I certify that the Appellant's submissions are suitable for publication in accordance with paragraph 27 of Practice Note SC CA 01.

Annabel Anderson
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on behalf of Karen Smith, Crown Solicitor, solicitor for the Appellant

Filed: 24 October 2025 2:02 PM

D00028ZE6G

Written Submissions

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00396912

TITLE OF PROCEEDINGS	
First Appellant	Attorney General of NSW
First Respondent	Dale Haines

FILING DETAILS	
Filed for	Attorney General of NSW,Appellant 1
Legal representative	Karen Smith
Legal representative reference	
Telephone	0294749000

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (AGNSW v Haines - Written submissions.pdf)

[attach.]

ATTORNEY GENERAL FOR NEW SOUTH WALES v DALE HAINES (BHT BARBARA RAMJAN)

APPELLANT'S SUBMISSIONS

Introduction

1 On 26 September 2025, his Honour Justice Coleman dismissed the Attorney General's application to extend the respondent's status as a forensic patient (*Attorney-General for New South Wales v Dale Haines (BHT Barbara Ramjan) (Final)* [2025] NSWSC 1117 (**Judgment**). The application had been made under Part 6 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (**the Act**). The Attorney General (**appellant**) appeals that decision.

2 By summons filed 11 April 2025, the appellant brought proceedings pursuant to s 123 of the Act seeking an order under s 121 extending the status of the respondent as a forensic patient. Those proceedings represented the second application for an extension order in respect of the respondent. The first extension order, made by her Honour Justice Yehia on 8 July 2022, commenced on 24 July 2022 and expired on 24 July 2025.

3 On 10 June 2025, prior to the expiry of the respondent's first extension order, his Honour Justice Harrison conducted a preliminary hearing, appointed two psychiatrists to conduct examinations and furnish reports, and ordered an interim extension of the respondent's forensic patient status until 24 October 2025.

4 These orders were later varied by consent to permit the appointment of a psychiatrist and psychologist.

5 The respondent was then examined by Dr Gordon Elliott (Forensic Psychiatrist) and Carollyne Youssef (Clinical and Forensic Psychologist) (**the Court-appointed experts**) on 12 August 2025 and 14 August 2025 respectively. Their reports formed a major part of the materials before the primary judge. The opinions reached by each expert, and how these opinions were treated by the primary judge, forms a central part of this appeal.

6 Coleman J dismissed the appellant's application for an extension order on 26 September 2025, however the earlier interim extension order made by Harrison CJ at CL, which provided for a

three-month interim extension of the respondent's status as a forensic patient, was not revoked and would have expired on 24 October 2025.

Current forensic patient status and interim relief

7 On 15 October 2025, the appellant applied to the Court of Appeal for a further interim extension order (**IEO**) for three months to preserve the status quo of the respondent's forensic patient status pending this appeal.

8 On 20 October 2025, his Honour Justice Kirk granted the interim relief sought by the appellant and made an order pursuant to s 130 of the Act that the respondent be subject to an IEO until 5.00pm on 19 December 2025. Kirk JA also made orders expediting the hearing of the substantive appeal proceedings, relisting the matter on 6 November 2025. In so ordering, his Honour accepted the appellant's construction of s 131(2) of the Act, namely, that the three month time limit on any IEO made in the Court of Appeal prior to the determination of an appeal "should be taken to run from when an order of that kind is first made in [the Court of Appeal]" (at [40]). His Honour considered that such a construction was open and supported by several contextual and purposive considerations, including the object of community safety prescribed in s 69(1) of the Act and the fact that the statutory right of appeal provided under s 135 of the Act would be rendered ineffective if the appellant's position was not accepted because the respondent would cease to be a forensic patient prior to the hearing of the appeal (at [34]-[35]).

