HIGH COURT OF AUSTRALIA

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Details of Filing

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S57/2026

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Dale Haines
by his litigation guardian Barbara Ramjan
Appellant

and

Attorney General of NSW
Respondent

APPELLANT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: CONCISE STATEMENT OF ISSUES

2. In dismissing the appellant's application for review of the interim extension order ("**IEO**") made on 20 October 2025 by Kirk JA in *Attorney General for New South Wales v Haines (BHT Barbara Ramjan)* [2025] NSWCA 231 ("***Haines (No. 1)***"), did the NSW Court of Appeal ("**NSWCA**") err in its construction and application of s 130 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (NSW) ("**the Act**")?

3. In allowing the respondent's appeal from the dismissal of its summons seeking an extension order, did the NSWCA err in its construction and application of s 122(1) of the Act?

PART III: SECTION 78B NOTICES

4. The appellant does not consider that any notice should be given under s 78B of the *Judiciary Act* 1903 (Cth).

PART IV: CITATIONS OF REASONS FOR JUDGMENT BELOW

5. Citations for the reasons for judgment below are as follows:

   a. First instance decision:

      Attorney-General for New South Wales v Dale Haines (BHT Barbara Ramjan) (Final) [2025] NSWSC 1117.

   b. Decision of Kirk JA on the motion for a further interim extension order:

      Attorney General for New South Wales v Haines (BHT Barbara Ramjan) [2025] NSWCA 231.

   c. Intermediate decision under appeal:

      Attorney General for New South Wales v Haines (by his tutor Ramjan) (No 2) (2025) 118 NSWLR 450; [2025] NSWCA 248.

PART V: RELEVANT FACTS

The index offences, unfitness and the limiting term

6. Between 26 June and 25 September 2014 the appellant committed five armed robberies to obtain money for prohibited drugs. He was arrested on 25 September 2014 and charged with those and further offences. He was remanded in custody. (**CAB 74 at [6]**)

7. In December 2015 the Mental Health Review Tribunal ("**the Tribunal**") determined that he was unfit to be tried (**CAB 74 at [6]**).

8. A special hearing was conducted before English DCJ, who found that, on the limited evidence available, he had committed the offences charged (**CAB 9 at [16]** and **CAB 74 at [7]**).

9. On 15 May 2017, her Honour imposed a limiting term of 7 years and 7 months, commencing on 25 September 2014 and expiring on 24 April 2022. As a consequence of the nomination of that limiting term, an order was made in accordance with the *Mental Health (Forensic Provisions) Act* 1990 (NSW) that the appellant be detained, and he became a forensic patient (**CAB 74 at [7]**).

10. On 4 September 2017, the Tribunal ordered that the appellant be detained at the Forensic Hospital (**CAB 75 at [8]**).

Extension of forensic patient status

11. The appellant's status as a forensic patient was first extended by an interim order for three months made on 14 April 2022 (commencing 24 April 2022) by Lonergan J: *Attorney General for NSW v Haines (Preliminary)* [2022] NSWSC 458 (**CAB 75 at [9]**).

12. On 8 July 2022 Yehia J made an order ("**First Extension Order**") extending the appellant's status as a forensic patient under s 121 of the Act for three years, commencing 24 July 2022: *Attorney General for NSW v Haines (Final)* [2022] NSWSC 930 (**CAB 75 at [9]**).

The present application for an extension order and the interim extension orders

13. By operation of s 124(2)(b) of the Act, the earliest date on which an application for a further extension order could have been brought was 24 January 2025 (that is, six months before the expiry of the First Extension Order).

14. On 11 April 2025 the respondent filed an application in the Supreme Court for a further extension of the appellant's status as a forensic patient (**CAB 75 at [11]**). Unlike the extension application heard before Yehia J, this application was opposed by the appellant.

15. As the First Extension Order was due to expire on 24 July 2025, the respondent also sought an IEO, which was granted by Harrison CJ at CL on 22 July 2025: *Attorney General of NSW v Haines (Preliminary)* [2025] NSWSC 774 ("**Application IEO**"). The Application IEO commenced on 24 July 2025 and was due to expire on 24 October 2025 (**CAB 75 at [11]**).

16. On 22 July 2025 orders were made for the appointment of two psychiatrists to examine the appellant and report by 24 September 2025; that order was varied by consent on 5 August 2025 to provide for a psychiatrist and a psychologist (**CAB 75–76 at [11]**). Reports were obtained from Dr Gordon Elliott, psychiatrist, and Dr Carollyne Youssef, forensic and clinical psychologist (**CAB 76 at [11]**).

