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HAINES, Dale – Respondent's submissions

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ATTORNEY GENERAL OF NSW V DALE HAINES (BHT BARBARA RAMJAN);
IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL
AT SYDNEY
2025/00396912

RESPONDENT'S SUBMISSIONS

1. SUMMARY

1. This appeal raises three central questions relating to the extension of Dale Haines' status as a forensic patient. All three centre on the application of Part 6 Division 4 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) ("**MHCIFP Act**"). The issues, and the Respondent's position on them, are encapsulated as follows:

- 1.1. On **Mr Haines' application for review** (of the decision of Kirk JA):

On their proper construction, s 130 and 131 provide for a hard limit of three months' extension of a forensic patient's status. The statutory preconditions for an order were not made out in this case. To the extent that argument is wrong, Kirk JA took into account insufficient context, and gave undue weight to the time pressures arising in this case (which were the Appellant's fault).

- 1.2. On appeal **Ground 1** (Coleman J's comment on the absence of *viva voce* evidence):

Coleman J's reasons did no more than describe the circumstances before him.

- 1.3. On appeal **Ground 2** (the asserted failure to consider the adequacy of a CTO to manage the defendant's risk):

His Honour's reasons responded to the issues and arguments in the case. Moreover, the issue is now arid, given further evidence.

2. RESPONDENT'S APPLICATION FOR REVIEW – INTERIM EXTENSION BY KIRK JA

Kirk JA's decision

2. On 26 September 2025 Coleman J delivered judgment on the final hearing of the Appellant's application to extend Mr Haines' status as a forensic patient. On 15 October 2025, the Attorney-General commenced appeal proceedings seeking to overturn that decision.
3. It is a necessary precondition of an extension order that the defendant is, at the time of any extension, then currently a forensic patient, either because of an original limiting term, or because of an existing extension order: MHCIFP Act s 124(1). This issue is dealt with in more detail below at [52]-[66].
4. At the time the Appellant's appeal was lodged, the existing interim extension order applying to Mr Haines was due to expire on Friday 24 October 2025 (i.e. nine days after the appeal was lodged).
5. The Appellant applied for a further interim extension order ("IEO"), or in the alternative expedition so that the appeal could be heard before the end of the existing extension (that is, final hearing within nine days).
6. The application for a further interim extension was heard before Kirk JA, sitting alone, on Monday 20 October 2025.¹ His Honour made orders in relation to the final determination of the appeal.
7. Kirk JA also made an order for a further IEO. Mr Haines opposed that application.
8. Now, by Notice of Motion, Mr Haines seeks review of the decision of Kirk JA.

¹ *Attorney General for New South Wales v Haines (BHT Barbara Ramjan)* [2025] NSWCA 231; White Book Volume 1, p 55ff.

Relevant aspects of Kirk JA's reasons

9. There was a dispute between the parties about whether the Court had jurisdiction to make a further order. This was encapsulated by Kirk JA as follows:

24. The issue in dispute is 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. If it did apply in that way, I could not now make an IEO as the IEO currently in place expires this coming Friday, being three months after the IEO made by Harrison CJ at CL commenced. On that understanding, to make any further IEO would go beyond the three month window.

10. Another way of expressing this is to say that Mr Haines contended that the three month limit was a “hard” limit, whereas the Appellant contended that it merely applied to each application for extension. Since (in the Appellant’s submission) the appeal was a “separate” application (that is “*proceeding*”), a further three month limit should apply.
11. Kirk JA identified that the issue was one of statutory construction.² His Honour considered that there was a dispute over what was encompassed by the word “*proceedings*” in s 130(1), and that this required consideration of the link between ss 130 and 131. His Honour observed that in some contexts an appeal has been held to be a separate “*proceeding*”, and this meant that the Appellant’s argument was “*open*” – but his Honour also found that those earlier decisions did not resolve the question of the correct construction in this case (at [29]). Similarly, his Honour considered that neither the text of s 136 of MHCIFP Act, nor an examination of the Hansard or New South Wales Law Reform Commission Reports which led to that act, provided much guidance (at [30]-[31]).
12. Turning to the purpose of the provisions, his Honour held that the purpose of providing for IEO’s was to give the Supreme Court “... *a reasonable, if limited, period of time in which to consider and application for an extension order*”. This, his Honour held, was consistent with other aspects of the statutory scheme, which provided that

² Ibid, at [27]; White Book Volume 1, p 65.

an application may only be made in the last six months, and that the required preliminary hearing must be heard within 28 days of the application being filed (at [32]).

