



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number: A2/2025
File Title: CD & Anor v. The Commonwealth of Australia
Registry: Adelaide
Document filed: Form 27F - DPP (SA) Outline of oral argument
Filing party: Defendants
Date filed: 13 May 2025

Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

CD and TB

Plaintiffs

and

THE COMMONWEALTH OF AUSTRALIA

Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE DIRECTOR OF PUBLIC
PROSECUTIONS (SA)**

Part I: CERTIFICATION

The Director certifies that this outline is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. Section 74 TIAA contemplates the challenge to the admissibility of information that is, purportedly, lawfully intercepted information (**TIAA, s 6E**), in an exempt proceeding (**TIAA, s 5B**).
2. Section 5 of the Confirmation Act attributes to each of:
 - a. information or a record obtained under, or purportedly under, a relevant warrant,
 - b. anything done, or purportedly done, under a relevant warrant, and
 - c. evidence obtained under, or purportedly under, a relevant warrant

(facts to be established in the ordinary way as part of pre-trial argument, if issue is taken) a particular legal status (**DPP: [14]-[22], [26]-[27], [29]-[35]**).

That attribution does not involve fact finding.
3. The consequence of that attribution is that invalidity on any basis which, but for s 5, would enliven the rule of evidence contained in s 77 TIAA, can no longer (**DPP: [36]-[37]**).
4. Section 6 of the Confirmation Act operates similarly (**DPP: [23]-[27], [29]-[35]**).

5. The consequence of s 6 of the Confirmation Act is that unlawfulness or impropriety on any basis to which s 6 applies, can no longer enliven a discretionary exclusionary rule (whether statutory or at common law).
6. Thus, the practical effect of the Confirmation Act is to regulate proof of a fact or facts in an exempt proceeding or a proceeding in relation to which evidence obtained under a relevant warrant may be used (**DPP: [36]-[37]**); *Nicholas v The Queen* (1998) 193 CLR 173 (**JBA Part C, vol 3, 578**) at [23], [55], [162], [235], [238]).
7. The Confirmation Act facilitates correct fact finding (*Graham v Minister for Immigration* (2017) 263 CLR 1 (**JBA Part C, vol 3, 475**) at [30]-[32]).
8. The question of admissibility, which the Confirmation Act impacts, is a matter of practice or procedure that may arise supplementary to the resolution of the controversy (**DPP [48]-[50], [62]**). The Confirmation Act may apply in any case in which evidence is sought to be adduced that was obtained pursuant to a relevant warrant., civil or criminal. SIn this case:
 - a. the controversy is defined by the Information and the charges laid,
 - b. the Information engaged the criminal jurisdiction of the Supreme Court of South Australia,
 - c. the ultimate fact – liability for the offences charged – depends on proof by the prosecution of the elements of each offence to the criminal standard in the usual way, requiring fact finding and the application of the law in the usual way.
9. The question of admissibility is not foreclosed by the Confirmation Act (**DPP [43]-[45], [58]-[60]**)
 - a. Evidence must still be relevant, and both statutory (eg Part 3.11 *Evidence Act 1995* (Cth)) and common law (eg *Christie* and “general unfairness”) discretions remain.
 - b. the power to stay proceedings is untouched.

Dated 13 May 2025



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