

HIGH COURT OF AUSTRALIA

EDELMAN, JAGOT AND BEECH-JONES JJ

DALE HAINES BY HIS LITIGATION
GUARDIAN BARBARA RAMJAN

APPELLANT

AND

ATTORNEY GENERAL OF NSW

RESPONDENT

*Dale Haines by his litigation guardian Barbara Ramjan v Attorney General
of NSW*

[2026] HCA 34

Date of Judgment: 9 September 2026

S57/2026

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made 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.*

On appeal from the Supreme Court of New South Wales

Representation

The appellant is represented by Legal Aid NSW

The respondent is represented by Crown Solicitor for New South Wales

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Dale Haines by his litigation guardian Barbara Ramjan v Attorney General of NSW

Mental health – Forensic patient – Extension of status as forensic patient – Where making of extension order subject to *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), s 122(1) – Where s 122(1) requires satisfaction both that forensic patient poses unacceptable risk and that the risk cannot be adequately managed by other less restrictive means – Where primary judge not satisfied to requisite standard of either matter – Where Court of Appeal allowed appeal on basis that satisfaction of unacceptable risk was common ground – Where respondent concedes satisfaction of unacceptable risk was not common ground – Where determination of remaining issues would have no practical utility – Whether to accept concession.

Words and phrases – "common ground", "extension order", "forensic patient", "high degree of probability", "interim order", "less restrictive means", "no practical utility", "satisfied to the requisite standard", "unacceptable risk of causing serious harm", "unfit to be tried".

Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW), s 122(1).

Mental Health (Forensic Provisions) Act 1990 (NSW), ss 4, 10-11.

The concession of this appeal

1 Since 15 May 2017, the appellant has been a forensic patient under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) ("the Act") and its predecessor, the *Mental Health (Forensic Provisions) Act 1990* (NSW), following a finding by the District Court of New South Wales that he was unfit to be tried for offences including armed robbery.¹ On 26 September 2025, the primary judge (Coleman J) refused to make an order extending the appellant's status as a forensic patient. Following an interim extension order, the Court of Appeal of the Supreme Court of New South Wales (Adamson, McHugh and Ball JJA) allowed an appeal from the orders made by the primary judge and substituted an order extending the appellant's status as a forensic patient for a period of two years from 20 November 2025.

2 Following a grant of special leave to appeal to this Court, this matter was listed for an expedited hearing to take place before a Full Court on 16 September 2026. Written submissions were filed by the parties. The respondent, the Attorney-General for the State of New South Wales, conceded in the written submissions that the appellant should succeed on the second ground of his notice of appeal. The effect of that concession was that the Attorney-General accepted that this Court should make orders which would have the consequence that the appellant would no longer be a forensic patient. In reply, the appellant accepted that if the concession of the Attorney-General were accepted, then a determination of the remaining issues would have no practical utility for the appellant and would not affect the disposition of the appeal. On 24 August 2026, the parties wrote to this Court with proposed consent orders to allow the appeal on the basis of the second ground of the notice of appeal.

3 For the following reasons, on 27 August 2026 we accepted the concession of the Attorney-General and made orders, consistently with the proposed consent orders, to allow the appeal and set aside the orders of the Court of Appeal.

1 Under *Mental Health (Forensic Provisions) Act 1990* (NSW), ss 4, 10-11. See *Attorney-General for New South Wales v Dale Haines (BHT Barbara Ramjan) (Final)* [2025] NSWSC 1117 at [15]; *Attorney General for New South Wales v Haines (BHT Barbara Ramjan)* [2025] NSWCA 231 at [5]. See also, as to the Mental Health Review Tribunal, *Attorney General for New South Wales v Haines [No 2]* (2025) 118 NSWLR 450 at 453 [6]-[7].

Background

4 On 15 May 2017, following a finding that the appellant had committed a number of offences including at least five counts of armed robbery, a limiting term of detention was imposed upon the appellant of seven years and seven months, backdated to 25 September 2014. As a consequence of that order, the appellant was detained for care and treatment as a forensic patient under the predecessor to the Act. The appellant's status as a forensic patient under the Act was extended by interim order on 14 April 2022 and then, in an extension of three years, by a (first) final extension order on 8 July 2022.

5 Prior to the expiry of the first final extension order on 24 July 2025, the Attorney-General commenced proceedings in the Supreme Court of New South Wales seeking a second final extension order. An interim order was made extending the appellant's status as a forensic patient until 24 October 2025.² After a hearing, on 26 September 2025 the primary judge dismissed the Attorney-General's summons seeking the second final extension order.³

6 On 15 October 2025, the Attorney-General filed a notice of appeal against the orders of the primary judge and also filed a notice of motion seeking an interim extension order under the Act. On 20 October 2025, the interim order was made by Kirk JA with an expiry date of 19 December 2025. The appellant brought an application for review of the interim order of Kirk JA on the basis that his Honour had no power to make that order. It was common ground in the Court of Appeal that if Kirk JA lacked the power to make the interim order, then the Court of Appeal would have been required to dismiss the appeal because the appellant would no longer be a forensic patient.