13. His Honour observed (at [35]) that “[n]o doubt the time limits are imposed in recognition of the fact that the statutory scheme imposes significant restrictions on liberty.” However, his Honour considered that this also meant that it was important for applications to be dealt with promptly, but also carefully and judiciously. This, his Honour considered, made it unlikely that the time limits were intended to operate in a way which would commonly restrict or deprive the parties and the Court of the opportunity to deal with appeals with requisite diligence and care, in circumstances where appeal rights were expressly provided for. He observed that the Court of Appeal, by s 135(6), was provided with a power to remit a matter and make an interim order revoking or varying an extension order. The words of s 135(6), his Honour considered, suggested a slight lack of care in the drafting of the provision (at [38]).
14. On the basis of his Honour’s analysis, he concluded that the Appellant’s argument was correct, and that the consequence was a further three-month limit applied which commenced from the making of an order by the Court of Appeal (at [39]).

Mr Haines’ application for review of Kirk JA’s decision

15. The Respondent submits that Kirk JA was wrong to conclude that the MHCIFP Act permitted a further three month IEO. His Honour erred in the following three respects:
 - 15.1. The analysis of Kirk JA gave insufficient primacy to the plain words of s 131(2).
 - 15.2. His Honour failed to consider whether the legislative criteria for an IEO were made out. Mr Haines was not subject to a “*limiting term*” or an “*extension order*”, as those terms are defined in the legislation. This was either a jurisdictional error, or at the very least a further textual indicator

that Parliament did not intend for IEOs to be cumulative for periods exceeding three months. This argument was not made before Kirk JA; in the urgency of responding to the Appellant's urgent application it was overlooked.

15.3. It is submitted that his Honour's analysis of the legislative context of the words in the MHCIFP Act was too narrow – that is, his Honour looked insufficiently far back in the legislation (and the process of a defendant becoming a forensic patient), such that his Honour's conclusion about context was incomplete. A complete reading of the context requires more consideration to the means by which a defendant becomes a forensic patient (including that this is the result of a judicial order), the punitive nature of forensic patient status (even if the legislation also shares some characteristics with so-called “protective” legislative regimes), and therefore would have given greater weight to the unlikelihood that Parliament intended for extension of the orders in the way contended by the Appellant.

15.4. His Honour gave undue primacy, in interpreting the legislation, to the facts of this particular matter, insofar as he took into account time pressures which were entirely the product of delay on the part of the Appellant, and were the sole reason that time was pressing. If the Appellant had dealt with the matters expeditiously, there would not have been a need for an extension, and in turn there would not be a justification for the interpretation contended for by the Appellant.

The text of section 131 MHCIFP

16. The text of s 131 is in plain terms; there is no ambiguity, other than that which has been artificially introduced by the Appellant's argument in this case.

17. First, the section prohibits extension of “*the person’s status*” for periods totalling more than 3 months. That is, the section draws attention to the status of the defendant, not the proceedings in which that status is being extended.
18. Secondly, the plain words exclude extension “*for periods totalling more than 3 months*”, which expresses an aggregate limit, not a per-proceeding limit.
19. Thirdly, s 131(2) establishes that the limit applies to orders “*of that kind*”. That is, the Parliament clearly turned its attention to further consideration of the same kinds of order.
20. This plain meaning of the words is supported by the decision in *Attorney General of New South Wales v WB* [2020] NSWCA 7 (“WB”). That decision did not directly consider the issue and it was not argued, but that two judges read the legislation on the basis of (what is submitted by the Respondent to be) its plain meaning supports the proposition that the words mean what they say. WB considered the provisions of the *Mental Health (Forensic Provisions) Act 1990* (NSW), Schedule 1. The time limit provision in cl.11 of that Schedule was in very similar terms to those presently in issue:

11 Term of interim extension order

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

(2) An interim extension order 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 such an order for periods totalling more than 3 months.

21. Basten JA relevantly observed, at [8], that “... *an interim extension order (or orders) cannot have effect for a period of more than three months in total.*” Subsequently when discussing the potential requirement for leave in relation to appeals, his Honour observed at [22] that “... *An interim extension order is not only interlocutory, but can have operation for a very limited period, namely for a period of no more than three months...*”. And Leeming JA observed, at [63], that

*An interim extension order may not be made for a period longer than 3 months.
Although more than one interim extension order may be made, the period during which
the status as a forensic patient is thereby extended may not exceed 3 months.*

22. Against the background of the clear words of the section, the only basis upon which it could be concluded that there was ambiguity (such as to justify resort to the context and purpose of the legislation) was if, as the Appellant sought to do, the words of the chapeau to s 130 were strained, such that the limit is not, as the words of s 131 clearly intended, a “hard” cumulative limit on the extension of a forensic patient’s status, but a “per proceeding” limit.
23. However, even resort to context and purpose leads to the conclusion that Parliament did not intend for the interpretation asserted by the Attorney-General, and accepted by Kirk JA.

