

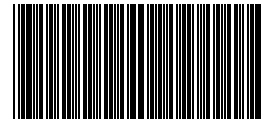
I certify that the Applicant's submissions in reply are suitable for publication in accordance with paragraph 27 of Practice Note SC CA 01.

PC Clark

Philippa Clark, Solicitor
on behalf of Karen Smith, Crown Solicitor, solicitor for the Applicant



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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	Attorney General of NSW, Applicant 1
Legal representative	Karen Smith
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 (Submissions in Reply (15 October 2025) signed.pdf)

[attach.]

2025/369134

ATTORNEY GENERAL (NSW) v MM (A PSEUDONYM)**APPLICANT'S SUBMISSIONS IN REPLY****PART A: INTRODUCTION AND SUMMARY**

1. These submissions address the submissions of the respondent filed on 10 October 2025 (**RS**). There does not appear to be any dispute that the interpretations urged by the parties are open on the statutory language. The dispute is which of the open interpretations should be preferred. For the most part, issue has been joined and the Attorney General relies on his summary of argument filed 25 September 2025 (**SOA**).

PART B: RESPONSE TO THE RESPONDENT'S SUBMISSIONS

2. **Statutory scheme (RS [4]-[9]):** The general law capacity to provide disability services is not, in substantial respects, extinguished by the NDIS Act and replaced with a conditional permission to do so (contra RS [4]), nor does the Attorney General accept that the design of the Act “rests” on the scheme for registration (contra RS [6]).¹ The objects of the NDIS Act are set out in s 3(1). Two mechanisms by which the NDIS Act achieves those objects are through adopting an “insurance-based approach ... to the provision and funding of supports for people with disability” and “establishing a national regulatory framework for persons and entities who provide supports and services to people with disability...”. An aspect of that “insurance-based approach” is creating restrictions on the provision of some services (where funding is managed through the Agency), where those services are funded by the scheme.
3. The NDIS Act does not provide funding to registered providers (contra RS [8]). Rather, it sets up a scheme for the provision of funding supports and services for NDIS participants. Section 73B(7) provides that *to the extent* that the funding for supports under a participant’s plan is managed by the Agency, the plan must provide that the supports are to be provided only by a registered NDIS provider. The Court should not make *a priori* assumptions about the scheme setting up particularly “close” or “extraordinary” relationships, and then interpret the legislation by reference to those assumptions (contra RS [9], [35]).
4. **“Duties, functions and powers” (RS [11]-[13]):** In *Smith v Victoria Police* (2012) 36 VR 97, a broader interpretation of the phrase “the exercise of functions under this Act” was preferred.

¹ See SOA [7].

Justice Ferguson explained that this broader interpretation better promoted the objects and purpose underlying the *Whistleblowers Protection Act* 2001 (NSW), noting that the narrower interpretation would protect the alleged wrongdoer rather than the whistleblower ([55]). While it may be accepted that registered providers play an important role in the delivery of the NDIS scheme, the respondent characterises this role in a way that divorces it from the actual operation of the NDIS Act (see RS [12]). Providers are not “enlisted” or “harnessed” by the NDIS Act. Providers of disability support services may (but need not) seek registration. If they do so, they are able to provide supports to persons whose funding is managed by the Agency. If they do not, then they may continue to provide support services to people with disability, both within and outside the scheme.

5. **“Under” the Act (RS [14]-[18]):** The respondent accepts that the word “under” may be construed in a variety of different ways. One reason for construing such a word narrowly may be the penal nature of a statute, as was the case in *Re Craig; ex parte Zietsch* (1944) 44 SR (NSW) 360. Another, as in this case, is where the broad meaning of “under” would give rise to surprising or impractical consequences which are not consistent with the objects of the NDIS Act, and which create incoherence in the statutory scheme.² Registration under the NDIS Act is not a statutory license to provide disability services. As set out above, it allows providers to opt in to registration in order to be eligible to provide services in a particular context. This is to be contrasted with many other service-providers, who *must* be registered or otherwise licensed in order to provide particular kinds of services, or services in a specific field (e.g., childcare providers).
6. The exclusion of registered providers from the operation of s 67G is not inconsistent with the language of “any person” in s 67G having regard to the context of s 67G and the legislative history (contra RS [17]-[18]). The protections in Divisions 1 and 2 of Part 2 concern disclosure. They are silent concerning compulsory processes. By contrast, s 67G limits the circumstances in which compulsory production of information may be required. It applies to Agency and Commission officers, as defined under the NDIS Act, and also to, for example, consultants (ss 171, 181V) and inspectors or investigators appointed under the NDIS Act (who may include third party contractors – see s 73ZR).