9 Having accepted the appellant's argument as to construction, Kirk JA referred to the statutory preconditions under ss 130(a)-(b) of the Act and considered that these were both satisfied. Notably, Kirk JA found that "the key difference between the views of the two experts was not as to whether or not the respondent could pose a continued risk of serious harm but rather as to whether that risk was sufficiently ameliorated by ongoing management in the absence of an extension order being made". His Honour considered this to be an evaluative matter going to future risk and thus that it was not surprising that the experts might disagree on this. His Honour noted it would be "open to this Court to prefer the view of Dr Youssef on appeal" and in this sense, it could be said that the matters alleged in the supporting documentation

(including the notice of appeal) would, if proved, justifying the making of an extension order, satisfying s 130(b) of the Act (at [41]-[45]).

Grounds of Appeal

10 Pursuant to s 135(1) of the Act, the appellant appeals against the decision of Coleman J to refuse to make an extension order on two grounds.

11 First, the appellant submits that the Court erred in treating the plaintiff's failure to call and question the Court-appointed experts as a matter weighing against the plaintiff. In a protective jurisdiction, where the experts are appointed by and answerable to the Court, it is arguably inconsistent with principle to treat their absence as adverse to the plaintiff without the Court itself indicating that their evidence was required or that the Court would be assisted by hearing oral evidence from them, or exercising its own power to call them.

12 Secondly, the appellant submits that the Court misapplied s. 122(1)(b) of the Act by adopting an overly rigid approach to the question of whether a Community Treatment Order (**CTO**) could constitute a less restrictive means of managing the respondent's risk. The statutory test arguably requires a practical, evidence-based assessment of whether the risk *cannot* be adequately managed in the community, rather than a hypothetical or "black-and-white" inquiry divorced from the realities of whether a CTO could and would operate effectively.

Reasoning in the Judgment

13 The appellant's application was heard on 1 September 2025. On 26 September 2025, his Honour delivered the Court's judgment.

14 At paragraphs [7]-[17] of the Judgment, his Honour set out the background facts including the respondent's history of alcohol and substance use which commenced when the respondent was a teenager ([10]), the respondent's diagnosis with chronic schizophrenia and substance use disorder ([11]), and the respondent's criminal history commencing in 1999 at the age of 18 ([12], [14]-[17]). The Judgment records that since 2016 the respondent has received the antipsychotic medication Clozapine, and that while the respondent has a history of non-compliance with treatment, he has been compliant with the medication since his transition to supported independent living accommodation ([13]).

15 At paragraphs [18]-[25], his Honour set out the procedural history to the appellant's application.

Risk of causing harm

16 His Honour accepted that the respondent does pose a risk of causing harm to others ([99]). However, he found that the appellant had not discharged its burden of proving to the high standard required that the respondent poses an unacceptable risk of causing serious harm to others if he ceases to be a forensic patient ([99], [104]).

Developments since the first extension order proceedings in 2022

17 His Honour contrasted the present case with the 2022 proceedings before Yehia J, where all experts agreed that the respondent posed an unacceptable risk and the order was unopposed. In the present proceedings, the experts diverged, and the order was opposed ([99]). His Honour also noted that unlike in 2022, the respondent now has accommodation, social supports, and NDIS arrangements in place ([101]). His Honour further considered that the respondent now appears to have limited insight into his mental illness, and insight into his substance abuse and the impact it has had on him ([101]).

Plaintiff bears the burden

18 His Honour determined that that even if he were wrong in his conclusion that the expert evidence did not support a conclusion that the respondent posed an unacceptable risk of causing harm to others, the appellant had not discharged its burden to also prove that the risk could not be adequately managed by less restrictive means. His Honour accepted the respondent's submission that the appellant bears the burden of proving to a high degree of probability that the risk posed by the respondent cannot be managed in a less restrictive way ([104]).

Dr Youssef's report insufficient to discharge the onus of proof

19 The difference between the conclusions of the Court-appointed experts was described in the Judgment as follows. Dr Elliott opined that while there remains a risk that the respondent may cause serious harm to others if he ceases to be a forensic patient, the likelihood of such harm would be critically dependent on the respondent remaining abstinent from illicit substance use,

particularly methamphetamines, which in turn depended on the respondent's continued compliance with Clozapine ([50]-[51]). However, Dr Elliott was of the view that the respondent would not present as a continued risk of serious harm to others if he ceased to be a forensic patient, so long as the risk was managed by a combination of the respondent's existing care, treatment and support with a CTO ([54], [109]).

