HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN: **KMD**
Appellant

and

CEO (DEPARTMENT OF HEALTH NT)
First Respondent

and

THE KING
Second Respondent

and

CEO (ATTORNEY-GENERAL FOR THE NT)
Third Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATE

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

PART II: ISSUES AND SUMMARY OF SUBMISSIONS

2. The ultimate issue in this appeal is whether the Northern Territory Court of Criminal Appeal (**CCA**) erred when finding error in the primary judge's decision to revoke the appellant's custodial supervision order (**CSO**) and to release the appellant on a non-custodial supervision order (**NCSO**). For the reasons which follow, the CCA was correct to find error and to reinstate the CSO.

3. As to ground 1, the CCA unanimously and correctly held that the appeal was to be determined on the correctness standard, rather than applying the principles described in ***House*** *v The King* (1936) 55 CLR 499: see [14]-[36] below. In any event, that issue was not material, the majority having disposed of the appeal after identifying error of the kind that qualifies as a *House* error: see [37]-[38].

4. As to grounds 2 and 3, there was no relevant expectation created by the Court's conduct of the proceedings below that the parties would be given a further hearing in the event that error was found: see [42]-[47]. The exchanges with the bench were inconclusive and the proposition that the parties proceeded on the basis of such an expectation is inconsistent with submissions made to the CCA that it was open to the Court to resolve the appeal on the material before the primary judge. No party sought to adduce further evidence during the hearing and the CCA, having found error in the primary judge's orders, was entitled to proceed on the material before it: see [48]-[53].

5. As to ground 4, the majority's reasons did not depend upon any generalised implication from s 43ZN(2) that a person cannot be released upon an NCSO unless they have engaged with the experts preparing reports under that section. Rather, their Honours held that it was not reasonably open to the primary judge, given the history and particular facts of this matter, to be satisfied that the appellant did not pose a serious risk to the community without some probative evidence of her current mental state: see [39]-[41].

6. If error is established, the proper disposition would be to remit the matter to the CCA, including because (due to the passage of time) the appellant could no longer comply with the conditions of the NCSO formulated by the primary judge: see [54]-[56].

PART III: SECTION 78B NOTICE

7. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: FACTS

8. The facts contained in the appellant's submissions (**AS**), while accurate, are an incomplete record of the factual background relevant to this appeal. The appellant's summary of the facts is supplemented as follows.

9. In 2013, the appellant engaged in a number of "extremely violent" acts, the underlying cause of which was the appellant's delusional belief system: **CAB 263; CCA [111]**. That conduct included shooting two people, holding a person at gun point, hiding in a house with a firearm to commit an offence, and possessing an altered firearm: **CAB 253, 256; CCA [97], [105]**. Following a special hearing under Part IIA of the Criminal Code,[1] on 4 July 2014 the appellant was found not guilty of various charged offences arising out of that conduct, by reason of mental impairment. On the same date the appellant was placed on a CSO under ss 43Z and 43ZA by Riley CJ. The Chief Justice found that the appellant "present[s] a danger to other people who might already be or may become caught up in her deluded beliefs" and that the consequences of her engaging in further violence would be "extreme": **CAB 262-3; CCA [111]**. The Chief Justice also noted psychiatric evidence that, without treatment, the appellant's delusional belief disorder was only likely to deteriorate: **CAB 259-60; CCA [107]**.

10. The CSO was subject to regular periodic reviews, involving periodic reports as required by s 43ZK leading to court reviews as authorised by s 43ZH(2). The Court found on the first and second such reviews that the risks found by Riley CJ had persisted or worsened. In 2017, Hiley J found that the appellant continued to suffer from the same delusional disorder (**CAB 265; CCA [116]**), that the appellant refused to engage in treatment for that disorder and did not accept that she had a mental illness (**CAB 266-8; CCA [117]-[122]**), and that her condition was "probably worse": **CAB 268-9; CCA [123]**. His Honour said that the outcome of further violence would be "catastrophic", that the risk of this occurring was "not insignificant", and that the appellant posed a "serious risk to the community": **CAB 268-9; CCA [123]**. His Honour concluded that, unless the appellant accepted her condition and received treatment, her condition would "deteriorate and a risk of safety to the public will

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[1] Schedule 1, ***Criminal Code*** *Act 1983* (NT). References to sections in these submissions are to the Code.

remain or get worse": **CAB 268-9; CCA [123]**. Hiley J conducted a second periodic review, commencing in 2020 and concluding in 2021, in which his Honour reached essentially the same conclusions: **CAB 269; CCA [124]-[125]**.

11. The appeal below arose from a further periodic review held by Brownhill J in 2021 which concluded that the appellant could be released into the community without any prior forensic assessment or any forensic oversight. This was despite the primary judge confirming that the same risk factors identified by Riley CJ and Hiley J persisted. Justice Brownhill found that there was "ample evidence" that the appellant continued to suffer from her delusional disorder (**CAB 272; CCA [130]**), that the appellant maintained that her violence in 2013 was a "rational" response to her circumstances (**CAB 274-5; CCA [137]**) and a "normal reaction to a highly stressful event" (**CAB 275; CCA [140]**), that the appellant continued to refuse any medication or treatment (**CAB 278; CCA [145]**), that the appellant posed a real risk of causing harm, of a "high" magnitude, to others (**CAB 276-8, 289-90; CCA [143]-[144], [171]-[172]**), that there was "a need to protect [others] from danger" if the appellant was released (**CAB 290; CCA [172]**), and that the victims of her offending held "genuine concerns for their personal safety" if she were released: **CAB 291-3; CCA [178]**.

12. As required by s 43ZN(2)(a)(i) as a precondition to any order to release a supervised person from custody, the primary judge had before her two reports: one from a social worker (Ms Guy) and one from a psychologist (Professor Ogloff). The appellant had refused to engage with Professor Ogloff so that the primary judge had no evidence of any contemporary psychological or psychiatric assessment from which to assess the status of the appellant's condition, it having been several years since the appellant had engaged with such experts. This was in circumstances where it was accepted that the appellant did not require a guardian and was capable of making decisions about what treatment she would or would not accept: **CAB 299-300; CCA [192]**.