The hearing and decision at first instance

17. The respondent's application for a further extension order was heard by Coleman J on 1 September 2025.

18. On 26 September 2025 Coleman J delivered judgment (*Attorney-General for NSW v Dale Haines (BHT Barbara Ramjan) (Final)* [2025] NSWSC 1117 ("***Haines (Final)***"); **CAB 5–36**). His Honour dismissed the respondent's summons and ordered the respondent to pay the appellant's costs (**CAB 76 at [13]; order at CAB 37**).

The appeal, the interim extension order of Kirk JA, and the review application

19. On 15 October 2025, the respondent filed a notice of appeal against Coleman J's orders (**CAB 38–42**), together with a notice of motion seeking a further IEO (**CAB 83 at [31]**).

20. On 20 October 2025 Kirk JA heard and determined that motion and made an IEO under s 130 of the Act, commencing that day and expiring on 19 December 2025 ("**Appeal IEO**"): ***Haines (No. 1)*** (**CAB 43–61**; order at **CAB 62–63**).

21. On 31 October 2025, the appellant filed a notice of motion seeking review of the order making the Appeal IEO, contending that Kirk JA had lacked power to make that order (**CAB 64–66**; **CAB 83 at [32]**).

The hearing and decision of the Court of Appeal

22. The appellant's motion and the respondent's appeal were heard together by Adamson, McHugh and Ball JJA on 6 November 2025 (**CAB 67**; **CAB 73**). It was common ground that if Kirk JA had lacked power to make the Appeal IEO, the appeal must be dismissed because the appellant would no longer be a forensic patient, the Application IEO having expired (**CAB 84 at [34]**; and **CAB 73 at [2]**).

23. By the time of the hearing of the appeal, additional evidence which had not been before Coleman J established that a Community Treatment Order ("**CTO**") had been made in respect of the appellant for a period of 12 months, expiring on 23 October 2026 (**CAB 101 at [93]**; **CAB 105 at [103]; ABFM at 4-9**).

24. On 20 November 2025 the NSWCA delivered judgment (*Attorney General for NSW v Haines (by his tutor Ramjan) (No. 2)* (2025) 118 NSWLR 450; [2025] NSWCA 248 (("***Haines (No. 2)***"); **CAB 67, 113**). It dismissed the appellant's review application, allowed the respondent's appeal, set aside the orders of Coleman J and made an order extending the appellant's status as a forensic patient for two years from 20 November 2025 (**CAB 113** at [135]; orders at **CAB 114**).

PART VI: APPELLANT'S ARGUMENT

Ground 1

25. Ground 1 is that in dismissing the appellant's application for review of the Appeal IEO, the NSWCA erred in its construction and application of s 130 of the Act.

Section 130

26. Section 130, along with other relevant statutory provisions, is set out in Part 6 of the Act. It provides as follows:

> *130 Interim extension orders*
>
> *The Supreme Court may make an order for the interim extension of a person's status as a forensic patient if, in proceedings on an application for an extension order, it appears to the Court–*
>
> *(a) that the limiting term or existing extension order to which the forensic patient is subject will expire before the proceedings are determined, and*
>
> *(b) that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order.*

Reasoning in Haines (No. 1)

27. In his judgment (**CAB 43-61**), Kirk JA observed at [28] that s 130 provides that an IEO can be made "in proceedings on an application for an extension order". His Honour then stated at [29] that the "key question is whether an appeal to this Court is the same 'proceedings' as the application for the extension order in the Supreme Court." In addressing that "key question", his Honour held that previously decided cases dealing with the meaning of "proceedings" illustrated that the respondent's argument was "open" but did not resolve the issue, before going on at [30] to state that while s 136 seemed "to distinguish between proceedings at first instance and on appeal ... it cannot be said that the point is clear" and at [31] to find that "the NSWLRC report and explanatory materials offer little guidance on the application of the three month time limit on IEOs in a case such as this."

28. His Honour then considered the practical effect of the competing constructions, stating at [34] that were the same three month time limitation in respect of an IEO

made in the Supreme Court to apply also to appeal proceedings "then little, or perhaps no, time may be left for the appeal process to take its course" and at [35] that he considered it "unlikely", given the "importance of protecting the safety of the public, as referred to in s 69(1)", that "the time limits were intended to operate in [such] a way ...".

29. His Honour then went on to consider the relevance of the fact that, as set out in s 135(5) of the Act, the Court of Appeal may remit a matter to the Supreme Court for decision, holding at [39]-[40] that while it was not necessary to determine whether a remitter constituted a further set of proceedings permitting the making of a further IEO for up to three months, it was "sufficient for current purposes to note that the Act provides for the possibility of remitter, and that fact militates in favour of the conclusion that the three month limit on any IEO made in this Court prior to the determination of an appeal should be taken to run from when an order of that kind is first made in this Court."

Reasoning in <u>Haines (No. 2)</u>

30. The NSWCA (**CAB 67-113**), in dismissing the application for review of Kirk JA's decision, effectively decided the issue on the same basis as had his Honour, holding that the construction contended for by the respondent was available (at [61]), that the practical effect of the interpretation contended for by the appellant told against its acceptance (at [62]), and that the construction of the wording of the Act preferred by Kirk JA was "consistent with its purpose" (at [63]).

