HIGH COURT OF AUSTRALIA

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Details of Filing

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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 SUBMISSIONS

PART I: FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE ISSUES

2. This special case concerns the validity of ss 5, 6 and 7 of the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) (**Confirmation Act**).

3. The plaintiffs' submissions on both questions in the special case are premised on the proposition that ss 5 and 6 of the Confirmation Act constitute a "legislative declaration of fact" (eg **PS [5]**). For the reasons set out below, that premise cannot be made good. Sections 5 and 6 of the Confirmation Act confirm (or deem) the legal characteristics of certain information and records that were obtained or purportedly obtained under a "relevant warrant" (as defined in s 4). They ensure that particular legal grounds on which it could be argued that information or records are inadmissible do not apply. They neither declare any fact, nor direct the courts to find any fact. In accordance with longstanding authority, they do not involve a purported exercise of judicial power or an interference with the institutional integrity of courts vested with federal jurisdiction.

PART III: SECTION 78B NOTICE

4. The plaintiffs gave notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) on 7 February 2025 (**SCB 19**). No further notice is required.

PART IV: MATERIAL FACTS

5. In late 2018, the Australian Federal Police (**AFP**) launched "Operation Ironside". That operation involved the programming and distribution of an application known as "AN0M" (**AN0M Application**), which was installed on mobile telephones, and a telecommunications platform on which electronic communications could be sent or transmitted (together, the **AN0M Platform**) (**SCB 23 [4]**).

6. There is no dispute as to the manner of operation of the AN0M Platform (**PS [9]**). When a user (**User A**) composed a message to another user (**User B**) in the AN0M Application and pressed "send", a second message would be created within the application which included the original message and some additional data for law enforcement purposes (**AN0M Message**). Both the original message and the AN0M Message were then

encrypted and sent as separate messages over the telecommunications system. The original message was sent to User B. The AN0M Message was sent to a server known as the "iBot server", and it was then re-transmitted to servers that were able to be accessed by the AFP pursuant to surveillance device warrants and computer access warrants obtained, or purportedly obtained, under the *Surveillance Devices Act 2004* (Cth) (**SD Act**) (**SCB 23-25 [5], [7]**). A second set of data relating to the AN0M Messages was obtained pursuant to warrants issued, or purportedly issued, under s 3E of the *Crimes Act 1914* (Cth) (**Crimes Act**) (**SCB 25 [8]**).

7. The plaintiffs are on remand awaiting trial in the Supreme Court of South Australia. The prosecution seeks to rely on some AN0M Messages (the **AN0M Messages Subset**) at their trial (**SCB 26 [12]**).

8. On 5 December 2022, the plaintiffs filed an interlocutory application seeking an order for the exclusion of the AN0M Messages Subset on the ground that it was unlawfully intercepted in breach of s 7(1) of the *Telecommunications (Interception and Access) Act 1979* (Cth) (**Interception Act**) and was therefore inadmissible under ss 63(1)(a) and 77(1)(a) of the Interception Act (**SCB 27 [14]**). On 5 April 2023, the trial judge dismissed the application on the basis that the communications were not intercepted in breach of s 7(1) of the Interception Act (**SCB 27 [16]**).

9. On 25 September 2023, the trial judge stated facts and two questions of law arising from the interlocutory application for the consideration of the Court of Appeal. The two questions concerned (i) whether the AN0M Platform "involve[d] an interception of a communication passing over a telecommunications system contrary to s 7(1) of the [Interception Act]" and (ii) whether, if so, the information and records obtained as a result were inadmissible at trial (**SCB 28 [17]**). The Court of Appeal answered the first question in the negative, meaning that the second question did not arise (**SCB 28 [18]**).

10. The first plaintiff has also filed interlocutory applications in the criminal proceedings seeking orders for the exclusion of the AN0M Messages Subset on the basis that the warrants under the SD Act and the Crimes Act were invalid. Those applications have been heard but not yet determined (**SCB 29 [24]-[25]**).

PART V: ARGUMENT

The Confirmation Act

11. Section 5(1) of the Confirmation Act operates by reference to information or a record obtained under, or purportedly under, a "relevant warrant". "Relevant warrant" is defined in s 4 to mean one of 11 specific warrants issued, or purportedly issued, under the SD Act or s 3E of the Crimes Act, these being all of the warrants used to obtain the AN0M Messages. Section 5(1) provides:

> Information, or a record obtained under, or purportedly under, a relevant warrant, is taken for all purposes:
>
> (a) not to have been, and always not to have been, intercepted while passing over a telecommunications system; and
>
> (b) not to have been, and always not to have been, information or a record obtained by intercepting a communication passing over a telecommunications system.

12. Section 4 defines "intercepting a communication passing over a telecommunications system" to have the "same meaning as in the [Interception Act]" and provides that "intercepted while passing over a telecommunications system has a corresponding meaning". Accordingly, the direct legal operation of s 5(1) is to deem certain information and records not to answer a particular statutory description in the Interception Act.

13. As the plaintiffs submit (**PS [23]**), embedded within the statutory concept of "intercepting a communication passing over a telecommunications system" in the Interception Act are "a number of interlocking defined terms" in that Act which are "necessarily imported into the meaning of s 5(1) of the Confirmation Act". For example, the phrase "interception of a communication passing over a telecommunications system" is defined in s 6(1) of the Interception Act, subject to some exceptions that are not presently relevant, to consist of "listening to or recording, by any means, such a communication in its passage over that telecommunications system without the knowledge of the person making the communication". That concept is affected by the deeming provision in s 5F, which provides that a communication "is taken to start passing over a telecommunications system when it is sent or transmitted by the person sending the communication" and that it "is taken to continue to pass over the system until it becomes accessible to the intended recipient of the communication". Other parts of those

definitions, such as "communication" and "telecommunications system" (which itself uses defined terms), are further defined in s 5(1) of the Interception Act.