13. The primary judge ultimately released the appellant on a NCSO without any condition requiring forensic oversight in the community: **CAB 293; CCA [179]**. The first respondent (**CEO**) brought an appeal from that order, having formed the opinions, for the purposes of s 43ZB(2), that a different order should have been made, and that an appeal should be brought in the public interest. In allowing that appeal, Burns and Reeves JJ held that it was not reasonably open for the primary judge to conclude that the safety of the public would not seriously be at risk if the appellant were placed on a NCSO. Their Honours observed that in circumstances where, because of the

appellant's conduct, there was no updated psychological or psychiatric assessment of the appellant's condition, the position regarding the appellant's mental condition and risk assessment had not fundamentally changed since the earlier reviews conducted by Hiley J: **CAB 300-1; CCA [193]-[194], [196]**. Their Honours also found that it was not reasonably open to Brownhill J to have formulated a NCSO the terms of which did not provide for the appellant to be the subject of expert monitoring and counselling: **CAB 301; CCA [195].**

PART V: ARGUMENT

Ground 1: The standard of review

The CCA identified the correct standard of review

14. The CCA dealt with the appeal on the basis that the appropriate standard of appellate review was the "correctness standard", not the *House* standard: **CAB 204, 252; CCA [2], [93]**.[2] In reaching that conclusion, Reeves and Burns JJ (with whom Blokland J agreed on the question of the nature of the appeal: [2]) correctly identified the difference between the two standards (**CAB 248-9; CCA [81]-[82]**) and the principles by which the appropriate standard is identified (**CAB 249-50; CCA [83]-[85]**), quoting from this Court's recent decisions in *SZVFW* and *GLJ*[3] and in terms consistent with this Court's subsequent decision in *Moore*.[4]

15. As Reeves and Burns JJ recognised, the proper standard of review depends upon the characterisation of the issue under appeal as discretionary (in the sense of tolerating a range of outcomes) or non-discretionary (in the sense of demanding a unique outcome), the *House* standard applying to the former and the correctness standard to the latter: **CAB 249-50; CCA [83]-[84]**.[5] A discretionary decision is one where the judge is allowed "some latitude as to the choice of the decision to be made"[6] and which involves "value judgments in respect of which there is room for reasonable differences of opinion".[7] In such cases, there will be a "range of legally permissible outcomes"

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2 The CEO acknowledges that in the proceedings below it contended that *House* provided the correct standard of appellate review.

3 *Minister for Immigration and Border Protection v* ***SZVFW*** (2018) 264 CLR 541; ***GLJ*** *v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857.

4 ***Moore*** *(a pseudonym) v The King* (2024) 98 ALJR 1119.

5 Ibid, [14]-[15] (the Court); *GLJ* (2023) 97 ALJR 857, [15]-[16] (Kiefel CJ, Gageler and Jagot JJ); *SZVFW* (2018) 264 CLR 541, [48]-[49] (Gageler J), [86]-[87] (Nettle and Gordon JJ, Kiefel CJ agreeing on this point) and [146]-[148] (Edelman J).

6 *Moore* (2024) 98 ALJR 1119, [15] (the Court), quoting ***Coal and Allied Operations*** *Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, [19] (Gleeson CJ, Gaudron and Hayne JJ).

7 *SZVFW* (2018) 264 CLR 541, [144] (Edelman J), quoting ***Norbis*** *v Norbis* (1986) 161 CLR 513, 518 (Mason and Deane JJ).

within which, objectively, one outcome is "no better than the first"[8] so that it would be "wrong to allow a court of appeal to set aside a judgment merely because there exists just such a difference of opinion."[9] By contrast, the correctness standard applies where the legal criterion "demands a unique outcome … [rather than tolerating] a range of outcomes".[10]

16. Whether a criterion admits of only one legally permissible answer is to be determined as a matter of construction.[11] Thus any requirement for judicial restraint on appeal must derive from the terms of the statute.[12] The scope of the statutory criterion is relevant but not determinative.[13] It is also relevant to consider the nature of the rights in issue, whether the subject matter is concerned with matters of general public interest rather than merely individual rights and interests, and whether the primary decision maker has some particular expertise different from the appellate court.[14]

17. The statutory criterion relevantly posed by s 43ZH(2)(a) admits of only one correct answer. It provides that, in conducting a review of a CSO, the Court:

> must … vary the supervision order to [an NCSO] unless satisfied on the evidence available that the safety of the supervised person or the public would be seriously at risk if the person is released on [an NCSO].

18. Section 43ZH(2)(b) then provides that, if the Court *is satisfied* that such a risk exists, the person must remain on a CSO.

19. As the majority noted, s 43ZH(2) presented a "stark" choice between confirming a CSO or ordering a NCSO: **CAB 252; CCA [92]**. That reasoning did not depend on characterising the choice as "binary" (which language was not used): **cf AS [19]-[21]**. The binary character of a statutory formula (such as s 43ZH(2)(a)) will generally point towards the correctness standard applying,[15] but it may be accepted that some binaries

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8 *SZVFW* (2018) 264 CLR 541, [45] (Gageler J), quoting ***Singer*** *v Berghouse* (1994) 181 CLR 201, 212 (Mason CJ, Deane and McHugh JJ).

9 *SZVFW* (2018) 264 CLR 541, [44] (Gageler J), quoting *Norbis* (1986) 161 CLR 513, 518. Also [60].

10 *Moore* (2024) 98 ALJR 1119, [15] (the Court), quoting *SZVFW* (2018) 264 CLR 541, [49] (Gageler J).

11 *Coal and Allied Operations* (2000) 203 CLR 194, [11] (Gleeson CJ, Gaudron and Hayne JJ).

12 *SZVFW* (2018) 264 CLR 541, [151] (Edelman J), cited with approval in *Moore* (2024) 414 ALR 161, [14] (the Court).

13 *SZVFW* (2018) 264 CLR 541, [153] (Edelman J), cited with approval in *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216, [7] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

14 Ibid.

15 ***Mann*** *v R* [2023] NSWCCA 256, [19] (Kirk JA, Hulme JA and N Adams J agreeing); ***Young*** *v The King* [2024] SASCA 47, [136] (Doyle JA, Kourakis CJ and David JA agreeing); *Trustees of the Christian Brothers v* ***DZY*** *(a pseudonym)* [2024] VSCA 73, [96] (Beach and Macaulay JJA); *Scone Race Club Ltd v Cottom* [2024] NSWCA 34, [69] (Basten AJA, Gleeson and Mitchelmore JJA agreeing); *Franks v Cameron* [2024] NSWCA 56, [70] (Leeming JA, Adamson and Stern JJA agreeing);

are discretionary (e.g. to grant an adjournment[16] or to make a non-publication order[17]). The factor supports the application of the correctness standard here, but the reasons below did not turn on that.

20. Rather, the CCA's reasoning turned on the nature of the legal criterion and its controlling effect. Whether to continue to detain or not to detain a supervised person is controlled by the Court finding or not finding that "the safety of the supervised person or the public would be seriously at risk" if the person were released. The criterion is in mandatory terms ("*must*") in contrast to surrounding provisions ("*may*": cf ss 43I(3), 43O, 43R(5), 43Y(1)) and the criterion imposes a clear legal rule. As such, the question for the primary judge in applying s 43ZH(2) was whether "on the evidence adduced, [the] legal criterion had been satisfied"[18] with the result "dictated by the application of a fixed rule to the facts on which its operation depends"[19]: **cf AS [25]**. A legal question of that nature is one which demands a unique answer.[20] The correctness standard therefore applied: **CAB 252; CCA [93]**.