20 In comparison, Dr Youssef stated that the respondent continues to pose a risk of violence to others, with the potential for this to be serious, if he ceases to be a forensic patient and that his status as a forensic patient was necessary to manage his risk of harm to others ([78]). In Dr Youssef's view, the respondent's substantial forensic needs related to his risk of reoffending could not be adequately addressed by a CTO. In particular, Dr Youssef opined that the respondent had previously been subject to a CTO, the conditions of which were insufficient to manage his risk ([82], [110]).

21 His Honour accepted the opinion of Dr Elliott over that of Dr Youssef, holding that Dr Youssef's report was insufficient to discharge the appellant's onus ([103], [111]-[116]).

Decision not to call and question the experts

22 His Honour stated that the appellant had argued at first instance that the opinion of Dr Youssef should be preferred but had given "no cogent reason" as to why this was so. It was observed that "neither of the experts had been called [for cross-examination] so that [the difference between the experts] could be explored", and that the Court was "unable to ask those experts questions which might have resolved this difference" ([111]). His Honour stated that the decision not to call experts in circumstances where the experts' views and conclusions differ was "regrettable", noting that ordinarily experts should be called in such circumstances to "enable the Court to determine which of the conflicting opinions should be accepted" ([37]).

Statutory test

23 His Honour observed that "[t]here was debate in the hearing as to whether it was the mere availability of a less restrictive means of managing the [respondent's] risk that was to be considered or whether his Honour had to be satisfied that a less restrictive means of managing that risk would in fact be in place" ([113]). His Honour determined that s 122(1)(b) required

that the appellant "prove to a high degree of probability that the risk posed by the respondent *cannot* be managed by other less restrictive means. The question is not whether the risk posed *will* not be managed by less restrictive means." His Honour said that the onus is on the appellant to prove to a high degree of probability, the negative, referring to *Minister for Health v Paciocco* [2017] NSWSC 4 at [8] ([114]). In relation to the question of whether a CTO would be applied for in this case, his Honour observed that "[t]here is no evidence put forward by the [appellant] to suggest that if one was applied for that it would not be made" ([115]).

Provision for Appeal

24 Section 135 of the Act provides the right of appeal in the following way:

(1) An appeal to the Court of Appeal lies from a determination of the Supreme Court to make, or to refuse to make, or to vary or revoke an extension order.

(2) An appeal may be on a question of law, a question of fact or a question of mixed law and fact.

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

(4) The making of an appeal does not stay the operation of an extension order.

(5) If the Court of Appeal remits a matter to the Supreme Court for decision after an appeal is made, the extension order the subject of the appeal continues in force, subject to any order made by the Court of Appeal.

(6) Without limiting any other jurisdiction it may have, if the Court of Appeal remits a matter to the Supreme Court for decision after an appeal is made, the Court of Appeal may make an interim order revoking or varying an extension order the subject of the appeal.

(7) This section does not limit any right of appeal that may exist apart from this Part.

25 As set out above, pursuant to s 135(2) of Act, an appeal may be brought on a question of law, a question of fact, or a question of mixed law and fact. To establish a valid ground of appeal, it is necessary to identify an error of law, fact, or mixed law and fact, or an error in the exercise of discretion.

Ground 1

26 The appellant asserts by ground one that the primary judge erred in:

(1) holding at [37] of the primary judgment that "ordinarily" Court-appointed experts should be called to give oral evidence and be questioned where they have a difference of opinion; and/or

(2) placing weight on the fact that the appellant did not call the Court-appointed experts (see [103]-[104] and [111]-[112]) to give oral evidence in circumstances where:

(a) neither party required the experts for examination or cross-examination;

(b) the Court did not indicate during the hearing that it would be assisted by hearing from the experts orally;

(c) the experts are appointed by the Court to assist the Court in exercising a power that is protective of the community; and

(d) the ultimate task of the Court was to make its own assessment of whether there was an unacceptable risk and whether that risk could be adequately managed by less restrictive means.