14. The combination of definitions and deeming provisions summarised above demonstrates that whether any particular record or information was "intercepted" when passing over a telecommunications system is not a question of fact. It is a legal conclusion that is reached by applying numerous statutory concepts to the facts as found. The Confirmation Act confirms (or, at most, alters) that legal conclusion with respect to records or information that were, as a matter of fact, either obtained or purportedly obtained under a relevant warrant. It does not constitute a legislative determination of any fact.

10 15. If the legal conclusion is reached that information or a record was "intercepted passing over a telecommunications system", two provisions in the Interception Act are relevant:

15.1. **first**, s 63(1)(b) prohibits a person, subject to Part 2-6 and s 299, from giving evidence in a proceeding if that evidence is properly characterised as either "lawfully intercepted information" or "information obtained by intercepting a communication in contravention of subsection 7(1)". As to those terms:

(a) "lawfully intercepted information" is relevantly defined in s 6E as "information obtained … by intercepting, otherwise than in contravention of subsection 7(1), a communication passing over a telecommunications system" (emphasis added); and

20 (b) section 7(1) provides that a person shall not "intercept", "authorize, suffer or permit another person to intercept" or "do any act or thing that will enable him or her or another person to intercept … a communication passing over a telecommunications system" (emphasis added).

15.2. **second**, s 77(1)(a) provides that "[w]here a communication passing over a telecommunications system has been intercepted, whether or not in contravention of subsection 7(1), then … neither information, nor a record, obtained by the interception is admissible in evidence in a proceeding" except in so far as that is permitted by a number of specified provisions (emphasis added).

16. The relevant legal operation of s 5(1) of the Confirmation Act is to ensure that s 63(1) and 77(1) of the Interception Act do not apply to the AN0M Messages. In order for s 5(1) to apply with respect to any particular information or record, that information or record must have been obtained, or purportedly obtained, pursuant to one of the relevant warrants. Whether the information or record was obtained under a relevant warrant is a fact, which it is for a court to find in the usual way. If that fact is found to exist, then Parliament has addressed the legal characterisation of that fact for the purposes of the Interception Act and for other purposes. But it has not made a legislative declaration of any fact.

17. Section 5(2) of the Confirmation Act provides that, to avoid doubt, anything done or purportedly done by a person that would have been wholly or partly invalid except for s 5(1) is taken for all purposes to be valid and lawful and to have always been valid and lawful, despite any effect on the accrued rights of any person. Section 5(3) deems evidence that, but for s 5(1), would have been obtained illegally, improperly or in consequence of an illegality or impropriety not to have been, and always not to have been, so obtained. Like s 5(1), these provisions address the legal characterisation and consequences of identifiable past facts, but contain no legislative declaration of any fact.

18. Section 6(1) of the Confirmation Act provides that information, or a record, obtained in reliance, or purported reliance, on a relevant warrant is "taken for all purposes" to have been, and always to have been, obtained under:

18.1. in the case of a relevant warrant referred to in subparagraph (a)(i) or (ii) of the definition of "relevant warrant" in s 4 – a surveillance device warrant issued under Division 2 of Part 2 of the SD Act;

18.2. in the case of a relevant warrant referred to in any other subparagraph of para (a) of the definition of "relevant warrant" in s 4 – a computer access warrant issued under s 27C of the SD Act; or

18.3. in the case of a relevant warrant referred to in para (b) of the definition of relevant warrant in s 4 – a search warrant issued under Part IAA of the Crimes Act.

19. The relevant legal operation of s 6(1) is to deem certain information and records that were obtained in reliance or purported reliance on "relevant warrant[s]" to have been obtained, for all purposes, pursuant to valid warrants. This is a familiar and orthodox statutory provision, which retrospectively confers (or confirms that there was) authority for particular (potentially unauthorised) historical acts.[1] It addresses the legal character (validity or invalidity) of those past acts, rather than declaring those facts to exist. Sections 6(2) and 6(3) operate in a relevantly similar way to s 5(2) and (3).

20. Section 7 of the Confirmation Act provides that the Act applies in relation to civil or criminal proceedings instituted both before and after the Act commenced, including proceedings that were pending when the Act commenced.

Question 1: The Confirmation Act does not exercise or usurp the exercise of judicial power

21. It is "well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution".[2] Specifically, Ch III "contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action".[3]

22. The plaintiffs do not challenge the authorities that establish these propositions. Instead, they attempt to distinguish those authorities, advancing an argument that "teeters on a narrow proposition of statutory construction"[4] to the effect that the Confirmation Act should be construed as "in substance the determination or declaration of facts by the Parliament" (**PS [12];** also **PS [5], [15], [40], [42], [46], [54]**). On that construction, the Confirmation Act is said to be invalid on the ground that it interferes with the judicial process of fact-finding. That argument should fail for two reasons. *First*, it mischaracterises the operation of the Confirmation Act, which does not determine or

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1 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at [40]-[42] (Gageler J) (***Duncan***).

2 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 (***BLF (Cth)***) at 96 (the Court); see also *Australian Education Union v General Manager Fair Work Australia* (2012) 246 CLR 117 (***AEU***) at [49], [53] (French CJ, Crennan and Kiefel JJ).

