



HIGH COURT OF AUSTRALIA

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Details of Filing

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Registry: Sydney
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Important Information

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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 REPLY

PART I: FORM OF SUBMISSIONS

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

PART II: REPLY TO THE ARGUMENT OF THE RESPONDENT

The disposition of the proceedings

2. The appellant notes the concession made by the respondent in its written submissions (**RWS**) dated 6 August 2026 that Ground 2 is made out, insofar as it concerns s 122(1)(a) of the *Mental Health Cognitive Impairment Forensic Provisions Act 2020* (NSW) (**the Act**) and that on this basis, the appeal should be allowed and orders (2) to (4) of the NSW Court of Appeal (**NSWCA**) set aside. The appellant submits that the concession by the respondent is properly made and would be accepted by the Court.¹

¹ Further to RWS [19], the representatives of the respective parties have, as at the date of filing of this reply, discussed the effect of the respondent's concession and are in the process of drafting joint correspondence to the Registry to raise the issue for the Court's consideration prior to the hearing of the appeal.

Whether special leave should be revoked on acceptance of the respondent's concession

3. The appellant concurs with the submission at RWS [8]-[9] and [10]-[12] that if the concession is accepted, the determination of Ground 1 and so much of Ground 2 as is unaffected by the concession² (**residual issues**) will “have no practical utility for the [appellant], and cannot affect the disposition of the appeal.”
4. The appellant further accepts that in the circumstances it would be “open”, as the respondent submits,³ for the Court to decline to determine the residual issues or to revoke the grant of special leave, on the basis that there is no dispute between the parties regarding whether the appeal should be allowed and the orders which should be made in consequence, which would have the effect that the appellant would no longer be subject to the extension order made by the NSWCA.
5. The appellant submits however that it would be appropriate for the Court, even if the concession is to be accepted, to continue to determine the residual issues, on the basis that because they are unrelated to the subject of the concession, this case remains an appropriate vehicle for considering the proper construction and application of s 130 of the Act (Ground 1) and s 122(1)(b) of the Act (Ground 2), which are submitted to involve questions of law of public importance.

Ground 1

6. By Ground 1, the appellant asserts that the NSWCA erred in its construction and application of s 130 of the Act. The issue is, in essence, whether the power to make an interim extension order (**IEO**) under that provision exists where, as in this case, an IEO has been made and it appears to the Supreme Court that the existing IEO will expire before proceedings on an application for an extension order (including any appeal) are determined.
7. The power conferred by s 130 may be exercised where it appears to the Supreme Court (including the NSWCA) that the “limiting term or existing extension order ... will expire before the proceedings are determined.” The section does not confer the power in the circumstances which existed in this case, namely, where it appeared to the NSWCA that the existing *interim* extension order would expire before the proceedings

² That is, so much of Ground 2 which relates to the asserted error in construction of s 122(1)(b) of the Act.

³ RWS [10], [12].

were determined. Both “extension order” and “interim extension order” are defined in s 3(1) by reference to the sections by which the power to make them is conferred.⁴ The RWS do not squarely address this difficulty with the construction for which the respondent contends. Nor do they suggest a cogent basis for interpreting “extension order” in s 130 otherwise than in accordance with its statutory definition, and as inclusive of “interim extension order”, or, put another way, for holding that the definition does not apply to s 130 because, reading the Act as a whole, a “contrary intention ... appear[s] from context or legislative purpose”.⁵

8. As regards context, noting the analysis of Basten JA in *Attorney General of New South Wales v WB* [2020] NSWCA 7 at [19]-[21], the Act draws a clear and consistent distinction between the two forms of order. As submitted in the preceding paragraph, the RWS posits no reason why that distinction would not apply when construing s 130.⁶
9. As regards purpose, the operation of the statutory definitions, in the context of ss 130 and 131, is submitted to be consistent with a legislative intention to provide for three months as the maximum length of time that a person’s status as a forensic patient can be extended by the making of an IEO. By the drafting of s 130 to provide that the power applies only where the “limiting term or existing *extension order* ... will expire before the proceedings are determined”, that maximum period of extension will apply regardless of whether the IEO is made at first instance or on appeal. For example, in this case, the proceedings at first instance were yet to be determined prior to the expiry of the First Extension Order⁷ on 24 July 2025, hence Harrison CJ at CL made the Application IEO on 22 July 2025 for a period of three months.⁸ However, if the respondent had commenced proceedings for a further extension of the appellant’s status as a forensic patient at an earlier time than 11 April 2025 (say, on 24 January 2025, when he became entitled to do so pursuant to s 124(2)), the proceedings at first instance

⁴ ““extension order”” means an order for the extension of a person's status as a forensic patient under section 121.”