21. The question here is functionally equivalent to that considered in *GLJ*. This Court held in *GLJ* that the correctness standard applies to an appeal from a decision to permanently stay a proceeding for oppression because "[p]roceedings either are or are not capable of being the subject of a fair trial or are or are not so unfairly and unjustifiably oppressive as to constitute an abuse of process" and "a judge must stay proceedings that are an abuse of process and must not stay proceedings that are not an abuse of process."[21] So too, in circumstances where a court is engaged in a periodic review under s 43ZH, the court will either be satisfied that release on a NCSO will put the supervised person or the public seriously at risk – in which case the person must remain on a CSO – or the court will not be so satisfied – in which case the court must vary the CSO to a NCSO.

Finniss v State of New South Wales [2023] NSWCA 292, [85] (Payne JA, Stern JA and Basten AJA agreeing); *Sio v The Queen* (2015) 249 A Crim R 533, [30] (Leeming JA, Johnson and Schmidt JJ agreeing).

16 Criminal Code, ss 43R(9), 43ZE(3A), 43ZG(5A); *Mann* [2023] NSWCA 256, [19] (Kirk JA, N Adams J and Hume AJ agreeing).

17 ***Chaarani** v DPP (Cth)* [2018] VSCA 299, [38]-[39] (the Court): **cf AS 27 fn 42**.

18 *Harika v The King* [2023] VSCA 317, [92] (Macaulay JA, Priest and Taylor JA agreeing). See also *Coal and Allied Operations* (2000) 203 CLR 194, [19] (Gleeson CJ, Gaudron and Hayne JJ); ***Dwyer** v Calco Timbers Pty Ltd* (2008) 234 CLR 124, [40]-[41] (the Court); *Rossi v Qantas Airways Ltd* [2024] FCAFC 144, [33] (the Court).

19 *Norbis* (1986) 161 CLR 513, 518 (Mason and Deane JJ).

20 *Moore* (2024) 98 ALJR 1119, [15] (the Court).

21 *GLJ* (2023) 97 ALJR 857, [15] and [26] (Kiefel CJ, Gageler and Jagot JJ). See similarly ***Connelly** v Transport Accident Commission* (2024) 73 VR 257, [38] (the Court).

22. This conclusion as to the nature of the legal criterion is supported by the subject matter of the proceedings. The Court's determination was not concerned with case management and an assessment of relative fairness between the parties.[22] It was concerned with, on the one hand, the liberty of the supervised person and, on the other hand, serious risks to the safety of the supervised person and to the public at large. The statute makes clear that a person's liberty is only to be burdened if there are no reasonably practicable alternatives: ss 43H(3A), 43R(6), 43Y(2), 43ZA(2), 43ZD(3C), 43ZE(3C), 43ZG(5C), 43ZM. That objective is furthered if, in an appeal by a supervised person (s 43ZB(1)), the CCA is able to review for the correctness of the decision below. In relation to public safety, the Attorney-General said when introducing the Bill containing s 43ZH that "community safety is specifically drawn to the court's attention… as an important *determinant* of their decision making" so that if "the court considers that the safety of the public will be, or is likely to be, seriously at risk if the person is released, *then they must not order that person's release*."[23] The gravity of the outcome of the court's decision-making is a factor supporting the conclusion that the law demands a uniquely correct answer.[24] In this context, adherence to the correctness standard also promotes consistency and predictability in decision making under the Code and the attainment of justice in individual cases.[25]

23. This conclusion is also consistent with the provisions of the Code describing the nature of the appeal brought from a decision under s 43ZH. The appeal was brought pursuant to s 43ZB(2), which provides that the CEO may only appeal to the CCA against a supervision order if she or he considers that (a) "a *different* supervision order should have been made" and (b) "an appeal should be brought *in the public interest*". The first criterion signals that the subject matter of the appeal is whether the correct supervision order was made. That is, the CEO's appeal reflects a conclusion by the CEO (as the departmental chief executive with administrative responsibility for forensic mental health) that the original order was not the one that "should have been made", being the *correct* order. That is inconsistent with the notion that s 43ZH(2) tolerates a range of

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22 See *Young* [2024] SASCA 47, [140] (Doyle JA, Kourakis CJ and David JA agreeing); *GLJ* (2023) 97 ALJR 857, [18] and [22] (Kiefel CJ, Gageler and Jagot JJ).

23 Legislative Assembly, *Debates*, 15 May 2002, 1227 (Dr Toyne MLA, Attorney-General), emphasis added.

24 *GLJ* (2023) 97 ALJR 857, [17] (Kiefel CJ, Gageler and Jagot JJ).

25 *SZVFW* (2018) 264 CLR 541, [41] (Gageler J), quoting *Warren v Coombes* (1979) 142 CLR 531, 552 (Gibbs ACJ, Jacobs and Murphy JJ).

possible supervision orders (in the particular sense of a CSO or an NCSO), each of which is no more the one that "should" have been made than another.

24. Finally, the appeal is not brought from any specialist tribunal. The CCA is constituted by the same judges who constitute the Supreme Court at first instance.[26] As such, there is no difference in expertise between trial and appellate levels which would justify deference in an appeal pointing to the applicability of the *House* standard.

The appellant's three factors

25. The appellant says that the determination under s 43ZH(2)(a) is nevertheless discretionary for three reasons.

26. The first is that the assessment under s 43ZH(2)(a) depends upon the conditions that would be imposed under the NCSO, and the content of those conditions is a matter of discretion, so that the assessment of risk must itself be discretionary: **AS [23]-[26]**. There are two problems with that submission.

27. The first problem is that it ignores the language of s 43ZH. The purpose of a periodic review arising from a report under s 43ZK is described in s 43ZH(1) – it is to determine whether the supervised person the subject of the report may be released from the supervision order. Where the review is of a CSO, s 43ZH(2) sets the critical inquiry. That subsection requires the court to consider whether the specified serious risk will or will not arise if the person is released on "*a* non-custodial supervision order". The indefinite article does not presuppose that the conditions of any particular order will be known and pre-determined. Rather, it requires the Court to consider whether there is *a* form of NCSO which could result in the person being released without creating a serious risk of safety: **cf AS [25]**. The second problem is that, even if the question in s 43ZH(2)(a) were posed after the Court had formulated potential conditions as to the most favourable form of NCSO, there would nevertheless be a uniquely correct answer to the statutory question to be reviewed for its correctness on appeal. This is a common approach to staged decision-making where one aspect of the trial court's task is not discretionary (review of which attracts the correctness standard) and another aspect is discretionary (attracting the *House* standard).[27]

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26 Criminal Code, s 407(1).