3 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250 (Mason J) (***Humby***), approved in *BLF (Cth)* (1986) 161 CLR 88 at 96 (the Court); *AEU* (2012) 246 CLR 117 at [49], [53] (French CJ, Crennan and Kiefel JJ), [78] (Gummow, Hayne and Bell JJ); *Duncan* (2015) 256 CLR 83 at [20]-[21] (French CJ, Kiefel, Bell and Keane JJ).

4 As did the argument in *Duncan* (2015) 256 CLR 83 at [37] (Gageler J).

declare any facts, but rather is concerned with the legal characterisation of facts. *Second*, it overstates the extent to which Ch III restricts laws that may affect the judicial process of fact-finding. In particular, given that the relevant legal operation of the Confirmation Act is to confirm that certain information and records are not inadmissible, the argument that the Act contravenes Ch III is irreconcilable with *Nicholas v The Queen*.[5]

(i) The Confirmation Act does not determine or declare facts

23. The plaintiffs' mischaracterisation of the operation of the Confirmation Act is apparent from their own description of the "critical factual issue" that they assert is determined or declared by that Act. They say (**PS [10]**):

> the critical factual issue underlying the challenge to the admissibility of the AN0M messages is whether the copy of the original message involved an unlawful interception under the Interception Act. (emphasis added)

24. That is not, in truth, a factual issue at all. It is a question about the legal characterisation of facts: namely, whether they fall within the statutory concept of an "interception" as used in the Interception Act. That point is implicitly acknowledged in many other parts of the plaintiffs' submission. For example, having referred to "the statutory concept of 'intercepting a communication passing over a telecommunications system' as that concept is understood under the Interception Act", the plaintiffs submit that "[e]mbedded within the descriptive concept of 'intercepting a communication passing over a telecommunications system' in the Interception Act are a number of interlocking defined terms which are necessarily imported into the meaning of s 5(1) of the Confirmation Act" (**PS [23]**). That submission implicitly recognises that, far from being a legislative direction as to the finding of facts, the Confirmation Act addresses how certain facts should be characterised against a "statutory concept" (being a legal characterisation that would otherwise have turned upon how various defined terms and deeming provisions in the Interception Act applied in light of the facts as found).

25. Indeed, in the appeal proceedings, the plaintiffs themselves proceed on the premise that the issue of whether information and records were "intercepted" is a question of legal characterisation, not a question of fact. That follows because they appeal from the Court

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[5] (1998) 193 CLR 173 (***Nicholas***).

of Appeal's judgment on a question of law stated by the trial judge under ss 153 and 154 of the *Criminal Procedure Act 1921* (SA) (see **SCB 28 [17], 68, 78**), namely whether (on the facts stated) the AN0M Application "involve[d] an interception of a communication passing over a telecommunications system contrary to s 7(1)" of the Interception Act (**SCB 28 [17]**). That being a question of law, the legislature's "determination" of the answer to that question cannot be a determination of fact.

26. The plaintiffs accept, as they must, that "in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence"[6] (**PS [34]**). They also appear to accept (**PS [15], [42]**), as again is well settled, that legislation may "attribute the consequences of legal validity to things done"[7] pursuant to the relevant warrants, including attaching "new legal consequences and a new legal status to things done which otherwise would not have had such legal consequences or status".[8] Parliament may do that even if a "court had held, on the previous state of the law, [the thing] not to attract such consequences"[9] (which, of course, is not the case here, the courts below having held that the legal consequence of information and records being obtained under the relevant warrants was already as s 5(1) of the Confirmation Act states it to be).

27. Those established principles are fatal to the plaintiffs' case. Contrary to **PS [15]** and **PS [46]**, s 5(1) follows a now familiar model for "validating" legislation. It selects a factum – being that information or a record was obtained under, or purportedly under, a "relevant warrant".[10] It then specifies the "legislative consequence" or clarifies the "legal status" of that factum, being that the information and records in question are "taken for all purposes" not to answer the description of having been "intercepted while passing over a telecommunications system" as that statutory concept is used in the Interception Act (whether or not they would otherwise have had that legal character applying the "interlocking definitions" in that Act: cf **PS [25]**). Both as a matter of form and

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6 *Baker v The Queen* (2004) 223 CLR 513 at [43] (McHugh, Gummow, Hayne and Heydon JJ) (***Baker***), citing *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [25] (Gleeson CJ), [59]-[60] (Gaudron J), [107] (McHugh J), [208] (Gummow J), [347] (Hayne and Callinan JJ); *Duncan* (2015) 256 CLR 83 at [14] (French CJ, Kiefel, Bell and Keane JJ), [42] (Gageler J).

7 *Duncan* (2015) 256 CLR 83 at [15] (French CJ, Kiefel, Bell and Keane JJ);

8 *Duncan* (2015) 256 CLR 83 at [25] (French CJ, Kiefel, Bell and Keane JJ).

9 *AEU* (2012) 246 CLR 117 at [53] (French CJ, Crennan and Kiefel JJ).

10 Contrary to PS [46], that is a "pre-existing state of affairs to which a new law is to apply".

substance, s 5(1) does not determine or declare facts: it deems certain facts not to answer, and never to have answered, a particular statutory description. That is "a retrospective alteration of the substantive law which is to be applied by the courts in accordance with their ordinary processes".[11] It is neither an exercise of judicial power, nor a direction to courts as to the exercise of their judicial function in determining issues of fact. In that respect it is not distinguishable from validating legislation upheld by this Court on numerous occasions, including in *AEU* and *Duncan*.

