



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN: **ESTATE OF THE LATE GEOFFREY CROFT**
Appellant

and

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MTH
First Respondent

STATE OF NEW SOUTH WALES
Second Respondent

SANDRA CROFT
Third Respondent

SUBMISSIONS OF *AMICI CURIAE*

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF APPEARANCE

2. *Amici curiae* appear pursuant to the order of Beech-Jones J made in the proceeding on 8 December 2025.

PART III ARGUMENT

3. By the order made on 8 December 2025, *amici curiae* were appointed to assist the Court by addressing the grounds of appeal and whether s 92 of the *Evidence Act 1995* (NSW) (the

Evidence Act) enabled the tender of any certificate of conviction against the appellant. These submissions address the latter question first.

A THE APPLICATION OF SECTION 92 OF THE *EVIDENCE ACT*

4. Section 92 of the *Evidence Act* provides an exception to the exclusionary rule contained in s 91(1) that “[e]vidence of the decision, or of a finding of fact, in an Australian ... proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding”. Of relevance to this appeal is s 92(2), which relevantly provides that, in a civil proceeding, s 91(1) does not prevent the admission of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, “not being a conviction—(a) in
10 respect of which a review or appeal (however described) has been instituted but not finally determined”.
5. Mr Croft was, until his death in 2022, a party to the civil proceeding instituted by the first respondent in 2020 in which she sought damages arising from physical and sexual assault said to have been perpetrated on her by Mr Croft in 1979.¹ In 2019, Mr Croft had been convicted of five sexual offences against the plaintiff and four sexual offences against a boy.² His appeal to the Court of Criminal Appeal was unsuccessful³ and he sought special leave to appeal to this Court.⁴ He died in prison before his application for special leave could be determined and the special leave application was, accordingly, dismissed.⁵ Upon Mr Croft’s death, his estate became a party to the civil proceeding, such that Mr Croft is “a person
20 through or under whom a party claims” for the purposes of s 92(2) of the *Evidence Act*.
6. Accordingly, s 92(2) would have permitted admission or use of evidence that Mr Croft had been convicted of offences against the first respondent provided his convictions were not convictions that engaged the exception in s 92(2)(a) to the exclusionary rule in s 91. Mr Croft’s convictions did not engage that exception.

¹ *MTH v State of New South Wales* [2024] NSWSC 1517 (PJ) at [1] (CAB 8), [2] (CAB 8), [6] (CAB 9), [21] (CAB 12).

² *MTH v State of New South Wales* [2025] NSWCA 122 (J) at [20] (CAB 152–153).

³ See *Croft v R* [2021] NSWCCA 146.

⁴ PJ [21] (CAB 12); J [6] (CAB 146).

⁵ *Croft v The Queen* [2022] HCASL 120 (16 June 2020); J [6] (CAB 146).

7. **“review or appeal (however described)”**: It is well settled that an application for special leave to this Court is not an “appeal”.⁶ However, whether an application for special leave to this Court is a “review ... (however described)” within the meaning of the *Evidence Act* has not been authoritatively determined. In the Court of Appeal, Adamson JA (with Mitchelmore JA and Price AJA agreeing) considered that “the word ‘review’ in this context is apt to refer to, for example, a review by way of application under Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW)”⁷ (the **CAR Act**), without finally determining whether such a Part 7 review would fall within s 92(2)(a). There is nothing in the text, context or purpose of s 92 that restricts a “review” for the purpose of s 92(2)(a) to a specific type of review contemplated by an Act. The *Evidence Act* applies to “all proceedings in a NSW court”, including proceedings heard in chambers and interlocutory-type proceedings.⁸ Further, the inclusion of the words “(however described)” are a textual indication that Parliament intended the reach of the proviso in s 92(2)(a) to be broad. An application for special leave to appeal to this Court requires determination by a court, following “a hearing, whether orally or on written materials” of how to exercise its “very wide discretion”.⁹ The process of such judicial determination falls within the ordinary meaning of the words “review ... (however described)”.
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8. **“finally determined”**: Unlike in some statutory contexts,¹⁰ the words “finally determined” are not defined in the *Evidence Act*. The words as they appear in s 92(2)(a) of the *Evidence Act* take their ordinary meaning, which is that the review or appeal has been concluded in such a way that the conviction can no longer be disturbed as a result of that review or appeal. It does not mean that no further question may arise in respect of the conviction that is the subject of the appeal or review, or that the appeal or review has been determined on its merits.
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9. Section 92(2)(a) is only capable of application in respect of a review or appeal that “has been instituted”. Thus, it is not the case that, because there may remain the possibility in perpetuity

⁶ See, eg, *Attorney-General (Cth) v Finch (No 1)* [1984] HCA 1; 155 CLR 102 at 105 (the Court); *United Mexican States v Cabal* [2001] HCA 60; 209 CLR 165 at 179 [30] (Gleeson CJ, McHugh and Gummow JJ).

⁷ J [17] (CAB 151).

⁸ See *Evidence Act*, s 4(1).

⁹ *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* [1991] HCA 43; 173 CLR 194 at 218 (the Court).

¹⁰ See, eg, *Migration Act 1958* (Cth), s 11A.

for a conviction to be overturned through the reviews provided for in Part 7 of the *CAR Act*, evidence of the conviction will never be admissible. However, once an application for special leave has been made (that is, the “review ... (however described)” “has been instituted”), evidence of the conviction the subject of the review will not be admissible until the application has been determined such that the “review” cannot result in the conviction being disturbed.

