



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA**

**ADELAIDE REGISTRY**

A2 of 2025

**BETWEEN:**

**CD**

First Plaintiff

**TB**

Second Plaintiff

and

**THE COMMONWEALTH OF AUSTRALIA**

Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEYS GENERAL FOR  
THE STATE OF WESTERN AUSTRALIA AND THE STATE OF VICTORIA  
(INTERVENING)**

## PART I: CERTIFICATION

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1. This outline is in a form suitable for publication on the internet.

## PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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### Confirmation Act materially indistinguishable from *Nicholas v The Queen*

2. The operation of the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) is materially indistinguishable from the legislation held to be valid by this Court in *Nicholas v The Queen* (1998) 193 CLR 173 (**JBA Vol 3 Tab 15, 578**): **WA [9]**. See **NSW [34]-[36]**.
3. As in *Nicholas*, the Confirmation Act makes admissible evidence that may otherwise have been inadmissible. That the Confirmation Act does so in a less directive way and in respect of a larger class further supports the conclusion that its provisions do not infringe Ch III: **WA [5](d), [9]**. See **DS [38]**.

### Confirmation Act does not declare any facts

4. The Confirmation Act does not declare any facts or impermissibly interfere with the exercise of judicial power: **WA [8]**.
5. The plaintiffs' submission that the Confirmation Act is not validating legislation must be rejected: **PR [13]**.
  - (a) Sections 5(2), 6(1), and 6(2) of the Confirmation Act confirm the validity of the relevant warrants and associated administrative acts: **WA [27]-[28]**, **DS [17]-[19]**, **NSW [18]-[21]**.
  - (b) Section 5(1) of the Confirmation Act is a provision attaching legal consequences or status to things which may not otherwise have had those legal consequences or status: **WA [5](c), [14]**. See also **WA [25]-[26]**, **DS [27]**, **NSW [17]**.
6. The Confirmation Act's operation is not materially distinguishable from the operation of legislation upheld in earlier decisions of this Court including *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 (**JBA Vol 3 Tab 11, 340**) and *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 (**JBA Vol 3 Tab 10, 294**): **WA [14], [29]**.

7. The plaintiffs' submissions at **PR [5]-[8]** are irreconcilable with decisions of this Court confirming that Parliament may pass legislation rendering nugatory pending proceedings, including an appeal: **WA [11]-[12], [15]**. It is of no consequence that the Confirmation Act does not deem judicially found or determined unlawful intercepts to have been validly intercepted: see **PR [6]**.
8. The fact-finding role of the court is left unimpaired by the Confirmation Act; the Confirmation Act attaches legal consequences to a factum (information being obtained pursuant to a "relevant warrant"), if that factum is found to exist by the relevant court: **WA [21]-[24], [29], DS [16]**.
- 10 9. Parliament is not required to await the outcome of judicial proceedings considering a particular trigger or factum before passing legislation declaring rights and liabilities to be applied by a court in relation to that trigger or factum. See **WA [18], DS [29]-[34], [42]**.

**Confirmation Act does not abolish discretionary bases for exclusion of evidence**

10. It is unclear on what basis the plaintiffs say that the discretionary bases to exclude ANOM evidence are completely curtailed by s 5(3) of the Confirmation Act: **PR [16]**. This is not the case for the reasons explained in **DS [36], NSW [19], [39]** and **SA DPP [32]**. See **WA [10]**.

**Confirmation Act does not create two legal regimes**

- 20 11. The plaintiffs' submission that the Confirmation Act creates two different legal regimes is without merit: **PR [17]**.
12. The Confirmation Act does not result in such a consequence; it operates in relation to "relevant warrants", capturing the cohort of cases in which evidence of ANOM messages may be used in legal proceedings: see **WA [20]**. It is irrelevant that the Confirmation Act is of no application to cases which do not involve the use of the ANOM application, or to cases not involving a "relevant warrant".

Dated: 13 May 2025



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Craig Bydder SC

Aleksandra Miller