28. The plaintiffs refer to an asserted "*spectrum of (in)validity*" between *Liyanage v The Queen*[12] and the line of authorities culminating in *AEU*[13] and *Duncan*[14] in which "it has consistently been held that Parliament may select (*cf* declare) a factum and attach to that factum a new legal consequence, including in proceedings pending before the Court" (**PS [32]-[34]**). The assertion of a "spectrum" tends to obscure the fact that there are, in fact, no Australian authorities that have invalidated legislation on the basis it constitutes a direction as to the outcome of pending litigation. The "line of authorities" to which the plaintiffs refer is, in reality, strongly against them. In any event, the Confirmation Act so closely resembles the legislation upheld in *AEU* and *Duncan* that it falls squarely at the "valid" end of any "spectrum" that may exist.

29. The plaintiffs' reference (**PS [35]**) to the observations of Gummow, Hayne and Bell JJ in *AEU* goes nowhere. If consideration is given to the extent to which the Confirmation Act "amounts to a legislative direction about how specific litigation should be decided",[15] it is apparent that it does not amount to such a direction at all, it being potentially relevant to present and future proceedings involving hundreds of defendants and a wide variety of criminal charges. Furthermore, Gummow, Hayne and Bell JJ expressly accepted the orthodox proposition that Ch III "contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action".[16]

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11 *Duncan* (2015) 256 CLR 83 at [28] (French CJ, Kiefel, Bell and Keane JJ); see also [31].

12 [1967] 1 AC 259 (***Liyanage***).

13 (2012) 246 CLR 117.

14 (2015) 256 CLR 83.

15 *AEU* (2012) 246 CLR 117 at [87] (Gummow, Hayne and Bell JJ).

16 *AEU* (2012) 246 CLR 117 at [78] (Gummow, Hayne and Bell JJ), citing *Humby* (1973) 129 CLR 231 at 250 (Mason J). See also *AEU* (2012) 246 CLR 117 at [49] (French CJ, Crennan and Kiefel JJ); *BLF (Cth)* (1986) 161 CLR 88 at 96 (the Court); *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [17] (the Court) (***Bachrach***); *Duncan* (2015) 256 CLR 83 at [20] (French CJ, Kiefel, Bell, Keane JJ).

Indeed, as repeated decisions of this Court have demonstrated, the fact that legislation affects the outcome of specific proceedings – even completely foreclosing pending litigation – does not itself establish an interference with judicial power.[17] That was so in *BLF (Cth)*, where the *Builders Labourers' Federation (Cancellation of Registration – Consequential Provisions) Act 1986* (Cth) cancelled the registration of one specific organisation, and in doing so rendered nugatory pending proceedings in this Court that the organisation had brought to challenge the cancellation of its registration.[18] Similarly, in *H A Bachrach Pty Ltd v Queensland*, legislation addressed to particular land, and to a specific planning deed, effectively foreclosed the consideration of the issues in a pending planning appeal in the Queensland Court of Appeal.[19] More recently, *Duncan* concerned the validity of legislation enacted at a time when there was a pending judicial review proceeding seeking relief in relation to the invalidity of the very thing that the legislation operated to validate (namely, ICAC's findings of corrupt conduct).[20] The plaintiffs argument is irreconcilable with those authorities.

30. Finally, the submission that ss 5 and 6 of the Confirmation Act are consistent with Ch III derives strong support from *Lazarus v Independent Commission Against Corruption*.[21] In that case, the New South Wales Court of Appeal unanimously rejected a constitutional challenge to retrospective validating legislation – the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) (**ICAC Validation Act**), which deemed certain compulsory examinations to be valid (being the same validating legislation that was upheld in *Duncan* in the context of civil litigation). The ICAC Validation Act used nearly identical language to the Confirmation Act, providing that "relevant conduct [a defined term] is taken to have been, and always to have been, validly done". The two appellants in *Lazarus* each had pending appeals against conviction that were on foot at the time when the ICAC Validation Act commenced. They argued that this Act was invalid because, by reason of its effect on those appeals, it impermissibly interfered with the judicial process.

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17 *Bachrach* (1998) 195 CLR 547 at [17]-[20] (the Court); *BLF (Cth)* (1986) 161 CLR 88 at 96-97 (the Court).

18 *BLF (Cth)* (1986) 161 CLR 88 at 96-97 (the Court).

19 (1998) 195 CLR 547 at [9], [17]-[20] (the Court).

20 *Duncan* (2015) 256 CLR 83 at [1]-[4], [25]-[28] (French CJ, Kiefel, Bell and Keane JJ), [41]-[42] (Gageler J), [45]-[46] (Nettle and Gordon JJ).

21 (2017) 94 NSWLR 36 (***Lazarus***).

31. In the case of one appellant,[22] the ICAC Validation Act had the effect of removing a possible basis for the discretionary exclusion of evidence in the prosecution's case against her.[23] The Court (Leeming JA, with whom McColl and Simpson JJA agreed) rejected the constitutional challenge by this appellant principally[24] on the basis that it was inconsistent with *Nicholas* (which is discussed below).[25] For the same reason, the present plaintiffs' challenge to ss 5(3) and 6(3) of the Confirmation Act must fail.

32. Of more relevance to ss 5(1) and 6(1), the other appellant[26] had been convicted of giving false or misleading evidence contrary to s 87 of the *Independent Commission Against Corruption Act 1988* (NSW), the first element of which was that she had given evidence at a (valid) compulsory examination.[27] By reason of this Court's decision in *Independent Commission Against Corruption v Cunneen*,[28] it was accepted that this appellant's compulsory examination was not valid at the time when it occurred. As a result, her conviction could be maintained only if the ICAC Validation Act were valid in its application to her, with the result that the previously invalid examination was to be treated as valid.[29] As is apparent, the ICAC Validation Act in *Lazarus* therefore needed to do considerably more work than is required of the Confirmation Act (which affects the available evidence, but does not deem any element of an offence to be established when, as a matter of law, it previously could not have been established).