Context

24. As identified above, it is submitted that Kirk JA gave insufficient consideration to the *whole* of the legislative context – no doubt in part because of the time pressure and consequent incomplete level of assistance from the parties.

The forensic patient regime is punitive as well as protective

25. The origin of a defendant’s status as a forensic patient is a criminal prosecution, following which there must have been a qualified finding of guilt after a special hearing. Crucially, the forensic patient status which the defendant has accrued is the result of a “*limiting term*”. That limiting term is properly described as a *penalty*: see s 63 of the MHCIFP Act. The limiting term is set by a court, and is a result of a judicial officer making a “*best estimate*” of the *sentence* that the defendant would have otherwise received.
26. Properly understood, a limiting term involves punishment.³ That the status of a forensic patient is a punitive one is emphasised by the fact that that it is a central

³ See *Newman v R* (2007) 173 A Crim R 1; [2007] NSWCCA 103 at [34]-[46] (per Spigelman CJ, Bell and Price JJ agreeing).

question for the Tribunal to consider in determining whether the defendant has spent “*sufficient time in custody*” before making any order for release: MHCIFP Act s 84(1)(c).

27. The process of extension of a forensic patient’s status is a continuation of that limiting term by a further process.
28. It may be accepted that the regime also includes aspects of what might be described broadly as a “protective” jurisdiction (eg MHCIFP Act s 84(2)).
29. However, the punitive aspect of the defendant’s status means that the Court should not lightly infer words resulting in further restriction. This is particularly not where, as here, the consequence is to extend the limitations by a cumulative period of six months (that is, the initial three-month IEO, followed by the *additional* IEO which the Appellant asserted is available upon appeal).

The process of application and appeal may already take nine months

30. The existing time limits in the legislation already provide the Minister with up to nine months to commence proceedings and pursue any appeal. As is described below (at [43]-[50]), in circumstances insufficiently explained, the Appellant in the present case did not make good use of that time.
31. An application for extension can be made in the last six months of the forensic patient’s status: MHCIFP Act s 124(2). The Minister may then obtain, if necessary, an additional three months by way of an IEO. That is, a total of nine months is available.
32. Notably, the final three months of that application are in addition to the orders made by the sentencing court. If the contention of the Appellant is to be accepted and there is available *another* three months, the result would be to provide a 12-month period, of which fully six months is the result of applications by the Minister.

An application for extension is the result of a choice

33. The application for extension is the result of a choice by the Minister. That is, the application – and therefore the *timing* of the application – is in no way automatic, and is a matter wholly within the control of one party.
34. This has a number of consequences. For example, it is one of many indicators that the Minister bears the onus of proof. But relevantly it also means that if the Minister is late in making the application, then he or she should be prepared to accept that the consequences of that situation are that appeal rights may not be able to be fully ventilated.
35. Again, as is discussed in some greater detail below, in this case the Appellant had a relevant report, had dealt with this Respondent before, and yet waited until several months after proceedings could be commenced before filing.
36. The control that the Appellant had over the timing of proceedings is a further contextual indicator that Parliament did not intend there to be additional time allowed for appeals, because if the Minister acted with due dispatch then it wouldn't be necessary.

The defendant is vulnerable

37. By definition, a defendant in any extension proceedings is vulnerable. They lack legal capacity (having been found unfit to plead), and are not guaranteed representation, or funding in order to obtain their own reports or other information.

The Court should not lightly read into the legislation words that are not there

38. Given the context referred to above, the Court should not lightly read into ss 130 and 131 words that are not there, with the result being an extension of the restrictions on the liberty of an individual.

39. No reason has been articulated by the Appellant for the proposition that nine months is, as a matter of course, insufficient to determine an application and any appeal.

The time pressures of this particular matter

40. In his interpretation of ss 130-131, Kirk JA plainly considered that the “*tight time constraints*” were of some importance such that, it should be inferred, his Honour gave some weight to an interpretation that would give the parties sufficient time to give effect to their rights under the MHCIFP Act (see [34]-[36] of his Honour’s judgment).
41. However, his Honour failed to take into account that the time constraints would have been very significantly less “tight” if the Appellant had not:
- 41.1. lodged the application **almost three months after it was eligible to do so**; and
- 41.2. **waited a further 19 days** after judgment to file the appeal.
42. Indeed, it is notable that the three months which the Attorney-General now considers are justified in order to consider its appeal is **almost precisely the length of time he himself has delayed the proceedings.**

Timing of events in this matter

43. In this matter, the existing extension order was due to expire on 24 July 2025. That is, the Appellant could have commenced proceedings for the extension of Mr Haines’ status from **24 January 2025.**
44. The Appellant received a report from Dr Sathish Dayalan on or about 29 November 2024, almost two full months *before* the start of time within which proceedings could be commenced.⁴ It is also noted that Mr Haines had already

⁴ White Book Volume 2, p 153

been subject to this process previously; the Minister already had significant material on file, in addition to previous judgments of the Court on this precise topic.