27 See, e.g., *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41, [99]-[100] (Handley JA) and [109] (Basten JA) (also Spigelman CJ at [37]), approved in *Canty v PaperlinX Australia Pty Ltd* [2014] NSWCA 309, [124]-[130] (the Court), ***Huang*** *v Wang* [2016] NSWCA 164, [81] (Barrett AJA), *Al Maha Pty Ltd v Coplin* [2017] NSWCA 318, [29] (Meagher JA, Macfarlan and Gleeson JJA agreeing), *Magann v Trustee of the Roman Catholic Church for the Diocese of Parramatta* [2020] NSWCA 167,

28. The appellant places significant reliance on *Singer* to suggest that the *House* standard applies to both stages of a two-stage process where one stage is factual and the other stage is discretionary: **AS [26]**. However, that was not the reasoning in *Singer*.[28] The majority held the *House* standard applied to review of the first stage determination (whether a person has been left with "inadequate" provision for his or her "proper maintenance, education and advancement in life") because (a) it rested on a criterion that invited "different evaluation which, objectively speaking, may be no better than the first" and (b) finality was needed in estate litigation.[29] As to the second stage determination of the quantum of provision, their Honours likened it to the (discretionary[30]) assessment of damages for pain and suffering.[31] Thus, the conclusion that the *House* standard applied to both stages did not rest on the a relationship between the two stages of the inquiry. Some intermediate authorities have doubted the continued correctness of *Singer* following *SZVFW* and *GLJ*,[32] but its correctness has been explained on the basis that the criterion necessarily postulated that "both determinations [of inadequate or adequate maintenance were] legally permissible".[33]

29. In any event, the legislation in *Singer* was materially different. The two stages of the inquiry were (a) whether "inadequate" provision had been made for a person in a testamentary disposition and (b) if, so, what provision "ought" to be made from the estate.[34] As earlier High Court authority identified, those two questions were almost identical[35] because what may be described as "inadequate" presupposes something less than what "ought" to have been provided. The same cannot be said of the two questions of whether a person, if released, would pose a serious risk of harm to themselves or to

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[49] (Bell P, Macfarlan and Payne JJA agreeing), *Superannuation & Corporate Services Pty Ltd v Turner* [2020] NSWCA 246, [89] and [128] (Gleeson JA, Basten and Leeming JJA agreeing). See also ***Project Sea Dragon*** *Pty Ltd v Canstruct Pty Ltd* [2024] FCAFC 141, [114] and [122] (Jackman J, O'Callaghan and McElwaine JJ agreeing) and *TSL v Secretary to the Department of Justice* (2006) 14 VR 109, [26] (Callaway AP, Buchanan JA and Coldrey AJA agreeing).

28 Distinguished on this basis in *Project Sea Dragon* [2024] FCAFC 141, [120] (Jackman J, O'Callaghan and McElwaine JJ agreeing).

29 *Singer* (1994) 181 CLR 201, 212 (Mason CJ, Deane and McHugh JJ), quoting *Golosky v Golosky* (Unreported, NSW Court of Appeal, 5 October 1993), pp 13-14 (Kirby P).

30 *SZVFW* (2018) 264 CLR 541, [44] (Gageler J) and [128] (Edelman J).

31 *Singer* (1994) 181 CLR 201, 211 (Mason CJ, Deane and McHugh JJ).

32 *Bassett v Bassett* [2021] NSWCA 320, [72]-[75] (the Court), referring to ***Strang*** *v Steiner* [2019] NSWCA 143, [76] (Macfarlan JA).

33 *SZVFW* (2018) 264 CLR 541, [45] (Gageler J). See also *Strang* [2019] NSWCA 143, [79] (Macfarlan JA), [133] (White JA) and [190] (McCallum JA) and *Council of the Law Society of NSW v Zhukovska* (2020) 102 NSWLR 655, [94] (Leeming JA).

34 See *Family Provision Act 1982* (NSW), ss 7 and 9(2)(a), set out at *Singer* (1994) 181 CLR 201, 208 (Mason CJ, Deane and McHugh JJ).

35 *Singer* (1994) 181 CLR 201, 227-228 (Gaudron J), quoting from *White v Barron* (1980) 144 CLR 431, 449 (Aickin J).

the public and, secondly, the conditions that should be imposed on an order for supervision out of custody.

30. The second factor relied on by the appellant is the reference in s 43ZH(2) to the formation by the Court of a state of "satisfaction": **AS [27]-[30]**. That verbal formula is not determinative of the question.[36] The correctness standard has been found to apply to a court's "satisfaction" that confidential notes would have substantial probative value[37] and a court's "satisfaction" that a person poses an unacceptable risk of committing a serious terrorism offence.[38] In this particular context, the appellant's argument divorces the word from the surrounding words. Section 43ZH(2)(a) requires the court to determine whether it is "satisfied *on the evidence available*" of a factum. That does no more than direct the court to evaluate the evidence and determine whether the relevant factum exists,[39] which is "precisely one of the exercises" which an appellate court may review in applying the correctness standard.[40] Indeed, intermediate courts have held that the reference to "satisfaction" in a statute may equally be taken to refer to the satisfaction of the court on appeal.[41]

31. Tellingly, the decisions referred to by the appellant placed no reliance on the language of "satisfaction": **AS [27]-[28]**. The *House* standard applied in *Coal and Allied Operations* because the criterion "involved a degree of subjectivity."[42] The Commission had to decide whether industrial action was "threatening … to cause *significant* damage to the Australian economy or an *important part* of it" (emphasis in original).[43] What damage was "significant" and which parts of the economy were "important" were matters of "impression or value judgment" and therefore could "be described as [] discretionary".[44] As noted above, the result in *Singer* turned on the

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36 *DZY* [2024] VSCA 73, [98] (Beach and Macaulay JJA); *Project Sea Dragon* [2024] FCAFC 141, [119] (Jackman J, O'Callaghan and McElwaine JJ agreeing).

37 *Duncan (a pseudonym) v The King* [2024] VSCA 27, [17] and [29] (the Court).

38 *New South Wales v* ***Naaman*** *(No. 2)* (2018) 365 ALR 179, [15], [18] and [20] (the Court). See also *Huang* [2016] NSWCA 164, [57] and [61] (Bathurst CJ, McColl JA and Barrett AJA agreeing) concerning s 237(2) of the *Corporations Act 2001* (Cth).

39 *Buller v Black* (2003) 56 NSWLR 425, [37]-[39] (Mason P, in dissent but not on this point).

