has been finally dealt with and ought not be regarded as applicable in cases where this Court has adopted one of the courses open to it … to direct an acquittal and order a re-trial".[42] That provision being relevantly in the same terms as s 297 (and being the provision on which s 297 was in fact based), is a strong reason to favour a like construction, consistently with the principle in *Farah Constructions Pty Lty v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135].

51. *Fifth,* the decision in *R v Murrell* (2001) 123 A Crim R 54 does not assist the appellant
20 (cf **AS [49]**). As the Court expressly observed, it resolved to take a "prudent" approach of not entering a "verdict that operated as a general acquittal on the indictment",[43] rather than in fact deciding that the entry of an acquittal on the charge would have the adverse effect that was the subject of its caution.[44] (And here, the Court of Appeal did not enter a "general acquittal" on the charges on the indictment. It expressly entered an acquittal only in respect of the charge of murder and reserved the question of the appropriate verdict on manslaughter: **JCAB 146**).

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39 See *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW), Sch 3, Pt 2, [15]. It is now contained in s 163 of the *Criminal Procedure Act 1986* (NSW).
40 *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW), Sch 2, [31].
41 Explanatory Note, Crimes Legislation Amendment (Sentencing) Bill 1999 (NSW).
42 [2025] NSWCCA 158 at [90].
43 *R v Murrell* (2001) 123 A Crim R 54 at [38] (Wood CJ at CL, Kirby J and Mathews AJ agreeing).
44 As observed by Adamason JA in *Smith v The King* [2025] NSWCCA 158 at [103].

52. The appellant omits at **AS [49]** that in the passage from *R v Quinn* (1952) 53 SR (NSW) 21 extracted in *Murrell,* Herron J in fact went on to state that "there must be a legal verdict", and that because a plea of not guilty to a charge of murder on an indictment covers a plea of not guilty to manslaughter, the question is whether the "record of trial" demonstrates a verdict of acquittal on any alternative left to the jury. Herron J concluded:[45]

> The record of a criminal trial is constituted, not only by the indictment but by a record of the jury's verdict on the charge preferred in the indictment and on any other charge which by law the judge may properly leave to the consideration of the jury. The record in this case shows (a) an indictment containing a charge of murder; (b) a verdict of not guilty of the charge of murder; (c) a record of no verdict of the jury on the charge of manslaughter, considered by the jury under the same indictment, by reason of a disagreement of the jury on this charge.
>
> There was, therefore, no verdict of acquittal, and the plea of autrefois acquit entered at the second trial cannot be held to have been established. The appeal must be upheld.

53. Justice Owen (Street CJ agreeing) similarly concluded (having considered standard texts about criminal pleading) that: "the significance of the statements of the text writers which I have quoted is that they all emphasize the divisibility of averments and point to the conclusion, which accords with commonsense, that on the undisputed facts in the present case the appellant could not have supported a plea of autrefois acquit".[46]

54. The approach taken in *Murrell* was also subsequently disapproved in *AJS*, with the Court expressly observing that the prudent course adopted in that case "should not be followed".[47] It is similarly unsupported by the subsequent authorities of *R v PL* (2009) 199 A Crim R 199 and *Smith* (as set out at paragraphs 49 and 51 above respectively), and this Court's decision in *Sio v The Queen* (2016) 259 CLR 47 at [82], in which the Court held it was open to enter an acquittal for murder and order a re-trial limited to the lesser alternative of armed robbery for which the appellant may have been found guilty at trial. The decision in *R v A2* (2019) 269 CLR 507, was concerned with the particular provisions of ss 6 and 8 of the *Criminal Appeal Act 1912* (NSW) (on which the appellant focusses in **AS [51]**), and the incapacity of the Court on a proper construction of those provisions to quash a conviction but decline to make any further order. The decision says nothing

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45 (1952) 53 SR (NSW) 21 at 28.
46 (1952) 53 SR (NSW) 21 at 25.
47 (2007) 235 CLR 505.

about either the proper construction of s 297 of the *Crimes Act* or the powers of the Court under the differently worded s 37O of the *Supreme Court Act.*

55. *Finally,* there is no principled basis for the submission at **AS [55]** that 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 retrial". The very presence of the order reserving the latter question denies the correctness of the proposition that the appeal was "determined". That is confirmed by the terms of s 37O, which expressly contemplate the making of orders for verdict of acquittal, "another verdict", and/or a "new trial". For these reasons, the majority was correct to conclude that the entry of a verdict of acquittal on the charge of murder did not operate to preclude either the entry of a verdict of guilty of manslaughter *or* the order for a new trial.

