HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 06 Aug 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S57/2026
File Title:	Dale Haines by his litigation guardian Barbara Ramjan v. Attor
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	06 Aug 2026

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

RESPONDENT'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. For the reasons set out at [6]-[8] below, the respondent accepts that the Court of Appeal of the Supreme Court of New South Wales (**Court of Appeal**) erred in upholding the appeal below based on Ground 2 alone in circumstances where both limbs of the test in s 122(1) of the *Mental Health Cognitive Impairment Forensic Provisions Act* 2020 (NSW) (**the Act**) needed to be satisfied before an extension order could be made, and both were in dispute. The respondent acknowledges that the appellant should succeed in respect of Ground 2 on this basis and, further, that the appeal should be allowed and the orders of the Court of Appeal set aside.

3. As such, at the time of finalising these submissions, there is no longer controversy between the parties concerning Ground 2 of this appeal insofar as it concerns the Court of Appeal's approach to s 122(1)(a). This matter is addressed at [10]-[19] below. The issues that remain in controversy are as follows:

a. Did the Court of Appeal err in its construction and application of s 130 of the Act?

b. Did the Court of Appeal err in its construction and application of s 122(1)(b) of the Act?

PART III: SECTION 78B OF THE *JUDICIARY ACT* 1903 (CTH)

4. The respondent does not consider that any notice is required by s 78B of the *Judiciary Act* 1903 (Cth).

PART IV: RELEVANT FACTS

5. The respondent does not contest any of the factual matters set out at Part V of the appellant's written submissions (**AWS**) dated 16 July 2026.

PART V: RESPONDENT'S ARGUMENT

The disposition of the proceedings

6. These submissions address Ground 2 of the appeal first. For the reasons set out at [10]-[19] below, the respondent accepts that Ground 2 is made out, insofar as it concerns s 122(1)(a) of the Act. On this basis, the appeal should be allowed and orders (2) to (4) of the Court of Appeal set aside.

7. The appeal must succeed, whether or not Ground 1 is dealt with. For the reasons set out at [8]-[12], the respondent submits that it would be open for this Court to conclude that it should not consider the remaining issues in the appeal, on the basis that it is not necessary to determine those issues, or that it would be appropriate to revoke special leave in relation to Ground 1 and, to the extent this course is available, in relation to the remaining aspect of Ground 2.

<u>Ground 1</u>

8. The appellant is no longer the subject of the interim extension order made by Kirk JA. There is now agreement between the parties that the appellant should not be the subject of an extension order under the Act. It is not necessary for this Court to determine Ground 1, as the outcome of Ground 1 will not affect the disposition of the appeal.

9. The respondent raises two matters that may be relevant to the Court's decision concerning the appropriate approach to Ground 1. *First,* success in relation to Ground 1 will have no practical utility for the appellant. The IEO has expired, and as soon as the extension order is revoked, or the orders of the Court of Appeal are set aside, the appellant will no longer

be a forensic patient within the meaning of the Act. *Second*, the issue of interpretation raised in Ground 1 is not one of general application.[1] Section 130 does not have an analogue in the statutory schemes in other jurisdictions that govern unfitness to be tried and the consequences flowing from such a determination, including the possibility of the making of a supervision order.[2] Therefore, it would be open to the Court to revoke the grant of special leave on this ground or decline to determine this ground.

<u>Ground 2 – the Court of Appeal's approach to s 122(1)(b)</u>

10. The appellant does not dispute the correctness of the Court of Appeal's holding that "*in assessing the adequacy of a proposed measure to manage an unacceptable risk, the efficacy and reliability of the measure cannot be ignored*"[3] (referring to these considerations as the 'availability and adequacy' of that means of managing risk: Appellant's Written Submissions (**AWS**) at [52]). The appellant contends, instead, that the Court of Appeal misstated the primary judge's reasons, and thus fell into error (AWS [61]).

11. Although the appellant speculates that the Court of Appeal interpreted s 122(1)(b) so as to "*exclude consideration of less restrictive means that were not already in place*" (AWS [61]), in the respondent's submission it is clear that the Court of Appeal did not take this approach. There was no community treatment order (**CTO**) in place at the time of the hearing before the primary judge such that, if the Court of Appeal had considered the test in s 122(1)(b) to be confined in this manner, it would have found that the primary judge erred in considering the option of a CTO at all.

12. There is no dispute between the parties as to the applicable test under s 122(1)(b), having regard to AWS [52]. The answer to this question will therefore have no practical utility for the applicant, and cannot affect the disposition of the appeal. Ground 2 of the appeal will succeed in any event. In those circumstances, the respondent submits it is not necessary for the Court to determine this issue. If it were possible to revoke special leave in relation to

---

1 *Crump v R* (1995) 129 ALR 719 at 719 (Brennan CJ, Dawson and Gummow JJ); *Morris v R* (1987) 163 CLR 454 at 475 (Dawson J).