33. The Court of Appeal held that the ICAC Validation Act was valid, on the basis that it:[30]

    33.1. did not "affect the determination of any issue of fact"; rather, it altered the "legal characterisation of certain facts if those facts be found";

    33.2. did not purport to direct the Court to treat something as valid which was invalid;

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22 Referred to by her first name, Sandra, by the Court of Appeal.
23 *Lazarus* (2017) 94 NSWLR 36 at [112] (Leeming JA).
24 This appellant also failed for the same reasons (discussed below) that the other appellant failed: *Lazarus* (2017) 94 NSWLR 36 at [120] (Leeming JA).
25 *Lazarus* (2017) 94 NSWLR 36 at [119] (Leeming JA).
26 Referred to by her first name, Michelle, by the Court of Appeal.
27 *Lazarus* (2017) 94 NSWLR 36 at [66] (Leeming JA).
28 (2015) 256 CLR 1.
29 *Lazarus* (2017) 94 NSWLR 36 at [67], [112] (Leeming JA).
30 *Lazarus* (2017) 94 NSWLR 36 at [124], [127], [129], [131] and [137] (Leeming JA).

rather, it changed the legal characterisation of the facts as found, which did not amount to a usurpation of the judicial process;

33.3. did not deal directly with "ultimate issues of guilt or innocence"; and

33.4. was not directed to legal proceedings, nor targeted to a particular person or small class of persons.

34. Expanding upon the first point, Leeming JA stated that the ICAC Validation Act "does not affect the determination of any issue of *fact*. It merely affects the legal characterisation of certain facts if those facts be found".[31] Similarly, his Honour observed that, although the legislation altered the legal characterisation of the facts comprising the first element of the offence, he did not "consider a retrospective alteration of the *legal characterisation* of facts as found to amount to a usurpation of the judicial process".[32] His Honour observed that, as appellate decisions which alter the "perceived legal meaning of a statute" may often "affect the legal character ascribed to past acts purportedly made pursuant to that statute", "it is difficult to see how legislation which reverses the effects of those retrospective alterations to the perceived character of past acts could be antithetical to the institutional integrity of courts".[33] *A fortiori* here, where the legislation confirms the conclusions of both the Supreme Court and the Court of Appeal that there was no "interception" of the AN0M Messages Subset. But, as *Lazarus* illustrates, even if the Confirmation Act altered the legal characterisation of the acts by which information or records were obtained under the relevant warrants, that would not contravene Ch III.

(ii) Parliament may legislate to make evidence admissible without infringing Ch III

35. Sections 5(3) and 6(3) of the Confirmation Act deem evidence that, but for ss 5(1) and 6(1) respectively, would have been obtained illegally, improperly or consequent on an illegality or impropriety not to have been, and always not to have been, so obtained. They are important because, while ss 5(1) and 6(1) should themselves be sufficient to ensure

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[31] *Lazarus* (2017) 94 NSWLR 36 at [124].
[32] *Lazarus* (2017) 94 NSWLR 36 at [129].
[33] *Lazarus* (2017) 94 NSWLR 36 at [133].

that information or records were not "obtained in contravention of an Australian law", the deeming in those subsections might not have prevented the discretionary exclusion of such information or records on the ground that it was improperly obtained (if, as is not conceded, that characterisation of the obtaining of the AN0M evidence would otherwise have been open).

36. It is not the case that ss 5(3) and 6(3) "preclude, or render futile any application for, the discretionary exclusion of evidence … under s 138 of the uniform Evidence Acts or the common law" (cf **PS [18]** and **PS [20]**). Those subsections apply only to "evidence that, except for subsection (1), would have been wholly, or partly, obtained" either improperly or in contravention of Australian law. As such, they are not directed to discretionary exclusion for reasons unrelated to the matters addressed in ss 5(1) and 6(1). Their effect is rather to address the limited grounds on which AN0M Messages might have been held to be inadmissible, namely:

    36.1. in respect of s 5(3), to prevent AN0M Messages from being excluded by reason of ss 63(1)(b) and 77(1)(a) of the Interception Act or under s 138 of the uniform Evidence Acts (or its common law or statutory equivalents) in the event that they were obtained by intercepting a communication passing over a telecommunications system; and

    36.2. in respect of s 6(3), to prevent the AN0M Messages from being excluded under s 138 of the uniform Evidence Acts (or its common law or statutory equivalents) on the ground that they were not validly obtained under warrants under the SD Act or s 3E of the *Crimes Act*.

37. Those effects are not relevantly distinguishable from the effects of the provisions upheld in *Nicholas* and in *Lazarus* (with respect to the first appellant).

38. Mr Nicholas had been charged under a federal law with offences in relation to the possession or attempted possession of a prohibited import, namely heroin. The heroin the subject of the charge had been imported by law enforcement officers in contravention of the *Customs Act 1901* (Cth). Following this Court's decision in *Ridgeway v The*

Queen,[34] Mr Nicholas applied for, and was granted, a permanent stay of his prosecution. Shortly thereafter, Parliament enacted s 15X of the Crimes Act, which relevantly provided that "the fact that a law enforcement officer committed an offence in importing the narcotic goods … is to be disregarded" in specified circumstances. Like the Confirmation Act, s 15X applied only to a closed class.[35] Where it applied, its legal consequence was to prevent an applicant from relying on the illegality of the law enforcement officers' conduct in importing the drug in question as a basis for an application to exclude evidence of that importation in reliance upon the *Bunning v Cross*[36] discretion. Thus, while s 15X did not deem the relevant conduct always to have been valid or lawful, it did instruct the Court to disregard a particular matter (identified in s 15X as a "fact") that might have caused the Court to decide not to admit evidence that was central to the prosecution case.[37] If anything, s 15X could therefore have been more readily characterised as a direction or interference with the Court's fact-finding function than is the case with the Confirmation Act (cf **PS [28]**).

