HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S155/2025
File Title:	Estate of the late Geoffrey Croft v. MTH & Ors
Registry:	Sydney
Document filed:	Form 27F - Amici Outline of Oral Argument
Filing party:	Intervener
Date filed:	10 Jun 2026

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

and

MTH
First Respondent

STATE OF NEW SOUTH WALES
Second Respondent

SANDRA CROFT
Third Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE *AMICI CURIAE*

PART I FORM OF OUTLINE

1. This outline is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Section 92(2) of the *Evidence Act 1995* (NSW) enabled the tender of evidence that Mr Croft had been convicted of an offence (ACS [4]–[15])

2. Mr Croft is a "person through or under whom a party claims" for the purposes of s 92(2) of the *Evidence Act* (ACS [5]; cf Reply [3]).

   Re HIH Insurance Ltd (in liq) [2015] NSWSC 790 at [61]–[62] (JBA vol 6, tab 41); *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), s 2(1) (JBA vol 2, tab 12); *Ramsey Food Processing Pty Ltd v Tomlinson* [2014] NSWCA 237 at [83] (JBA vol 5, tab 40).

3. An application for special leave to appeal is capable of constituting a "review … (however described)" for the purposes of s 92(2)(a) of the *Evidence Act* (ACS [7]).

4. An application for special leave to appeal that has been dismissed due to the death of the applicant is an application that has been "finally determined" for the purposes of s 92(2)(a) of the *Evidence* Act (ACS [8]–[15]).

> Australian Law Reform Commission, *Evidence (Interim)* [1985] ALRC 26 [776] (JBA vol 7, tab 46); Australian Law Reform Commission, *Evidence* [1987] ALRC 38 at [170] (JBA vol 7, tab 47)

Ground 1: There was no error in the Court of Appeal holding that, in the circumstances of this case, the primary judge was under an obligation to ensure that the first respondent did not, because of a lack of legal skill, fail to claim rights or put forward legal arguments (ACS [16]–[23])

5. Read in context, the Court of Appeal at J [66] was not stating an absolute obligation on courts in every case in which a party is self-represented (ACS [18]–[19]).

> *Chalik v Chalik* [2025] NSWCA 136 at [68] (JBA vol 4, tab 25); *Hamod v NSW* [2011] NSWCA 375 at [312] (JBA vol 5, tab 32); *MacPherson v R* (1981) 147 CLR 512 at 534 (JBA vol 3, tab 18); ***Flightdeck*** *Geelong Pty Ltd v All Options Pty Ltd* (2020) 280 FCR 479 at [53]–[57] (JBA vol 4, tab 29); J [69]

6. What is required of a court to ensure fairness when a litigant is self-represented depends on the facts and circumstances of each case (ACS [20]).

> *Flightdeck* (2020) 280 FCR 479 at [55] (JBA vol 4, tab 29)

7. In this case, the primary judge was required to put the unrepresented litigant (the first respondent) in the position of being able to make an effective choice as to how to prove the offending conduct, including the procedural option of obtaining a certificate issued pursuant to s 178 of the *Evidence Act* (ACS [22]–[23]).

> See J [71]–[74]

Ground 2: It was appropriate for the Court of Appeal to proceed as though a s 178 certificate had been tendered, even though one had not (ACS [24]–[31])

8. It was not disputed that the first respondent would have obtained and tendered a s 178 certificate had she been aware of the potential to do so to prove the offending conduct (ACS [27]).

9. The appellant articulated no forensic disadvantage to it that would be occasioned by the Court of Appeal proceeding that way and has not articulated such a disadvantage in this appeal (ACS [31]).

Ground 3: The Court of Appeal did not err in assessing the probative value of a s 178 certificate (ACS [32]–[48])

10. The Court of Appeal took an appropriately limited approach to the question of what a certificate would be evidence of (ACS [36]–[38]).

    J [29]; *Osborne v Butler* (2024) 73 VR 386 at [34], [37] (JBA vol 5, tab 36); *Prothonotary of the Supreme Court of NSW v Sukkar* [2007] NSWCA 341 at [9] (JBA vol 5, tab 39).

11. The Court of Appeal did not treat the s 178 certificate as conclusive (ACS [43]–[45]): J [45], [46], [61]–[62].

12. The Court of Appeal did not fail to engage with the body of evidence relied on by the appellant at trial. The Court appreciated its nature (not being direct evidence), and noted the submissions of counsel, with one exception, that it was open to the Court of Appeal to assess the first respondent's credit for itself (ACS [46]).

    J [46], [61], [62], [85], [87], [91]

Ground 4: The Court of Appeal did not err in reassessing damages in the absence of a finding that the primary judge's credit findings were glaringly improbable or contrary to compelling inferences (ACS [49]–[56])

13. Relevant factual findings in the primary judge's assessment of damages were not likely to have been affected by impressions about the credibility and reliability of witnesses formed as a result of seeing and hearing them give their evidence (ACS [53]–[54]).

    Lee v Lee (2019) 266 CLR 129 at [55] (**JBA vol 3, tab 17**); see PJ [390], [393]; [403]–[405]; [411]

14. The primary judge's failure to make any allowance for pain and suffering in the period 1979 until 2008 or 2011 on the basis that the first respondent could not have been suffering from a psychological condition causally related to abuse by Mr Croft was found to be "glaringly improbable" in relevant sense (ACS [56]).

    Fox v Percy (2003) 214 CLR 118 at [29] (**JBA vol 3, tab 16**); see PJ [368], [391], J [228]–[229]

Dated: 10 June 2026

Joanna Davidson

Amanda Sapienza

Amici curiae