56. For these reasons, in the event the Director's appeal in C3/2026 is dismissed, this appeal ought also be dismissed, and the verdict of manslaughter maintained.

The application for leave to intervene by the DPP (SA)

57. The Director does not oppose the Director of Public Prosecutions (SA) being granted leave to intervene in the proceedings.

PART VIII: ESTIMATE OF HOURS

58. The Director estimates that 1 hour is required for the presentation of oral argument (in addition to the 1.25 hours estimated for C3/2026, with a combined estimate for both appeals of 2.25 hours). In the event the Director of Public Prosecutions (SA) is granted leave to intervene in the appeals, the Director would cede part of the time allowed for the presentation of her oral argument to the South Australian Director.

Dated: 1 April 2026

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ANNEXURE TO RESPONDENT'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	*Australian Capital Territory Supreme Court Act 1933-1959* (Cth)	Historical version for 22 May 1959 to 30 September 1960	s 52	For illustrative purposes only, date of the decision of the High Court in *Stokes v The Queen* (1960) 105 CLR 279	16 December 1959
2	*Crimes Act 1900* (ACT)	Republication No. 135 effective 11 November 2021 – 11 May 2022	s 12	Version as at the date of the offence	14 to 18 April 2022
		Republication No. 141 effective 11 June 2023 to 12 September 2023	s 49	Version as at the date of the trial	Verdict returned on 15 June 2023
		Republication No. 153 effective 1 July 2025 to 15 November 2025	ss 321-324; Part 12	Version at the date of the decision of the ACT Court of Appeal in *O'Connell v DPP (No 4)* [2025] ACTCA 41	29 September 2025
3	*Crimes Act 1900* (NSW) (as amended in its application to the Australian Capital Territory)	Republication No 0D (RI) effective 1 July 1990 – 5 February 1992	s 426	For illustrative purposes only, last republication before republication following self-government	N/A
4	*Criminal Code Act 2002* (ACT)	Current	Ch 2	For illustrative purposes only	N/A

5	*Crimes Legislation Amendment (Sentencing) Act 1999* (NSW)	As made	Sch 2 [31], Sch 2, Pt 2, [15]	For illustrative purposes only	N/A
6	*Criminal Appeal Act 1912* (NSW)	Current	ss 6-8	For illustrative purposes only, considered by the Court of Appeal in *O'Connell v DPP (No 4)* [2025] ACTCA 41	N/A
7	*Criminal Procedure Act 1986* (NSW)	Historical version for 23 February 2001 to 30 June 2001	s 125	For illustrative purposes only, considered in authorities referred to by the Court of Appeal in *O'Connell v DPP (No 4)* [2025] ACTCA 41	4 June 2001 (date of decision in *R v Murrell* (2001) 123 A Crim R 54)
		Current	s 163	For illustrative purposes only, considered by the Court of Appeal in *O'Connell v DPP (No 4)* [2025] ACTCA 41	N/A
8	*Federal Court of Australia Act 1976* (Cth)	Historical version for 20 December 1983 to 31 May 1984	s 28	For illustrative purposes only, date of the decision of the High Court in *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521	22 February 1984
		Current	s 30AJ	For illustrative purposes only, considered by the Court of Appeal in *O'Connell v DPP (No 4)* [2025] ACTCA 41	N/A
9	*Legislation Act 2001* (ACT)	Current	s 139	For illustrative purposes only	N/A

10	*Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW)	Current	Part 3	For illustrative purposes only	N/A
11	*Seat of Government Acceptance Act 1909* (Cth)	As made	s 6	For illustrative purposes only	N/A
12	*Seat of Government (Administration) Act 1910* (Cth)	As made	s 4	For illustrative purposes only	N/A
13	*Supreme Court Act 1933* (ACT)	Republication No. 71 effective 15 May 2024 – 25 November 2025	s 37O, Part 7.	Version as at the date of the decisions of the ACT Court of Appeal in *O'Connell v DPP* [2025] ACTCA 20 and *O'Connell v DPP (No 4)* [2025] ACTCA 41	June – September 2025
14	*Supreme Court Amendment Act (No 2) 1993* (ACT)	As made	Whole	Amending Act (only one version)	N/A