40 *SZVFW* (2018) 264 CLR 541, [46] (Gageler J), quoting *ACCC v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, [167] (Callinan J, Kirby J agreeing).

41 *Project Sea Dragon* [2024] FCAFC 141, [119] (Jackman J, O'Callaghan and McElwaine JJ agreeing), citing with approval *New South Wales Crime Commission v Vu* [2009] NSWCA 349, [16] (Spigelman CJ, Allsop P and Hodgson JA agreeing).

42 *Coal and Allied Operations* (2000) 203 CLR 194, [20] (Gleeson CJ, Gaudron and Hayne JJ). Explained by reference to the "breadth" of that criterion in *SZVFW* (2018) 264 CLR 541, [152] (Edelman J).

43 *Coal and Allied Operations* (2000) 203 CLR 194, [28] (Gleeson CJ, Gaudron and Hayne JJ).

44 Ibid, [20], [28] (Gleeson CJ, Gaudron and Hayne JJ).

statutory criteria there in issue.[45] *Chaarani* was resolved by concession and, in any event, no reliance was placed on the word "satisfaction".[46]

32. The appellant's reliance on administrative law principles is also misplaced: **AS [29]**. It may be accepted that, in the context of judicial review, the formulation of a power as predicated on the existence of a state of mind of the decision-maker may evince an intention to create a subjective jurisdictional fact, judicial review of which may only be undertaken on the particular basis discussed by Gummow J in *Eshetu*.[47] However, the constitutional rationale for that lies in the limitations on judicial review and the inability of courts to review the merits of administrative action.[48] The same is not true of judicial appeals, which may be limited (*stricto sensu*) or may involve the wholesale re-exercise of the power under review (*de novo*).[49] The submission merely begs the question of construction: whether the satisfaction here was intended to be for the primary judge alone or was to be considered by the appellate court for itself.

33. The third factor relied upon by the appellant is that s 43ZH(2)(a) requires an "evaluative" assessment: **AS [31]-[34]**. However, the line between the *House* and correctness standards "is not drawn by reference to whether the primary judge's process of reasoning… can be characterised as evaluative or is on a topic on which judicial minds might reasonably differ."[50] So too, an assessment is not discretionary merely because it "falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations": **cf AS [33]**.[51]

34. In *SZVFW*, Gageler J tracked the rejection in Australia of a deferential approach in "appellate review of an evaluative conclusion reached by a primary judge when

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45 *Singer* (1994) 181 CLR 201, 208 and 210-212 (Mason CJ, Deane and McHugh JJ).

46 *Chaarani* [2018] VSCA 299, [39] (the Court): **cf AS [28] fn 42**.

47 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, [133]-[137] (Gummow J).

48 Ibid, [132] (Gummow J) quoting from *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-36 (Brennan J) and also [139]-[145].

49 ***Lacey** v Attorney-General (Qld)* (2011) 242 CLR 573, [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

50 *SZVFW* (2018) 264 CLR 541, [46] and also [49] (Gageler J) and [85] (Nettle and Gordon JJ, Kiefel CJ agreeing). See also *Moore* (2024) 98 ALJR 1119, [15] (the Court); *GLJ* (2023) 97 ALJR 857, [15] and [17] (Kiefel CJ, Gageler and Jagot JJ); *ASIC v **Kobelt*** (2019) 267 CLR 1, [47] (Kiefel CJ and Bell J); *CFMEU v Personnel Contracting Pty Ltd* (2020) 279 FCR 631, [77]-[79] (Lee J, Allsop CJ and Jagot J agreeing); *Shannon v Permanent Custodians Ltd* [2020] WASCA 198, [159]-[161] (Quinlan CJ and Tottle J) at [409] (Vaughan JA); *Port Stephens Council v Sansom* (2007) 156 LGERA 125 (NSWCA), [51] (Spigelman CJ, Mason P, Beazley, Giles and Ipp JJA agreeing); *Connelly* (2024) 73 VR 257, [38] (the Court).

51 *GLJ* (2023) 97 ALJR 857, [22] (Kiefel CJ, Gageler and Jagot JJ), citing *Walton v Gardiner* (1993) 177 CLR 378, 395-396.

applying imprecisely defined legal criteria to findings of primary fact".[52] As was held in that case, the characterisation of an administrative decision as unreasonable is "largely an evaluative one"[53] but it nevertheless demands a uniquely correct answer. Similarly, the correctness standard applies to the judicial determination of whether an injury is "very considerable",[54] whether evidence has "significant probative value",[55] whether the *Bunnings v Cross* (1978) 141 CLR 54 "discretion" should be exercised,[56] whether setting aside a settlement agreement would be "just and reasonable"[57] and whether conduct is "unconscionable".[58]

35. The criterion in s 43ZH(2) is not discretionary merely because it requires an assessment of risk: **AS [31], [33]**. It may be accepted that the assessment takes into account the magnitude of possible harms and their likelihood and that both steps in that assessment (and their combination) may be described as requiring evaluation. But that does not constitute a discretion. The question in *Moore* also turned on three separate evaluative judgments,[59] but it still admitted only one correct answer. While it may be difficult, the assessment of risk or likelihood of harm is an ordinary question of fact, not a discretion.[60] As such, whether a person poses an "*unacceptable risk* of committing a serious terrorism offence if not kept under supervision" is a determination attracting the correctness standard.[61] Qualifying that fact so that the risk must be "serious" does not alter that result: whether a person suffered a "*serious* injury" is a judgment drawn from facts to which the correctness standard applies.[62]

36. Finally, the Victorian decisions referred to in **AS [32]** do not assist the appellant. The Court of Appeal in *Nigro* distinguished between an appeal concerning the making of an order and its terms (to which the standard in *House* applied[63]) and an appeal concerning the predicate fact that a person posed an "unacceptable risk of harm" (which could only be set aside, not on the *House* standard, but if it were "plainly wrong

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52 *SZVFW* (2018) 264 CLR 541, [39]-[41] (Gageler J).
53 Ibid, [25] (Gageler J).
54 *Connelly* (2024) 73 VR 257, [38]-[40] (the Court).
55 *R v* ***Bauer*** (2018) 266 CLR 56, [61] (the Court); *R v Geoffrey (a pseudonym)* [2024] SASCA 40, [65] (the Court).
56 *Young* [2024] SASCA 47, [119]-[149] (Doyle JA, Kourakis CJ and David JA).
57 *DZY* [2024] VSCA 73, [103] (Beach and Macaulay JJA).
58 *Kobelt* (2019) 267 CLR 1, [47] (Kiefel CJ and Bell J).
59 *Moore* (2024) 98 ALJR 1119, [18] (the Court).
60 *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, [29] (the Court); *Nathaniel Corbett v Town of Port Hedland* [2024] WASCA 9, [66] (the Court).
61 *Naaman* (2018) 365 ALR 179, [11]-[15] (the Court).
62 *Dwyer* (2008) 234 CLR 124, [41]-[50] (the Court). The same conclusion was reached in Victoria following *GLJ* in *Connelly* (2024) 73 VR 257, [40] (the Court).
63 ***Nigro*** *v Secretary to the Department of Justice* (2013) 41 VR 359, [38]-[40], [55] and [64] (the Court).