27 This ground concerns how his Honour addressed the parties' decision not to call the experts to give oral evidence. As described above at [22], the reasoning suggests that some weight was placed on that decision, which raises questions about whether such an approach was appropriate in circumstances where the experts were court-appointed and the proceeding was conducted within a protective, rather than adversarial, jurisdiction.

28 Early in the hearing, the primary judge observed that there was a "difference between the [experts]" (at T5.3-4). However, his Honour did not give any indication that the Court required

or would be assisted by oral evidence from the Court-appointed experts. Rather, discussion as to whether there would be cross-examination of the Court-appointed experts was limited only to the following exchange at the very outset of the hearing (at T1.26-47):

> APPELLANTS COUNSEL: … This is second application made in respect of the [respondent]. His Honour, Chief Judge Common Law, Harrison J, conducted the preliminary hearing of this application on 10 June 24 this year. The interim relief granted on 22 July 2025. There was an interim extension order made for three months to expire on 24 October 2025. The Court also made orders that the [respondent] be assessed, and that report of those assessments be prepared. Those steps have been taken, so that is what brings the parties here before your Honour today for final hearing.
>
> HIS HONOUR: It is on those reports that I should make my assessment as to whether the [appellant] has discharged the relevant test.
>
> APPELLANT'S COUNSEL: That is the position, yes, your Honour. There is not going to be any anticipated oral evidence. It will just be on the papers before your Honour today.
>
> HIS HONOUR: Neither of you want to cross-examine any of the psychiatrists or psychologists.
>
> APPELLANT'S COUNSEL: I do not, your Honour.
>
> RESPONDENT'S COUNSEL: No, your Honour.

29 At [37] of the Judgment, his Honour stated:

> Neither of the experts were called to give evidence or required for cross-examination. That is regrettable in a case like this where the experts' views and conclusions differ. Further, where as is the case here, there is a submission that one expert's conclusion on a relevant issue should be preferred over the other, it is difficult for the Court to resolve that issue when there has been no testing of the experts' evidence by questions from the parties or the Court. I consider in matters of this kind where there is an issue

> as to whether the relief sought should be granted and the experts have different opinions on a relevant matter; ordinarily those experts should be called to give evidence to best enable the Court to determine which of the conflicting opinions should be accepted. If the experts are not called, this would be a matter that may impact upon whether the party with the onus of proof has discharged that onus.

30 The Judgment further recorded that neither of the experts was called so that the difference between their opinions could be explored and the Court was unable to ask those experts questions which might resolve the difference ([111]). His Honour rejected the appellant's submission that the opinion of Dr Youssef as to whether a CTO would effectively manage the respondent's risk should be preferred over that of Dr Elliott on the basis that, having called two experts who have reached different conclusions on the issue, the appellant could not offer a cogent reason why one should be preferred over the other ([111]-[112]).

31 In many cases, it might be that a plaintiff's case may not be assisted where expert witnesses are not called. However, in the present case, it is significant that the experts in question were not retained by the plaintiff, but were appointed by the Court. Given the statutory function of Court-appointed experts, and the circumstances in which their reports were tendered at the hearing, the appellant submits that the primary judge erred in treating the appellant's decision not to call the Court-appointed experts to give oral evidence (noting the divergence in their opinions) as a matter weighing against the appellant. The appellant submits this conclusion is based on the following reasons.

32 *First*, his Honour's approach is inconsistent with the nature of the jurisdiction exercised by the Court under Part 6 of the Act. The objects of Part 6 include the protection of the safety of members of the public (s 69(1)(a)), as applied to that Part by s 69(2). The jurisdiction conferred by s 122 is protective rather than adversarial in character. Within that protective jurisdiction, it was erroneous for his Honour to place weight on the appellant's failure to call the Court-appointed experts, where neither party sought to call them, the Court did not indicate that it would benefit from their oral evidence, and the Court did not itself call them. While the appellant accepts that its case could not be strengthened in the absence of further oral evidence, it does not follow that the failure to call the experts detracted from the probative force of the expert evidence already before the Court.