Question of statutory construction

31. Consistent with the view expressed by Kirk JA (at [25]-[26], **CAB 52-53**) (and with the absence of citation of authority on the point by the NSWCA), the appellant submits that there was no authority which bound the NSWCA in relation to the issue for determination. The issue is, as Kirk JA noted at [27], one of statutory construction.

32. In that respect, in argument before the NSWCA the appellant accepted that the construction preferred by Kirk JA was "available". But a concession that an interpretation is open is not a concession that it is correct. As recorded in the transcript, the position advanced by Senior Counsel for the appellant in respect of

the construction accepted by Kirk JA was that while "we don't say it wasn't available" it was "not the correct [interpretation]."[1]

Error – construction and application of s 130

33. The appellant maintains that position before this Court, and submits that the construction of s 130 adopted by the NSWCA in *Haines (No. 2)* was erroneous for the following reasons.

34. First, s 130 should be interpreted in accordance with the clear wording of its text. It applies where "the limiting term or existing extension order to which the forensic patient is subject will expire before the proceedings are determined". Subsection 3(1) separately defines "extension order" and "interim extension order". Accordingly, s 130 does not apply where, as here, an existing interim extension order will (or might) expire before the proceedings are determined. Read as a whole, the Act does not support a construction of s 130 in which the definitions in s 3(1) of "extension order" and "interim extension order" are impliedly excluded from the provision, noting that s 3(1) provides that the definitions contained therein apply "[i]n this Act." Further, as noted by Basten JA[2] in *Attorney General of New South Wales v WB* [2020] NSWCA 7 ("***WB***"):

> *"[19] Subject to one qualification, this scheme is consistent with a deliberate distinction between extension orders and interim extension orders. Where a power is intended to cover both, that is expressly stated, as in cl 12.*[3]
>
> *[20] The qualification to this scheme is cl 9*[4] *which appears in Div 2*[5]*, dealing with extension orders, but also applies to both orders …*
>
> *[21] … there is no reason to draw an inference from the reference to both in cl 9 that the term "extension order" when used by itself, was intended elsewhere to encompass*

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[1] Transcript of proceedings before the NSWCA, 6 November 2025, T41.27–28 (**ABFM 11**); see also **CAB 91 at [59]**.

[2] Macfarlan JA agreeing generally at [58]; Leeming JA agreeing as to the issue at [61] but dissenting as to the outcome of the appeal.

[3] *WB* was determined under Schedule 1 of the *Mental Health (Forensic Provisions) Act* 1990 (NSW). The equivalent provision to cl 12 of the Schedule to that legislation is s 133 of the Act. Other provisions in the Act which refer to "an extension order or interim extension order" are ss 68(3), 83(3), 101(e), (f) (which deals with the consequences of expiry of an extension order or an interim extension order), 129, 133(1), (3) and 138(1), (3).

[4] Section 129 of the Act.

[5] Division 3 of Part 6 of the Act.

interim extension orders. (On one view, it would have been appropriate to include cl 9 in Div 4[6] *with cl 12.)"*

35. The reasoning of Kirk JA and the NSWCA on the issue did not address the foregoing textual considerations, focusing largely on the meaning of "proceedings" (the significance of which Kirk JA ultimately held not to extend beyond illustrating that the respondent's argument was "open") and practical considerations, which are addressed below at [38]-[39].

36. Second, the effect of ss 130 and 131, when read together, is submitted to confirm that an IEO cannot be made if it will extend a person's status as a forensic patient for a period of more than three months in total. That is submitted to be so whether or not "proceedings" is construed so as to encompass an appeal to the Court of Appeal from a refusal by the Supreme Court to make an extension order. Where an IEO has been made (say for a period of two months), and, prior to the expiry of that IEO, an application is made for the further extension of that person's status as a forensic patient by way of an IEO, what is sought by the application is not for the Supreme Court to "make" an IEO, given that one is already on foot, but, rather, for the existing IEO to be "renewed", pursuant to s 131(2), up to a total length which does not exceed three months. Such a construction is submitted to be consistent with the wording of the two sections, along with the definition of "interim extension order" in s 3(1) of the Act ("an order for the interim extension of a person's status as a forensic patient under section 130"), the use of the phrase in s 131(2) of "an order of that kind", and with the wording of s 130(a), which provides the power to "make" an IEO where an "existing extension order" will expire (rather than where an "existing extension order or interim extension order" will expire).