45. Despite this, the Appellant did not in fact commence proceedings for extension until **11 April 2025**. That is, having received the relevant reports well in advance, the Minister waited almost five months before commencing proceedings, being almost three months after the application could have been made.
46. Notwithstanding the Appellant's delays, in due course a preliminary hearing was undertaken, and then a final hearing of the application was before Coleman J on **1 September 2025**.
47. Given the tenor of the hearing, the Appellant must have known at that time – that is, as of 1 September 2025 – that there was a prospect that the application may not succeed.
48. Coleman J's decision was delivered on **26 September 2025**. The Appellant took 19 days to lodge an appeal.
49. Again, the justification for this delay is not explained in the evidence.
50. The cumulative delays in this matter amounted to over three months. That time pressure patently weighed upon Kirk JA's interpretation of the legislation. But the Appellant was the reason that there was time pressure.
51. It is submitted that nine months is a sufficient time for the parties to litigate the issues under this legislation. Of that nine months, three months is an extension beyond the restrictions previously imposed by a Court as a punishment. If Parliament had intended there to be greater flexibility, it can be expected to have said so in very much clearer language than that relied upon by the Appellant.

The statutory preconditions were not made out

52. The following argument was not ventilated at first instance. It should be observed, in that connection, that Mr Haines and his representatives were served with the Appellant's submissions on the Friday before a Monday hearing before Kirk JA and did not know, at the time of submitting submissions on Mr Haines' behalf, any of the arguments the Appellant would make in relation to the time limit issue.
53. Nevertheless, there is a fundamental structural problem with the making of an order in the circumstances of this case: Mr Haines was ineligible.

The preconditions to an IEO

54. There are two main statutory preconditions to the making of an IEO, both found in s 130:
- 54.1. The defendant is subject to a "*limiting term*" or "*extension order*" (both of which are defined terms) which will expire before the proceedings are determined: s 130(a). And
- 54.2. A kind of *prima facie* risk assessment (s 130)(b)).
55. This argument concerns the first of those two preconditions: At the time Kirk JA was considering the matter, Mr Haines was not subject to a "*limiting term*" or an "*extension order*".

Limiting term?

56. "*Limiting term*" is a defined term. MHCIFP Act s 3(1) provides that it means "*a term nominated for a person under Division 3 of Part 4*".
57. Mr Haines' limiting term was imposed on 15 May 2017 by English DCJ, and ran between 25 September 2014 and 24 April 2022.
58. That is, the limiting term had long-since expired at the time Kirk JA was considering the matter.

Extension order?

59. “*Extension order*” is also a defined term. MHCIFP Act s 3(1) defines it as “*an order for the extension of a person’s status as a forensic patient **under section 121***” [emphasis added].
60. Section 121, is the provision providing for a *final* extension order.
61. Mr Haines had been subject to one earlier “*extension order*”, which was imposed by Yehia J on 8 July 2022, and ran between 24 July 2022 and 24 July 2025.
62. That is, the previous “*extension order*” (properly so-called) expired on 24 July 2025.
63. “*Interim extension order*” is *also* a defined term. It is defined in s 3(1) to mean “*an order for the interim extension of a person’s status as a forensic patient **under section 130***” [emphasis added].
64. That is: “*extension order*”, as defined, means an existing *final* order. It does *not* include an IEO.
65. There can be little doubt that the order to which Mr Haines was subject at the time of Kirk JA hearing the proceedings was not an extension order under s 121. Rather, the order to which Mr Haines was subject at that time was made by Harrison CJ at CL on 22 July 2025. That order relevantly stated, in part:

*Order pursuant to ss 130 and 131 of the Act, that Mr Haines be subject to an **interim order** for the extension of his status as a forensic patient commencing on 24 July 2025 for a period of three months.*

[emphasis added]

66. The preconditions to the making of an interim extension order under s 130(a) and (b) are (because of the word “*and*”) conjunctive. At the time that Kirk JA made his orders, Mr Haines was *not* subject to an “*extension order*”. The result is that his Honour had no jurisdiction to make the further order which he made.

3. GROUND 1

67. Ground 1 of the Appellant's appeal places a gloss on the words of Coleman J's judgment.
68. Read as a whole, his Honour's reasons do no more than describe the circumstances which presented themselves to his Honour. Relevantly, those circumstances involved the Appellant, who bore the onus of proof:
- 68.1. Asserting that a particular witness (Dr Youssef) should be preferred; but
- 68.2. Not proffering any submissions, whether in writing or orally, about *why* that witness should be preferred; and
- 68.3. Making a forensic decision not to call any witness, despite being clearly on notice (because of the Defendant's written submissions) that there was a dispute about whose opinion should be accepted.
69. The Appellant's submissions do not – and could not – assert a failure by his Honour to adhere to norms of procedural fairness. Rather, the Appellant's submissions assert, without statutory or other foundation, that the Court had some kind of duty to enter the fray and assist the Minister in discharging his onus of proof by resolving the dispute between the witnesses.
70. The ground should be rejected.