33 *Secondly*, such a conclusion is inconsistent with the role of expert witnesses in proceedings under Part 6 of the Act. Each Court-appointed expert is an independent witness, appointed by and answerable to the Court. The Act mandates the appointment of two such experts to conduct separate examinations of the forensic patient, and requires that each expert provide his or her report "to the Supreme Court" (s 126(5)(a)). Parliament's evident intention in enacting Part 6 was that the Court should receive and have regard to the assessments of "independent clinical experts" [1] appointed by the Court in determining whether to make an extension order. Although, for formal purposes, it was the appellant who tendered the reports of Dr Elliott and Dr Youssef (T4.9–21), that procedural step did not convert the independent Court-appointed experts into the appellant's witnesses, nor did it warrant treating the appellant's decision not to call them as a factor weighing against its evidentiary case.

34 *Thirdly*, the Court's conclusion overlooks the fact that the Court itself retains control over the presentation of expert evidence and has the express power to appoint, direct or call court-appointed experts as necessary for case management and decision-making. Under the *Uniform Civil Procedure Rules 2005* (NSW)(**UCPR**), Part 31, Division 2, Subdivision 5 (Rules 31.46–31.54) sets out detailed procedures for the selection, appointment, and management of court-appointed experts. Specifically, the Court can call the expert to give evidence, ask questions or clarify issues. Unlike party-appointed experts, a Court-appointed expert is answerable primarily to the court and can be called upon at any stage to give opinions or respond to the court's queries directly, ensuring that their evidence supports a fair and just outcome in protective proceedings.

35 Rule 31.46 empowers the Court to appoint an expert and to request further or supplemental reports as needed at any stage. Rule 31.51 permits any party to cross-examine the court-appointed expert and obliges the expert to attend court for examination or cross-examination on reasonable notice. Those provisions necessarily encompass the Court's own authority to require the expert's attendance to answer its questions, not merely those of the parties. Furthermore, the Court's inherent procedural power under the UCPR to manage expert evidence, reinforced by Rule 31.20 of the UCPR, enables it to call or question the expert

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[1] Second reading speech to the *Mental Health (Forensic Provisions) Amendment Bill 2013* (Mr Greg Smith, Attorney General and Minister for Justice), 13 November 2013, page 56. Available at: https://www.parliament.nsw.gov.au/bill/files/3232/2R%20Mental%20Health.pdf.

independently of the parties should the need arise. The Court's power to appoint an expert has been recognised as "part of the armoury made available to courts for the purpose of ensuring the just, efficient and cost-effective management of litigation": *Tyler v Thomas* [2006] FCAFC 6; (2006) 150 FCR 357 per Branson J at [29].

36 *Finally*, it is relevant to emphasise that the Court's task is not confined to choosing between competing expert opinions or determining which expert it prefers. In exercising its protective jurisdiction, the Court is required to undertake its own evaluative assessment of risk, informed by the totality of the expert evidence and the explanations provided. In other words, the Court's role is not to determine which expert it "prefers", but to draw upon the assistance provided by both experts in reaching its own independent judgment as to whether the statutory criteria are met.

37 As described above at [30], the approach of the Court materially affected the outcome of the decision. In addition, we note that the Court's approach to Dr Elliott's opinion at [102] is curious. His Honour stated:

> The management Dr Elliott referred to was the current care, treatment and support the [respondent] is receiving. Additionally, he considered a CTO as an important component of managing the [respondent's] risk. I do not read his opinion, however, as saying that without a CTO the [respondent] would pose a risk of serious harm to others if he ceased being a forensic patient, although his risk should be managed with the combination of his current care, treatment and supports as well as a CTO .

38 This is an unusual way of characterising Dr Elliott's opinion. Dr Elliott does not go so far as to say that the respondent would *not* pose a risk of serious harm if he were neither a forensic patient nor subject to a CTO. Rather, Dr Elliott's report (at page 30) indicates that a CTO is an essential component of managing the respondent's risk. He observes that a CTO would not only facilitate early hospital admission in the event the respondent refused Clozapine, but also "can be seen as an order upon a mental health service to provide continued care." Dr Elliott specifically stated (at page 30 of his report):

> Without a CTO, patients are typically discharged rapidly to GP care alone.

> I have concerns that, were Mr Haines 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; much as occurred prior to the index offences.