37. Third, the NSWCA, in dismissing the appellant's application for review, reasoned that there were two available constructions of s 130, and held that it preferred that advanced on behalf of the respondent given that it was "open on the wording of the Act and is consistent with its purpose." However, the NSWCA did not, in so reasoning, attempt to encapsulate the purpose of the Act, or of s 130, beyond at [56] citing Kirk JA's judgment on the point, and at [62] noting the need to

[6] Division 4 of Part 6 of the Act.

construe the relevant provisions of the Act in such a way as to allow time for all procedural steps to be taken and for an application for an extension order (and any appeal or proceedings following remittal) to be determined.[7] In particular, in its reasoning on the issue, it made no reference to either the long title of the Act, or to the objects of the relevant Part, as set out in s 69 (though it had set out the long title and paraphrased one of the objects earlier in its reasons, at [36] and [38] respectively).[8] Those expressions of the purpose of the Act are submitted not to be any more consistent with the construction adopted by the NSWCA than that urged on behalf of the appellant. The Act, and specifically s 130 and s 131, is submitted to strike a clear and intentional balance between, on the one hand, the provision of adequate time to determine an application for an extension order, along with any subsequent appeal and any proceedings following remittal should the application be refused, and, on the other, the constraints which arise from a person's status as a forensic patient and the extension of those constraints by the making of an interim extension order (noting, as did Kirk JA, "that the statutory scheme imposes significant restrictions on liberty").[9] For this reason the NSWCA's reliance upon the "purpose" of the Act as being consistent with s 33 of the *Interpretation Act* 1987 (NSW), and therefore supportive of its construction of s 130 is submitted to be misplaced, noting Gleeson CJ's observation in *Carr v The State of Western Australia* 232 CLR 138; [2007] HCA 47 at [5] that this "general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act."[10]

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[7] Kirk JA adopted (at [35]) as the purpose of Parts 5 and 6 of the Act "protecting the safety of the public" without reference to the other purposes disclosed in the long title, s 69 and the text of the relevant sections.

[8] Nor was reference made to s 70 of the Act, which imports from s 68 of the *Mental Health Act* 2007 (NSW) the principles for care and treatment of people with a mental illness or mental disorder.

[9] *Haines (No. 1)* at [35] (**CAB 56**). The powers the Tribunal can exercise in relation to forensic patients are set out in Part 5 of the Act.

[10] See also *Rich v Australian Securities & Investments Commission* (2004) 220 CLR 129 at [35] (per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) in relation to the manner in which "an a priori classification of proceedings as either protective or penal invites error. It invites error primarily because the classification adopted assumes mutual exclusivity of the categories chosen when they are not, and because the classification is itself unstable. ... Just as a law may bear several characters, a proceeding may seek relief which, if granted, would protect the public but would also penalise the person against

38. Fourth, contrary to the reasoning of Kirk JA (at [36]-[40], **CAB 56-57**) and the NSWCA (at [62] (**CAB 92**), the availability of remitter by the Court of Appeal does not support the construction contended for by the respondent. There is no evidence to suggest that if the respondent acts promptly and files six months before the expiry of the limiting term or existing extension order that there would not in the ordinary course be time to hear the application, along with any appeal and any remittal should it be ordered, noting that the time to do so would be at least six months, and up to nine months should an IEO be made for a period of three months shortly prior to the expiry of the limiting term or existing extension order. To the extent that if an appeal from a refusal to make an extension order is allowed and at that point the time to determine the proceedings by way of remittal is limited, it is submitted that it will generally, as illustrated by these proceedings, be available to the Court of Appeal to redetermine the application itself. Further, on the construction adopted below, an IEO could be made for three months by the Supreme Court, for three months by the Court of Appeal in connection with an appeal, and (noting that while Kirk JA at [39]-[40] did not decide the point) potentially for a further three months on remittal, IEOs could be made for a total of up to nine months. Set against an initial six month time limit for the institution and determination of those proceedings, such restrictions on the liberty of the person subject to the orders are submitted to be inconsistent with the overall scheme of the legislation, which otherwise requires expeditious disposition of the matter.

39. Fifth, it is submitted that it was erroneous for the NSWCA to assert, in holding that the construction contended for by the respondent was consistent with the purpose of the Act (at [62]), that if the construction of s 130 urged on behalf of the appellant was to be accepted "the Court below and this Court would, in all but exceptional cases, have insufficient time to follow the timetable set out in the Act … the appellant has a right to appeal at any time in the last 6 months of the extension order.[11] This right would be significantly compromised if the

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whom it is granted. That a proceeding may bear several characters does not deny that it bears each of those characters."