2 Part 5 of the *Crimes (Mental Impairment and Unfitness to be Tried Act*) 1999 (Vic) does not provide for the making of an interim supervision order of an analogous kind. Section 108 of the *Criminal Law (Mental Impairment) Act* 2023 (WA) contains a mechanism for the making of an interim community supervision order, but the test is materially different. Part 4 of the *Mental Health Act* 2016 (Qld), Part 8A of the *Criminal Law Consolidation Act* 1935 (SA), Part IB, Division 6 of the *Crimes Act* 1914 (Cth), Part 13 of the *Crimes Act* 1900 (ACT), and Part IIIA of the *Criminal Code Act* 1983 (NT) do not contain a mechanism for the making of an interim supervision order.

3 *Attorney General for New South Wales v Haines (by his tutor Ramjan) (No 2)* [2025] NSWCA 248 (***Haines (COA)*** at [88]. (**CAB 99-100**)

part of an appeal ground, it would be open to the Court to revoke special leave in relation to this issue.

Ground 2 – Court of Appeal's approach to s 122(1)(a)

13. The respondent accepts that the Court of Appeal erred:

    a. *first,* in its approach to whether s 122(1)(a) was in dispute; and

    b. *second*, in upholding the appeal in circumstances where the successful ground of appeal did not disturb the primary judge's conclusion as to s 122(1)(a).

14. Section 122 requires satisfaction of two matters to a high degree of probability:

    a. *first*, that the forensic patient poses an unacceptable risk of causing serious harm if the patient ceases to be a forensic patient (s 122(1)(a)); and

    b. *second*, that the risk cannot be adequately managed by other less restrictive means (s 122(1)(b)).

15. The Court of Appeal approached s 122(1)(a) on the basis that the appellant had conceded that the Court of Appeal could be satisfied that the "unacceptable risk" test was satisfied. At [83], the Court of Appeal observed that, "*The test in s 122(1)(b) was the principal issue in the case, it being common ground that the Court would be satisfied of s 122(1)(a) to the requisite standard*."

16. The respondent concedes that satisfaction of the "unacceptable risk" test was not common ground between the parties. It had been a matter of substantial dispute before the primary judge[4] and an issue on which the primary judge had found in favour of the appellant.[5]

17. In the Court below, there was no written concession by the appellant that s 122(1)(a) was satisfied, and the appellant's written submissions referred to the fact that the primary judge's consideration of s 122(1)(b) was in the alternative, in the sense of providing a further reason why his Honour refused the respondent's application (the appellant having succeeded in relation to s 122(1)(a) before the primary judge).[6] During the course of the hearing, Senior Counsel for the appellant was asked by McHugh JA, "*And if [the appellant] is not on clozapine, he's an unacceptable risk of harm clearly,*" to which Senior Counsel

4 *Attorney-General for New South Wales v Dale Haines (BHT Barbara Ramjan) (Final)* [2025] NSWSC 1117 (***Haines (Final)***) at [76], [88]-[89], [91], [103]-[104]. (**CAB, 24, 27, 28, 31**)

5 *Haines (Final)* at [99], [104], [117]. (**CAB 29, 27, 32**)

6 Appellant's Book of Further Materials at p 10.

replied, "*He's potentially unacceptable, yes.*"[7] Justice Adamson later said, "*you've conceded that he has to take clozapine in a compliant manner otherwise he poses an unacceptable risk of harm*", to which Senior Counsel replied, "*There doesn't appear to be any evidence to a country*[8] *to that proposition.*"[9]

18. The respondent accepts that these observations were made in the context of an appeal where the primary judge's approach to s 122(1)(a) had not been put in issue otherwise than by the ground of appeal (Ground 1) that was ultimately unsuccessful.[10] Ground 2, which was successful, did not challenge the primary judge's conclusion in relation to s 122(1)(a). The Court of Appeal did not independently consider whether the respondent had discharged its onus in relation to s 122(1)(a), as distinct from treating satisfaction of the unacceptable risk test as "common ground". Section 122(1)(a) is referred to at [83] and [116] of the Court's judgment, but the consideration and analysis of risk which follows is focussed upon s 122(1)(b), presupposing that s 122(1)(a) has been satisfied.

19. As noted above, the respondent accepts that this error is dispositive of the appeal, and that the appeal should be allowed and the orders of the Court of Appeal set aside. As at the time of filing these submissions, the respondent is consulting the appellant's representatives as to the steps that should be taken in respect of Order 4 of the Court of Appeal's orders, so that the appellant does not remain the subject of the extension order until the hearing.

Submissions in relation to Ground 1

20. These submissions now address the issues that remain in dispute between the parties.

<u>Section 130 – legislative framework and approach in the Court below</u>

21. Section 130 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

---

7 Court of Appeal Transcript at 7.29-45. (**RBFM 7**)

8 While the transcript says "to a country", clearly Senior Counsel would have said "to the contrary".

9 Court of Appeal Transcript at 8.32-37 (**RBFM 8)**

10 *Haines (COA)* at [66], [68], [77], [79]. (**CAB 93-94, 97**). This is consistent with the respondent's submissions before the Court of Appeal at [41]. (**RBFM 6**)

(b) that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order.