The Appellant bears the onus of proof

71. The Appellant's submissions fail to acknowledge that it was (is) the Appellant who bears the onus of proof in respect of each of the two limbs of the test under the MHCIFP Act s 122.⁵

⁵ *Minister for Mental Health v Paciocco* [2017] NSWSC 4 at [8] (per Campbell J).

72. Respectfully, the Appellant's submission that "*jurisdiction conferred by s 122 is protective rather than adversarial in character*"⁶ is at best tendentious, and ignores the words of the legislation.
73. The submission that this jurisdiction is protective is tendentious. As the High Court has observed

*... to begin the inquiry from an a priori classification of proceedings as either protective or penal invites error. It invites error primarily because the classification adopted assumes mutual exclusivity of the categories chosen when they are not, and because the classification is itself unstable. To assume mutual exclusivity of the categories is to fall into the same kind of error as was identified in the constitutional context in *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*. Just as a law may bear several characters, a proceeding may seek relief which, if granted, would protect the public but would also penalise the person against whom it is granted. That a proceeding may bear several characters does not deny that it bears each of those characters. Moreover, as Hayne J emphasised in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*, those who seek the "essential character" of statutory provisions do not proffer explanations of that process of distillation.⁷*

[internal citations omitted]

74. There are doubtless aspects of the MHCIFP Act which serve a protective function. But, as set out above (at [25]-[29]), the legislation in relation to forensic patients is patently also punitive.
75. Insofar as the Appellant makes the submission that a "protective" jurisdiction stands in contradistinction with adversarial jurisdictions, the submission finds no support in law. More to the point, if Parliament had intended for the jurisdiction under s 122 to be anything other than adversarial, it would have said so. Elsewhere in the same legislation it did just that: in relation to fitness inquiries, at MHCIFP Act s 44(3), the legislation explicitly states that "*a [fitness] inquiry is not to be conducted in an adversarial manner.*" Those words do *not* appear in the relation to an application for extension of a defendant's status as a forensic patient. That Parliament made

⁶ Appellant's Written Submissions, [32].

⁷ *Rich v Australian Securities & Investments Commission* (2004) 220 CLR 129 at [35] (per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ)

the distinction in one part of the legislation strongly implies that when it failed explicitly to do so elsewhere, that was intentional.

76. Moreover, the Appellant's position ignores that when he commenced the proceedings; they were not automatic. It was the Appellant who asserted that the test in s 122 was established. Section 126 twice mentions "*the Minister applying for the extension*".
77. The Appellant having made the application, it remained for him to make good that assertion, based on the evidence. That included, if it became necessary, by responding to evidence from the court-appointed experts which may not assist his assertion.
78. Nothing about the statutory scheme converted the Appellant's onus into an obligation in the Court to resolve doubts by reference to an inquisitorial style of order for the attendance of the experts in the matter.
79. Contrary to the Appellant's submissions,⁸ the statutory requirement for the appointment of experts does not change anything about the nature of the proceedings, and still less generates any obligation in the Court to assist the applicant to discharge his onus.
80. It is true, as far as it goes, for the Appellant to say that the experts were "*independent clinical experts*".⁹
81. But such a statement is a truism: *all* experts are required to be independent experts with "*an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise*".¹⁰ Indeed, they are required to acknowledge as such in every expert report, whether or not engaged by a party.

⁸ Appellant's Written Submissions, [33]

⁹ Appellant's Written Submissions, [33].

¹⁰ UCPR Schedule 7 – Expert Witness Code of Conduct, cl. 2(1).

