

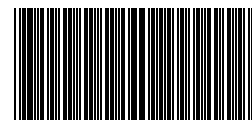
I certify that the Respondent's submissions are suitable for publication in accordance with paragraph 27 of Practice Note SC CA 01.



Checker McCarthy, Solicitor
on behalf of Cherie Pittman, Legal Aid NSW, solicitor for the Respondent



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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00369134

TITLE OF PROCEEDINGS

First Applicant	Attorney General of NSW
First Respondent	MM (a pseudonym) by his tutor Barbara Ramjan

FILING DETAILS

Filed for	MM (a pseudonym) by his tutor Barbara Ramjan, Respondent 1
Legal representative	CHERIE PITTMAN
Legal representative reference	
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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 (AG for NSW v MM (a pseudonym) bht Barbara Ramjan - respondent's summary of argument.pdf)

[attach.]

Supreme Court of New South Wales, Court of Appeal

Case No. 369134 of 2025

Attorney General for NSW v MM (A Pseudonym) bht Barbara Ramjan

Respondent's Summary of Argument

Introduction

1. The issue for decision is whether s 67G(a) of the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) immunises from compulsory production documents created and possessed by registered NDIS providers because of providing NDIS supports to participants in the NDIS. That turns on whether provision of those supports answers the description in s 67G(a) of the performance or exercise of duties, functions or powers under the NDIS Act. As the primary judge (**J**) held, they do, having regard to the purpose of s 67G and the scheme of the NDIS Act. The Attorney General's contrary submission, in essence, that registered providers operate, not in the performance of statutory functions, but in the exercise of general law capacities, should not be accepted. That distinction, by ignoring the legislative policy to enlist the private sector to deliver supports for scheme participants, and to do so within a system for registration, would undermine a designedly broad provision intended to protect not simply private information but an important confidential relationship between registered providers and NDIS participants, who must continually entrust sensitive information on a full and frank basis.

2. MM is a 56-year-old Kamilaroi man who is subject to a conditional release order under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (**MHCIFP Act**). He has a mild neurocognitive disorder and is an NDIS participant. Little Blue Wren is an NDIS service provider registered under s 73E of the NDIS Act and acted as MM's support coordinator until June 2025. It devised an NDIS Action Plan for MM and created various other documents which are the subject of this proceeding (see **WB 461-462**).

3. In connection with proceedings seeking to extend MM's status as a forensic patient for three months, the Attorney General invoked s 138 of the MHCIFP Act to compel Little Blue Wren to produce documents in its possession concerning MM's behaviour and mental condition. The primary judge held that Little Blue Wren could not be so compelled because s 138 was inconsistent with the operation of s 67G(a) of the NDIS Act: J [62]-[63] (**WB 50-51**). It is common ground that: a registered NDIS provider falls within the meaning of "any

person”; the documents were made by Little Blue Wren “in the ordinary course of providing support and services to the defendant”; and if s 67G applies then there would be an operational inconsistency with s 138(1). The Attorney does not contend that the documents could be admissible under s 138(1) of the *Evidence Act 1995* (NSW) (**WB 457-458 [98]**).

Statutory scheme

4. The Attorney General’s proposed appeal rests on the proposition that registered NDIS providers exercise general law capacities regulated by, but not derived from, the NDIS Act. There are two central difficulties with that proposition. The first is that it does not answer the operation of s 67G on the performance of *duties*, including duties to create and keep records of the kind in issue. This is the subject of the respondent’s draft notice of contention filed with this response. The second is that, even in respect of functions and powers, the scheme of the NDIS Act is not simply to regulate private sector entities exercising general law liberties; the scheme is substantially to *create* that private sector by deploying vast funds so that private providers are incentivised to deliver a public scheme that would not and could not otherwise be delivered. Moreover, any general law capacity to provide disability services is, in substantial respects, extinguished by the NDIS Act and replaced with a conditional permission to do so subject to the scheme for registration. All this fundamentally differs from mere regulation of private commercial activity.

5. The objects of the Act point beyond mere regulation of activities to the actual provision of supports to participants (ss 3(1)(b), 3(1)(d)) and to do so through an “insurance-based approach” (s 3(2)(b)) which has regard to the interaction between the provision of mainstream services and NDIS supports (s 3(3)(d)). The contemplation that NDIS supports will be delivered in a competitive market (s 4(15)) is not, as the Attorney submits, indicative of an intention merely to regulate private activity, but rather indicative of the intention to create the market, and the supply of services, by statutory intervention.