““interim extension order”” means an order for the interim extension of a person's status as a forensic patient under section 130.”

⁵ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [6].

⁶ Appellant’s written submissions at [34].

⁷ *ibid* at [12].

⁸ *ibid* at [15].

might have been determined by, say, early July 2025,⁹ such that, if an appeal was then filed by the respondent, and an application made for an IEO, the NSWCA would then have made such an order for a three month period, commencing on or immediately prior to the expiry of the First Extension Order. The overall effect in each instance is the same: the appellant's status as a forensic patient is extended for three months, by the making of the IEO either by the Supreme Court at first instance or by the NSWCA on appeal, but may not be extended for a further period by means of an IEO.

10. As regards the submission at RWS [49] that in relation to the construction contended for on behalf of the appellant it is "relevant to consider that a logistical matter outside the control of the parties may lead to the Court being deprived of jurisdiction", such an event may occur even if the sections are read so as to empower the NSWCA to make a further three month IEO on the expiry of an existing IEO. Statutorily imposed time limits will necessarily (and commonly) be susceptible to such scenarios where, as here, the operative provision does not permit for dispensing with that time limit.
11. Finally, in reply to RWS [52], the principle of statutory construction in *Marshall v Watson*¹⁰ is not confined to circumstances where the question is whether a power which would have the effect of restricting personal liberty should be implied in order that legislation may operate as intended. The principle, namely that where legislation has such an effect, it should be construed strictly in accordance with its terms, is submitted to be of direct application in this case, noting, again, that the operation of s 130 is restricted to circumstances where it appears that the "limiting term or existing *extension order* ... will expire before the proceedings are determined".

Ground 2

12. The residual issue in relation to ground 2 relates to the NSWCA's construction and application of s 122(1)(b) of the Act. The appellant submits that the NSWCA was in error in holding that the primary judge had "applied the wrong test" (**CAB 100 at [89]**). The RWS submit that the NSWCA was correct to so hold, on the basis that the primary judge had engaged only with the availability of a CTO, and not with whether it "would be adequate to manage the appellant's risk." However, as set out in the appellant's

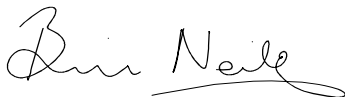
⁹ Applying the same timeframe as the proceedings took to be determined at first instance in this case, noting that the summons seeking a further extension order was filed on 11 April 2025 and that Coleman J delivered judgment dismissing the summons on 26 September 2025.

¹⁰ (1972) 124 CLR 640; [1972] HCA 27

written submissions (AWS) at [59], his Honour did consider the issue of adequacy, by reference to the experts, and in some detail.

13. Further, it was following this analysis that the primary judge then went on at (CAB 35 at [113]) to note that there had been “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.” Thus there was, as his Honour noted, controversy between the parties regarding whether the Court needed to be “satisfied that a [CTO] would in fact be in place” before it could be considered or whether (as was held) “it is the availability of means other than an order extending the defendant’s status as a forensic patient which is to be considered” and that it falls to the respondent (the plaintiff at first instance) to prove that “if one was applied for that it would not be made” (CAB 36 at [115]). While the NSWCA did not in terms hold that a “less restrictive means” was required to be extant before it was relevant to s 122(1)(b), to the extent that such a holding was implicit in the finding that the primary judge had “applied the wrong test” it is submitted that it was in error, noting (as did the primary judge) the burden of proof which falls to the respondent to discharge.
14. Finally, even if it is held that the primary judge used the word “could” to refer to the adequacy of a CTO (and not its availability), it is submitted that to do so would not give rise to an erroneous construction or application of the test in s 122(1)(b), noting both that it is predictive in nature and that the onus falls to the respondent (the plaintiff at first instance) “to prove to a high degree of probability, the negative.”¹¹

Dated: 20 August 2026



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¹¹ *Haines (Final)* [2025] NSWSC 1117 at [114] (CAB 36).