22. Section 131 provides for the point at which an IEO will commence and expire:

131 Term of interim extension orders

(1) An interim extension order commences on the day fixed in the order for its commencement (or, if no day is fixed, as soon as it is made) and expires at the end of the period (not exceeding 3 months from the day on which it commences) that is specified in the order.

(2) An interim extension order made for a period of less than 3 months may be renewed from time to time, but not so as to provide for the extension of the person's status as a forensic patient under an order of that kind for periods totalling more than 3 months.

23. An extension order may only be made pursuant to s 122 if a person is, at the time the orders are made, a forensic patient.[11] That term is defined in s 3 of the Act by reference to s 72 as including "*a person for whom a limiting term has been nominated after a special hearing (including a person who is subsequently subject to an extension order or an interim extension order) and who is detained in a mental health facility, correctional centre, detention centre or other place or who is released from custody subject to conditions under an order made by the Tribunal*".

24. The purpose of an interim extension order is to preserve the status quo where a person's status as a forensic patient will otherwise expire before proceedings are determined. In proceedings at first instance, an IEO, if necessary, allows a person to be examined under s 126(5) and expert reports prepared for the Court so that a final hearing can be conducted on the required basis, while at the same time ensuring that the community is protected from the risk of serious harm.[12] In the context of an appeal, an IEO protects the subject matter of the appeal. The making or continuation of an IEO may be critical where the Supreme Court has made orders dismissing an application for an extension order, as an extension order may only be made where a person remains a "forensic patient".[13]

25. If, in these circumstances, a person's status as a forensic patient lapses prior to or during the appeal, the Court of Appeal will not be able to make an extension order pursuant to s 122, and any remitter would be futile. The appeal right provided in s 135 will have no

---

11 As found in *Attorney General of New South Wales v **WB*** [2020] NSWCA 7 at [32], [38] (Basten JA, Macfarlan JA agreeing).

12 For example, *Attorney General for New South Wales v Bragg (Preliminary)* [2021] NSWSC 439 (Wright J); *Attorney General for NSW v Vakapora (Preliminary)* [2025] NSWSC 187 at [47]-[48] (Wright J); *Attorney General for New South Wales v Cullu (Preliminary)* [2025] NSWSC 197 at [5], [8], [56] (Davies J).

13 *WB* at [32], [38] (Basten JA, Macfarlan JA agreeing).

utility. An IEO also serves to ensure that the community is protected from the risk of serious harm until determination of the appeal.

The appeal is a separate proceeding for the purpose of s 130 of the Act

26. Justice Kirk (from whose decision to make an IEO the appellant sought review in the respondent's appeal) described the issue in dispute between the parties as "*whether the three month time limit in s 131(2) applies in such a way as to start running from when an IEO made in the Supreme Court against the respondent first commenced, despite the fact that an appeal has been instituted.*" The respondent argued before Kirk JA that an appeal was a separate proceeding,[14] with the effect that it was open to the Court of Appeal to consider afresh whether the preconditions in s 130(a) and (b) were satisfied, and to make a new interim extension order to which s 131 would apply.

27. Justice Kirk accepted that argument,[15] and considered that the meaning of "proceedings" in s 130 was of significance, given the connection between s 130 and s 131. His Honour described the "key question" as "*whether an appeal to this Court is the same "proceedings" as the application for the extension order in the Supreme Court.*"[16] His Honour went on to observe that "*proceedings" is capable of applying to a "matter", "so as to encompass any appeal", but that the world can also be used to mean "merely some method permitted by law for moving a Court or judicial officer to some authorized act, or some act of the Court or judicial officer*",[17] referring to ***Cheney*** *v Spooner.*[18]

28. In the respondent's submission, Kirk JA's analysis, which was embraced in the judgment of the Court of Appeal,[19] was correct. In *Cheney,* Harvey J made an order giving a liquidator leave to issue summonses to persons including the appellant to attend and give evidence before the Master-in-Equity concerning the affairs of a company. Justice Harvey subsequently made an order under s 16 of the *Service and Execution of Process Act* 1901 (Cth) for the service of the summons on the appellant in Victoria. The appellant argued that his Honour did not have jurisdiction to do so, relevantly because there was no "trial or proceeding" in which the appellant could be required to give evidence or produce books.

---

14 Submissions of the Attorney General before Kirk JA at [9]. (**RBFM 4**)

15 *Attorney General for New South Wales v Haines* [2025] NSWCA 231(***Haines (IEO)***) at [39]. (**CAB 57**)

16 *Haines (IEO)* at [29]. (**CAB 54**)

17 *Haines (IEO)* at [29]. (**CAB 54**)

18 (1929) 41 CLR 532.

