



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number: A2/2025
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A2 of 2025

BETWEEN:

CD

First Plaintiff

TB

Second Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA

Defendant

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ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING
OUTLINE OF ORAL SUBMISSIONS

PART I: INTERNET PUBLICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. Questions 1(a) and (b) of the Special Case rest on the same arguments. They should each be answered “no”.
- 20 **A. The Confirmation Act does not effect a “legislative declaration of fact”**
3. The premise for the plaintiffs’ challenge to the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) (**Confirmation Act**) is erroneous. The Confirmation Act does not effect a “legislative declaration of fact” (cf Reply at [4]). Rather, it confirms or affects the legal characterisation of certain facts.
- Submissions of the Attorney General for the State of New South Wales, intervening (**NSW**) [17], [27]-[31];
 - Submissions of the Defendant (**DS**) [14], [17], [19], [24];
 - Confirmation Act (**JBA Vol 1, Tab 3**) ss 5, 6.

B. Parliament may permissibly regulate the method of proving the ultimate facts

4. The Confirmation Act operates to regulate the admissibility of the evidence by which civil or criminal liability may be established. Such a law does not usurp the judicial power of the Commonwealth or undermine the institutional integrity of courts by reducing their function to the “merest of formalities” (cf Reply at [13]). It remains for the court in each case to determine whether the ultimate facts have been proved and to adjudicate accordingly.

– NSW [32]-[40];

– DS [35]-[41];

10 – *Nicholas v The Queen* (1998) 193 CLR 173 at [21], [23]-[24], [26], [29], [41] (Brennan CJ); [53], [55] (Toohey J); [69], [80] (Gaudron J); [156], [162], [165], [168] (Gummow J); [235], [249]-[251] (Hayne J) (**JBA Vol 3, Tab 15**).

5. Contrary to the plaintiffs’ contention, the Confirmation Act does not foreclose any application to exclude evidence to which it applies. The courts retain their powers to exclude (or limit the use of) that evidence under ss 135 to 137 of the uniform Evidence Acts, or analog principles and provisions.

– NSW [19], [39];

– Submissions of the Attorneys General for Western Australia and Victoria, intervening (**WA & Vic**) [10];

20 – DS [36];

– *Evidence Act 1995* (Cth) (**JBA Vol 2, Tab 5**) ss 135 to 137.

C. The fact of the pending controversy does not support a conclusion of invalidity

6. The circumstance that the Confirmation Act renders nugatory the plaintiffs’ appeal to this Court in proceeding A24 of 2024 does not give rise to any inconsistency with Ch III. It is well-established that the Parliament may enact a law having that effect, without interfering impermissibly with the exercise of the judicial power of the Commonwealth.

– NSW [41]-[46];

– WA & Vic [11], [14];

- DS [42];
- *Australian Building Construction Employees’ and Builders Labourers’ Federation v Commonwealth* (1986) 161 CLR 88 at 96-97 (the Court) (**JBA Vol 3, Tab 9**);
- *H A Bachrach Pty Ltd v State of Queensland* (1998) 195 CLR 547 at [12], [16]-[17] (the Court) (**JBA Vol 3, Tab 14**).

D. The “closed cohort of cases” does not support a conclusion of invalidity

7. That the Confirmation Act applies to a finite number of cases is an unremarkable feature of federal legislation and does not support a conclusion of invalidity. It is not, and is not said to be, *ad hominem* legislation. The affected cohort of cases is large.

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- NSW [47]-[50];
 - DS [50]-[51];
 - *Nicholas* at [27]-[29] (Brennan CJ); [57] (Toohey J); [67], [83] (Gaudron J); [163]-[165] (Gummow J); [247], [249] (Hayne J) (**JBA Vol 3, Tab 15**).

E. The Confirmation Act does not offend Ch III

8. Accordingly, the Confirmation Act:

- (a) is not an exercise by the Parliament of the judicial power of the Commonwealth;
and
- (b) does not undermine the institutional integrity of the courts.

Dated: 13 May 2025

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Scott Robertson



Louise Coleman