



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

CD
First Plaintiff

TB
Second Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

DEFENDANT'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

The Confirmation Act does not declare facts (DS [11]-[20], [23]-[25])

- 2 Section 5(1) of the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) (**Confirmation Act**) provides that specified information and records are taken not to have met a statutory description (“intercepted while passing over a telecommunications system”) in the *Telecommunications (Interception and Access) Act 1979* (Cth) (**Interception Act**): Confirmation Act s 4. That does not constitute a “legislative
10 declaration of fact” (cf **PS [5]**) but rather confirms or alters the legal characterisation of past facts. It concerns the same “question of law” stated by the trial judge for the Court of Appeal, and which is the subject of the plaintiffs’ appeal: **SCB 28 [17]-[21], 68**.
- 3 Sections 5(2)-(3) of the Confirmation Act specify related legal consequences, including for avoidance of doubt. Section 5(2) validates things done which would have been invalid or unlawful except for s 5(1). Section 5(3) deems evidence that would have been obtained illegally or improperly “except for” s 5(1) not to have been so obtained. It does not affect any illegality or impropriety which falls outside the scope of s 5(1): cf **Reply [16]**. Section 6(1) provides that information or a record obtained in reliance or purported reliance on a
20 “relevant warrant” is taken for all purposes to have been, and to always have been, obtained under one of three particular types of warrant. Sections 6(2)-(3) mirror ss 5(2)-(3).
- 4 The legal effect of s 5(1) is that specified information or records that were obtained in a particular way (ie “under, or purportedly under, a relevant warrant”) are deemed not to meet a particular statutory description, and therefore not to attract particular statutory consequences (including certain bars on admissibility): Interception Act ss 6E(1), 7, 63(1), 77(1)(a). Section 5(1) has that effect whether or not the information and records would otherwise have met the relevant statutory description and attracted those consequences. It operates where courts find the “factum” specified in s 5(1) to exist. While s 5(1) “changes the factual landscape” (**Reply [8]**) by altering the facts that are relevant to the plaintiffs’ challenge to admissibility, that does not amount to a declaration of fact. It merely signifies
30 that the new legal rule attaches significance to different facts than were previously relevant.

The Confirmation Act validly changes the applicable law (DS [28], [29], [42])

- 5 No invalidity arises from the fact that the Confirmation Act was passed while a “controversy was on foot” and in that sense “pre-empted judicial decision making”, or that it affects a closed class of cases: cf **Reply [4], [12]-[13]**.
- 6 In the *BLF Case* (1986) 161 CLR 88 (**Vol 3, Tab 9**) at 91-96, this Court held that a Commonwealth Act that operated with respect to a single union and rendered pending High Court proceedings “redundant” (thereby “abrogat[ing] the function which would otherwise have been performed by this Court”) did not offend Ch III. Parliament may “affect and alter rights ... in pending litigation without interfering with the exercise of judicial power”.
 10 That was so even where the Act’s very purpose “was to circumvent the proceedings and forestall any decision which might be given”. See also *H A Bachrach Pty Ltd v Qld* (1998) 195 CLR 547 (**Vol 3, Tab 14**) at [2], [8]-[9], [14], [16], [22]-[23].
- 7 The same principles were applied in *Duncan v ICAC* (2015) 256 CLR 83 (**Vol 3, Tab 11**) to reject a Ch III challenge to an Act that retrospectively altered the legal characterisation of facts in pending proceedings: at [1]-[8], [11]-[15], [20], [25]-[26], [31] (French CJ, Kiefel, Bell and Keane JJ), [39]-[42] (Gageler J), [45]-[46] (Nettle and Gordon JJ). *Duncan* illustrates that legislation can validly provide that past conduct “is taken to have been, and always to have been” within a statutory concept. It can do so even when the very question whether particular past conduct falls within that statutory concept is in issue in
 20 pending proceedings.

The Confirmation Act validly removes a basis for excluding evidence (DS [30]-[34], [37]-[41], [43]-[44])

- 8 One operation of the Confirmation Act is to remove several bases on which ANOM messages might otherwise have been excluded from evidence: Confirmation Act ss 5(1), 5(3), 6(3); Interception Act ss 63(1), 77(1); Uniform Evidence Acts s 138. In that operation, the Confirmation Act is indistinguishable from the provision upheld in *Nicholas v The Queen* (1998) 193 CLR 173 (**Vol 3, Tab 15**). That provision, which applied to a closed class of cases much smaller than that affected by the Confirmation Act, directed courts to disregard the central pertinent “fact” in deciding whether to exclude evidence on
 30 the ground that it was unlawfully or improperly obtained. The majority held that, although

it altered the available evidence in a criminal trial, the provision did not offend Ch III: at [5], [12], [21], [23]-[24], [26] (Brennan CJ), [155]-[156], [162]-[164] (Gummow J), [249] (Hayne J); see also [53] (Toohey J), [79]-[80], [83] (Gaudron J).

- 9 *Nicholas* is not distinguishable: cf **PS [44]**. A similar attempt to distinguish *Nicholas* was rejected by the NSW Court of Appeal in *Lazarus v ICAC* (2017) 94 NSWLR 36 (**Vol 5, Tab 19**). Like the Confirmation Act, the relevant provisions in issue in *Lazarus* validated conduct, one effect of which was to preclude an argument that evidence upon which a conviction depended was illegally or improperly obtained. That provision was upheld: at [3], [4], [5], [54], [56], [73], [103]-[104], [111], [117]-[119] (Leeming JA; McColl and Simpson JJA agreeing).
- 10 On the unchallenged authorities above, the Confirmation Act should be held to be consistent with Ch III. Questions 1(a) and 1(b) should be answered “No”. Question 2 should be answered “The Plaintiffs”.

Date: 13 May 2025



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