[11] This represents an incorrect reading of the Act, given that s 124 provides that an application for an extension order may not be made more than six months before the end of a forensic patient's limiting term or the expiry of the existing extension order, as appropriate. It does not relate to the timing of the

respondent's construction were preferred." First, that reasoning again represents an assumption; it lacks an evidentiary foundation. Second, to the extent that an assessment can be made of the time which might be required to "follow the timetable set out in the Act" based only upon the content of its provisions, it is submitted that there would generally be ample scope to do so if the respondent acts promptly, particularly in respect of the filing of the application. To the extent that this might be considered to occasion any practical difficulty to the respondent (which is disputed), it is submitted to fall squarely within the sort of "mere inconvenience" which has been held to be "not a ground for departing from the natural and ordinary sense of the language read in its context."[12] Third, the need for the respondent (and also the Supreme Court and the defendant) to conduct proceedings on an application for an extension order expeditiously is also consistent, again, with the legislature being conscious of the effect of the proceedings on the liberty of the person subject to the orders. Implicit in the NSWCA's reasoning is that the construction contended for by the appellant would be rejected as anomalous given it would restrict the respondent's ability to file an application for an extension order shortly before the expiry of a person's limiting term or existing extension order. However, that reasoning fails to give proper consideration to the effect upon the liberty of a defendant if s 130 was construed so as to empower the making of IEOs beyond the three month limitation provided for in s 131(2). Seen in this light it is the construction adopted by the NSWCA which is submitted to give rise to the anomalous result, particularly given the need to seek a further IEO will likely have arisen largely as a consequence of the respondent having acted without due despatch. In such circumstances, any peril to the ability to have the application (or any subsequent appeal) heard in time would not represent an anomalous result. Either way, where opinions may differ on whether a particular consequence is anomalous, it is submitted that care must be taken to ensure that arguments based on anomaly or incongruity do not obscure

right of appeal, which, pursuant to s 135(3), may be made as of right within 28 days after the date on which the decision of the Supreme Court was made or by leave within the further time as the Court of Appeal may allow.

[12] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26, per Mason and Wilson JJ at 320.

the intention of the legislature.[13] As this Court has stated on numerous occasions, the "language which has actually been employed in the text of legislation is the surest guide to legislative intention."[14]

40. Finally, to the extent that it could be said that on the construction contended for by the appellant the legislation fails to make provision for the extreme case where, for example, the Supreme Court, on the day that an IEO made for a period of three months is to expire, delivers judgment refusing an application for an extension order, it is submitted that as legislation which affects personal liberty, the Act should be construed strictly in accordance with its terms. Such an approach was applied and adopted by this Court in *Marshall v Watson* (1972) 124 CLR 640; [1972] HCA 27, where it was held in respect of s 42 of the *Mental Health Act* 1959 (Vic) that there was no express authority to take to a psychiatric hospital a person whose admission had been duly recommended, that no power of arrest and detention could be implied and that to the extent this represented a "gap" in the legislative scheme, that was a matter to be addressed by the legislature, rather than by the courts.

41. Ground 1 should be upheld.

<u>Ground 2</u>

42. Ground 2 is that in allowing the respondent's appeal from the dismissal of its summons seeking an extension order, the NSWCA erred in its construction and application of s 122(1) of the Act.

Section 122

43. Section 122 is contained in Part 6 of the Act. Subsection (1) is as follows:

> *122 Forensic patients in respect of whom extension orders may be made*
>
> *(1) A forensic patient can be made the subject of an extension order as provided for by this Part if and only if the Supreme Court is satisfied to a high degree of probability that—*

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[13] *Esso Australia Resources Limited v Commissioner of Taxation (Cth)* [1998] FCA 1655; (1998) 83 FCR 511.

[14] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [47].

(a) the forensic patient poses an unacceptable risk of causing serious harm to others if the patient ceases to be a forensic patient, and

(b) the risk cannot be adequately managed by other less restrictive means.

44. It thus provides for a two limb test, in respect of each limb of which the Supreme Court must be satisfied "to a high degree of probability" before an extension order may be made:

    a) First, s 122(1)(a) requires satisfaction to that standard that the forensic patient poses an "unacceptable" risk of causing "serious" harm if the patient ceases to be a forensic patient.[15]

    b) Second, s 122(1)(b) requires satisfaction to that standard that the risk "cannot" be "adequately" managed by "other less restrictive means".

Reasoning in the NSWCA

45. It is submitted that the NSWCA's reasoning in relation to the application and construction of s 122(1) of the Act involved two errors, and that if either is established, ground 2 would be upheld.

    a) First, the respondent needed to satisfy Coleman J of the matters in both s 122(1)(a) and (b) before an extension order could be made. His Honour held that the respondent had failed on both limbs. His conclusion in relation to s 122(1)(a) was not the subject of a ground of appeal other than to the extent that it was affected by the error asserted in ground 1, which the NSWCA held was not made out. By ground 2 alone there was no challenge to the primary judge's finding in respect of the first limb, which was dispositive of the application, that the respondent had not discharged the onus of establishing that the appellant posed an "unacceptable risk" of serious harm to others if he