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10. Such a construction of “finally determined” for the purposes of s 92(2)(a) of the *Evidence Act* is consistent with the scheme of which the provision is a part. The provision operates as an exception to an exception; that is, s 92(2)(a) carves out certain convictions from the exception to the exclusionary rule about non-admissibility of findings of fact in earlier proceedings that is provided by the chapeau to s 92(2). There are many reasons why an application for special leave, for example, may never be determined on its merits. Examples, in addition to the death of the convicted person, include where it is subsequently withdrawn or where it is made out of time with no adequate explanation for the delay. It would frustrate the statutory scheme of which s 92(2) is part—which includes the provisions of Division 1 of Part 4.6 of the *Evidence Act*, permitting a request to be made to call a witness to give evidence of a conviction of a person for an offence¹¹—if evidence of a conviction were to be inadmissible in these circumstances even though the conviction cannot be disturbed as a result of the application.
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11. Such a construction of “finally determined” is also consistent with the purpose of s 92(2) as apparent from the relevant extrinsic materials. In Chapter 35 of its 1985 interim report on the law of evidence,¹² the Australian Law Reform **Commission**, having already set out the common law rule that a conviction is not admissible in other proceedings to prove the facts on which it is founded,¹³ discussed the merits of a proposal to make evidence of a conviction admissible against the person convicted in any civil proceedings in which the conviction is relevant to the issue to be decided.¹⁴ The Commission stated:

¹¹ See *Evidence Act*, s 166(g) and s 167(b).

¹² Australian Law Reform Commission, *Evidence (Interim)* [1985] ALRC 26 (ALRC 26).

¹³ ALRC 26, Part III “The Need for Reform”, Chapter 16 “The rule in *Hollington v Hewthorn*”.

¹⁴ ALRC 26 [771]–[780].

It may be advisable, although perhaps not strictly necessary, to define a conviction for the purposes of the proposal as not including a conviction that has been set aside, quashed, subject to appeal or in respect of which the person convicted has been pardoned. Where a conviction has been appealed against but the outcome is as yet unknown, the civil court should adjourn the proceedings or not take the conviction into account.¹⁵

12. This passage suggests that the Commission’s concern was with the outcome of the review or appeal process being unknown or incomplete, in the sense that something may yet happen in the review or appeal that may disturb the conviction.
- 10 13. Similarly, in Chapter 13 of the Commission’s 1987 final report, the Commission referred to the proposal being that “evidence of a conviction should not be excluded by this rule if tendered against the person convicted or those claiming through that person in civil proceedings, provided the conviction is still operative”.¹⁶ Coupled with the words “has been instituted” in s 92(2)(a), a conviction will still be operative when there is nothing further that can be done to disturb it as a result of a review or appeal (however described) that has already been instituted at the time the evidence of the conviction is sought to be admitted.
14. To similar effect is the explanatory note to the Evidence Bill 1995 (NSW), which refers to the exception to s 91 not relating to “convictions under review”.¹⁷ None of s 91, 92 nor s 178 of the *Evidence Act* has been amended since coming into force.
- 20 15. Applying the foregoing analysis to what occurred in the first respondent’s proceeding at first instance, Mr Croft’s appeal in respect of his conviction (to the Court of Criminal Appeal) had been finally determined, and his application for special leave to appeal to this Court had been finally determined (as it had been dismissed). Accordingly, the exclusion provided by paragraph (a) to the exception provided by s 92(2) to the exclusionary rule was not engaged, such that s 92 enabled the tender of evidence that Mr Croft had been convicted of an offence,

¹⁵ ALRC 26 [776]. In so stating, the Commission referred to s 81(b) of the *Evidence Ordinance 1971 (ACT)*, which did not use words “finally determined” but “a reference to a conviction that has been set aside or quashed” or a paroled conviction; and to *Re Raphael* [1973] 1 WLR 998; [1978] 3 All ER 19, in which it was held that the court would not rely on a conviction which was subject to an appeal, so might later be quashed, and the court ordered that the action be adjourned until the appeal had been determined or the plaintiff was in a position to prove her case by evidence independent of the conviction.

¹⁶ Australian Law Reform Commission, *Evidence* [1987] ALRC 38 (**ALRC 38**) at [170] (emphasis added; citation omitted).

¹⁷ Evidence Bill 1995 (NSW), Explanatory note, page 19, re clause 92.

including a certificate of conviction issued pursuant to s 178 of the *Evidence Act* (a s 178 certificate) (see further Section C below – Ground 2).

B GROUND 1: DUTY OF THE COURT TO SELF-REPRESENTED LITIGANTS

16. The first ground of appeal challenges the Court of Appeal’s “holding” that “the primary judge had an obligation to ensure that the appellant did not, because of lack of legal skill, fail to claim rights or put forward legal arguments”.¹⁸ This statement was made in the context where the Court of Appeal had earlier observed that:

MTH as a litigant in person was not aware of the particular provisions of the *Evidence Act* which would produce that result [being proof of the elements of the offences of which Mr Croft was convicted] but it was obviously what she was trying to achieve by her constant references to the convictions of Mr Croft for offences against her and RS.¹⁹

17. The Court of Appeal’s subsequent reasoning indicates that it was of “signal importance”²⁰ that any failure by the appellant to claim rights or put forward legal arguments was due to her being misled by the primary judge (unintentionally) as to the need to give evidence of the sexual assaults herself to prove the assaults. This occurred as a result of twin errors by the primary judge in (1) inferring and communicating to the parties that the first respondent was not relying on the convictions as proof the offences were committed; and (2) misapprehending the effect of ss 91, 92 and 178 of the *Evidence Act*,²¹ in circumstances where the first respondent wanted to rely on Mr Croft’s convictions to prove the sexual assaults on which her claim for damages relied²² and was obviously ignorant of the admissibility of a s 178 certificate to provide evidence of the elements of the offences.²³
18. *Nobarani* (cited by the Court of Appeal at J [66]) is, for the purposes of this appeal, authority for the proposition that a litigant in person is not entitled to be relieved from rules that would apply to a party who is represented, albeit the rules must be explained to, and there may, in an appropriate case, be a degree of leniency in the standard of compliance demanded of, a

¹⁸ J [66] (CAB 170), citing *Rajski v Scitec Corporation Pty Ltd* (Court of Appeal (NSW), 16 June 1986 (unrep) (Kirby P, Samuels and Maloney JJA), noting that that case had been cited with approval by this Court in *Nobarani v Mariconte* [2018] HCA 36; 265 CLR 236 at 250 [47] (the Court).