² Coherence is of particular importance having regard to the cautions expressed in the authorities concerning the danger of “picking a winner” where the legislation has stayed its hand from doing so”, or utilising purpose in circumstances where the asserted purpose involves an *a priori* assumption about the intended reach of the provision: see, e.g., *Minister for Employment v Gribbles Radiology* (2005) 222 CLR 194 at [21]; *Palgo Holdings v Gowans* (2005) 221 CLR 249 at [28]; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [34].

7. ***The purpose of s 67G (RS [20]-[26]):*** Rule 6 of the *National Disability Insurance Scheme (Code of Conduct) Rules* 2018 (Cth) (**Code of Conduct Rules**) does not answer the concerns raised by the Attorney General. Even if it were permissible here to use the rules to construe the NDIS Act, rule 6 also requires that a Code-covered person “promptly take steps to raise and act on concerns about matters that may impact the quality and safety of supports and services provided to people with disability”. There may be circumstances in which these obligations come into conflict (for example, where disclosure of private information may be required to raise a concern about a service provided to a person with disability). Consistent with this, respecting privacy typically involves a balance of competing interests, typically reflected in the detail of privacy legislation with a suite of often-complex exceptions to rules about non-disclosure. Facilitating law enforcement and professional regulation is entirely consistent with respecting an individual’s privacy.
8. The respondent appears to accept that participants could not themselves compel production of their own information (RS [25]). The Attorney General has not submitted that there is a discernible purpose to require providers to do everything in the best interests of participants (contra RS [25]). Rather, the fact that a participant cannot compel production of records concerning services provided to them is an indicator of the incoherence created by the broad interpretation, noting that the secrecy protections in Div 1 and Div 2 of Part 2 expressly contain exceptions referable to the consent of the participant.
9. The respondent has not pointed to any part of the NDIS Act or extrinsic materials to support the proposition that s 67G is intended to ensure the privacy or secrecy of the *relationship* between registered providers and participants.³ People with disability may engage with a range of service-providers, only some of which will be registered and only some of which will be paid through the Scheme. The supports and services provided to a person with disability may encompass matters ranging from intimate care and medical services to assistance with cleaning and transportation.⁴ Disclosure of private information by persons who may be vulnerable is not restricted to the relationship between participant and a registered provider. There are many

³ *Piras v Thaisawat* (1993) 115 FLR 79 concerned whether secrecy provisions in the *Social Security Act* prevented a subpoena from issuing to the Department of Social Services. That case turned particularly on the construction of s 64A(4) of the *Family Law Act* 1975 (as it applied at that time), and the observations identified were made in that context.

⁴ The Explanatory Memorandum to the 2017 Amending Act identified that “Current quality systems have not been designed with the NDIS in mind. First, they have been designed with specialist disability services in mind, whereas the NDIS will cover a much wider range of supports, many of which are low risk. Alongside traditional specialist disability suppliers of supports there will be greater numbers of registered health professionals and suppliers of transport, household cleaning and gardening services”: House of Representatives, Explanatory Memorandum, *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill* 2017, p 60.

relationships recognised in general and statute law as requiring significant protection: for example, the relationship between medical practitioners or lawyers and their clients. It would be startling if the legislature had intended that that the logistical step of having funds managed through the Agency should have as its consequence that certain documents would be immune from law enforcement and professional regulators. In addition, that would create a discrepancy between people with disability whose funds are managed in this way, and those whose funds are not.

10. “*Consequentialist arguments*” (RS [27]-[35]): The consequences of competing interpretation are always relevant to the Court’s task of identifying the preferable construction. RS [27]-[31] appear to accept that *urgent* production of documents could not in general be compelled by a State-based regulator or law enforcement agency if s 67G is interpreted as his Honour did below. The respondent has not grappled with the risk this could create for people with disability, particularly if it was suspected a registered provider was engaging in criminality, impropriety or negligence.
11. Similarly, it is true that the interpretation favoured by the respondent does not make the universal complaint and redress mechanisms referred to in the extrinsic materials *unavailable*. However, the interpretation impairs the effectiveness of those mechanisms as regards a particular class of scheme participants (who, since their funding is managed by the Agency, might be expected to be among the more vulnerable participants).
12. The cases referred to at RS [32] do not assist the respondent. None goes beyond the uncontroversial proposition that interpretation of a provision protecting information, documents or witness from compulsory processes will turn upon the text of the provision in its statutory context.⁵ The respondent’s argument also appears to assume that providers *will* always act in the best interests of participants. The present case illustrates that a choice may be made by a provider voluntarily to disclose material (undoubtedly for proper purposes). However, if a provider wished for orders to be made under a provision such as 138, the