19 *Haines (COA)* at [63]. (**CAB 92**)

Section 16 used the language "any civil or criminal trial or proceeding". Isaacs and Gavin Duffy JJ concluded:[20]

> … A "proceeding" used broadly, as it is used in s 16 of the Federal Act, is merely some method permitted by law for moving a court or judicial officer to some authorised act, or some act of the court or judicial officer. In the case of a compulsory winding-up no doubt could exist. The application by petition under s 89 would initiate the necessary "proceeding," which would comprehensively cover also all subsequent steps in the winding-up. In the case of a voluntary winding-up, s 137 makes express provision for an "application" to the court in any matter, as if the winding-up were compulsory. … So there is a distinct judicial proceeding.

29. Similarly, Starke J similarly concluded that a civil proceeding "*includes any application by a suitor to a court in its civil jurisdiction for its intervention or action…*", and concluded that the issue of a summons was such a proceedings.[21] In *Cummings v Claremont Petroleum*[22] Brennan CJ, Gaudron and McHugh JJ observed that "[t]*he institution of an appeal by a defendant against a judgment in favour of a plaintiff is the commencing of a proceeding.*"[23]

30. Justice Kirk regarded himself as departing from *WB* at [19]-[21].[24] In that case, Ierace J made preliminary orders appointing a psychiatrist and a psychologist to examine the respondent and furnish reports to the Supreme Court, but dismissed the application for an IEO.[25] His Honour delivered judgment on 28 November 2019, the day before the limiting term imposed in relation to WB was to expire. The Attorney General appealed, and an IEO was made at an urgent hearing before Basten JA on 29 November 2019.[26] The IEO was subsequently extended until 6 February 2020, the date the appeal was to heard.[27] At the hearing on 6 February 2020, the IEO was extended until 13 February 2020.[28] Judgment was delivered on 12 February 2020. At [8], Basten JA, with whom Macfarlan JA agreed, observed:

> … an interim extension order (or orders) cannot have effect for a period of more than three months in total. It would appear to follow that, if an extension order can only be made with respect to a person currently a forensic patient, such an order must be made, if at all, by 29 February 2020. There would thus be a period of little more than three weeks in which to hear and determine the application for an extension order in the

---

20 *Cheney* at 536-537.
21 *Cheney* at 538-539.
22 (1996) 185 CLR 124.
23 (1996) 185 CLR 124 at 130 (Brennan CJ, Gaudron and McHugh JJ).
24 *Haines (IEO)* at [25]-[26]. (**CAB 52-53**)
25 *Attorney General of New South Wales v WB (Preliminary)* [2019] NSWSC 1664 at [76], [82].
26 *Attorney General of New South Wales v WB* [2019] NSWCA 301 (Basten JA).
27 *Attorney General of New South Wales v BW (No 2)* [2019] NSWCA 309 (Brereton JA).
28 *WB* at [54] (Basten JA).

Common Law Division from the date of hearing the appeal, if the Attorney's construction of the legislation were accepted.

31. The Court of Appeal allowed the appeal and made a further interim extension order which was to expire on 29 February 2020.[29] It is not apparent why the Court made a new IEO, rather than renewing the existing IEO, which was to expire the following day. However, Justice Basten's reference to "*an interim extension order (or orders) cannot have effect for a period of more than three months in total*" occurred in a context where no IEO had been made at first instance, but the Court of Appeal was considering making a second IEO.[30] There was no argument in relation to the issues of interpretation that now arise.

32. The consideration at [19]-[21] of *WB,* referred to by the appellant at AWS [34], concerned whether there was a right of appeal under cl 14 of Sch 1 to the former *Mental Health (Forensic Provisions) Act* 1990 (NSW) (**MHFP Act**) (the predecessor to the right of appeal now found in s 135(1) of the Act) from a refusal to make an interim extension order. However, it is apparent from that analysis that the Court did not consider that the definitions in s 3(1) provided an answer to the question of interpretation. Basten JA considered the context in which cl 14(1) operated, and in particular the fact there were rights of appeal separate to the MHFP Act. His Honour placed particular emphasis on the fact that the decision to make an IEO would be an interlocutory decision, for which leave to appeal would be required. The "*very significant difference in terms of potential consequences [between an extension order and interim order] provides a sound basis for permitting an appeal as of right (and within 28 days) from an extension order, but leaving any right of appeal with respect to an interim extension order subject to the requirement of leave under the general provisions of s 101(2)* [of the Supreme Court Act]."[31]

<u>The significance of s 130(a)</u>

33. The appellant maintains in this Court the new point raised in his application for review of Kirk JA's decision before the Court of Appeal, namely that the condition in s 130(1)(a) that "*the limiting term or existing extension order to which the forensic patient is subject will expire before the proceedings are determined*" cannot be satisfied where a person is subject to an interim extension order on the basis that there are separate definitions in s 3 of the

29 *WB* at [57], [58] (Basten JA, Macfarlan JA concurring).