¹⁹ J [63] (CAB 169); see also [36] (CAB 159), [72] (CAB 172).

²⁰ J [69] (CAB 171).

²¹ J [44] (CAB 162), [60] (CAB 168), [71]–[74] (CAB 171–173).

²² J [48] (CAB 163–164), [50] (CAB 164), [53] (CAB 165–166).

²³ J [72]–[73] (CAB 172).

self-represented litigant. As is implicit in the observations by the Court of Appeal in *Chalik v Chalik* [2025] NSWCA 136 at [68], this aspect of *Nobarani* is not authority for a broader principle of the duties of a court to unrepresented litigants.²⁴ The Court in *Chalik* pointed out that Adamson JA (in the passage the subject of ground 1 of this appeal) had “significantly overstate[d]” judicial responsibility to an unrepresented litigant and was “far too absolute” in referring to the primary judge having “an obligation to ensure...”.²⁵

19. However, read in its proper context, the Court below was not advancing a broader principle governing the duty of a court in every case involving an unrepresented litigant. Rather, Adamson JA was stating what the circumstances of this case required. That the circumstances of a particular case may require a primary judge to ensure that a self-represented litigant did not, because of lack of legal skill, fail to claim rights or put forward legal arguments has been accepted in other decisions of intermediate appellate courts.²⁶ The potential obligation, so stated, can be traced to the statement of Mahoney JA in *Rajski* that “the court will [where a party appears in person] ... be careful to examine what is put to it by a party in person to ensure that he [sic] has not, because of the lack of legal skill, failed to claim rights or to put forward arguments which otherwise he might have done”.²⁷ Subsequent judicial consideration, with one possible exception,²⁸ appears not to have treated this statement as recognising an absolute obligation on a judge dealing with a self-represented litigant. For example, the Full Court of the Federal Court gave ensuring the litigant has not, because of a lack of legal skill, failed to claim rights or put forward arguments as an example of a kind of assistance that a court may find it appropriate to provide.²⁹

²⁴ See also *Azad v Avant Insurance Limited (No 2)* [2025] FCA 853 at [126].

²⁵ *Chalik v Chalik* [2025] NSWCA 136 at [68] (the Court).

²⁶ In addition to the cases cited in nn 27–29 below, see *Trustee for The MTGI Trust v Johnson* [2016] FCAFC 140 at [105]–[106] (the Court); *Dyczynski v Gibson* [2020] FCAFC 120; 280 FCR 583 at 668–669 [356]–[357] (Lee J). Indeed, it appears to be the reason why the primary judge raised whether the estate should be permitted to deny the abuse: see PJ [36] (CAB 10).

²⁷ *Rajski v Scitec Corporation Pty Ltd* (Court of Appeal (NSW), 16 June 1986 (unrep), BC8601930 at 56; quoted in *Minogue v Human Rights and Equal Opportunity Commission* [1999] FCA 85; 84 FCR 438 (Full Court) at 446 [28] (the Court).

²⁸ *Martires v Endura Paint Pty Ltd (No 1)* [2021] FCA 178 at [41].

²⁹ See *Flightdeck Geelong Pty Ltd v All Options Pty Ltd* [2020] FCAFC 138; 280 FCR 479 at 492 [55(c)] (the Court), applied in *Boensch v Somerville Legal* [2021] FCAFC 79; 286 FCR 293 at 313 [86], 318 [104] (the Court).

20. A number of decisions of intermediate appellate courts concerning the “nuanced” question of the extent of assistance which a judge should afford to an unrepresented litigant in civil proceedings support the following propositions of relevance to this case:
- (a) an unrepresented litigant should be provided with sufficient information about the practice and procedure of the court to ensure a fair trial takes place;³⁰
 - (b) there may be a duty to provide information in order to attempt to overcome the procedural disadvantages faced by a self-represented litigant and ensure that an unrepresented party understands the procedural options available to them and can make an effective choice as to the conduct of their proceeding,³¹ but that duty is not a duty to run the case for the litigant and does not extend to advising the litigant as to how their rights should be exercised;³²
 - (c) what is required of a court to ensure that a trial is fair to all parties will depend on the circumstances of the case,³³ and
 - (d) the judge must remain at all times an impartial adjudicator, measured against the touchstone of fairness, limiting any assistance provided to that which is necessary to diminish the disadvantage suffered by reason of being self-represented.³⁴

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³⁰ See, eg, *Chalik* [2025] NSWCA 136 at [69], referring to *Jae Kyung Lee v Bob Chae-Sang Cha* [2008] NSWCA 13 at [48] (see also [49]) (Basten JA, Hodgson and Bell JJA agreeing) and *Jeray v Blue Mountains City Council* [2010] NSWCA 153 at [14] (Sackville AJA, Handley AJA agreeing); *Stone v Braun* [2015] WASCA 103 at [65] (Beech J, Buss and Mazza JJA agreeing); *Hamod v New South Wales* [2011] NSWCA 375 at [311] (Beazley JA, Giles and Whealy JJA agreeing).

³¹ See, eg, *Flightdeck* (2020) 280 FCR 479 at 491 [55(a)]; *Cicek v Estate of the Late Mark Solomon* [2014] NSWCA 278 at [126]–[130] (Ward JA, Meagher and Barrett JJA agreeing), referring to, relevantly, *MacPherson v The Queen* [1981] HCA 46; 147 CLR 512 (see at 535 per Mason J, Aickin J agreeing) and *King v The Queen* [2003] HCA 42; 215 CLR 150 at 179–180 [95] (Kirby J) (in dissent); *Moleirinho v Talbot & Olivier Lawyers Pty Ltd* [2014] WASCA 65 at [51]; *Hamod* [2011] NSWCA 375 at [312]. The primary judge appears to have taken this approach to the first respondent’s desire to secure the attendance of RS at the hearing: see PJ [51] (CAB 17).