6. As the Attorney acknowledges (AS [7]), the design of the Act rests on the “registration of ‘registered NDIS providers’...and a corresponding prohibition on unregistered NDIS providers”. The Commissioner may register a person as a “registered NDIS provider” (s 73E). Rules may require that “specified classes of supports provided under participants’ plans are to be provided only by persons who are registered” (s 73B). For example, rule 6 of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* requires that providers of specialist disability accommodation, or providers who will undertake

behaviour support assessments or will develop a behaviour support plan for a participant, must be registered under s 73E. To do otherwise would be to commit an offence (s 73B(2)).

7. To that extent the NDIS Act partially extinguishes a capacity generally enjoyed but replaces it with a permission based in the statutory provision for “registration”. Registration is subject to statutory conditions (s 73F), which include compliance with the Code of Conduct. In addition, a registered provider is given a certificate which exhaustively states the classes of supports they may supply, the class of persons in respect of which they are registered and any conditions of registration (s 73E(5)). Registered providers are required to manage “each participant’s information [to ensure] that it is identifiable, accurately recorded, current and confidential” (ss 73F(2)(c), 73J, cl 12 of Sched 1).¹ They must “implement and maintain the applicable incident management system” (ss 73F(g), 73Y). There is a mandatory complaints resolution process (s 73W), and mandatory reporting obligations for “reportable incidents” (s 73Z).

8. Only registered providers are entitled to funding under the Act. To the extent that funding for supports under a participant’s plan is managed by the Agency, the plan must provide that supports are to be provided only by a registered provider (ss 32D(7), 33(6)). Further, payments are made to registered providers only upon submission of a claim complying with s 45A of the NDIS Act, which requires the registered provider to supply any information required by the CEO, which would include records of supports in fact provided to a participant such as would be evidenced by case notes of interactions with the participant.

9. By harnessing providers to deliver NDIS supports to eligible participants, the NDIS Act has created the conditions for ongoing and close *relationships* between providers and participants. The regulation of providers furthers the statutory objects of promoting the provision of high quality supports (s 3(1)(g)) and protecting participants from harm (s 3(1)(ga)). It recognises that participants may experience degrees of vulnerability in that relationship.

Preferred construction of section 67G

10. ***Duties, functions or powers:*** The references in s 67G to “duties”, “functions” and “powers” are distinct. The Attorney attempts to cut down the meaning of “functions...under the Act” by reading the phrase “duties, functions or powers” as a composite expression. “Duties, functions or powers” should not be read as a composite expression because “duty” and “power”

¹ See also *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*, r 20.

point to distinct concepts; components cannot be read *ejusdem generis* if they do not express a common genus. The natural reading of that phrase is a disjunctive one. “[D]uties, functions or powers under the Act” is intended to capture the variety of activities referred to in the Act.

11. **“Functions”** is a broad concept. In characterising a provider’s “functions...under the Act”, one may take the ordinary conceptions of the “role” that a provider performs. In *Smith v Victoria Police* (2012) 36 VR 97, the “functions” of the Commissioner in that case were not enumerated in the statute. But it sufficed to look to “the role he performs” in the Scheme (at [47]) and to conclude that he “has a pivotal role to play when it comes to protected disclosures” which was “central to ensuring that the whistle-blower scheme works” (at [50]).

12. Registered NDIS providers play a pivotal role in delivery of the NDIS scheme. Although not governmental entities, they have been enlisted or harnessed by the NDIS Act to deliver the supports that the statutory scheme intends to provide. Registered providers are the principal subjects of a “national regulatory framework for persons and entities who provide supports and services to people with disability” (s 3(2)(c)). The role of a registered provider under the Act is to deliver supports in a manner governed by the NDIS scheme. When a private provider is providing the supports for which they have been registered in a manner governed by the NDIS scheme, that provider is performing functions within the meaning of s 67G.

13. **Duties:** “Duties”, especially when read with the reference to “any person” in s 67G, is broad enough to encompass obligations owed by any person by reason of the NDIS Act. It extends, in its ordinary and natural meaning, to the many obligations to which registered providers are subject including, as mentioned above, record-keeping and incident reporting obligations.