30 Despite the appellant's reliance on *WB*, if their argument in relation to s 130(a) is accepted, the Court of Appeal had no power to make an IEO in relation to WB because, at the time the Court made orders, WB's status as a "forensic patient" under the Act was dependent upon the IEO made by Basten JA on 29 November 2019.

31 *WB* at [22].

Act of "extension order" and "interim extension order".[32] If this argument about s 130(a) is accepted, then irrespective of whether appeal proceeding are new proceedings, and irrespective of the impact of s 131(2) on the possible duration of any further IEO, the Court of Appeal could never make an IEO where a person's status as a forensic patient under s 72 is conferred by an interim extension order, rather than a limiting term or extension order.

34. The Court of Appeal addressed the appellant's argument, and concluded that:[33]

> While s 3 defines "extension order" as meaning an extension order under s 121 (which is a final extension order and has a maximum term of 5 years) and an "interim extension order" as an extension order under s 130 (which has a maximum term of 3 months), the important consideration, as far as the Act is concerned, is that whenever either a final or interim extension order is still current, the person to whom it relates remains a forensic patient: s 101(f). . . .

<u>The argument before this Court</u>

35. The respondent understands the appellant's argument in relation to the Court of Appeal's approach to s 130 to be as follows. *First*, s 130(a) has the effect that the power under s 130 is not available where a person falls within the meaning of "forensic patient" set out in s 72(b) of the Act by reason of being subject to an interim extension order (AWS [34]). *Second*, s 131(2) imposes an "aggregate limit, not a per proceeding limit"[34] on s 130, such that irrespective of whether an appeal is new proceedings, this limitation applies (AWS [33]).

36. In undertaking the process of statutory interpretation, "[t]h*e duty of courts is to give effect to the meaning of statutory words as intended by Parliament. In common with how all speech acts are understood, the meaning is that which a reasonable person would understand to have been intended by the words used in their context*."[35] The fact the starting point of interpretation is the text of the statute does not mean context and purpose are considered at some later stage of the process of interpretation: considerations "*of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*"[36]

---

[32] *Haines (COA)* at [57](1), [59]. (**CAB 90-91**)
[33] *Haines (COA)* at [60]. (**CAB 91**)
[34] Transcript of the hearing before Kirk JA at 5.45-47. (**RBFM 5**)
[35] *Mondelez Australia Pty Ltd v Automotive Food, Metals, Engineering, Printing and Kindred Industries* (2020) 271 CLR 495 at 529-530 [95] (Edelman J).
[36] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14] (Kiefel CJ, Nettle and Gordon JJ).

37. Section 130 provides that "[t]*he 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* … ." There is no dispute between the parties that the "Supreme Court" includes the Court of Appeal. In their ordinary meaning, these words are apt to allow the Court of Appeal to make an interim extension order, as an appeal comprises "proceedings on an application for an extension order."[37] Once an interim extension order is made, s 131 provides for the commencement and expiration of that order.

38. There does not appear to be any dispute that the Court of Appeal could make an IEO if a forensic patient remained the subject of an extension order at the commencement of the appeal, and was not the subject of an existing IEO. Similarly, there does not appear to be any dispute that the Court of Appeal could utilise s 131(2) to renew an IEO made at first instance. Renewal of an order does not require reconsideration of the preconditions to the making of an order set out in s 130(a) and (b). The dispute between the parties concerns a circumstance where an IEO has been made at first instance and commenced, such that a person's ongoing status as a forensic patient within the meaning of s 72(b) during the appeal is dependent upon the operation of the IEO.

39. The appellant places reliance upon s 130(a) to argue that s 130 should not be construed as permitting the making of an IEO where a person remains a forensic patient due to the operation of an IEO (AWS [34]). Section 130(a) requires that, in order to make an IEO, it must appear to the Court that "*the limiting term or existing extension order to which the forensic patient is subject will expire before the proceedings are determined*". The appellant's reliance upon s 130(a) hinges on acceptance that the phrase "existing extension order", where used in s 130(a), refers only to an "extension order", as defined in s 3, and thus excludes an "interim extension order", which is separately defined. For the reasons set out below, the Court of Appeal was right to reject the appellant's argument in relation to s 130(a).

40. Section 131 identifies the dates for commencement and expiration of *an* interim extension order. Sub-section (2), has the effect that *an* interim extension order made for a period of less than 3 months may be renewed, but "*not so as to provide for the extension of the person's status as a forensic patient under an order of that kind for periods totalling more than 3 months*." The time limit specified in s 131(2) necessarily applies to an interim

[37] See [27]-[29] above.

extension order that was made "in proceedings on an application for an extension order" as identified in s 130(1). It is the interim extension order "made" under s 130, meaning in "proceedings on an application for an extension order", which can be renewed, but not for periods totalling more than 3 months (contra AWS [36]).