³² See, eg, *Flightdeck* (2020) 280 FCR 479 at 492 [56]; *Stone* [2015] WASCA 103 at [65]; *Cicek* [2014] NSWCA 278 at [130]; *Bauskis v Liew* [2013] NSWCA 297 at [69]; *Hamod* [2011] NSWCA 375 at [312]; see also *Chalik* [2025] NSWCA 136 at [70].

³³ See, eg, *Lee v Huo* [2026] NSWCA 15 at [72] (Bell CJ, Mitchelmore and Stern JJA agreeing); *Flightdeck* (2020) 280 FCR 479 at 492 [57]; *Hamod* [2011] NSWCA 375 at [311]; *MacPherson* at 547 (Brennan J, Aickin J agreeing).

³⁴ See, eg, *Flightdeck* (2020) 280 FCR 479 at 491 [53]–[54]; *Hamod* [2011] NSWCA 375 at [316].

21. These principles were recognised by the Court below at J [65]–[68] (CAB 170–171). It expressly stated that it was “not necessary to outline or seek to determine the bounds of necessary or appropriate judicial assistance to a litigant in person”.³⁵
22. It was in the particular circumstances outlined at [17] above that the Court below considered that ensuring a fair trial for all parties required the primary judge to inform the first respondent of the “evidentiary pathway” to relying on the convictions as evidence of the elements of the offences provided by ss 91, 92 and s 178 of the *Evidence Act*. That is, in these circumstances, the primary judge was required to ensure that the first respondent did not, because of her lack of knowledge of the procedures provided by the *Evidence Act*, fail to claim her right to rely on a s 178 certificate. There is, in the submission of the *amici curiae*, no error in the Court’s approach. The fact that the first respondent had some assistance from a barrister during the course of the trial does not alter the position in circumstances where she remained unrepresented throughout the trial: cf Appellant’s submissions filed on 26 February 2026 (AS) [31], [39].
23. There may at times be a fine line between informing a litigant “of a fundamental procedure which, if invoked, may prove to be advantageous”³⁶ and giving judicial advice. However, in this case, informing the first respondent of the ability to obtain a s 178 certificate and the use to which the *Evidence Act* permitted it to be put would have fallen on the correct side of the line.³⁷

20 **C GROUND 2: ISSUE OF CONVICTION CERTIFICATE**

24. In its terms, this ground of appeal goes to the exercise of the Court of Appeal’s discretion to proceed, in effect, on the basis that a s 178 certificate had been tendered at first instance. An anterior issue is whether the Court below had power to proceed in that way; that is, whether:

³⁵ J [69] (CAB 171).

³⁶ *MacPherson* (1981) 147 CLR 512 at 534 (Mason J), applied in the context of a civil proceeding in *Flightdeck* (2020) 280 FCR 479 at 492 [55(b)]; *Lee* [2008] NSWCA 13 at [49]; *Hamod* at [2011] NSWCA 375 at [309], [312].

³⁷ See *SZRUR v Minister for Immigration and Border Protection* (2013) 216 FCR 445 at 454 [39], [40] (Robertson J, Allsop CJ and Mortimer J agreeing), in which the appellant was unaware that statements made from the bar table would not be taken into account as evidence and the primary judge appeared to encourage the appellant to “tell” the judge matters from where he was. The Full Court held that an explanation could have been given while leaving it open to the appellant to choose whether or not to give evidence as opposed to speaking from the bar table, and that such an explanation would not have run the risk of the Court being seen to advise the appellant.

- (a) the Court of Appeal, in exercising its appellate function, was permitted to proceed as though a s 178 certificate had been tendered at first instance when it had not; and
- (b) whether s 92 of the *Evidence Act* enabled the tender of any certificate of conviction against the appellant.

25. The second sub-issue was addressed in Section A above. As to the first, the Court of Appeal identified errors (one factual and one legal) in the primary judge’s failure to inform the first respondent of the existence of the procedural route by which she could have proved the elements of the offences the subject of the convictions, and therefore the abuse at the centre of her claim for damages. Proceeding on the basis that, had those errors not occurred and the first respondent had been so informed, she would have obtained and tendered a s 178 certificate, the Court of Appeal was simply doing what, in its view, the primary judge could have done had the error not been made, rather than remitting the matter for re-trial. That is, the Court below was fulfilling its obligation to “give the judgment which in its opinion ought to have been given in the first instance”.³⁸
26. Section 75A(6) and (10) of the *Supreme Court Act 1970* (NSW) authorised the Court to proceed in this manner. These provisions, read with the requirement for the appeal to be by way of rehearing,³⁹ permitted the Court of Appeal to review the record of the proceedings at first instance and determine for itself that evidence that would have been available as a matter of course had the procedure to obtain it been invoked by the first respondent could be treated on the appeal as having been tendered.
27. There appears to be no challenge to the conclusion of the Court below that the first respondent would have obtained and tendered a s 178 certificate had she been aware of that procedural option.⁴⁰ That is, it is not suggested that the Court of Appeal proceeding in the way that it did amounted to an order that the first respondent obtain such a certificate. Accordingly, given the above and the analysis in Section A as to the applicability of s 92(2) in this

³⁸ *Fox v Percy* [2003] HCA 22; 214 CLR 118 at 125 [23] (Gleeson CJ, Gummow and Kirby JJ), quoting from *Dearman v Dearman* [1908] HCA 84; 7 CLR 549 at 561.

³⁹ See *Supreme Court Act*, s 75A(5).

⁴⁰ See J [71] (CAB 171–172), [73] (CAB 172).

proceeding, the Court of Appeal had the power to proceed as though a s 178 certificate had been issued and was tendered.