39 Properly construed, Dr Elliott's evidence supports the proposition that the respondent's risk can only be managed safely if a CTO were both made and assertively implemented by local mental health services. The appellant submits that his Honour's reading of that evidence at [102] understates this qualification and the extent to which the CTO was, in Dr Elliott's opinion, indispensable to risk management.

40 This characterisation potentially impacted upon his Honour's subsequent treatment of Dr Youssef's report. At [103], his Honour stated: "I do not consider Dr Youssef's report, including [the] conclusions, is enough for the [appellant] to have discharged its onus. I reach that conclusion not only based on my reading of her conclusions, but because of the differences between her opinion and that of Dr Elliott". Insofar as his Honour's assessment of Dr Youssef's evidence was informed by an unduly narrow reading of Dr Elliott's opinion, this may have affected his Honour's conclusion as to whether the appellant had discharged its burden.

41 In summary, his Honour's approach to the expert evidence affected the Court's conclusions with respect to both the first and second limbs of s 122(1) of the Act (that is, both the: (a) 'unacceptable risk' test; and (b) 'adequately managed by other less restrictive means' test).

Ground 2

42 By the second ground of appeal, the appellant contends that the primary judge erred in his approach to s 122(1)(b) of the Act, which raises the issue of whether there are less restrictive means of managing any risk presented by a forensic patient.

43 Section 122 sets out the two-limb test for when an extension order for a person's status as a forensic patient may be made, as follows:

(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.

(2) The Supreme Court is not required to determine that the risk of a person causing serious harm to others is more likely than not in order to determine that the person poses an unacceptable risk of causing serious harm to others.

44 Section 122(1)(b) requires the plaintiff to prove, to a high degree of probability, that the risk posed by the defendant *cannot* be managed "adequately" in the community. His Honour states the test as follows: "is it is 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?" (emphasis added). His Honour said he considered the former was the case ([113]).

45 The appellant submits that his Honour erred in approaching the inquiry under s 122(1)(b) as though a bright-line, "black-and-white" distinction could be drawn. In our view, the correct position is more nuanced. On the one hand, it would not be consistent with the statutory language - particularly the use of the word "cannot" - to require the Court to be *certain* that a CTO would be granted before concluding that the risk *could* be managed by other, less restrictive means. On the other hand, it would be equally inconsistent with the protective purpose of the Act for the Court to proceed on a purely hypothetical basis divorced from the practical reality of whether a CTO could and would be implemented.

46 In our view, the resolution of these positions lies in the word "adequately". If there are substantial reasons to doubt that a proposed mechanism - such as a CTO - will be implemented or properly resourced in the community, that doubt provides a sound basis for concluding that the risk cannot "adequately" be managed by that means.

Meaning of "adequately" managed under s 122(1)(b)

47 The phrase "adequately managed" was considered by his Honour Justice Garling in *Attorney General of NSW v McGuire (No 2)* [2014] NSWSC 288. In that case, his Honour took the use of the phrase "adequately managed" to mean that the unacceptable risk is mitigated by the proposed management regime so that the community's interest in being kept safe is outweighed by the community's interest in not having mentally ill or mentally disordered individuals or forensic patients being confined in some form of institutional care rather than taking their place in the community ([63]).

48 Additionally, in *Attorney General (NSW) v Doolan by his tutor Jennifer Thompson (No 2)* [2016] NSWSC 107 (**Doolan**), her Honour Justice Adamson considered the assessment of whether there existed "adequate management by other less restrictive means" to involve a comparison of the legal powers over a forensic patient compared with other alternate powers. Her Honour undertook a detailed analysis of the alternate regimes under, on the one hand, forensic patients under the *Mental Health Forensic Provisions Act 1990* (the predecessor to the Act) and, on the other hand, the regime for "civil" patients, including for involuntary patients, under the *Mental Health Act 2007*. This included an analysis of the objects of both statutory regimes (at [101]-[103]), the respective powers to impose conditions whilst the forensic patient is living in the community and the type of conditions that might be imposed under the various statutory regimes (at [114]-[116]), the consequences that would follow from a breach of conditions as between a forensic patient and a civil patient (at [117]-[118]), the different standards and onus for imposing and removing conditions under each statutory regime (at [121]) and safeguards and enforcement considerations (at [124]).

