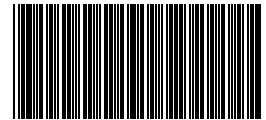


I certify that the Appellant's written submissions in reply are suitable for publication in accordance with paragraph 27 of Practice Note SC CA 01.

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



Filed: 4 November 2025 11:32 AM



D0002971YU

### 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 - Appellant's reply submissions.pdf)

[attach.]

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

**APPELLANT'S SUBMISSIONS IN REPLY**

**Introduction**

- 1 These submissions in reply respond to [67]-[126] of the respondent's submissions filed on 31 October 2025 (**RS**). Those paragraphs address the appellant's submissions on the substantive appeal filed on 24 October 2025 (**AS**).
- 2 A separate set of submissions has been prepared to address RS, [2]-[66], which relate to the respondent's Notice of Motion filed on 31 October 2025 (seeking that the interim extension order granted by his Honour Justice Kirk on 20 October 2025 be discharged on the basis that Kirk JA erred in making that order).

**Respondent's arguments on the substantive appeal**

- 3 The respondent's stated arguments on the substantive appeal are as follows:
  - (a) With respect to Ground 1, his Honour Justice Coleman's reasons did no more than describe the circumstances before him (RS, [1.2]); and
  - (b) With respect to Ground 2, his Honour Justice Coleman's reasons responded to the issues and arguments in the case. Moreover, given further evidence, the issue is now arid (RS, [1.3]).

**Ground 1**

*The Court was required to "enter the fray" merely because there was a dispute between the parties*

- 4 The respondent misstates the appellant's position in suggesting that it asserts a duty on the Court to "enter the fray" and assist the Attorney General in discharging the onus by resolving the dispute between the witnesses (RS, [69]). Nor does the appellant submit that UCPR r 31.20 (or any other rule) directs or requires the Court to call experts "simply because there is a dispute between the parties" (RS, [84]).

5 The appellant’s contention is narrower. The appellant says that Coleman J erred in treating the absence of oral evidence from the Court-appointed experts as a forensic deficit adverse to the appellant, notwithstanding that:

- (a) neither party sought to call those experts;
- (b) the Court did not indicate during the hearing that it would be assisted by oral evidence;
- (c) the experts had been appointed by the Court pursuant to s 126(5) for the purpose of assisting the Court, in the exercise of a protective function; and
- (d) the statutory task required the Court to form its own assessment of whether the forensic patient posed an unacceptable risk and whether that risk could be adequately managed by less restrictive means.

*Characterising the jurisdiction as “protective” is tendentious*

6 Contrary to the respondent’s argument at RS, [72]-[73], the appellant’s submission that “jurisdiction conferred by s 122 is protective rather than adversarial in character” is not tendentious. The appellant does not deny that the proceeding is adversarial in the sense that the parties advance competing contentions, nor is it contended that the onus of proof is somehow displaced (RS, [86]).

7 Rather, the appellant submits that the purpose for which the Court exercises its power in these proceedings is protective in nature. That characterisation is drawn directly from the statutory text. Section 69 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (**the Act**) expressly states that the objects of the regime include protecting “the safety of members of the public” (s 69(1)(a)) and “the safety of victims of forensic patients [...]” (s 69(1)(f)). It also states that one object is “to provide for the care, treatment and control” of persons with a mental health impairment or cognitive impairment who are subject to criminal proceedings (s 69(1)(b)), including by facilitating hospital care, care in the community, and community treatment orders where involuntary treatment is required (ss 69(1)(c)–(e)). Importantly, s 69(2) makes clear that these objects extend to Part 6, which governs the making and extension of forensic patient orders. Read as a whole, the statutory scheme emphasises

public and victim safety and the provision of care, treatment and control of forensic patients as considered necessary and appropriate.

- 8 Moreover, the power under s 122 turns not on past conduct but on future risk and whether that risk cannot be adequately managed by less restrictive means. Those features reflect a protective, risk-management purpose, rather than any penal or retributive aim. The exercise does not involve an *a priori* classification of proceedings as “protective” or “penal” of the kind cautioned against in *Rich v Australian Securities & Investments Commission* (2004) 220 CLR 129 (at [35]), an extract of which is cited at RS, [73]. The appellant accepts the proposition as set out in that citation, that is, “a proceeding may seek relief which, if granted, would protect the public but would also penalise the person against whom it is granted.”<sup>1</sup> Similarly, proceedings may have a protective purpose but be adversarial in terms of the procedure adopted – the two characteristics are not mutually exclusive.
- 9 The appellant does not accept the respondent’s contention that the regime governing the extension of forensic patient status is punitive in character (RS, [25]-[29], [74]). But, even if it were, that distinction does not diminish the Court’s obligation to give close regard to the serious implications for individual liberty inherent in the making of an extension order, regardless of whether the legislative scheme is characterised as being “punitive” or “protective”. It follows that nothing turns on the respondent’s submissions at RS, [29], [74].

*The significance of the experts being Court-appointed experts under s 126(5)*

- 10 The respondent contends that the appointment of experts pursuant to s 126(5) does not alter the “nature of the proceedings” and does not give rise to any obligation on the Court to assist the appellant in discharging the onus (RS, [75]). That submission understates the statutory purpose of such appointments. Section 126(5) experts are not party-retained witnesses. They are appointed by the Court, for the Court, to inform the Court’s evaluative assessment of risk within a regime that is directed to protecting community and victim safety. The respondent’s submission that “all experts [in any type of proceedings] are required to be independent experts” (RS, [81]) does not answer that point.