28. The appropriateness of proceeding in that way may be assessed by reference to the arguments made against doing so in the Court below, noting the AS does not specifically address the issue but combines grounds 2 and 3 in the notice of appeal (see AS [37]–[56]).
29. The third respondent argued below that any certificate would have been inadmissible having regard to ss 97 and 135(a) of the *Evidence Act*.⁴¹ In considering (and dismissing) these arguments,⁴² the Court below acknowledged that s 178 does not itself provide for the admissibility of evidence of a conviction; rather, the evidence of the conviction may be adduced if it is admissible according to other substantive rules.⁴³ There is, respectfully, no error in the Court of Appeal’s application of settled principles of evidence law in dismissing these arguments.
30. The Court also considered (and dismissed) arguments against proceeding as though a certificate had been tendered to the effect that:⁴⁴
- (a) to so proceed would amount to the giving of judicial advice; and
 - (b) to so proceed would cause forensic disadvantage to the estate because the estate could have called evidence to rebut it.
31. The correctness of the Court’s reasons for dismissing the first argument is addressed above in Section B.⁴⁵ The Court dismissed the second argument because the estate adduced and relied on evidence to counter the first respondent’s evidence and was unable to identify any further evidence it might have called had a certificate been tendered.⁴⁶ That is, the Court rejected the argument that the estate could have conducted its case differently. In the absence of any articulated disadvantage, there was no error in the Court’s approach to this argument, either. Thus, the Court of Appeal did not err in holding that it was appropriate for it to

⁴¹ J [77]–[78] (CAB 173–174).

⁴² See J [80]–[84] (CAB 174–176).

⁴³ See *Cunneen v R* [2024] NSWCCA 28 at [205] (Fagan J, Ward P and Davies J agreeing).

⁴⁴ J [75]–[77] (CAB 173–174), [85]–[86] (CAB 176–177).

⁴⁵ See J [86] (CAB 177).

⁴⁶ J [85] (CAB 176–177).

proceed as though a s 178 certificate had been tendered and admitted into evidence in circumstances where no s 178 certificate had, in fact, been served or tendered.

D GROUND 3: PROBATIVE WEIGHT OF CONVICTION IN ABSENCE OF CERTIFICATE

32. This ground of appeal apparently arises from the following statements:

(a) “[b]y starting with MTH’s oral evidence and finding her an unreliable witness, the primary judge disregarded the probative weight of the convictions to prove the elements of the offence”: J [61]; and

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(b) “The evidence of the conviction ... constituted significant corroboration of MTH’s evidence that the offending conduct had occurred. It was therefore also relevant to an assessment of her credibility. Thus, the failure to attribute probative value to the evidence of the convictions led to his Honour’s assessment of the oral evidence of witnesses being compromised”: J [90].

33. The effect of AS [37]–[56] on this ground appears to be that, in circumstances where no s 178 certificate had been tendered by the first respondent, it was appropriate for the primary judge to disregard the probative weight of Mr Croft’s convictions.

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34. In the submission of the *amici curiae*, it is not the tendering of a s 178 certificate (or not) that affects the probative value of a conviction, but the available evidence of the conviction generally, which may include the evidence provided by a s 178 certificate. The primary judge approached the matter as though, because (as his Honour understood it) the first respondent was not relying on the conviction to prove the underlying conduct,⁴⁷ she could only discharge her legal onus in this proceeding by adducing evidence of the conduct in this proceeding, and his Honour found her evidence, at least as to matters providing context to her abuse claims, to be unreliable. In so approaching the matter, his Honour failed to assign any probative value to the evidence that Mr Croft had been convicted of offences involving the conduct that the third respondent needed to prove to establish her claim for damages against the appellant.

⁴⁷ See J [43] (CAB 161–162); see the full transcript at Appellant’s Book of Further Materials (**ABFM**) volume 1, page 100, line 1–47. This passage is the only reference to s 92 of the *Evidence Act* before the primary judge.

35. His Honour’s error is evidenced by his consideration of the use that could be made of Mr Croft’s convictions through the lens of abuse of process.⁴⁸ The question was not whether the conviction should be able to be disputed at all, but of what is the conviction evidence? By contrast, the Court of Appeal’s reasons on this issue involve no error.
36. There is intermediate appellate case law to the effect that a s 178 certificate is evidence of:
- (a) the particular offences of which Mr Croft was convicted;⁴⁹ and
 - (b) the existence of the facts in issue in the criminal proceeding (namely, the elements of each of the offences), but not the detailed facts of the offending.⁵⁰
37. The effect of these cases is consistent with how Price AJA put the matter during the hearing before the Court of Appeal: a s 178 certificate would have been evidence that “[t]he physical elements of the offence had been committed by the deceased with the requisite state of mind”.⁵¹
38. The approach to the certificate taken by the Court below was consistent with this line of authority. The Court, having reviewed relevant authorities, concluded that a s 178 certificate “is admissible to prove the fact of conviction and the fact of the commission of the offence, being the fact of each element of the offence, its date and the identity of the offender and, if there be one, the victim”.⁵² The Court held that, by reason of s 178 of the *Evidence Act*, the first respondent was entitled to rely on the s 178 certificate “to establish, first, that Mr Croft had raped her twice and indecently assaulted her three times during the period specified; and, second, that Mr Croft had sexually assaulted RS four times during the period specified”.⁵³
39. The Court of Appeal’s approach is consistent with the words used in s 178. A certificate that states the offence in respect of which a person was convicted (see s 178(3)) certifies that the elements of that offence (physical and mental) were found to have existed beyond reasonable

⁴⁸ See PJ [36]–[82] (CAB 14–24), referred to at J [45] (CAB 162).

⁴⁹ *Prothonotary of the Supreme Court of New South Wales v Livanos* [2012] NSWCA 325 at [9] (McColl JA, Campbell and Meagher JJA agreeing).

