



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: A24/2024
File Title: CD & Anor v. Director of Public Prosecutions (SA) & Anor
Registry: Adelaide
Document filed: Form 27F - R2 A-G Cth -Outline of oral argument
Filing party: Respondents
Date filed: 13 May 2025

Important Information

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**IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY**

BETWEEN:

CD

First Appellant

TB

Second Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)

First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Respondent

**SECOND RESPONDENT'S
OUTLINE OF ORAL SUBMISSIONS**

PART I: INTERNET PUBLICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1: when a communication starts “passing over a telecommunications system”

2. **Text (CS [32]-[36]; [42]-[43]):** The text of s 5F(a) of the *Telecommunications (Interception and Access) Act 1979* (Cth) (**Interception Act**) does not “make plain” that a communication starts passing over the telecommunications system when the sender physically presses send: cf AS [26].
3. The words “is taken to...” do not have the effect that the section creates a fiction: CS [42]-[43], cf AS [3], [16], [26], [29].
 - *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65-67 (**Vol 3, Tab 8**).
4. Nor does the provision speak to a human action of pressing “send”. Rather “when it is sent or transmitted” points to the moment at which a communication has actually been sent or transmitted, and “by the person sending the communication” identifies the individual who has taken the anterior steps that have led to that moment: cf AS [30].
5. **History and purpose (CS [21]-[29]):** Prior to the introduction of s 5F it was clear that an interception under s 7(1) involved copying or recording a communication in its passage over the telecommunications system in the form of electromagnetic energy.
 - *Interception Act* (Reprint No 2), s 5(1) “telecommunications system”, “telecommunications network”, “passing over”, “carry” and “equipment” (**Vol 2, Tab 5**).
 - *R v Giaccio* (1997) 68 SASR 484 at 491 (**Vol 4, Tab 12**).
6. The introduction of s 5F was not intended to effect a fundamental change to the operation of the Interception Act by altering these basic requirements or expanding the statutory window in which a communication is passing over a telecommunications system. Rather, the history reveals that s 5F was inserted to *maintain* a distinction between communications passing over a telecommunications system in the form of electromagnetic energy and “stored communications”.

- *Report of the Review of the Regulation of Access to Communications*, August 2005 at pp 5-6, 10-11, [1.3]-[1.5], [7.5] (**Vol 5, Tab 14**).
- *Explanatory Memorandum to the Telecommunications (Interceptions) Amendment Bill 2006* at [1]-[4], pp 5-6 (**Vol 5, Tab 15**).
- *Supplementary Explanatory Memorandum to the Telecommunications (Interceptions) Amendment Bill 2006* at pp 1, 3 (**Vol 5, Tab 17**).

7. **Consequences of construction (CS [44]):** The appellants' preferred construction of s 5F(a) does not provide certainty or consistency (cf **AS [16]**), but would lead to anomalies. It is no answer to this problem with their proposed construction to say that such consequences do not arise on the facts of this case: cf **Reply [10]-[12]**.
8. **Application to ANOM communications (CS [7], [18], [40]):** After the user of an ANOM device composed a message and pressed "send", the message was copied within the ANOM application. It was only after this that the original message and the second message: were encrypted within the ANOM application; began moving through the layers of the device during which they underwent various processes; and were ultimately converted into electromagnetic energy. Accordingly, the original message was not copied "in the course of" its movement through the device (cf **AS [17]**). More importantly, the original message was copied before it had been transmitted over the telecommunications system in the form of electromagnetic energy. It was not yet "sent or transmitted" and, therefore, had not started "passing over" that system.

Ground 2: when a communication stops "passing over" (CS [47]-[55])

9. The point at which a communication stops "passing over a telecommunications system" for the purposes of s 7(1) of the Interception Act is answered by ss 5F(b), 5G and 5H.
10. Section 5G provides that the "intended recipient" is ascertained by reference to the address to which the communication is, in fact, addressed. It does not require the sender to have taken some intentional action to enter an address.
11. The ANOM application addressed the second message to the "iBot Server": **CS [7]**. Under s 5G(c), the person with control of that server was the "intended recipient" of the second message. Under subs 5H(a) and (c), the second message was "accessible" to the intended recipient when it had been received by, or had been delivered to, the iBot Server. That was the point at which the second message stopped passing over the

telecommunications system. The AFP's subsequent access to the second message was therefore not an interception of a communication passing over a telecommunications system.

Notice of contention (CS [56]-[67])

12. The Court of Appeal should have found that only so much of the functioning and capability of the mobile device as was capable of being used for transmitting or receiving a communication by means of electromagnetic energy was "equipment" connected to a "telecommunications network".
13. The relevant definitions indicate that "equipment" only forms part of a "telecommunications network" to the extent that it is actually for transmitting or receiving a communication by means of electromagnetic energy: **CS [60]-[63]**.
 - *Interception Act*, s 5(1) "telecommunications system", "telecommunications network", "equipment" and "telecommunications device" (**Vol 1, Tab 3**).
 - *Macquarie Dictionary*, "system" (**Vol 5, Tab 16**).
14. There being boundaries between the ANOM application and the telecommunications network, the functioning of that application did not itself form part of the telecommunications system: **CS [65]-[67]**.

Dated: 13 May 2025



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