82. It follows that the Appellant submission that “[u]nlike party-appointed experts, a Court-appointed expert is answerable primarily to the court”¹¹ is misstates the law and must be rejected.
83. The appointment of experts in the current case was empowered by – indeed *mandated by* – MHCIFP Act s 126(5). It did not involve, as submitted by the Appellant, UCPR r 31.46.¹² Moreover, against the statutory background of mandatory appointment it is, respectfully, curious to talk of the experts as being part of the armoury towards providing just, efficient and cost-effective management of litigation (a quote taken from a case about property transfer in the context of the *Bankruptcy Act 1966* (Cth))¹³. Although this litigation is technically “civil” in nature, cost-effectiveness is a low priority. And the efficiency of the proceedings has not been assisted by the Appellant’s repeated delays (as described above at [43]-[50]).
84. Viewed in light of the statutory scheme, the Appellant’s references to the UCPR rules relating to appointment of court-appointed experts¹⁴ are, respectfully, completely inapposite. In any event, nothing in UCPR r 31.20 or any other rule in the UCPR directs or requires a Court to call experts, simply because there is a dispute between the parties. It remains for the parties to conduct their cases in their clients’ best interests, taking account of the relevant onus of proof.
85. Ultimately the Appellant seeks, without statutory foundation, to infer that the Court has an obligation to inquire into the opinions presented by experts which were necessitated as a result of the Appellant’s application – an application the result of which was to confer an onus upon the Appellant to make good his case.
86. Whilst it may be accepted that proceedings for the extension of a forensic patient’s status share some aspects in common with so-called “protective”

¹¹ Appellant’s Written Submissions, [34].

¹² Cf Appellant’s Written Submissions, [35].

¹³ Appellant’s Written Submissions, [35]; *Tyler v Thomas* [2006] FCAFC 6; (2006) 150 FCR 357 at [29] (per Branson J).

¹⁴ Appellant’s Written Submissions, [34]-[35].

jurisdictions, the proceedings for extension retain their adversarial nature, and the onus of proof does not shift.

87. Thus it was unsurprising, when Coleman J commented, at [37] of his judgment that *“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.”*

88. This was, in effect, no more than a statement of the reality, which was that in the absence of further evidence, it must be the person who bears the onus of proof whose case suffers if, after comparing the evidence, there is an absence or ambiguity in the evidence on one or more crucial points.

89. The Appellant having offered no argument as to why Dr Youssef should be preferred, it would be extraordinary if the Court were consequently obliged to assist the Appellant in resolving the dispute which his representatives chose not to pursue.

90. The Appellant's submissions on Ground 1 essentially seek to do three things. First, to take advantage of the Appellant's own decision not to call evidence. Second, to infer adverse consideration by the judge based on the judge's anodyne description of the circumstances at first instance. Third, to ascribe to the Court an obligation to call expert evidence where doubt exists. All of this occurs in circumstances where the Appellant made the application and bore the onus of proof.

91. Coleman J was not, in any sense, using the way that the A-G had conducted his case against him. Rather, his Honour was merely stating that there remained an uncertainty, which plainly bore upon the question of whether he could be satisfied to a *“high degree of probability”* of the relevant issues.

92. Ground 1 should be rejected.

4. GROUND 2

93. By Ground 2, the Appellant argues that Coleman J approached s 122(1)(b) as a “black-and-white” inquiry into whether a Community Treatment Order (CTO) could theoretically exist as a less restrictive means, rather than conducting a practical, evidence-based assessment of whether a CTO would actually be implemented and properly resourced to “adequately” manage the respondent's risk.
94. The Appellant asserts that Coleman J failed to properly grapple with Dr Elliott's expressed doubts about whether local mental health services would actually pursue and assertively manage a CTO, which was critical to determining whether the risk could be adequately managed by less restrictive means.
95. These arguments fail because:
- 95.1. His Honour was merely responding to the arguments as presented by the parties – which turned principally on the question of the *availability* of a CTO, rather than its *adequacy*;
 - 95.2. The concept of “adequacy”, as characterised by the Appellant, suffers from the very flaw that it asserts: it elides the requirement from s 121(1)(b) into a single step; and
 - 95.3. There is in fact now a CTO in place. To a significant degree, the argument has been rendered arid.
96. The Appellant's argument in respect of Ground 2 must also be seen in light of the fact that Coleman J's conclusion on the question of the availability and adequacy of a means to address risk was expressed *in the alternative*: [103]-[104] of his Honour's judgment

What does s 122(1)(b) require?

97. Section 122(1)(b) requires a Court to be satisfied “... *to a high degree of probability that ... the [unacceptable risk of causing serious harm to others] cannot be adequately managed by other less restrictive means.*”

98. There is a Note to s 122. It provides that

Less restrictive means of managing a risk includes, but is not limited to, a patient being involuntarily detained or treated under the Mental Health Act 2007.

99. The Note purports to inclusively define “*less restrictive means*”, but unhelpfully it does not form part of the Act: MHCIFP Act s 3(4).

100. Nevertheless, the Note tends to draw attention to statutory (that is, mandatory) forms of restriction, whilst leaving open consideration of other factors which would tend to manage risk. Arguably, involuntary detention as mentioned in the Note is significantly *more* restrictive than continued status as a forensic patient, but little turns on this point.