[15] The term "unacceptable risk" has been held to require consideration of the likelihood of the risk eventuating and the gravity of the risk that may eventuate: see, e.g., *State of New South Wales v Simcock (Final)* [2016] NSWSC 1805 at [71] and *Attorney General of New South Wales v Randall (Final)* [2023] NSWSC 708 at [48]. The term "serious harm" has come to be understood as meaning, as regards physical harm, something more than would satisfy the minimum threshold for "actual bodily harm" under the criminal law, and as regards psychological harm, something more than emotions such as fear or panic: *Attorney-General (NSW) v Kereopa (No 2)* [2017] NSWSC 928 at [16], per R A Hulme J.

ceased to be a forensic patient. The NSWCA thus erred by upholding the appeal below based on ground 2 alone.

b) Second, the NSWCA erred in its application and construction of the second limb of the test by conflating the concepts of the availability and the adequacy of "other less restrictive means" of managing risk, leading to the incorrect conclusion that Coleman J "applied the wrong test". To the extent that in so doing, the NSWCA interpreted s 122(1)(b) so as to exclude consideration of less restrictive means not already in place, it was in error also for this reason.

First error – construction and application of s 122(1)(a)

46. At first instance, Coleman J found against the respondent in respect of the first limb, s 122(1)(a).[16] For the application to succeed, the Supreme Court needed to be satisfied in respect of both limbs, hence his Honour's finding in respect of the first limb was sufficient to determine the application adversely to the respondent. In those circumstances, it was not necessary to address the second limb. Nevertheless, Coleman J proceeded to do so on the basis articulated at [104] ("… [e]ven if I am wrong…"), before holding adversely to the respondent also in respect of s 122(1)(b).[17]

47. Appeals are against orders, not reasons.[18] It follows that for a ground of appeal asserting an error in reasoning to be upheld, it must be material, in that correction of the error would (or could) lead to the making of different orders.

48. The respondent's appeal below was filed on two grounds (**CAB 39**). By ground 1, the respondent contended that Coleman J erred in his treatment of the court-appointed experts' evidence, both in holding (at [37]) that such experts should "ordinarily" be called where they differ, and in placing weight on the respondent not having called them. Ground 1(b)(iv) explicitly drew attention to both limbs of the "ultimate task of the Court" in the s 122 assessment. Thus, had ground 1 been

[16] *Haines (Final)*, [99] (**CAB 29**), [104] (**CAB 30**).
[17] ibid, [112] (**CAB 35**), [116] (**CAB 36**).
[18] *Kramer v Stone* [2023] NSWCA 270 at [259]: "No differently from "judgments, decrees, orders, and sentences" in s 73 of the Commonwealth Constitution from which an appeal lies to the High Court, the "judgment or order" in respect of which section 101(1) of the *Supreme Court Act* 1970 (NSW) confers a right of appeal does not include "reasons for judgment" …" See also *BP v State of New South Wales* [2019] NSWCA 223 at [11]-[12].

upheld, then redetermination of the application by the NSWCA would have become appropriate. In contrast, ground 2 related only to the manner in which Coleman J applied s 122(1)(b), asserting that his Honour "erred in [his] approach to the statutory test".

49. Before the NSWCA, the appellant's written submissions drew attention to the fact that Coleman J's finding in respect of s 122(1)(b) was expressed "in the alternative", in the sense that holding adversely to the respondent in respect either of that limb or in respect of s 122(1)(a) was sufficient to defeat the application.[19] It was against that background – with the NSWCA considering one (yet to be determined and ultimately rejected) ground of appeal which touched both limbs of the test – that senior counsel for the appellant acknowledged that, in the event that the NSWCA was to uphold the appeal, for it to redetermine the application rather than remit it to the Supreme Court was "an avenue that's available."[20] Both in terms, and noting the implicit qualification of having already submitted in writing that the primary judge's finding in respect of s 122(1)(a) was dispositive, such acknowledgement could not be taken to represent any form of concession in relation to the first limb of the test.

50. In its reasons the NSWCA dealt with s 122(1)(a) on the basis that it was "common ground that the Court would be satisfied of s 122(1)(a) to the requisite standard" (*Haines (No. 2)* at [83], **CAB 98**). This was in error. Coleman J found adversely to the respondent on the point, the evidence of the experts was at least equivocal,[21] and, as noted above at [49], no concession was made in terms of s 122(1)(a).

51. In circumstances where for the application for an extension order to be granted the respondent needed to satisfy the Supreme Court in respect of both s 122(1)(a) and (b), where Coleman J had found adversely to the respondent in respect of s 122(1)(a) and where ground 1 had been dismissed, the error asserted by ground 2 could not be material, given that it did not challenge his Honour's holding in respect of the first limb of the test. It follows that the NSWCA erred by allowing the appeal and setting aside the orders of Coleman J on that basis. The complaint

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[19] Written submissions of the appellant (as respondent) before NSWCA, at [96] (**ABFM 10**)
[20] Transcript of proceedings before NSWCA, T45.12 (**ABFM 15**)
[21] *Haines (Final)* at [100]-[103] (**CAB 30-31**).

asserted by ground 2 represented, at its highest, a matter capable of establishing error in the reasons given by Coleman J, but not in the orders his Honour made consequent upon those reasons, given that his holding in respect of s 122(1)(a) was independently determinative of the summons.