⁵ The remarks referred to at 446 of *Kizon v Palmer* (1997) 72 FCR 409 concerned s 63 of the *Telecommunications (Interception) Act* and go no further than identifying that the Commonwealth may, without interfering with the exercise of the judicial power of the Commonwealth, create immunities from compellability. In *Commissioner of Taxation v Tamarama Fresh Juices Australia* (2017) 252 FCR 471 it was concluded that a subpoena directed to the Commissioner of Taxation (who was not a party to the substantive proceedings) should be set aside on the basis that disclosure to the Court was not necessary for the purposes of carrying into effect the provisions of a taxation law (see [3]-[4], [41]-[48]). *Kaldas v Barbour* (2017) 107 NSWLR 341 concerned a provision of far narrower scope than s 67G that made the Ombudsman and officers of the Ombudsman non-compellable in proceedings, except for proceedings under the *Ombudsman Act*. The Court was also not required to determine the question of the scope of the immunity, having concluded that the proceedings were incompetent: see [369] (Basten JA, Macfarlan JA concurring).

respondent's construction would allow them to disclose records selectively (except insofar as the Agency and Commission had requested information to then pass on to a State agency), in circumstances where the participant may not know what the balance of those records indicates.

PART C: NOTICE OF CONTENTION

13. As to the draft notice of contention, the Attorney General accepts that there is an available argument that the impractical breadth of s 67G could be curtailed by the operation of the words "because of". It is not clear that all, or even the majority, of documents held by a registered provider would be held because of a duty, power or function under the NDIS Act. Each document is addressed in Annexure A to these submissions. Much would turn on the particular facts and the circumstances in which the document was created – which itself makes the interpretation unattractive, as it leaves registered providers or State-based regulators forced to make a difficult judgment about precisely which documents fall on one side of the line or the other.
14. Moreover, there is a difficulty in giving primacy to the factual question of causation. This would mean that whether something fell within s 67G might turn on the evidence of why the record was made or kept by the particular provider. For example, one provider might be protected by s 67G (because s 73Q is the only reason they retain the records, and s 67G would apply), whereas another provider might say they would keep records regardless of what s 73Q required (because they are naturally prudent and would have excellent record-keeping regardless of the NDIS Act, in which case their records might fall outside s 67G). The difficulties with this outcome give some weight to the suggestion that s 67G was not intended to capture provisions like s 73Q, and supports the narrower interpretation of s 67G.

15 October 2025



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Annexure A		
Implementation report		
1.	Support coordination – implementation report(13 Jun 2024)	It is apparent that LBW would not have completed this form if it were not a registered provider (RS [36]).
Support plan (LBW letterhead)		
2.	Support Plan (29 Jul 2024)	The preparation of a support plan is not referable to any power, function or duty under the NDIS Act, the Rules, or LBW’s conditions of registration. The existence of this type of document – which may well be prepared irrespective of whether a person is a NDIS participant whose funding is managed through the NDIA (see p 2, which identifies different funding sources) – illustrates the difficulty with the respondent’s focus on the question of factual causation.
LBW Reports		
3.	Report (17 Oct 2024)	These two reports are not records required to be kept by operation of the conditions of LBW’s registration (s 73F(2)(g)), the incident management system set up under s 73Y, or the <i>NDIS (Incident Management and Reportable Incident) Rules 2018</i> . The reports do not describe a reportable incident within the meaning of s 73Z(4) or the Rules. A prudent service provider could be expected to prepare and maintain documents of this kind regardless of the obligations under the NDIS Act.
4.	Report dated 21 Oct 2024)	
Case and Progress Notes		
5.	Support Worker Progress Notes (25 Sep and 17 Oct 2024)	Each of these documents comprises case or progress notes completed by employees of LBW. These are not records required to be kept by operation of the conditions of LBW’s registration (s 73F(2)(g)), the incident management system set up under s 73Y, or the <i>NDIS (Incident Management and Reportable Incident) Rules 2018</i> . The notes do not describe a reportable incident within the meaning of s 73Z(4) or the Rules. The use of the word “incident” does not necessarily indicate that a note or record refers to a reportable incident. Nor can it be inferred that the note or record was created or retained due to the requirements of s 73Y. A prudent service provider could be expected to prepare and maintain documents of this kind regardless of the obligations under the NDIS Act.
6.	Case note (29 Oct 2024)	
7.	Case notes (30 April 2025 to 22 May 2025)	
8.	Incident notes dated 24 January 2025 to 19 February 2025.	