101. It may be observed that s 122(1)(b) draws attention to two separate but potentially related concepts:

101.1. The **availability** of a means of managing risk (or the likelihood that it will be available) – this is connoted by the word “*cannot*”. And

101.2. The **adequacy** of that means in addressing the risk – as connoted by the words “*adequately managed*”.

102. It may be accepted, as far as it goes, that the Appellant is correct to submit¹⁵ that the test is not “*black and white*”; this is the nature of *any* risk assessment or evaluation.

¹⁵ Appellant's Written Submissions, [45].

103. However, Coleman J did not apply a “black and white test”; his Honour merely directed himself to the evidence of the experts on this topic. More to the point, the Appellant’s characterisation of his Honour’s reasoning ignores the issues which were in fact put in issue between the parties at first instance. It was to those arguments that his Honour was responding.
104. Moreover, the Appellant’s assertion about adequate management misstates the qualification to Dr Elliott’s opinion. The qualification had nothing whatever to do with adequacy – his concern was only in respect of the availability. Moreover, the Appellant’s submissions omit a crucial sentence in what has been described as the qualification to his opinion.

The arguments at first instance

105. At first instance, each party filed substantial written submissions. The Appellant’s written submissions observed¹⁶ that “... *Dr Elliott remained of the view that a CTO could adequately manage the Defendant’s risk.*” In respect of the risks, the Appellant’s counsel conceded that in the event of Mr Haines’ not complying with a CTO, that was, in Dr Elliott’s opinion “... *a risk that Dr Elliott had considered, but thought could be managed.*”¹⁷
106. Crucially, at first instance the Applicant’s counsel then submitted as follows:

Secondly, and perhaps more concerningly, is that Dr Elliott’s view that the management of the Defendant can be achieved without a forensic extension order is premised on the existence of a CTO. That is not a matter that is presently free from doubt. In fact, the material referred to by Dr Elliott in that respect is entirely equivocal as to whether a CTO would be continued if he was no longer a forensic patient. In other words, even based on Dr Elliott’s opinion, there is a link between the status of the Defendant as a forensic patient and whether a CTO, which is the centrepiece of managing the Defendant’s risk, will be made.

Put in the negative, as required by the central test, should the Defendant cease to be a forensic patient, this Court would find, based on Dr Elliott’s opinion, that there would be some doubt as to whether the CTO would be made at all. In other words, there

¹⁶ At [53] of the Defendant’s Written Submissions at first instance; White Book Volume 4, p 951.

¹⁷ Ibid.

would be some doubt as to whether the centrepiece of the appropriate management of the Defendant, according to Dr Elliott, would be continued at all should the Defendant cease to be a forensic patient.

107. In response, the Defendant's written submissions stated:

9. Secondly – and more relevantly to the position articulated by the Plaintiff – the section requires that the risk “cannot” be adequately managed by other “less restrictive means”.

10. That is, Parliament did not select a formulation of “will not”, “would not” or “might not” be adequately managed by less restrictive means.

11. In the Defendant's submission, “cannot” draws focus on the capacity of a less restrictive means to address the risk.

12. This is logical. If it were necessary for there to be certainty as to the imposition of a less restrictive means in the absence of forensic patient status, the de facto result would be to prefer the existing restrictions as a forensic patient (which are certain because they are within the Court's control) over some other means (which may not be).

13. As a statute restricting the liberties of an individual, uncertainty about the exercise of Executive functions should not be construed in a way that leads to a higher level of restriction as the presumed outcome.

14. Moreover, the Plaintiff bears the onus of establishing, to the same “high degree of probability”, that such a less restrictive means is not available. That is, the Plaintiff must establish a negative to a high degree of probability.

15. By relying on a mere uncertainty of outcome in order to establish the test, the Plaintiff would not address its burden under the second limb.¹⁸

[internal footnotes omitted]

108. As a result of the exchange of written submissions before Coleman J the ‘battle lines’ for the oral hearing were drawn.

109. That his Honour was alive to this proposition is patent in the transcript of the proceedings at first instance. Indeed, although his Honour eventually accepted the Defendant's characterisation of the test, initially Coleman J doubted that the question of availability (or as it was referred to at the hearing, capacity) was in accordance with the submissions made by the Defendant:

¹⁸ White Book Volume 4, p 957.