or wholly erroneous"[64]). In reaching that latter view, the Court noted at [42] that the predicate fact could only be described as "discretionary" in the extended (and presently irrelevant) sense identified in *Coal and Allied Operations*,[65] noted at [43] that this Court had identified in *Dwyer* that the *House* standard did not apply to such conclusions,[66] but then applied its earlier decision in ***Mobilio** v Balliotis* [1998] 3 VR 833 to impose an intermediate standard of review for evaluative findings of fact.[67] Importantly, applying this Court's recent decision in *GLJ*, the Victorian Court of Appeal has overruled *Mobilio*, holding that the correctness standard applies to whether a person has suffered a "very considerable injury", in place of the "plainly wrong or wholly erroneous" test.[68] Thus, following *GLJ*, the test in Victoria for reviewing the predicate fact is the correctness standard, consistent with the approach of the CCA.[69] That conforms with the position in New South Wales, following *SZVFW*.[70]

Ground 1 is immaterial

37. In any event, whether the majority adopted the *House* or correctness standard was not material to its conclusion because their Honours resolved the appeal by identifying a *House* error: **cf AS [35]-[42]**. That was consistent with the CEO's first ground of appeal below, which contended that the primary judge's finding was "not *reasonably open* on all of the evidence": **CAB 245-7; CCA [76]**. That language is well-understood to invoke the *House* standard.[71] The majority then upheld ground 1, concluding in consistent language that it was "not *reasonably open* to the primary judge to find that the safety of the public would not be seriously at risk if [the appellant] were placed on [a NCSO]": **CAB 300-1; CCA [194], [196]**.

38. The appellant dissects the majority reasons, cherry-picking individual passages and suggesting that they do not, of themselves, identify a *House* error: **AS [36]-[41]**. However, it is plain that, having reviewed in detail the procedural history and evidence before the primary judge, the majority were persuaded that the primary judge's

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64 Ibid, [55] and [64] (the Court).
65 *Coal and Allied* (2000) 203 CLR 194, [19] (Gleeson CJ, Gaudron and Hayne JJ).
66 *Dwyer* (2008) 234 CLR 124, [39]-[40] (the Court).
67 See *Nigro* (2013) 41 VR 359, [44]-[52] (the Court).
68 *Connelly* (2024) 73 VR 257, [32]-[40] (the Court), confirmed in *Kesper v Victorian WorkCover Authority* [2024] VSCA 237, [67] and [77] (Orr JA and Forrest AJA) and *Victorian WorkCover Authority v Perumal* [2024] VSCA 107, [100] (the Court).
69 In *NOM v DPP* (2012) 38 VR 618, there was no predicate fact similar to that in s 43ZH(2). The Court had a bare discretion to confirm an order having regard to certain factors: at [46]-[48] (the Court).
70 *Naaman* (2018) 365 ALR 179, [15], [18] and [20] (the Court).
71 *Moore* (2024) 98 ALJR 1119, [14] and [16] (the Court); *Bauer* (2018) 266 CLR 56, [61] (the Court); *SZVFW* (2018) 264 CLR 541, [20] (Gageler J).

conclusion was not merely not correct: it was not "reasonably open" on the material available: **CAB 300-1; CCA [193]-[194]**. The majority considered that the absence of any contemporaneous psychological or psychiatric evidence made it "effectively *impossible*" for the primary judge to "make a proper assessment of KMD's current mental state and any risk she may present to the public if she is released": **CAB 297; CCA [187]**. Against the background of consistent findings that the appellant posed a serious risk of harm to the public if released, the majority considered that this lack of evidence meant that the primary judge could not reasonably have come to a different conclusion: **CAB 300-1; CCA [194]**. That is, the primary judge's order proceeded upon a mistake of fact concerning the critical issue in s 43ZH(2). That is a *House* error.[72] The appellant criticises the reasoning as "brief" (**AS [35]**), but there is no ground of appeal contending the reasons are inadequate.

Ground 4: Mischaracterisation of the majority's reasons

39. Ground 4 contends that the majority misunderstood the statutory scheme to require the appellant to have engaged with Professor Ogloff: **AS [43]-[49]**. That mischaracterises the majority's reasons, which did not hold that the Code requires a person subject to a supervision order to cooperate with the two experts who produced reports under s 43ZN(2)(a)(i): **AS [43]-[44]**. Their Honours held that, "*[i]n the present case*" (**CAB 297; CCA [187]**), it was not open to the primary judge to find that the appellant's release would not pose a serious risk to the public. The majority essayed the operation of s 43ZN(2) without saying that it had the asserted effect: **CAB 296; CCA [185]**.

40. Review of their Honours' reasons as a whole demonstrates that their approach was not abstract but context specific. Their Honours noted that: (a) the appellant had engaged in extreme violence because of her delusional disorder (**CAB 256-9; CCA [105]**); (b) Riley CJ and Hiley J had found that the appellant continued to suffer from that delusional disorder and posed a serious risk of harm to the public, which would likely worsen without treatment (**CAB 259-59; CCA [106]-[125]**); (c) the appellant had refused to engage with experts who could treat her condition or form any view about the status and intensity of her condition (**CAB 297; CCA [187]**); and (d) Ms Guy did not have relevant expertise to give probative evidence about the appellant's psychiatric condition and risk profile; so that (e) the appellant's refusal to engage with Professor Ogloff "deprived the primary [j]udge of crucial evidence upon which [she] could

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72 *House* (1936) 55 CLR 499, 504-505 (Dixon J).

formulate *a reliable judicial determination of the risk that [the appellant] may present* … if she were released": **CAB 299; CCA [190]**.

41. This does not translate into a broader legal duty arising from the statutory scheme in all cases. It was also not to visit "consequences" upon the appellant in any improper sense: **cf AS [44]**. It was to acknowledge that, given the factual context and history of this matter, certain consequences as to fact finding necessarily flowed from the paucity of evidence available to accurately assess risk against a background of consistent findings of the serious risk of harm to the public.

Ground 2: Procedural fairness

42. Ground 2 contends that the CCA deprived the appellant of procedural fairness by not holding a further hearing to determine what orders should be made in the event the Court identified error: **AS [55]-[56]**. That expectation is said to arise from interactions between counsel and the CCA. Ground 2 falls to be resolved by a fair reading of those interactions.