Second error – construction and application of s 122(1)(b)

52. Section 122(1)(b) of the Act requires, for an extension order to be made, the Supreme Court to be satisfied "… to a high degree of probability that … the [unacceptable risk of causing serious harm to others] cannot be adequately managed by other less restrictive means." It thus requires consideration of two separate but related matters in respect of any potential less restrictive means of adequately managing any such risk:

    a) the *availability* (present or prospective) of that means of managing the risk; and

    b) the *adequacy* of that means of managing the risk.

53. Thus, the respondent may satisfy the second limb of the test in respect of any given "less restrictive means" by establishing to a high degree of probability that it is unavailable to manage the risk, or inadequate to do so, or both.

54. In relation to the respondent's application for an extension order in these proceedings, a CTO was the relevant "less restrictive means" which was the subject of argument before, and consideration by, Coleman J.[22] In issue between the parties was not only the adequacy of a CTO to manage the risk, but also the question of availability, as Coleman J noted in the opening sentence of [113] (**CAB 35**):

> *"There was debate in the hearing as to whether it was the mere availability of a less restrictive means of managing the defendant's risk that was to be considered or whether I had to be satisfied that a less restrictive means of managing that risk would in fact be in place."*

55. It was in this context that his Honour continued on in the balance of that paragraph to use the word "could" (**CAB 35**):

[22] *Haines (Final)*, [107] (**CAB 34**).

"That is, here, is it enough that a CTO if made could be a less restrictive means of managing the defendant's risk, or did I need to be satisfied that a CTO would be in place and therefore manage the defendant's risk in a less restrictive way? I consider the former is the case. Whilst Yehia J did not specifically consider this question, I note that in [46] of her reasons in Haines (final) (2022), in making the assessment of whether there were less restrictive means of managing the defendant's risk, her Honour considered the alternative orders that ***could*** *be made."* (emphasis in original as italics)

56. In the following paragraph, [114] (**CAB 36**), his Honour stated the test in s 122(1)(b) ("the requirement under s 122(1)(b) is that the plaintiff must prove to a high degree of probability that the risk posed by the defendant *cannot* be managed by other less restrictive means") before noting that the "question is not whether the risk posed *will* not be managed by less restrictive means".[23] The distinction drawn by his Honour, as the use of italics emphasises, was thus not between "cannot be adequately managed" and "could not be adequately managed", in the context of the adequacy of a CTO. It was, rather, in the context of the *availability* of a CTO, between whether the respondent was required to satisfy the Supreme Court in relation to "alternative orders that *could* be made",[24] and whether he was required only to satisfy the Supreme Court in relation to "less restrictive means of managing that risk [which] *would* in fact be in place"[25]. His Honour, correctly, it is submitted, found that it was the former.

57. Thus understood in its proper context, and contrary to the conclusion of the NSWCA at [88] (**CAB 99**), his Honour's use of the word "could" was not "inconsistent with the word 'adequately'", given that it was directed to the question of availability. In that respect the use of the modal auxiliary verb is submitted to be consistent with the chapeau to s 122(1) given that the onus which it imposes on the respondent in respect of the application for an extension order is that the Supreme Court be "satisfied to a high degree of probability" of the matters

[23] Italics original.
[24] *Haines (Final)* at [113] (emphasis original) (**CAB 35**).
[25] ibid (emphasis added).

set out in paragraphs (a) and (b) to the subsection.[26] It is submitted that Coleman J construed and applied the provision correctly, giving consideration to each of these matters.

58. In relation to the question of availability, having accepted the submission made on behalf of the appellant that a CTO did not need to be in place in order to be considered as a particular less restrictive means of managing the risk posed should he cease to be a forensic patient, his Honour then found that the respondent had not satisfied the Court to a high degree of probability that a CTO (not being extant) was not available to be made or that "if one was applied for that it would not be made."[27] That is, his Honour applied the onus of proof to the question of availability, in the context of the specific controversy between the parties.