39. Following the commencement of s 15X, the prosecution applied to discharge the permanent stay that Mr Nicholas had obtained. Mr Nicholas responded by challenging the validity of s 15X, which he argued usurped or impermissibly interfered with the judicial power of the Commonwealth. By a 5:2 majority, this Court rejected that argument and held that s 15X was valid.

40. In so holding, Brennan CJ observed that s 15X did not "impede or otherwise affect the finding of facts by a jury"[38] and did "not impair the curial function of finding facts, applying the law or exercising any available discretion".[39] His Honour noted that the "procedure for determining the admission of evidence of illegal importation is affected, but the judicial function of fact finding is unchanged and the judicial power to be exercised in determining guilt remains unaffected".[40] In a similar vein, Gummow J

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34 (1995) 184 CLR 19.

35 *Nicholas* (1998) 193 CLR 173 at [5] (Brennan CJ, explaining that it "applie[d] only to controlled operations that started before the commencement" of Part 1AB and "cover[ed] prosecutions which were pending … at the time" it came into force).

36 (1978) 141 CLR 54.

37 See *Lazarus* (2017) 94 NSWLR 36 at [117]-[118] (Leeming JA).

38 *Nicholas* (1998) 193 CLR 173 at [21].

39 *Nicholas* (1998) 193 CLR 173 at [23].

40 *Nicholas* (1998) 193 CLR 173 at [26].

emphasised that s 15X did not deem to exist "any ultimate fact, being an element of the offences with which the accused is charged".[41] Although the law "operates to facilitate the proof by the prosecution of its case by the admission of evidence that otherwise was liable to exclusion", with the result that the case for the accused is made "that much more difficult than … if s 15X had not been enacted", it did not "deem any ultimate fact to exist, or to have been proved" and was therefore not invalid.[42] Justices Gaudron, Toohey and Hayne reasoned to similar effect.[43]

41. *Nicholas* has been applied on multiple occasions by this Court.[44] Its significance for present purposes is that, to the extent that the Confirmation Act has the effect that evidence that may previously not have been admissible is now admissible, it is closely analogous to the law upheld in that case. *Nicholas* (and *Lazarus*) makes clear that legislation that alters the rules of evidence, including limiting the circumstances in which evidence that is critical to establishing a charge is excluded, does not contravene Ch III.

42. The plaintiffs suggest that the present case is of a different kind because the Confirmation Act "has determined the judicial controversy at stake in the A24 of 2024 appeal proceedings pending before this Court" (**PS [42]**). That submission cannot assist them,[45] given it is well settled (by authorities that the plaintiffs do not challenge) that Ch III contains no prohibition on the confirmation or alteration of rights that are in issue in pending legal proceedings.[46] That is so even if legislation "render[s] nugatory"[47] or "mak[es] redundant … legal proceeding in this Court".[48] In that regard, it is significant that neither the appeal, nor the Confirmation Act, is concerned with the question of the

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41 *Nicholas* (1998) 193 CLR 173 at [156].

42 *Nicholas* (1998) 193 CLR 173 at [162].

43 *Nicholas* (1998) 193 CLR 173 at [53] (Toohey J), [80] (Gaudron J), [238] (Hayne J).

44 See, eg, *AEU* (2012) 246 CLR 117; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 (***Graham***); *X7 v Australian Crime Commission* (2013) 248 CLR 92.

45 Both *BLF (Cth)* (1986) 161 CLR 88 at 96 (the Court) and *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 579 (Dixon J) demonstrate that point, as both involved legislation that conclusively resolved disputes that were pending in this Court at the time the challenged legislation was enacted.

46 *AEU* (2012) 246 CLR 117 at [78] (Gummow, Hayne and Bell JJ), citing *Humby* (1973) 129 CLR 231 at 250 (Mason J); *BLF (Cth)* (1986) 161 CLR 88 at 96 (the Court); *Bachrach* (1998) 195 CLR 547 at [17] (the Court); *Duncan* (2015) 256 CLR 83 at [20] (French CJ, Kiefel, Bell, Keane JJ).

47 *AEU* (2012) 246 CLR 117 at [49] (French CJ, Crennan and Kiefel JJ).

48 *BLF (Cth)* (1986) 161 CLR 88 at 96 (the Court); *AEU* (2012) 246 CLR 117 at [49] (French CJ, Crennan and Kiefel JJ).

plaintiffs' ultimate guilt or innocence.[49] That remains a matter for determination by the Supreme Court of South Australia in a future trial in the exercise of exclusively judicial power.[50] The Confirmation Act does not "amount to a legislative direction about how [that] litigation should be decided".[51]

43. Nor is it possible to distinguish *Nicholas* on the basis that the legislation in that case was a "procedural law" that regulated the "ascertainment of facts" (cf **PS [43]**). The impugned section in *Nicholas* was not some general law of evidence regulating the manner in which courts find facts. It required the courts, with respect to a closed class of cases, to disregard the fact of a law enforcement officer having committed an offence (that offence having previously been the foundation for the permanent stay of the proceeding against Mr Nicholas).[52] It operated so that evidence of an essential element of the charged offence, being evidence that might previously have been inadmissible or been subject to discretionary exclusion, was admissible.[53] That is not relevantly distinguishable from a central operation of ss 5 and 6 of the Confirmation Act (save that those provisions affect a much larger class than was the case in *Nicholas*).