43. It may be accepted that, as a matter of principle, procedural unfairness may arise if a decision-maker resiles from a stated intention to take a particular course which a party has, in good faith, relied upon to refrain from putting their case.[73] In the context of a court hearing, rather than an administrative process, any assessment of a supposed representation about the procedure to be followed needs to take account of the established approaches to court hearings in an adversarial setting. Here, no procedural unfairness occurred. The CCA did not cause a "fundamental change" to the appellate process without the parties being alerted.[74] Similarly, it did not foreshadow a course from which it later resiled[75] and the appellant "lost no opportunity to advance [her] case"[76]: **AS [55] fn 83**. Nor was this a case where the decision-maker indicated that argument or evidence was unnecessary on a point because it was already persuaded on the issue: **cf AS [59] fn 86**.[77]

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73 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte* ***Lam*** (2003) 214 CLR 1, [37] (Gleeson J); *Minister for Immigration and Border Protection v* ***WZARH*** (2015) 256 CLR 326, [35] (Kiefel, Bell and Keane JJ).

74 Cf *WZARH* (2015) 256 CLR 326, [31]-[32] and [43]-[47] (Kiefel, Bell and Keane JJ): **AS [55] fn 82 and [61]**.

75 Cf *Lam* (2003) 214 CLR 1, [36] (Gleeson J) and [122] (Hayne J): **AS [55] ffn 81 and 82**.

76 Cf *Lam* (2003) 214 CLR 1, [38] (Gleeson CJ), cited with approval in *WZARH* (2015) 256 CLR 1, [36] (Kiefel, Bell and Keane JJ).

77 Cf *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 144 and 146 (the Court).

44. From the outset of the hearing, the CCA identified a live question as to the standard of review and the material on which the appeal should be decided: **ABFM 6 lines 44-45; 7 lines 1-15; 8 lines 29-34**. Those topics were first taken up by each of their Honours with senior counsel for the CEO. Those interactions raised a number of concerns and possible outcomes, but were ultimately inconclusive: **cf ABFM 9 lines 1-12 and 47); 10 lines 1-2; 12 lines 17-24**. The presiding judge (Blokland J) noted that nothing prevented "either party from bringing any fresh evidence if there were some matter to bring to the court's attention": **ABFM 18 lines 21-23**. Her Honour then concluded her interactions with counsel for the CEO by saying that the parties were on notice of the Court's "concerns about the nature of the appeal": **ABFM 20, lines 15-16**. Nothing in this exchange involved the Court committing to a staged process, or otherwise created any reasonable expectation that a further hearing would be held. The point is reinforced by the context that this was a bench of three. At no point did the presiding judge make a procedural direction or express a procedural conclusion on behalf of the Court.

45. This remained the case during the appellant's address. Justice Reeves asked, if error were to be found, what should occur: **ABFM 71 lines 28-35**. In that exchange, senior counsel submitted that one option would be to identify whether an error occurred and then hold a further hearing to determine what orders to make: **ABFM 72, lines 1-5**. The CCA did not assent to that submission. Senior counsel then proceeded to submit that one potential outcome in the event of error could be the remittal of the matter: **ABFM 72, lines 14-17**. Senior counsel then continued by submitting that an alternative would be for the CCA to "attempt to make an order based on [the evidence before your Honours]": **ABFM 72, lines 30-33**.[78] While senior counsel for the appellant submitted that this would be "highly undesirable and artificial", it was not submitted that this course was unavailable. Nor was it submitted that this could only occur if further notice were given to the parties. That submission would not make sense if, by that point in the hearing, the parties and the CCA were already proceeding on the basis that there would be a staged process with a separate further hearing. Justice Blokland's interjection at **ABFM 75 line 17** did no more than clarify the question her Honour had asked immediately beforehand: **cf AS [59]**. Again, nothing from these exchanges could be construed as indicating that a further hearing would necessarily occur, or that the parties were entitled to refrain from setting out their full case.

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78 This inconsistent with the appellant's position on appeal at **AS [60]** that "nobody suggested that orders could be made without updating evidence".

46. The point regarding the tender of further evidence is particularly important. Given the nature of the appeal, and the exchanges between counsel and the bench, the appellant must be taken to have known that it was open to her to seek to adduce further evidence. The parties to an appeal do not need to be specifically invited by the bench to do so. In this case, no attempt was made by the appellant to adduce further evidence. And, critically, nothing that fell from the bench indicated that any application to adduce further evidence could and should be deferred to a later point.

47. That is distinguishable from *Cumberland v The Queen* (2020) 94 ALJR 656: **AS [55] fn 84**. That case concerned a Crown appeal against sentence which was referred to the Full Court to resolve a question of statutory construction. Before the referral was made, counsel for the offender sought an opportunity to make submissions about the Court's residual discretion and submitted that a presentence report would be required to take into account the offender's progress in custody.[79] The Court responded that this would occur after the determination of the referred matter.[80] However, that did not happen and the offender was resentenced immediately after the Full Court handed down judgment. The Crown conceded that the offender had been denied procedural fairness.[81] That is plainly distinguishable from what occurred below because the CCA in the present matter did not commit to a procedure from which it later departed.

Ground 3: Further evidence

48. Ground 3 is raised as an alternative to ground 2, but the grounds ultimately collapse into each other. By ground 3, the appellant contends that the CCA was under a duty to inquire into the matter and invite the parties to provide further evidence before disposing of the appeal: **AS [62]**. That is said to flow from the nature of a rehearing as an appeal to review for error on the facts and the law as they stand at the time of the appeal and because the decision under appeal was discretionary: **AS [64]**.

49. The submissions under this ground invert the proper analysis. It is not in dispute that the appeal was by way of rehearing and that, in such a case, the hearing is ordinarily "based on the facts and the law as they then stand".[82] However, that is no more than a shorthand descriptor of the *powers* which are an ordinary incident of such appeals.

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79 *Cumberland v The Queen* (2020) 94 ALJR 656, [19]-[21] and [24] (the Court).
80 Ibid, [19] and [24] (the Court).
81 Ibid, [30] and [37] (the Court).
82 ***Allesch** v Maunz* (2000) 203 CLR 172, [23] (Gaudron, McHugh, Gummow and Hayne JJ).