41. The words "an order of that kind" in s 131(2) do not support any contrary proposition. In the respondent's submission, the word "renewed" in s 131(2) indicates that the three-month period applies to a single IEO, rather than being a cumulative maximum period of IEOs made in separate proceedings. In the event that a new IEO is made on appeal, the Court of Appeal is not renewing an IEO. Rather, the Court of Appeal must consider afresh whether the preconditions to the making of an IEO have been satisfied, including the requirement in s 130(b) that "*that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order*."

42. The "textual considerations" referred to at AWS [35] and set out at AWS [34] were considered by the Court of Appeal. As quoted at [33] above, the Court of Appeal considered, but rejected, the appellant's argument, on the basis that the context and subject matter supported a contrary conclusion.[38]

Context and purpose

43. The objects of Part 5 and 6 of the Act, set out in s 69, include protecting the safety of members of the public and protecting the safety of victims of forensic patients and acknowledging the harm done to victims. The safety of the community is a mandatory consideration under s 127(2) in determining whether to make an extension order. The Act reflects a clear legislative intention to balance the protection of the community with the least restrictive management of forensic patients.[39] As noted at AWS [37], and acknowledged by Kirk JA,[40] the time limits in the Act recognise the fact that the regime imposes significant restrictions on liberty. Those time limits include the prohibition in s

38 *Haines (COA)* at [60]. (**CAB 91**)

39 The predecessor provisions to ss 130 and 131 were introduced by the *Mental Health (Forensic Provisions) Amendment Act* 2013 (NSW) to implement a recommendation of the New South Wales Law Reform Commission in its report entitled *People with Cognitive and Mental Health Impairments in the criminal justice system—Criminal Responsibility and Consequences* (May 2013). That report had identified a "gap" in relation to forensic patients who posed an unacceptable risk of serious harm to others at the end of a limiting term, but who might not come within the definition of a mentally ill person: see Hansard (Legislative Assembly, 13 November 2013), pp 55-57. (**RBFM 9-11**)

40 *Haines (IEO)* at [35]. (**CAB 56**)

124(2) on applications being made more than 6 months before the end of the forensic patient's limiting term or existing extension order.

44. There is, then a staged process for the making of applications. A preliminary hearing is to be conducted within 28 days after the application is filed in the Supreme Court or within any further time that the Supreme Court may allow (s 126(4)). If, at that preliminary hearing, the judge is satisfied that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order, the Supreme Court must make orders appointing experts to examine the forensic patient and furnish reports to the Court. Once that has occurred, a final hearing will take place, and judgment will be delivered (s 126(5)). In the respondent's submission, Kirk JA was correct to hold that while the time limits are imposed in recognition of the fact that the statutory scheme imposes significant restrictions on liberty, Parliament can also be taken to have intended that applications be dealt with carefully and judiciously, having regard to the object of protecting the safety of the community as set out in s 127(2)(a) and in s 69(1)(a). [41]

45. These time constraints are such that little time is left for an appeal process to take its course within that six-month period, extending to nine months if an IEO is made. The scheme provides for appeals from decisions to make "*or to refuse to make*" an extension order (s 135). Given the purpose of ss 130 and 131 is to preserve forensic patient status pending the determination of an application, and that loss of that status removes the power to make an order under s 122, it would be surprising if the respondent had no practical ability to appeal against a refusal where the Supreme Court's decision is made at the end of the 9 month maximum period permitted under the Act for determination of the application. This would be unjust where the time constraint occurs for reasons outside the respondent's control.

46. It is submitted that Kirk JA was correct in stating that:[42]

> "In some plausible circumstances, thus, the statutory appeal right would be rendered ineffective because there would be insufficient time for the appeal to be filed, prepared, heard and determined. In other plausible circumstances the parties and this Court would be required to act with extreme expedition under great pressure."

47. Similarly, the Court of Appeal was correct to hold that "[i]*t is not reasonable to expect that all of* [the steps under the Act] *could be taken within the time of a single interim extension*

---

41 *Haines (IEO)* at [35]. (**CAB 56**)
42 *Haines (IEO)* at [34]. (**CAB 56**)

order made at first instance" and that the appeal right "*would be significantly compromised if the respondent's construction were preferred*".[43]

48. The appellant's submission as to a lack of evidence about what time period is possible *"in the ordinary course"* for hearing applications along with any appeal (AWS [38]) should not be accepted. The Court of Appeal was in a position to express a view concerning the time periods ordinarily required for the hearing of applications under the Act, and any additional period for the proper determination of an appeal. Further, if that submission was accepted, a corollary is that there is similarly no evidence that a nine-month period *will* always or even in most cases be sufficient where an appeal by the respondent is warranted.

49. In the respondent's submission, the question of when (or by when) proceedings at first instance and any appeal *should* ordinarily be commenced and resolved, in the event that the respondent acts expeditiously, is not a matter which can resolve the interpretative exercise. It is, however, relevant to consider that a logistical matter outside the control of the parties may lead to the Court being deprived of jurisdiction to make an order in respect of a person who poses an unacceptable risk of causing serious harm to others.