44. At **PS [29]** and **[42]**, the plaintiffs rely on the obiter observations of Isaacs J in *Williamson v Ah On*[54] that were referred to by Brennan CJ in *Nicholas*.[55] However, the Confirmation Act is a far cry from Isaac J's hypothetical "parliamentary arbitrary creation of a new offence of theft, leaving no room for judicial inquiry as to the ordinary offence"[56] in respect of which "legislature itself would have found the fact of stealing".[57] The

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49 See *Graham* (2017) 263 CLR 1 at [31] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), citing *Nicholas* as an example of Parliament's capacity to "regulate aspects of judicial fact finding", and specifically pointing out that s 15X was valid in part because "its effect was not to determine criminal guilt". See also *Nicholas* (1998) 193 CLR 173 at [29] (Brennan CJ), [80] (Gaudron J), [162] (Gummow J), [249], [251] (Hayne J)

50 As to the significance of that power being exclusively judicial, see *Bachrach* (1998) 195 CLR 547 at [15], [18] (the Court).

51 *AEU* (2012) 246 CLR 117 at [87] (Gummow, Hayne and Bell JJ); *Bachrach* (1998) 195 CLR 547 at [18] (the Court).

52 *Nicholas* (1998) 193 CLR 173 at [5] (Brennan CJ).

53 *Nicholas* (1998) 193 CLR 173 at [162] (Gummow J), [255] (Hayne J).

54 (1926) 39 CLR 95 at 108 (***Ah On***).

55 *Nicholas* (1998) 193 CLR 173 at [24] (Brennan CJ).

56 *Ah On* (1926) 39 CLR 95 at 108, quoted in *Nicholas* (1998) 193 CLR 173 at [24] (Brennan CJ).

57 *Nicholas* (1998) 193 CLR 173 at [24] (Brennan CJ).

Confirmation Act does not deem the elements of an offence to be established.[58] It is concerned with the validity of the means by which evidence was obtained and with the admissibility of that evidence, being evidence that may be relevant to the proof of a wide variety of federal and State offences. As this Court has repeatedly affirmed, Parliament may regulate "the method or burden of proving facts" even though that "may have a serious effect on the outcome of proceedings".[59]

45. For the above reasons, the Confirmation Act does not involve an impermissible exercise by the Parliament of judicial power. In particular, it does not involve a legislative declaration of any fact. Instead, it identifies past facts (being that information or a record was obtained or purportedly obtained under a list of specified warrants), and confirms (or, at most, alters) the legal character of those facts. Longstanding authority confirms that legislation of that kind is consistent with Ch III, even if it affects pending litigation.

Question 2: The Confirmation Act does not impair the institutional integrity of courts

46. The plaintiffs also contend that the Confirmation Act impairs "the constitutional principle concerning the institutional integrity of courts vested with federal jurisdiction recognised in *Kable*" (**PS [36]-[37]**). This argument, in common with the plaintiffs' argument on Question 1, proceeds on the mistaken premise that the Confirmation Act "legislat[es] the facts upon which a court is to proceed to a determination of law" (**PS [37], [52], [54]**). It is simply a repackaging of their submissions on the first question.

47. This Court has consistently reasoned that the "derivative nature of the relationship between the *Kable* restriction and the *Boilermakers* restriction logically entails that a State or Territory law will not transgress the *Kable* restriction if a Commonwealth law in the same terms would not transgress the *Boilermakers* restriction".[60] As the Court unanimously held in *Bachrach*:[61]

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58 *Nicholas* (1998) 193 CLR 173 at [156] (Gummow J). See also at [19]-[22] (Brennan CJ)

59 *Graham* (2017) 263 CLR 1 at [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

60 *Garlett v Western Australia* (2022) 277 CLR 1 at [121] (Gageler J), citing *Bachrach* (1998) 195 CLR 547 at [14] (the Court); *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at [10] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Baker* (2004) 223 CLR 513 at [22]-[24] (McHugh, Gummow, Hayne and Heydon JJ); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ). See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at [82] (Gageler J); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [147] (Gageler J).

61 *Bachrach* (1998) 195 CLR 547 at [14] (the Court).

> *Kable* took as a starting point the principles applicable to courts created by the Parliament under s 71 and to the exercise by them of the judicial power of the Commonwealth under Ch III. If the law in question here had been a law of the Commonwealth and it would not have offended those principles, then an occasion for the application of *Kable* does not arise.

48. Adopting the above approach, in *Duncan*, which concerned the impact of New South Wales legislation on the institutional integrity of New South Wales courts, French CJ, Kiefel, Bell and Keane JJ considered whether "a law of the Commonwealth to the effect of [the validating legislation] would not be inconsistent with Ch III of the Constitution".[62] Justice Gageler, and Nettle and Gordon JJ, likewise reasoned by reference to the cases concerning federal legislation.[63] Reasoning by that pathway obviated the need to consider whether, and if so to what extent, the proceedings in the Court of Appeal were in federal jurisdiction.[64]

49. For the same reason, it is not necessary for the Court to determine whether the proceedings in the Court of Appeal, or the underlying criminal proceedings, are in federal jurisdiction. That is unnecessary because, for the reasons already addressed in answering Question 1, the Confirmation Act does not "compel a court to proceed on the facts determined by the Parliament" (cf **PS [52]**) and does not otherwise interfere with the exercise of the judicial power of the Commonwealth. If the Confirmation Act – being a law of the Commonwealth Parliament – survives the direct challenge against Ch III in Question 1, then it cannot be invalid by reason of the derivative limitation identified in *Kable v Director of Public Prosecutions (NSW)*.[65]

50. The only additional matter the plaintiffs rely on for this alternative argument is that the Confirmation Act applies to a "select" or "closed" cohort of cases (**PS [50]-[51];** also **PS [12], [16], [37]**). The plaintiffs do not appear to contend that this alone is sufficient to contravene the *Kable* doctrine, and nor could they credibly do so, for validating laws commonly apply only to an identifiable class of cases (which ensures such laws do not have unnecessary breadth). That being so, it is unclear how this feature of the

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62 *Duncan* (2015) 256 CLR 83 at [18].