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<sup>1</sup> *Rich v Australian Securities & Investments Commission* (2004) 220 CLR 129 at [35] (per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

11 Further, the appellant’s references to the UCPR are not, as the respondent submits, “completely inapposite” (RS, [84]). They are directed to illustrating that the Court possesses a broad power – also reflected in s 126(5) - to appoint experts, receive reports from experts, and, where necessary, hear from experts. Where the Court neither requested nor indicated any need for oral clarification, the absence of oral evidence from Court-appointed experts could not properly be treated as being a matter that weighed against the appellant’s case. To do so was to adopt an approach that is inconsistent with the broader statutory scheme and its legislative purpose.

## Ground 2

### *Issues argued at first instance before the primary judge*

12 The respondent states that at the hearing before Coleman J, the appellant did not submit that a community treatment order (**CTO**) would be inadequate if it were in fact put in place. Rather, says the respondent, the argument proceeded on the narrower question of whether s 122(1)(b) requires only that the alternative means have the capacity to manage the risk, or whether the Court must also be satisfied that such means are likely to be implemented. The respondent states that “it was on that narrowed basis, framed by the parties’ submissions, that his Honour reached the conclusions now challenged in Ground 2” (RS, [112]-[114]).

13 This is not an accurate representation of the appellant’s submissions at first instance for the following reasons.

14 *First*, it is not accurate to say that the appellant argued that a CTO would be adequate assuming it were in place (RS, [112]). On the contrary, the appellant contended that the Court should prefer the opinion of Dr Youssef, who held that view that a CTO could not adequately manage the respondent’s risk.

15 *Secondly*, in written submissions dated 22 August 2025, the appellant clearly articulated the fact that Dr Elliott’s support for a CTO was qualified by his concern that it would not be assertively managed by the local mental health service (that is, this point addressed the adequacy, rather than the availability of the CTO). At [47], those submissions stated:

47. That said, there is an important caveat offered by Dr Elliott:

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[...].

16 The appellant also wrote at [52]:

52. Viewed in that light, Dr Elliott's opinion in relation to the appropriate management of the Defendant's risk centres around the proposition that a CTO can adequately ensure the Defendant's continued compliance with treatment. That said, Dr Elliott acknowledges the limitations of a CTO as having no practical effect in relation to a lapse into drug use but considers that:

[A] CTO [is] an important component of managing Mr Haine's risk if he ceases to be a forensic patient. I again note that Clozapine is the mainstay of Mr Haines' antipsychotic treatment and that, as an oral only treatment, it is difficult to enforce this. Nonetheless, given the concerns around the risk of serious harm Mr Haines would pose, were he to refuse Clozapine, then a breach of a CTO would provide an avenue for early admission to recommence Clozapine without him becoming so unwell as to progress down a path of full relapse of psychosis and a return to methamphetamine use. A CTO can also be seen as an order upon a mental health service to provide continued care. 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.** (*Emphasis added in the appellant's written submissions dated 22 August 2025*).

- 17 The above extracts clearly demonstrate that the appellant emphasised in its written submissions before Coleman J the fact that Dr Elliott had real concerns about the adequacy, and not just the availability, of a CTO. Adequacy, as well as availability, was in issue between the parties at first instance.

*Dr Elliott's opinion*

- 18 The respondent points to the omission of a sentence from an extract reproduced from Dr Elliott's report (page 31) at AS, [52], namely: "I am not convinced that he continues to pose an unacceptable risk of serious harm given his compliance with his current care and treatment" (RS, [117]). That sentence was not reproduced because the appellant intended to draw attention to the qualification expressed by Dr Elliott discussed on the same page (note AS, [51] includes in the chapeau to the relevant extract, "The issue is particularly significant in the present case given the qualifications expressed by Dr Elliott"). However, nothing turns on that purported omission, and no misstatement of Dr Elliott's evidence was intended.
- 19 In addition, the Court should not accept the respondent's assertion (RS, [115]) that "Dr Elliott expressed no doubts whatsoever about the adequacy of a CTO, if one were in place being adequate to manage the risk". The passages referred to above at [15]–[16] demonstrate that Dr Elliott did, in fact, express serious concerns about the adequacy of a CTO to manage the relevant risk, not merely about its practical availability. As stated at AS, [39], his Honour's reading of that evidence at [102] of the primary judgment understates this qualification and the extent to which the CTO was, in Dr Elliott's opinion, indispensable to risk management.

*Effect of the making of a CTO on 24 October 2025*

- 20 The submissions at RS, [124]–[125] address only the availability of a CTO. They do not engage with the concerns identified by both Dr Elliott and Dr Youssef as to the adequacy of a CTO as a mechanism capable of appropriately managing the respondent's risk. The fact that a CTO is now in place does not mean that the issue has "fallen away".

## Conclusion

- 21 For the foregoing reasons, and the reasons outlined in the submissions dated 24 October 2025, 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.
- 22 Alternatively, given 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 SC

Maurice Byers Chambers

**4 November 2025**



Claire Palmer

Sixth Floor Selborne Chambers