⁵⁰ *Dajani & Dajani* [2025] FedCFamC1A 28 at [27] (the Court); *Osborne v Butler* [2024] VSCA 6; 73 VR 386 at [35]–[36] (the Court).

⁵¹ ABFM, page 1317 (page 338 of volume 3), lines 46–49.

⁵² J [29] (CAB 156).

⁵³ J [19] (CAB 152).

doubt. The provision for the certificate to contain, in addition to the relevant offence, particulars of a conviction, and for the certificate to be evidence of those particulars where they are stated in the certificate (see s 178(5)), confirms that a s 178 certificate may be evidence of more than the fact of the conviction (cf AS [39], [43], [46]). Nothing in s 178 limits the use of a certificate issued under that section to a proceeding in which the conviction is a fact in issue in the proceeding (cf AS [45]).

40. A s 178 certificate being evidence not only of the fact of conviction of a person of a particular offence but also the existence of the elements of that offence, the question then arises to what use such a certificate could be put in the first respondent's proceeding. As already noted (at [36] above), where s 92(2) applies, the evidence that may be admitted or used (such as a s 178 certificate) includes evidence of the existence of the elements of the offence of which the party was convicted.⁵⁴
41. The statement of Bathurst CJ in *Chevalley v Industrial Court (NSW)*,⁵⁵ that he “would not read s 178(3) as providing for evidence that the offence was committed”, did not govern the use to which a s 178 certificate could be put in the proceedings below (cf AS [46]). A question arising in that case was whether a s 178 certificate stating that a company had been convicted of a particular offence under occupational health and safety law was proof that the company committed the offence in a separate prosecution of a director of that company for the same offence (where, under the statutory scheme in question, the director's liability could be derived from the company's contravention of the law). His Honour went on to state that, in the case then before the Court, the certificate would not be evidence of the company's contravention, but rather of the company's conviction of the offence, which fact was not relevant to whether a director contravened the law. It will be noted that the certificate was sought to be relied on in a further criminal proceeding, not a civil proceeding. The exception provided by s 92(2) of the *Evidence Act* was not available. Accordingly, Bathurst CJ went on: “Whether or not s 178 has a wider meaning was not the subject of argument. It need not be decided because, whatever its width, it does not provide for proof of the facts relevant to

⁵⁴ See *The Prothonotary of the Supreme Court of New South Wales v Sukkar* [2007] NSWCA 341 at [9] (Hodgson JA, Tobias JA agreeing); *Osborne* (2024) 73 VR 386 at [22]–[34], particularly at [31]–[34]; *Dajani* [2025] FedCFamC1A 28 at [23]–[27].

⁵⁵ [2011] NSWCA 357; 82 NSWLR 634 at 650 [58] (Bathurst CJ; Allsop P, Beazley and Basten JJA and Sackville AJA agreeing).

the commission of the offence in the face of s 91(1) of the *Evidence Act 1995...*”. *Chevalley* is distinguishable from the present case because it involved the use to which a s 178 certificate could be put in a criminal proceeding, rather than in a civil proceeding in which the exception to s 91(1) provided by s 92(2) applies.⁵⁶

42. Similarly, the statement by the Court of Appeal in *Prothonotary v Gregory* [2017] NSWCA 101 at [18] that s 92(2) provides that evidence a person has been convicted of an offence may be admitted to show the fact of conviction (see AS [55]) ought not be read as a statement that s 92(2) does no more in circumstances where the issue in that case was whether sentencing remarks could be adduced.⁵⁷ There is no suggestion in the Court of Appeal’s reasons that anything other than the existence of the elements of the offences of which Mr Croft was convicted could be proved by the s 178 certificate.

43. The question before the Court of Appeal concerned the probative weight of a conviction (including one evidenced by a s 178 certificate) in one proceeding in a later civil proceeding in which a fact in issue in the criminal proceeding is relevant. The Court below adapted the statement in the ALRC report which prompted the evidence law reforms resulting in the insertion of ss 91, 92, 178 and other relevant provisions of the *Evidence Act*,⁵⁸ stating that the certificate would amount to “‘evidence of high probative value’, which was readily available to her”.⁵⁹ The certificate, and the conviction underlying it, may well be evidence of high probative value, but the Court below, consistently with other intermediate appellate decisions, accepted that a s 178 certificate is not conclusive.⁶⁰ In *Claridades v Gonzales*, Campbell J, referring to the same ALRC report, stated that:

The effect of s 92(2) is to impose an evidentiary onus on anyone who disputed the correctness of the conviction to produce evidence that it is incorrect, but s 92(2) does not alter the legal onus of proof of the facts underlying the conviction.

... anyone who was contending [in forfeiture proceedings] that a forfeiture had occurred would still bear the legal onus of so proving, and it would be open to [the convicted

⁵⁶ See also *Dajani* [2025] FedCFamC1A 28 at [21].

⁵⁷ See [2017] NSWCA 101 at [16], [19] (the Court).

⁵⁸ ALRC 1985 at [385]; see the excerpt quoted in J [18] (CAB 151–152).

⁵⁹ J [36] (CAB 159).

⁶⁰ J [45] (CAB 162), [46] (CAB 163), [61]–[62] (CAB 168–169); see also [18]–[30] (CAB 151–156).

person] to call evidence, if he wished, with a view to showing that any such conviction was erroneous.

... whether the outcome of [the criminal trial] is a conviction or an acquittal, that outcome will not be determinative of any civil proceedings to which [the convicted person] is a party in which there is an issue about [whether a benefit had been forfeited].⁶¹

44. As the Court of Appeal noted at J [22] (CAB 153), Campbell J’s reasoning was endorsed on appeal.⁶² It has subsequently been applied by other intermediate appellate courts.⁶³

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45. The Court below did not depart from this reasoning. It considered that the s 178 certificate was “sufficient to establish not only the fact of conviction but also the elements of each offence”.⁶⁴ That is, after recognising that the certificate would not have been conclusive evidence,⁶⁵ and considering:

(a) the absence of any evidence directly contrary to the matters of which the certificate is evidence,⁶⁶ and

(b) that any evidence given by the first respondent as to the elements of the offences would have been corroborated by the s 178 certificate;⁶⁷

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the s 178 certificate was sufficient to establish that Mr Croft sexually assaulted the first respondent, and the first respondent’s legal onus was discharged. The Court did not shift the onus (cf AS [53]) or rely on any facts of the offending other than those that comprise the elements of the offences: the acts of abuse. That is, the Court did not manufacture any particulars of the convictions that a s 178 may have contained (cf AS [48], [54]).