SPOHR: *Well, that is the rider I was going to come to. My submission is, the legislative test draws attention, not to the fact of a less restrictive means, but to the capacity of a less restrictive means.*

HIS HONOUR: *I don't agree with that. We will get to that when you make the submission.*¹⁹

110. That was therefore the context in which the following exchanges with the Appellant's counsel occurred:

HIS HONOUR: ... *I don't know that that really addresses the question because we're looking at alternatives here as to whether or not the CTO as the less restrictive means could manage Mr Haines such that he doesn't pose the relevant substantial risk.*

[Appellant's counsel]: ***But only in so far as such an order would exist and I know—***

HIS HONOUR: *Well, that's a question that [Respondent's counsel] raises.*

[Appellant's counsel]: *I have to accept that because I bear the burden of persuading your Honour to a high degree of probability that "couldn't adequately manage" means I need to persuade your Honour that there is a high of degree of probability in effect that the CTO won't be applied for.*²⁰

[emphasis added]

111. And later:

HIS HONOUR: *But that doesn't answer the question whether if a CTO was applied for that it couldn't adequately manage the risk. Isn't that the question? And that's what [Respondent's counsel] says. You see, you're just saying if he is not extended as forensic patient they probably won't go for a CTO or they may not, therefore, you can't conclude that the risk cannot be adequately managed by any other less restrictive means, for example, a CTO.*

[Appellant's counsel]: *I think my submission rises and falls on whether your Honour approaches it on a pure capacity basis or not. I urge your Honour not to do it purely on capacity because the question here is ultimately one that depends on how this person's risk is likely to actually be managed, so I think on a pure capacity point I would lose because Dr Elliott is very clear on that and I haven't challenged it, but my point is that's not exactly how it would operate in terms of how the risk is actually managed. And Dr Elliott is clear on that as well, his risk management, really the CTO is central to that.*

HIS HONOUR: *Well, that's what I said to [Respondent's counsel]. My preliminary view when I was reading it is how can the risk if it exists be managed by*

¹⁹ White Book Volume 4, p 919.

²⁰ Transcript of Final Hearing before Coleman J, p 11.28-40; White Book Volume 4 p 926.

any other less restrictive means, in this case the CTO, if there is no CTO because, absent that, the risk can't be managed by that.

[Appellant's counsel]: Yes, and I would urge your Honour to adopt that approach rather than approaching it purely through capacity, but-- ²¹

[emphasis added]

112. In summary, in the hearing before Coleman J, the Appellant did not argue on the basis that a CTO would not be adequate, assuming it was in place.
113. Rather, argument proceeded on the basis that the question was whether s 122(1)(b) required (in addition to a finding of adequacy) a finding that the other means *could* address the risk (that is, whether a means of addressing the risk had the relevant capacity, even if implementation was for some reason uncertain), or whether it was necessary that implementation was likely.
114. It was against that background – that is, upon a narrowed basis argued by the parties – that his Honour expressed the conclusions about which the A-G now complains in Ground 2.

Dr Elliott's opinion

115. Dr Elliott expressed no doubts whatever about the adequacy of a CTO, if one were in place, being adequate to manage the risk.
116. Respectfully, the extract of Dr Elliott's opinion which appears at [52] of the Appellant's Written Submissions omits a crucial sentence without acknowledgement.
117. The relevant opinion appeared at p 31 of Dr Elliott's report²² the *full* extract reads as follows – the words in bold were left out of the quote in the Appellant's written submissions:

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

²¹ Transcript of Final Hearing before Coleman J, p 13.25-48; White Book Volume 4 p 926.

²² White Book Volume 2, p 189.

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. ...

118. That sentence is, absolutely central to the opinion expressed by Dr Elliott and the test being applied by the Court.
119. This opinion plainly expresses that a CTO would manage precisely the kind of risk with to which the legislation directs attention.
120. Moreover, it is not correct to assert, as the Appellant has, that Coleman J did not engage with the readiness or ability of local mental health services to manage the respondent's risk.²³ This was precisely what his Honour was responding to when he held, at [113]

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

[emphasis in original]

121. And, subsequently, at [115]:

... 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.

122. His Honour responded to the arguments made by the parties, and responded directly to the limited qualification identified by Dr Elliott.
123. Moreover, that qualification has subsequently been found to be unjustified, because the CTO is now in place.

²³ Appellant's Written Submissions, [53].

A CTO has been made; the qualification falls away

124. The Respondent relies upon an affidavit affirmed by Amelia Gilroy, dated 28 October 2025. In it, the witness deposes that, on 24 October 2025 (the date when the IEO would otherwise have expired), the Tribunal made a CTO in relation to Mr Haines. That order will run for a period of 12 months.
125. The conditions of the CTO require Mr Haines to present himself for medication and therapy, counselling, management, rehabilitation, and other services, in accordance with the attached treatment plan. The expectation, according to the treatment plan, is that he will attend reviews with his treating psychiatrist at least every three months, reviews with a psychiatric case manager at least every month, requires him to participate in monthly blood tests relating to his clozapine regimen, and blood tests for metabolic monitoring every three months.
126. For the above reasons, Ground 2 should also be dismissed.

5. ORDERS SOUGHT

127. The Respondent's application for review should be allowed and Kirk JA's decision reversed.
128. The Appellant's appeal should be dismissed.
129. There should be an order for costs in favour of the Respondent.



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