49 In *Attorney General of New South Wales v Skerry (Preliminary)* [2021] NSWSC 1393 (at [18]), his Honour Justice Dhanji observed that in approaching s 122(1)(b) of the Act, the focus should be on the question of whether a less restrictive means could "adequately manage" a forensic patient's risk of serious harm, rather than identifying whether one regime is more or less restrictive than the other. In forming this view, his Honour placed reliance upon the earlier remarks of RA Hulme J in *Attorney General of New South Wales v Skerry (Preliminary)* [2015] NSWSC 859 at [54]. This approach has subsequently been endorsed in final extension order applications: see *Attorney General for New South Wales v Mulipola (Final)* [2021] NSWSC 1041 at

[29] (Walton J); *New South Wales Minister for Mental Health v BB* [2015] NSWSC 1418 at [73] (Bellew J).

50 In *Attorney General of New South Wales v McGuire (by his tutor Thompson)* [2019] NSWSC 76, his Honour Justice Wright stated that the process for assessing whether a risk can be adequately managed by other less restrictive means involves determining *first,* whether the means proposed are less restrictive and *secondly,* whether the less restrictive means adequately manage the risk. As to the first of these matters, his Honour observed that whether means are more or less restrictive is to be judged by the legal power of others to control the defendant's actions, locations, treatment and other matters, as well as the practical operation of how that power might be exercised in a particular instance, in reliance on *Doolan* at [96]. As to the second matter, his Honour had regard to Garling J's remarks in *McGuire (No 2)* at [63] and the areas of difference in respect of legal regimes that should be considered when assessing "adequacy of management" articulated by Adamson J (as her Honour then was) in *Doolan* at [100].

51 In *Attorney General for New South Wales v Mulipola (Final)* [2021] NSWSC 1041 at [32], his Honour Justice Walton considered that the phrase "adequate management of risk" is more holistic than treatment and "may involve considerations such as managing how the defendant may be reviewed, who can discharge [them], monitoring risk, the ability to quickly respond to elevations of risk or deterioration of mental health, what is considered before the defendant is released and how [they] may be reintegrated into the community". See also his Honour's remarks in *Attorney General of New South Wales v Riley* [2019] NSWSC 1782 at [38].

Application to the present case

52 The issue is particularly significant in the present case given the qualifications expressed by Dr Elliott (at page 31 of his report):

> 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. *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. (Emphasis added).

53 His Honour adverted to, but did not otherwise engage with Dr Elliott's qualification regarding "the readiness or ability" of local mental health services to manage the respondent's risk assertively with a CTO ([109]). The appellant submits that his Honour failed to grapple with that qualification, which clearly indicated substantial doubt as to whether the mere *legal availability* of a CTO could amount to an *adequate* means of managing the respondent's risk.

54 The appellant recognises that it could not be contended that the Court must be affirmatively satisfied that a CTO will, in fact, be granted before taking it into account. Rather, in asking itself whether the plaintiff has proved the negative proposition (that the risk cannot be adequately managed by other less restrictive means) the Court needed to ask itself whether Dr Elliot's significant doubt as to the actual implementation of a CTO warranted the conclusion that the risk cannot be *adequately* managed by that means.

55 For the word "adequately" to have work to do, the Court must consider whether the available evidence supports a conclusion that the less restrictive means (such as a CTO) will be implemented, will be properly resourced in the community, and will thereby provide an *adequate* means of managing the risk of serious harm.

Conclusion

56 For the foregoing reasons, the appellant submits that the primary judge erred in dismissing the appellant's application for an extension order under s 121 of the Act. The Court should allow the appeal and, in the event that the appeal is successful, remit the matter to be decided according to law prior to the expiry of the respondent's IEO on 19 December 2025.

57 Alternatively, taking time constraints, as well as the potential difficulty and undesirability in further applications for interim extension orders being made, this Court may consider it appropriate to determine the matter to finality.

Paul Coady

Maurice Byers Chambers

Claire Palmer

Sixth Floor Selborne Chambers

24 October 2025