46. It is implicit in the Court of Appeal’s reasoning that the primary judge’s concerns about the first respondent being an unreliable witness⁶⁸ did not outweigh the probative value of the evidence of the conviction provided by the s 178 certificate. The Court below appeared to

⁶¹ *Gonzales v Claridades* [2003] NSWSC 508; 58 NSWLR 188 at 206 [66]–[68].

⁶² *Gonzales v Claridades* [2003] NSWCA 227; 58 NSWLR 211 at 215 [16] (Mason P, Beazley JA and Foster AJA agreeing).

⁶³ See *Osborne* (2024) 73 VR 386 at [33]; *Sukkar* [2007] NSWCA 341 at [9].

⁶⁴ J [11] (CAB 148); see also J [63] (CAB 169).

⁶⁵ J [45] (CAB 162).

⁶⁶ J [46] (CAB 163), [61]–[62] (CAB 168–169), [87] (CAB 177).

⁶⁷ J [61] (CAB 168–169), [90] (CAB 178).

⁶⁸ See J [58] (CAB 167–168).

take the view that the primary judge's assessment of the first respondent's reliability and credibility was affected by the primary judge's error as to the operation of ss 91, 92 and 178 of the *Evidence Act*, and may have been ameliorated to a material degree had evidence of the convictions (by way of a s 178 certificate) been tendered.⁶⁹ In assessing this approach, it is significant that the evidence of the first respondent that the Court of Appeal considered would be corroborated by the certificate was her evidence as to the elements of the offence: that the offending occurred. The Court's focus was on the evidence of the actual offending, in respect of which there was no direct contrary evidence, not the contextual evidence that caused the primary judge to have concerns about the first respondent's reliability as a witness, which in turn caused his Honour to doubt her evidence as to the offending. Having established errors in the trial judge's assessment of her reliability and credibility that did not depend on the advantages of a trial judge in hearing and seeing a witness (see further Section E below), the Court below was permitted to make its own assessments of the first respondent's credibility in light of the totality of the evidence that properly should have been before the primary judge.

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47. It follows that there is no error in the Court of Appeal's finding that the primary judge disregarded the probative value of Mr Croft's convictions. That error by the primary judge is demonstrated by his Honour's failure to consider⁷⁰ the fact that a stringent judicial procedure had been conducted and found, to a high standard of proof, that the conduct occurred.⁷¹ Nor did his Honour weigh his concerns about the first respondent's reliability against the evidence, provided by the conviction, that the sexual assaults occurred.

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48. Furthermore, the Court of Appeal did not err in the probative weight it attributed to Mr Croft's convictions. Whether a s 178 certificate had been tendered or not, the effect of s 92(2) of the *Evidence Act* was that evidence of the convictions potentially had high probative value. By not alerting the first respondent to the procedure available for providing documentary evidence of the convictions, and thereby evidence of the existence of the elements of the offences, the primary judge deprived the first respondent of the opportunity

⁶⁹ J [10] (CAB 147–148), [61] (CAB 168–169), [90] (CAB 178), [220] (CAB 210–211).

⁷⁰ See PJ [48] (CAB 17).

⁷¹ See ALRC 1985 at [385].

to corroborate her oral evidence with evidence of high probative value. The Court of Appeal’s approach corrected this error.

E GROUND 4: REASSESSMENT OF DAMAGES

49. Although the primary judge assessed damages on the “alternative basis” that the abuse occurred,⁷² the assessment appears to have been affected by the trial judge’s adverse assessment of the credibility of the first respondent’s evidence.⁷³ In these circumstances, the appellant submits that the trial judge’s assessment of damages could not be disturbed unless the credibility findings on which it was based unless those findings are “glaringly improbably or contrary to compelling inferences”: AS [59], [63].
- 10 50. The well-established admonition to appellate courts, in an appeal by way of rehearing, to make “due allowance”⁷⁴ for a trial judge’s advantages has frequently been understood to require appellate restraint in the interfering with a trial judge’s findings unless they are “glaringly improbable”⁷⁵ or “contrary to compelling inferences”.⁷⁶ However, as this Court made clear in *Lee v Lee*,⁷⁷ such appellate restraint “is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence”. It is the advantage that a trial judge gains from seeing and hearing the witnesses and “conflicting testimony”⁷⁸ for which proper allowance must be made. If, having made proper allowance for that advantage, the appellate court is satisfied that the trial judge’s conclusions are

⁷² PJ [340] (CAB 82).

⁷³ See PJ [382] (CAB 93); J [220] (CAB 211).

⁷⁴ *Fox v Percy* (2003) 214 CLR 118 at 126–127 [25] (Gleeson CJ, Gummow and Kirby JJ), quoting from *Dearman v Dearman* (1908) 7 CLR 549 at 564; see also *Lee v Lee* [2019] HCA 28; 266 CLR 129 at 148 [55] (Bell, Gageler, Nettle and Edelman JJ).

⁷⁵ See *Brunskill v Sovereign Marine & General Insurance Co Ltd* [1985] HCA 61; 59 ALJR 842 at 844 (the Court); cited in, eg, *Fox v Percy* (2003) 214 CLR 118 at 128 [29]; *Lee v Lee* (2019) 266 CLR 129 at 148 [55]; *Queensland v Masson* [2020] HCA 28; 94 ALJR 785 at 800 [78] (Kiefel CJ, Bell and Keane JJ), 812 [119] (Nettle and Gordon JJ).