50. Contrary to AWS [39], the concern of the respondent is not with "mere inconvenience" arising from the statutory timeframes. The concern is that the interpretation urged by the appellant would stymie the purpose for which these provisions were introduced: to ensure that while an application is extant, and in circumstances where the preconditions to the making of an IEO can be met, a person's status as a forensic patient can be maintained until the final determination of an application.

51. The construction preferred by the Court of Appeal ensures the utility of the appellate process, while maintaining the safeguards built into the regime. If a situation arises where an application is dismissed while a person is the subject of an IEO, and the Attorney General exercises the right to an appeal, a new IEO may be made, *if* the Court of Appeal is satisfied of the matters set out in s 130(a) and (b), to preserve a person's status as a forensic patient until the determination of the application. An IEO made in such an appeal cannot exceed three months.

52. At AWS [39]-[40] the appellant, in effect, invites the Court to put aside any consideration of the Act's purpose and the context of ss 130-131 in favour of a "strict" interpretation of

[43] *Haines (COA)* at [62]. (**CAB 92**)

"text" (AWS [39]-[40]). *Marshall v Watson,*[44] referred to at AWS [40], does not support the appellant's argument. The legislative "gap" in that case concerned the power of arrest and detention, which was "*a necessary element in the statutory scheme [that had] been omitted by the legislation*" and which could not "*be filled by construction of the legislation so as to imply the requisite power*."[45] In contrast, the present case concerns the interpretation of an express power to make the order concerned.

53. The Act's concern to secure the safety of the community and to maintain a person's status quo as a forensic patient status pending final determination of an extension order application, coupled with the statutory right to appeal against the refusal of an extension order application, weigh strongly in favour of the interpretation preferred by the Court of Appeal and Kirk JA. That interpretation promotes the Act's purpose of protecting the safety of members of the public. The incursion on liberty is balanced by the requirements in s 130(a) and (b), and the temporal limitation on any single interim extension order in s 131.

54. For these reasons, the Court of Appeal's conclusion in relation to the availability of an IEO was correct.

<u>Ground 2 (s 122(1)(b))</u>

55. There is no dispute that s 122(1)(b) required consideration of both the availability of a less restrictive means of managing risk, and the adequacy of that means of managing risk.[46] The Court of Appeal reached the following conclusion in relation to the primary judge's analysis of s 122(1)(b):[47]

> We consider that his Honour was incorrect to find 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. This construction is at odds with the protective purpose of the Act and is inconsistent with the word "adequately", which implies that the way in which the risk is to be managed is concerned with reality rather than hypothetical possibilities. Protecting safety is a question of practical outcomes, not theoretical possibilities. It follows that, in assessing the adequacy of a proposed measure to manage an unacceptable risk, the efficacy and reliability of the measure cannot be ignored. What is to be assessed and adjudged is the *risk* of the respondent causing serious harm to others and whether the appellant has proved that it *cannot* (not *could* not) be "adequately managed by other less restrictive means".

44 (1972) 124 CLR 640.
45 (1972) 124 CLR 640 at 644.
46 See AWS [52],
47 *Haines (COA)* at [88]. (**CAB 99-100**)

56. Contrary to the appellant's submissions,[48] the Court of Appeal's reasoning did not involve a misunderstanding of the primary judge's analysis. The distinction drawn in this paragraph between "cannot" and "could not" emerges from the analysis of the primary judge, particularly in the context of Dr Elliot's evidence. The error in the primary judge's reasoning emerges from [113]-[116] of his Honour's judgment, taken in conjunction with Dr Elliot's evidence.[49] It is in this context that the Court of Appeal draws a distinction between "reality", and "hypothetical possibilities".

57. Dr Elliot's evidence was that a CTO would be an important component of managing the appellant's risk. He was, however, concerned that if the appellant were to suffer a relapse, "*there would, even with the supervision of his disability providers, be delays before this would be managed assertively by the local mental health service, allowing him to become more unwell and potentially wander from his accommodation and return to a high risk state for serious harm to others*".[50] Further, he stated (emphasis added):[51]

> **I consider that a combination of Mr Haines' existing care, treatment and supports with a CTO is the least restrictive means of managing his risk of serious harm to others. I am not convinced that he continues to pose an unacceptable risk of serious harm given his compliance with his current care and treatment. The one caveat to this opinion relates not so much to his compliance with the CTO, but to the readiness of civilian mental health services to continue to manage his risk assertively with a CTO.** This is a general concern for all patients with serious mental illnesses. Community Mental Health Services are resource poor and constantly looking for patients to discharge to GP care to allow for new referrals. This is especially so in the current public psychiatry climate in NSW. **More specific to Mr Haines, my discussion with Dr Dorney indicated he has spoken with Dr Jabeen, his current community psychiatrist with the St Mary's Community Mental Health Service. Dr Dorney was left in doubt as to whether the St Mary's CMHS would pursue a CTO were his forensic order to lapse.** I also note that CTOs are of little utility in addressing a relapse into substance use. In favour of Mr Haines' remaining an active patient of the local mental health service is his treatment with clozapine. Typically, this is managed long term by public mental health services via monthly clozapine clinics, given the highly specialised nature of the treatment. This serves as a point of attachment to the service and a means of regular psychiatric review. **On balance, I maintain his risk can be managed with this combination of measures.**