63 See *Duncan* (2015) 256 CLR 83 at [42] (Gageler J), [45]-[46] (Nettle and Gordon JJ, relevantly agreeing with the plurality).

64 See *Duncan* (2015) 256 CLR 83 at [30]-[31] (French CJ, Kiefel, Bell and Keane JJ).

65 (1996) 189 CLR 51 (***Kable***).

Confirmation Act is said to assist the plaintiffs' argument. Contrary to the attempt to distinguish *Nicholas* (**PS [50]**), that case in fact provides an example of a law that made special provision that affected the admissibility of evidence only with respect to a small and identifiable group of people.[66] While the Confirmation Act applies to a particular class of information and records defined by reference to relevant warrants, it nevertheless affects a large cohort of cases, with more than 390 people having been arrested and charged as a result of Operation Ironside (and ongoing investigations meaning that further charges may be laid): **SCB 25 [9]-[10]**. It is not *ad hominem* legislation.

51. Finally, in so far as it is said that, for the cohort of cases to which the Confirmation Act applies, the "court's function … is reduced to a formality" (**PS [49])** or that "[t]here is no truly judicial role left for a court" (**PS [53]**), the argument cannot be accepted. The question of the guilt or innocence of persons within that cohort with respect to the offences with which they have been charged remains to be determined in their future trials. In its operation with respect to those trials, the Confirmation Act affects the evidence that will be admissible against the plaintiffs, but that is all that it does. That falls far short of leaving "no truly judicial role" for the courts.

PART VII: ESTIMATE

52. The defendant will require between 1 and 1.5 hours to present oral submissions.

Dated 17 April 2025

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[66] *Nicholas* (1998) 193 CLR 173 at [5] (Brennan CJ, explaining that it "applie[d] only to controlled operations that started before the commencement" of Part 1AB and "cover[ed] prosecutions which were pending … at the time" it came into force). At [247], Hayne J indicated that s 15X may have applied to only 5 or 6 people.

ANNEXURE TO THE DEFENDANT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2024, the Commonwealth sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provision(s)	Reasons for providing this version	Applicable date or dates
Commonwealth					
1.	*Builders Labourers' Federation (Cancellation of Registration – Consequential Provisions) Act 1986* (Cth)	As made (14 April 1986 to 28 February 1989)	Entire Act	In force when *BLF (Cth)* was decided	13 August 1986 (date of judgment in *BLF (Cth))*
2.	Constitution	Compilation No 6 (29 July 1997 to present)	Chapter III, s 71	Currently in force	N/A
3.	*Customs Act 1901* (Cth)	C2004C03256 (1 February 1998 to 30 March 1998)	s 233B	Version in force when *Nicholas* was decided	2 February 1998 (date of judgment in *Nicholas*)
4.	*Criminal Procedure Act 1921* (SA)	As at 27 June 2024	Sections 153, 154	In force at time of decision of Court of Appeal	27 June 2024 (being the date of the decision of the Court of Appeal)
5.	*Crimes Act 1914* (Cth)	Compilation No 136 (17 February 2021 to 31 August 2021)	Part IAA, s 3E	In force when warrants referred to in paras (b)(i)-(iii) of the definition of a 'relevant warrant' in	30 July 2021 (date of first s 3E warrant) 22 December 2021 (date of last 3E warrant)

				s 4 of the Confirmation Act were issued. Relevantly identical to the version in force when the warrant referred to at para (b)(iv) was issued.	
6.	*Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW)	As made	Entire Act	Amending Act considered in *Lazarus*	7 March 2017 (date of judgment in *Lazarus*)
7.	*Surveillance Devices Act 2004* (Cth)	Compilation No 43 (30 June 2018 to 21 November 2018)	Part 2, Div 2; s 27C	In force when warrants referred to in paras (a)(i)-(ii) of the definition of a 'relevant warrant' in s 4 of the Confirmation Act were issued. Relevantly identical to the version in force when the warrant referred to at para (a)(iii)-(vii) were issued.	16 October 2018 to 3 March 2021 (being the dates of the issue of the relevant warrants).

8.	*Surveillance Legislation (Confirmation of Application Act) 2024* (Cth)	C2024A00130 (10 December 2024 to present)	Whole Act	Currently in force and in force at time of originating application	11 December 2024 (being the date of commencement of the Act).
9.	*Telecommunications (Interception and Access) Act 1979* (Cth)	Compilation No 108 (13 December 2019 to 17 February 2020)	Sections 5, 5F, 6(1), 7, 63, 77	This is the Act as it stood at at the time when at least some of the AN0M Messages Subset were sent. Although some AN0M Messages may have been sent when previous or later versions of this Act were in force, it is noted that the provisions in this version were relevantly in the same form at all material times.	12 January 2020 (being the date at least some of the AN0M Messages Subset were sent).