⁷⁶ See *Chambers v Jobling* (1986) 7 NSWLR 1 at 10 (Kirby P); cited in, eg, *Fox v Percy* (2003) 214 CLR 118 at 128 [29]; *Lee v Lee* (2019) 266 CLR 129 at 148 [55]; *Masson* (2020) 94 ALJR 785 at 800 [78] (Kiefel CJ, Bell and Keane JJ), 812 [119] (Nettle and Gordon JJ).

⁷⁷ [2019] HCA 28; 266 CLR 129 at 148 [55] (Bell, Gageler, Nettle and Edelman JJ) (emphasis added); see also *Masson* (2020) 94 ALJR 785 at 814 [127] (Nettle and Gordon JJ).

⁷⁸ *Brunskill* (1985) 59 ALJR 842 at 844.

erroneous, the court must perform the appellate functions imposed on it by the statute governing the appeal (in this case, s 75A of the *Supreme Court Act*).⁷⁹

51. Not every credibility finding is based on what the trial judge observed of the witnesses giving oral evidence, in which case the appellate restraint need not be applied. Further, even where appellate restraint is required by reason of the basis for the trial judge’s credibility finding, it does not provide a basis for deference to the trial judge where the trial judge’s decision “can be seen to be clearly wrong on grounds which do not depend merely on credibility”.⁸⁰

52. There are three reasons why, in the submission of the *amici*, the Court below was permitted to reassess damages.

10 53. First, in the present case, the trial judge’s findings as to the first respondent’s credibility were not made on the basis of her presentation as a witness or her demeanour in giving oral evidence. Although the trial judge formed the view that the first respondent “did not present well when giving evidence”,⁸¹ his Honour went on to state that, “whilst demeanour and impression play a role in assessing witnesses, facts far outweigh matters of demeanour”.⁸² In the assessment of the evidence that followed, his Honour did not refer again to the first respondent’s presentation or demeanour as a witness. Rather, his Honour’s adverse assessment of her credibility and reliability was based on inconsistencies within her own evidence between the criminal proceeding and the present proceeding, inconsistencies between her evidence and the evidence of other witnesses (whose evidence was corroborated
20 by other evidence) and inconsistencies between her evidence and contemporaneous documents.⁸³ The Court of Appeal proceeded on the basis that, ultimately, with the exception of a finding concerning Mrs Croft, counsel for each of the respondents below submitted that it was open to the Court of Appeal to assess the (now) first respondent’s credit for itself.⁸⁴

54. The adverse credibility assessment being based on inconsistencies with other evidence which were apparent from the record, the Court of Appeal was “in as good a position as the trial

⁷⁹ *Fox v Percy* (2003) 214 CLR 118 at 128 [29]; *Masson* (2020) 94 ALJR 785 at 812 [119] (Nettle and Gordon JJ).

⁸⁰ *Brunskill* (1985) 59 ALJR 842 at 844.

⁸¹ PJ [138] (CAB 35).

⁸² PJ [139], see also [140]–[141] (CAB 36).

⁸³ See also J [58] (CAB 167–168).

⁸⁴ See also J [91] (CAB 178).

judge to decide on the proper inference to be drawn from facts ... which, having been disputed, are established by the findings of the trial judge”.⁸⁵ This included the proper inferences as to the first respondent’s credibility and reliability as a witness and the impact of that on the evidence before the Court.

55. Secondly, the primary judge’s assessment of the reliability of the first respondent’s evidence was itself affected by his Honour’s error as to the operation of ss 91, 92 and 178 of the *Evidence Act*. In these circumstances, the trial judge’s assessment of damages, to the extent that it relied on his Honour’s adverse assessment of the first respondent’s credibility as a witness, miscarried “on grounds which do not depend merely on credibility”.⁸⁶

10 56. Thirdly, to the extent that the trial judge did not award damages for pain and suffering for the period of over 30 years since the abuse occurred because (unlike in his Honour’s analysis in respect of liability) in the damages analysis he accepted her lay opinion evidence that her memory had been suppressed until 2008 or 2011 and found that she was not suffering,⁸⁷ the Court of Appeal held that that decision was “wholly at odds with what is known by courts, including those who sentence offenders for child sex offences”.⁸⁸ The finding that the first respondent did not experience any pain and suffering in this 30 year period was “glaringly improbable” in the relevant sense, so the Court of Appeal could, consistently with the principles discussed in paragraphs [49]–[50] above, reassess those damages.

PART IV ESTIMATED TIME

20 57. It is estimated that one hour and twenty minutes will be required for oral argument.

Dated: 23 April 2026



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⁸⁵ *Warren v Coombes* [1979] HCA 9; 142 CLR 531 at 551 (Gibbs ACJ, Jacobs and Murphy JJ).

⁸⁶ *Brunskill* (1985) 59 ALJR 842 at 844.

⁸⁷ PJ [368] (CAB 89), [391] (CAB 94).

⁸⁸ J [228] (CAB 213).

ANNEXURE TO *AMICI CURIAE*'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s) (to what event(s), if any, does this version apply)
1	<i>Evidence Act 1995</i> (NSW)	Current (in force since 25 November 2022)	Sections 4, 91, 92, 166–169, 178	Version in force at all relevant times	Decision of NSW Supreme Court on 28 November 2024; Decision of NSW Court of Appeal on 6 June 2025
2	<i>Supreme Court Act 1970</i> (NSW)	As in force from 1 July 2024–27 March 2026	Section 75A	Version in force at all relevant times	Decision of NSW Supreme Court on 28 November 2024; Decision of NSW Court of Appeal on 6 June 2025
3	<i>Crimes (Appeal and Review) Act 2001</i> (NSW)	As in force from 1 May 2025	Part 7	For illustrative purposes only	Decision of NSW Court of Appeal on 6 June 2025