14. **Under the Act:** Like most connecting words, the meaning of “under” is both protean and largely functional.² The effect of the Applicant’s construction is to read the word “under” as “conferred or imposed by” in a narrow sense. In some contexts, a narrow approach might be warranted. For example, in *Ex parte Zietsch; Re Craig*, Jordan CJ read down the meaning of a regulation such that a maximum price was fixed not “under” the regulation but “by” the regulation. But that was only because of the penal nature of the regulations. There is nothing in the text, policy or function of s 67G to warrant such a narrow construction. Instead, given the remedial policy of protecting the privacy of participants which underpins Pt 2 of Ch 4 of the

² *Ex parte Zietsch; Re Craig* (1944) 44 SR (NSW) 360, 364.

NDIS Act (entitled “Privacy”) there is every reason to give the word “under” the breadth it naturally admits.

15. Once the role of registered providers in delivering the statutory scheme is properly appreciated, the wider, more natural meaning of functions and duties “under” the Act is to be preferred. Private registered providers are not performing functions outside the Act. The Act has created a new, statutory, species of professional activity. It would be one thing for any person to provide self-funded disability services to another. It is quite another thing to provide those services under colour of a statutory license, representing a national governmental scheme, with conditional funding authorised by statute, and only to participants who qualify under the joint operation of ss 18, 24 and 33. Providers who are registered under an Act and who, by rendering scheme services are exercising a permission given to them by the Act, are readily seen to be performing functions “under” that Act.

16. Consistent with this accommodating construction, the Act itself describes the functions of registered providers as functions “under” the Act. The heading to section 4, which is part of the Act, refers to general principles guiding “actions *under this Act*”. The principles then elaborated are such as to be directed to, among others, registered providers (e.g. s 4(10), (11)). Section 4(14) refers expressly to supports provided “under” the NDIS, while s 4(17) makes clear that the principles are to be observed not only by identified public institutions, but also by “any other person or body” performing functions under the Act. Section 3(1)(ga) and s 181E(a) similarly refer to services “provided under” the scheme.

17. To exclude registered providers from the scope of s 67G, and limit the provision to public bodies on whom the Act directly confers public power, would be inconsistent with Parliament’s choice to extend s 67G to “any person”. In otherwise identical Commonwealth legislative provisions, Parliament has chosen to restrict an immunity to “officers” where that is the intention: *Student Assistance Act 1973* (Cth), s 354; *Child Care Act 1972* (Cth), s 12M.

18. Moreover, the Applicant’s construction does not cohere with the structure of Pt 2 of Ch 4 of the Act, of which s 67G forms an important, gap-filling, part. Div 1 of that Part is entitled “Protection of information held by the **Agency** etc”. It extends to “Agency officers” such as staff and actuaries. Div 2 is entitled “Protection of information held by the **Commission** etc”. It extends to “Commission officers”. By contrast, Div 3, in which s 67G appears, is entitled “Information **generally**”. On the Applicant’s view, only the Agency, the Commission and its staff would be made non-compellable because only they would be exercising powers directly

“under” the Act. But Divs 1 and 2 are already so directed. Section 67G must be given some other work to do.

19. The broader construction favoured by the foregoing textual and contextual considerations is supported by authority. *Tasmania v TJG* [2021] TASSC 47 is the only decision that has considered the construction of s 67G in any detail. Pearce J concluded that a registered NDIS provider was performing its functions “under” the NDIS Act when it had in its possession documents relating to the services it was giving participants as a registered provider. His Honour’s reasons included that s 67G must be referring to persons other than the Agency and Commission and its ancillary offices, and that a registered provider’s function of providing supports is a function under the NDIS Act (especially at [15]).

The purpose of section 67G

20. The purpose of s 67G favours the respondent’s construction. The Attorney pitches the purpose at too low a level of abstraction. He suggests that s 67G’s function is merely to protect the internal workings of the bureaucracy or administration of the Scheme in the sense that it protects only documents in the custody of government agents empowered directly by the statute, such as the Commission, the Agency and its officers.

21. That introduces a murky distinction, akin to that between “decisions under an enactment” and other decisions: cf AS [11], citing *Griffith University v Tang* (2005) 221 CLR 99 at [89]. Whether an administrative action is undertaken pursuant to a direct source of statutory power may be a relevant question when determining the availability of judicial review. But it is not a relevant inquiry in the context of a scheme, such as Part 2 of Chapter 4 of the NDIS Act, designed to protect the “Privacy” of scheme participants (which is quite distinct from government secrets).