58. Dr Elliot's evidence was that the appellant's risk could be managed on a CTO, if that CTO were managed assertively by local mental health services. When the primary judge came to consider s 122(1)(b), his Honour asked "*…is it enough that a CTO if made could be a*

---

48 AWS [54]-[60].

49 Quoted at *Haines (COA)* at [101]-[103] (**CAB 104-105)**

50 *Haines (COA)* at [101] (**CAB 104**)

51 *Haines (COA)* at [102] (**CAB 104**)

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?"[52] He concludes that the former is the case. His Honour goes on to say:

> 114. 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. The question is not whether the risk posed will not be managed by less restrictive means. The onus on the plaintiff is to prove to a high degree of probability, the negative: *Minister for Health v Paciocco* [2017] NSWSC 4 at [8].
>
> 115. I accept the defendant's submissions that it is the availability of means other than an order extending the defendant's status as a forensic patient which is to be considered. In this case that is a CTO as the experts have each otherwise opined that other alternative means (such as involuntary admission or guardianship orders) would not manage the defendant's risk. A CTO could be applied for by persons listed in s 51(2) of the *Mental Health Act*. There is no evidence put forward by the plaintiff to suggest that if one was applied for that it would not be made.
>
> 116. I have dealt above with the experts' views as to whether a CTO could manage the risks posed by the defendant in a less restrictive way than an order extending his status as a forensic patient. As stated, I accept the opinion of Dr Elliott that, in combination with the existing care, treatment and supports in place for the defendant, a CTO could do so.

59. It was not the mere *availability* of a CTO which required consideration. There was dispute both about the state of satisfaction the primary judge needed to reach in relation to the likelihood of a CTO being made, and whether a CTO would be adequate to manage the appellant's risk. Consideration of this second issue required the primary judge to engage with the question of "the readiness or ability" of the local health services to assertively manage a CTO, which was of significant relevance to Dr Elliot's conclusion. This qualification in Dr Elliot's evidence indicated that there was substantial reason to doubt that the availability of a CTO would prevent the plaintiff from discharging s 122(1)(b). The primary judge's analysis – engaging only with the availability of a CTO – illustrates the error in his Honour's approach to the test.

60. As noted at [11] above, the Court of Appeal did not hold that s 122(1)(b) excluded consideration of less restrictive means not already in place. If it had done so, it would have concluded that the primary judge should not have taken into account the availability of a CTO *at all*. The respondent does not contend that the Court of Appeal's reasons should be read as requiring the "less restrictive means" to be extant; and such a conclusion would be inconsistent with the Court of Appeal's approach.

52 *Haines (Final)* at [113]. (**CAB 35**)

PART VI: NOTICE OF CONTENTION OR CROSS-APPEAL

61. There is no notice of contention or cross-appeal in this matter.

PART VII: ESTIMATE

62. The respondent estimates that up to ninety minutes will be required for the presentation of oral argument.

Dated: 6 August 2026

Georgina Wright SC
13 Wentworth Chambers
P: (02) 9232 6420
E: gwright@13wentworth.com.au

RA McEwen
Koiki Mabo Chambers
P: (03) 9225 8558
E: Rebecca.mcewen@vicbar.com.au

ANNEXURE TO RESPONDENT'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	Sections Part 6 (ss 121-144)	In force at all relevant times.	In force at all relevant times.
2.	*Mental Health (Forensic Provisions) Act* 1990 (NSW)	7 Jan 2019, 1 Feb 2020	Sch 1, cl 14	In force during the *WB* proceedings. Clause 14 is identical in both versions.	26 Nov 2019 (IEO made by Basten JA) 12 Feb 2020 (IEO made by COA)
3.	*Mental Health (Forensic Provisions) Amendment Act* 2013 (NSW)	As enacted	Sch 1, cl 13	Introduced the predecessor provisions to ss 130-131.	N/A
Legislation referred to in fn 2					
4.	*Crimes (Mental Impairment and Unfitness to be Tried Act)* 1999 (Vic)	Current	Part 5	Version presently in force	
5.	*Criminal Law (Mental Impairment) Act* 2023 (WA)	Current	Section 108	Version presently in force	
6.	*Mental Health Act* 2016 (Qld)	Current	Part 4	Version presently in force	
7.	*Criminal Law Consolidation Act* 1935 (SA)	Current	Part 8A	Version presently in force	
8.	*Crimes Act* 1914 (Cth)	Current	Part IB, Div 6	Version presently in force	
9.	*Crimes Act* 1900 (ACT)	Current	Part 13	Version presently in force	
10.	*Criminal Code Act* 1983 (NT)		Part IIIA	Version presently in force	