7 On 6 November 2025, the application for review by the appellant and the appeal by the Attorney-General were heard by the Court of Appeal. On 20 November 2025, the Court of Appeal dismissed the application for review but allowed the appeal. The Court of Appeal set aside the orders made by the primary judge and in their place ordered that the appellant's status as a forensic patient be extended under the Act for a period of two years from 20 November 2025. By a grant of special leave to appeal, the appellant brought an appeal from the decision of the Court of Appeal.

2 *Attorney General of New South Wales v Haines (Preliminary)* [2025] NSWSC 774.

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

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The error in the reasons of the Court of Appeal

8 The appellant's two grounds of appeal before this Court respectively concerned: (i) the dismissal of the appellant's application for review of the decision of Kirk JA (the first order of the Court of Appeal); and (ii) the allowing of the Attorney-General's appeal, setting aside of the orders of the primary judge, and extension of the appellant's status as a forensic patient for two years (the second, third, and fourth orders of the Court of Appeal). Each of those grounds independently supported the orders sought by the appellant to allow the appeal and to set aside the orders made by the Court of Appeal. It is convenient to address only the second ground, which was conceded by the Attorney-General.

9 The appellant's second ground of appeal asserts that the Court of Appeal erred in its construction and application of s 122(1) of the Act.

10 Section 122(1) of the Act provides as follows:

"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 –
 - (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."

11 The effect of s 122(1) is that before a final extension order can be made, both limbs – (a) and (b) – must be satisfied. The primary judge refused to make the extension order on the basis that he was not satisfied to the required high degree of probability of either limb (a) or limb (b).

12 The Attorney-General's appeal to the Court of Appeal relied upon two grounds. The first concerned the treatment by the primary judge of the evidence of the court-appointed experts. The issues raised by the first ground of appeal were concerned with both of limb (a) and limb (b).

13 In written submissions before the Court of Appeal, the appellant pointed out that the primary judge's findings on each limb of s 122(1) had been expressed in the alternative. In other words, the Attorney-General needed to establish error by the primary judge on both limbs in order for the appeal to succeed. Since the issues raised by the first ground of appeal before the Court of Appeal were

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concerned with both limbs, the appellant conceded in the Court of Appeal that if the Attorney-General were to succeed on the first ground, then "an avenue that's available" was for the Court of Appeal to re-determine the application for an extension order. The Court of Appeal, however, rejected the Attorney-General's first ground of appeal.

14 The second ground of the Attorney-General's appeal was concerned only with the manner in which the primary judge had approached the statutory test in limb (b). The Court of Appeal accepted the Attorney-General's submissions in relation to the second ground. This acceptance did not establish any error in relation to limb (a). But the Court of Appeal nevertheless allowed the appeal because it considered that it was "common ground that the court would be satisfied of s 122(1)(a) to the requisite standard".⁴

15 The parties before this Court accept that the Court of Appeal was wrong to treat it as common ground that s 122(1)(a) was satisfied to the requisite standard. This issue had been a matter of substantial dispute before the primary judge⁵ and was a matter which the primary judge had decided in the appellant's favour.⁶ No written concession had been made by the appellant that the primary judge was in error. Indeed, the appellant had emphasised in his written submissions before the Court of Appeal that the second ground of the Attorney-General's appeal "must also be seen in light of the fact that [the primary judge's] conclusion" on limb (b) "was expressed *in the alternative*" (emphasis in original). In other words, success on the second ground of the Attorney-General's appeal could not, by itself, lead to the appeal being allowed.

16 The reason that the Court of Appeal thought it to be common ground that limb (a) of s 122(1) was satisfied to the requisite standard may have been the following exchange in oral argument:

"McHugh JA: And if [the appellant is] not on clozapine, he's an unacceptable risk of harm clearly?"

4 *Attorney General for New South Wales v Haines [No 2]* (2025) 118 NSWLR 450 at 468 [83].

5 *Attorney-General for New South Wales v Dale Haines (BHT Barbara Ramjan) (Final)* [2025] NSWSC 1117 at [76], [88], [91], [103]-[104].

6 *Attorney-General for New South Wales v Dale Haines (BHT Barbara Ramjan) (Final)* [2025] NSWSC 1117 at [99], [104], [117].

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[Senior Counsel]: He's potentially unacceptable, yes.

...

Adamson JA: ... [Y]ou've conceded that he has to take clozapine in a compliant manner otherwise he poses an unacceptable risk of harm.

[Senior Counsel]: There doesn't appear to be any evidence to [the contrary] to that proposition."

17 These remarks, however, were made by Senior Counsel in the context of the second ground of the Attorney-General's appeal, which had not challenged the primary judge's conclusion concerning limb (a). Senior Counsel cannot be taken to have abandoned the appellant's position which supported the primary judge's conclusion in relation to limb (a). Nor can Senior Counsel be taken to have abandoned the appellant's position that success by the Attorney-General on the second ground of the Attorney-General's appeal would not lead to the appeal being allowed; only success on the first ground could do that (and the first ground was rejected by the Court of Appeal).

Conclusion

18 For these reasons, on 27 August 2026 we accepted the concession of the Attorney-General that the appeal should be allowed and made orders as follows:

- (1) Appeal allowed with costs.
- (2) Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made 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.