22. Part 2 of Ch 4 implements one of the purposes of the Act outlined in s 4: that “[p]eople with disability should have their privacy and dignity protected”. The connection with registered NDIS providers, rather than just bodies established under the Act, is evident. Registered NDIS providers engage on a daily, continuing and personal basis with scheme participants. The Agency and Commission and their officers generally do not. Providers will hold the *most* sensitive information directly from patients and participants. That is why they are always required to “respect the privacy of people with a disability” as a condition of registration: *National Disability Insurance Scheme (Code of Conduct) Rules 2018*, r 6.

23. The Attorney General submits (AS [21]) that the purpose of s 67G cannot be the protection of participants' privacy generally because s 67G still leaves the disclosure of participants' information at the mercy of a provider's discretion. He submits that s 67G only "provides an immunity from requirements to produce but no obligation of secrecy, and has no explicit carve-out referable to the consent of the disabled person". Similarly, AS [16] then says it is "difficult to understand" why a discretion would be given under s 67G to a private service provider, as opposed to a Commonwealth officer.

24. Those submissions rest on a false premise. The spectre of NDIS providers disclosing personal information at a whim is inapt. It is true that providers would not be prohibited by s 67G from making a voluntary disclosure. But any voluntary disclosure would be constrained significantly by the obligation to "respect the privacy of people with a disability" as a condition of registration. Those obligations are just as strict as, if not stricter than, the obligations imposed on the Agency and Commission for the protection of participants' information. None of this points against a characterisation of s 67G's purpose as the protection of participants' privacy.

25. The Attorney also submits (AS [29]) that the primary judge's conclusion would preclude participants from compelling production of their own information unless they can persuade the Commissioner to disclose them. That does not undermine the Respondent's characterisation of s 67G's purpose. The Respondent submits that the purpose of s 67G is to ensure participants' *privacy* by protecting their information from compulsion; there is no need to construe s 67G as though there is a discernible purpose to require providers to do everything in the best interests of a participant.

26. The Attorney also submits (AS [30]) that the purpose of s 67G cannot be the protection of participants' privacy because the criterion of s 67G's operation is not private documents, but simply any document held because of functions performed under the Act. That could well include documents disclosing no private information. It may be accepted that, unlike an equity of confidence, s 67G does not fix upon information having any necessary quality of confidentiality. But the point of s 67G's protection of privacy is not simply to protect private information. It is to ensure the privacy of the *relationship* set up by the Act between providers and participants, by preventing any coercive interference with that relationship irrespective of the contents of any document in question. Anything less would "predictably diminish public confidence" in the sanctity of that relationship: *Piras v Thaisawat* (1993) 115 FLR 79 at 86. It is that confidence or expectation that underpins disabled persons' choice to participate in the scheme and entrust information.

Consequentialist arguments

27. Much of the Attorney's arguments below and in this application rests on consequentialist arguments. AS [18]-[21] invokes the spectre of State regulatory bodies unable to obtain documents relating to suspected criminal activity in the exercise of their statutory investigative powers. Those concerns are exaggerated. The Act already prescribes a mechanism for State regulatory authorities to receive information about NDIS participants.

28. The Act envisages that the Agency will keep records of participants' NDIS plans (ss 37, 38) and that important information such as notifications of "reportable incidents" will be notified to the Agency (s 73Z). Further, the Commission may demand a provider give documents to the Commission which are relevant to monitoring the supports that are being funded, or compliance with registration conditions, or the quality, safety and competence of the services (ss 55A, 73F(2)(b), 181F(c); see also NDIS Code of Conduct, r 3). The Commission may also have received participant information by reason of its investigative powers under s 55A, and will certainly have received participant information by reason of the regular audits that must be conducted under Rule 13B(6) of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*.

29. Section 66(1)(a) then empowers the CEO of the Agency to disclose those requested documents to any person if "satisfied on reasonable grounds that it is in the public interest to do so". Section 66(1)(b)(v) specifically empowers the Agency to disclose those requested documents to "the head of an authority of a State or Territory, for the purposes of that Department or authority". Equally, s 67E empowers the Commissioner to disclose requested documents to any person, on similar terms to s 66(1)(a)'s public interest requirement, and contains a similar specification for heads of State authorities.

30. Parliament has decided that the best way of balancing participants' rights to privacy with competing regulatory goals is for the Agency and the Commission, rather than NDIS providers, to act as the gatekeepers to NDIS information.