50. Appeals are typically classified as appeals in the strict sense, appeals by way of rehearing or appeals de novo.[83] The proper classification of the appeal depends on the terms of the statute and the incidents of the procedure it creates.[84] An appeal is described as one by way of rehearing if the appellate body has the *power* to receive further evidence and its powers are not restricted to making the decision that should have been made at first instance.[85] When determining an appeal by way of rehearing, "the correctness of the judgment is to be determined on the *evidence adduced* at the trial supplemented by *any further evidence* that the appellate court may allow to be adduced on appeal" (emphasis added).[86] Consistent with the usual adversarial approach, the parties (not the court) control the evidence to be called,[87] and the appellate judges do not take on an inquisitorial role to remedy a party's case.[88]

51. Neither party sought to adduce further evidence in the appeal below. At its highest, the appellant submitted it was *open* to the CCA to receive further evidence. However, the appellant did not proceed to apply to adduce any such evidence. This was despite the appellant submitting that it would be undesirable (though not precluded) for the Court to decide the appeal on the material before the primary judge. In those circumstances, it was not incumbent on the CCA to "descend into the arena"[89] and purport to require the parties to adduce further evidence.

52. The appellant grounds the asserted duty on the observation by the plurality in *Allesch* that where, in "an appeal by way of rehearing from a discretionary judgment an appellate court is minded to exercise the discretion in question by reference to the circumstances as they exist at the time of the appeal, it is necessary that the parties be given an opportunity to adduce evidence as to those circumstances": **AS [64]**.[90] However, for the reasons set out above concerning ground 1, this was not an appeal from a discretionary judgment and the majority did not, in upholding the appeal, "exercise the discretion" conferred by s 43ZH(2).

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83 *Lacey* (2011) 242 CLR 573, [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

84 *Fox v Percy* (2003) 214 CLR 118, [20] (Gleeson CJ, Gummow and Kirby JJ); *SZVFW* (2018) 264 CLR 541, [29] (Gageler J); *Allesch* (2000) 203 CLR 172, [20]-[22] (Gaudron McHugh, Gummow and Hayne JJ).

85 *Coal and Allied Operations* (2000) 203 CLR 194, [13] (Gleeson CJ, Gaudron and Hayne JJ).

86 *SZVFW* (2018) 264 541, [31] (Gageler J). See also *Coal and Allied Operations* (2000) 203 CLR 194, [13] (Gleeson CJ, Gaudron and Hayne JJ).

87 *Waugh v British Railways Board* [1980] AC 521, 535 (Lord Simon), cited with approval in *GLJ* (2023) 97 ALJR 857, [19] (Kiefel CJ, Gageler and Jagot JJ).

88 *Whitehorn v The Queen* (1983) 152 CLR 657, 682 (Dawson J), cited with approval in *GLJ* (2023) 97 ALJR 857, [19] (Kiefel CJ, Gageler and Jagot JJ).

89 *GLJ* (2023) 97 ALJR 857, [20] (Kiefel CJ, Gageler and Jagot JJ).

90 *Allesch* (2000) 203 CLR 172, [31] (Gaudron, McHugh, Gummow and Hayne JJ).

53. The appellant seeks in the alternative to extend this duty to non-discretionary judgements: **AS [64]**. However, no authority has done so and, in any event, the appellant's argument collapses into ground 2 and the submissions addressed above. In any event, all that was said to be required in *Allesch* was that the parties have an *opportunity* to further additional evidence. That opportunity was always present at the appeal hearing. As outlined in ground 2, the Court did not foreshadow that it was proceeding in a staged manner and would provide a *further* opportunity to adduce evidence. No further opportunity was required. If the appellant refrained from taking up the opportunity that did exist to adduce relevant evidence because of a mistaken view that she might be given a separate opportunity at a subsequent hearing, the unfortunate reality is that the appellant must bear the consequences of that choice.

Disposition

54. In the event that any of the grounds of appeal are allowed, the Court should set aside Order 4 of the CCA's orders (**CAB 302**) and remit the matter back to the CCA. In relation to grounds 2-3, that is uncontentious save that the appellant seeks in the alternative an order remitting the matter to the primary judge: **AS [66]**. That is a matter which should be left to the CCA.

55. As to grounds 1 and 4, there is no reason why the same result should not hold: **cf AS [50]-[51]**. If the CCA did apply the incorrect standard of appellate review, or if it did misapply s 43ZN(2)(a)(i), the matter should be remitted so that the CCA can consider the matter afresh according to this Court's reasons. For example, in relation to ground 1, there would need to be a full review of the evidence before the primary judge to determine whether, in addition to that ground being made out, there was nevertheless no *House* error affecting the primary judge's orders. It would not be practicable for the Court to undertake that task: **CAB 304-309**.[91] Special leave to appeal was refused on proposed ground 5, that the dissenting view of Blokland J – that the NCSO should be confirmed – was correct.[92]

56. Further, as a practical matter, the CCA's orders cannot be simply vacated and the primary judge's orders restored, including because the appellant could no longer comply with the terms of the NCSO if released. Order 4(i) of the NCSO required the appellant to reside with two family members at 2 Little Street, Fannie Bay in the

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91 *R v A2* (2019) 269 CLR 507, [115] (Kiefel CJ and Keane J), citing with approval *R v Hillier* (2007) 228 CLR 618, [54] (Gummow, Hayne and Crennan JJ).

92 *KMD v CEO (Department of Health NT)* [2024] HCASL 271.

Northern Territory: **CAB 192**. That condition cannot be complied with because the residence has since been put to a different use.[93] Assuming that an NCSO were to be restored, it would need to be reformulated. By analogy with the approach in sentencing appeals, the Court is "not a sentencing court" and the matter should be remitted to the CCA for it to consider in accordance with the Court's reasons.[94]

Part VI: ESTIMATED TIME

57. The CEO estimates that it will require 2 hours to present oral argument.

Dated: 19 December 2024

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93 *KMD v CEO (Department of Health NT)* [2024] HCASJ 40, [22] (Gleeson J).

94 *Johnson v The Queen* (2004) 78 ALJR 616, [35]-[36] (Gummow, Callinan and Heydon JJ); *Bugmy v The Queen* (2013) 249 CLR 571, [49] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN: **KMD**
Appellant

and

CEO (DEPARTMENT OF HEALTH)
First Respondent

and

THE KING
Second Respondent

and

CEO (ATTORNEY-GENERAL FOR THE NT)
Third Respondent

ANNEXURE TO FIRST RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the First Respondent sets out below a list of the constitutional, statutory and statutory instrument provisions referred to in these submissions.

No.	Description	Version	Provisions
1.	*Criminal Code Act 1983* (NT)	Current	ss 43H(3A), 43I(3), 43O, 43R(5), 43R(6), 43R(9), 43Y(1), 43Y(2), 43Z, 43ZA, 43ZB, 43ZD(3C), 43ZE(3A), 43ZE(3C), 43ZG(5A), 43ZG(5C), 43ZH, 43ZK, 43ZM, 43ZN and 407(1).
2.	*Family Provision Act 1982* (NSW)	As enacted	ss 7 and 9(2)(a).