59. In relation to the question of adequacy, his Honour gave consideration to this matter by reference to the evidence of the experts, including in relation to the practicalities of managing the risk posed by the appellant by means of a CTO, and, again, found that the respondent had not satisfied the Court to a high degree of probability that the risk posed by the the appellant could not be managed by that less restrictive means.[28]

60. The NSWCA found that Coleman J had "applied the wrong test", although the test applied by his Honour at [114] was the same test endorsed by the NSWCA ([88], **CAB 99**). The NSWCA then paraphrased his Honour as having held "that it was sufficient to defeat an application for extension if there were an alternative means available which "could" manage the risk posed by the respondent" ([88], **CAB 99**). As explained above at [55]-[58], this was not the finding made by his Honour. By upholding ground 2 on that basis, the NSWCA fell into error by misstating Coleman J's reasons, conflating ([85], [88], **CAB 99**) the concepts of availability and adequacy, and so misconstruing s 122(1)(b).

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[26] Given that, as footnoted above at fn[15], whether there is an "unacceptable risk" requires the Court to consider the likelihood of any "serious harm" eventuating, Coleman J's use of "could" is consistent not only with the standard of proof, but with the test to determine whether the risk is "unacceptable".
[27] *Haines (Final)* [113]-[115] (**CAB 35-36**).
[28] ibid, [108]-[112] and [116] (**CAB 34-35**).

61. To the extent that in so doing, the NSWCA interpreted the provision so as to exclude consideration of less restrictive means that were not already in place, it was also in error, for the reasons which follow.

62. First, there is no warrant for so limiting s 122(1)(b). The use of "cannot" rather than, for example, "will not", clearly contemplates the prospective. Coleman J demonstrated in his judgment that considerations of "efficacy and reliability" can apply to and be taken into account in respect of both future and existing measures.[29]

63. Second, limiting consideration of less restrictive means to those which are extant would have the practical effect of reversing the onus. Section 122(1)(b) would always be satisfied by the respondent unless the defendant could satisfy the Supreme Court of the existence of a particular less restrictive means – the precise reverse of what the statute requires which is, as Coleman J noted at [114] (**CAB 36**), that "[t]he onus on the plaintiff is to prove to a high degree of probability, the negative."[30]

64. Third, the passage from the Second Reading Speech extracted by the NSWCA in *Haines (No. 2)* at [86] (**CAB 99**) indicates that it was not the legislative intention to restrict consideration to "less restrictive means" which are current. In explaining the manner of operation of the equivalent of s 122(1)(b) in earlier legislation, the then Attorney General stated that the provision would require the Supreme Court, prior to making an extension order, to consider the availability of less restrictive options. The Attorney then went on to provide examples of such options, which included means of managing risk self-evidently not in place at the time of determination of the application: "… transfer to the civil mental health scheme, the making of a guardianship order or entry into the Community Justice Program …".

65. Finally, such an interpretation would lead to potentially absurd results. In most instances the "other less restrictive means" of adequately managing the risk will not be extant, because the defendant is at that time a forensic patient.[31] In order for

[29] *Haines (Final)*, [108]-[112] (**CAB 34-35**), [115] (**CAB 36**).
[30] See also *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396; [2006] QCA 324 at [37].
[31] See s 53(3) of the *Mental Health Act* 2007 (NSW).

any such means to be able to be considered by the Supreme Court on the determination of the application, a CTO would need to be applied for, and made by the Tribunal, prior to the hearing date. The inherent logistical difficulties are submitted to be readily apparent, noting not only that a forensic patient commonly lacks legal capacity but that a person cannot apply to render themselves subject to a CTO.[32][33]

66. Ground 2 should be upheld.

PART VII: ORDERS SOUGHT

67. The orders sought by the appellant are as follows:

1) Appeal allowed.

2) Set aside the orders made by the Court of Appeal of the Supreme Court of New South Wales on 20 November 2025 and, in lieu thereof, order that:

   a) the appeal be dismissed; and

   b) the appellant pay the respondent's costs of the appeal.

3) The respondent pay the appellant's costs of the appeal to this Court.

PART VIII: TIME ESTIMATE

68. The appellant estimates that up to two hours will be required for presentation of oral argument.

Dated: 16 July 2026

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[32] *Mental Health Act* 2007 (NSW) s 51(2); *Mental Health Regulation* 2025 (NSW), cl 11.

[33] Whilst in this case a CTO was made pending the appeal, that was against the background of Coleman J having already dismissed the application to extend forensic patient status.

ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (NSW)	Current	ss 3, 68(3), 69 83(3), 101, s 72(b) Part 6 (ss 121-144)	In force at all relevant times	All relevant times
2	*Mental Health Act* 2007 (NSW)	Current	ss 14, 51, 53, 56, 68	In force at all relevant times	All relevant times
3	*Mental Health Regulation* 2025 (NSW)	Current	cl 11	In force at all relevant times	All relevant times
4	*Interpretation Act* 1987 (NSW)	Current	ss 6, 33, 35(2)	In force at all relevant times	All relevant times
5	*Mental Health (Forensic Provisions) Act* 1990 (NSW)	04/02/2019	Schedule 1	Referred to in *WB*, at [34] and fn 3 of submissions	12/02/2020 (date of judgment)