31. The Applicant submits that these alternatives are too inefficient. The proper conduct of applications for extension orders is time-sensitive, and the minimum 14-day notice period is said to be too long (ss 56, 73F(2)(i)). But there is no evidence that the production of information under s 138 of the MHCIFP (or like provisions) would be any faster: J [58]. Moreover, the Applicant seeks erroneously to read down a Commonwealth statute to accommodate regulatory objectives that involve fact-finding under State legislation.

32. Even if the proper construction of s 67G has the consequence the Applicant depicts, so much is simply a consequence of Commonwealth provisions giving immunities to persons entrusted with the execution of important public functions. The widespread exclusionary effect of similar Commonwealth provisions is detailed in *Halsbury's Laws of Australia*, vol 13, [205-2170]. It is illustrated in recent cases.³ In the context of s 67G itself, the Victorian Supreme Court recognised that the privacy provisions of the NDIS Act are such as to prevent adducing evidence that could “well have been of substantial relevance to an issue in the proceedings”.⁴

33. It is no answer that “[u]niversal complaints and redress mechanisms, including police...and other regulatory and complaints systems will continue to be available to both NDIS participants and people with disability outside the NDIS” (AS [14]). For one, the Respondent’s construction does not mean those complaints systems will not “continue to be available”. Moreover, to the extent the Respondent’s construction impinges on the unfettered conduct of those complaints systems, that is consistent with what the Act already achieves elsewhere, e.g. in s 58 and in Pt 2 generally. It is because the Act contemplates interference with the regulatory aims of State laws that s 207 at least disclaims an intention to cover the field. The Explanatory Memorandum is not to be understood as proclaiming no modification of the existing law so much as giving examples of the operation of s 207.

34. To the extent s 67G may “materially impair” (AS [29]) or “stymie” (AS [31]) regulatory aims under State provisions, that is simply the consequence of a deliberate parliamentary judgement that privacy should have more weight in certain sensitive relationships than some forensic benefits that might have been expedient in litigation. It is not for us to surmise, as the Attorney does (AS [30]), that the dignity of participants could have been “better served” by giving State health or safe work authorities untrammelled access to the information participants entrust to their providers in order to vindicate participants’ other interests.

35. If the consequence of all this be “extraordinary”, it is because the NDIS Act creates and organises an “extraordinary” relationship, one that is close, continuing and confidential, between registered providers and participants in the scheme.

³ *Kizon v Palmer* (1997) 72 FCR 409, 446; *Commissioner of Taxation v Tamarama Fresh Juices Australia* (2017) 252 FCR 471, [41], [42], [45], [48]. See also, in a NSW statute, *Kaldas v Barbour* (2017) 107 NSWLR 341, [370]-[376].

⁴ *Schmidt (a pseudonym) v Walter; Wagner (a pseudonym) v Walter (No 2)* [2020] VSC 122, [90], [92].

Disposition

36. The documents in issue (described at **WB 461-462**) were created and therefore possessed by Little Blue Wren in the performance of record keeping duties under the NDIS Act (see draft notice of contention). One document appears to be an official Agency form. Little Blue Wren would not complete this form were it not a registered provider. The form was evidently in its possession “because of” the duties and functions that attend registration. Others refer to “Incident[s]” or “Incident Reports”. Those are records required to be kept by all registered providers under ss 73F(2)(g), 73J, 73Y, as well as by the *NDIS (Incident Management and Reportable Incident) Rules 2018*. Again, Little Blue Wren would not complete those forms were it not a registered provider fulfilling conditions imposed upon it by the Act. All of the case notes can be seen to be records kept in compliance with the obligation to be able to justify claims for payment under s 45A.

37. Further or alternatively, as the primary judge held, the documents were created in the performance of functions under the NDIS Act, because they were created in the ordinary course of Little Blue Wren providing supports to the respondent.

38. The primary judge was therefore correct and any appeal should be dismissed with costs.

39. The Respondent consents to a concurrent hearing and does not oppose leave to appeal.

List of Authorities

- *National Disability Insurance Scheme Act 2013* (Cth), ss 3, 4, 14, Ch 3, Ch 4, s 207.
- *National Disability Insurance Scheme (Code of Conduct) Rules 2018*, r 6
- *National Disability Insurance Scheme (Incident Management and Reportable Incident) Rules 2018*.
- *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*, r 20.
- *Student Assistance Act 1973* (Cth), s 354.
- *Child Care Act 1972* (Cth), s 12M.
- *Smith v Victoria Police* (2012) 36 VR 97
- *Tasmania v TJG* [2021] TASSC 47.

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