HIGH COURT OF AUSTRALIA

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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 27C - A-G NSW Intervener's submissions
Filing party:	Interveners
Date filed:	24 Apr 2025

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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
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR NEW SOUTH WALES (INTERVENING)

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General for the State of New South Wales (**NSW Attorney**) intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the Respondent (**Commonwealth**).

PART III: LEAVE TO INTERVENE

3. Not applicable.

PART IV: ARGUMENT

Overview

4. Questions 1(a) and (b) of the Special Case should be answered "no".

5. The Surveillance Legislation (Confirmation of Application) Act 2024 (Cth) (**Confirmation Act**) is neither an exercise by the Parliament of the judicial power of the Commonwealth, nor an impairment of the institutional integrity of courts vested with federal jurisdiction. The plaintiffs' submission to the contrary proceeds from the erroneous premise that the Confirmation Act represents a legislative declaration or determination of *fact*. Far from declaring or otherwise directing a court to find the

existence of any "fact", the Confirmation Act confirms the legal characteristics of certain information and records and removes particular barriers that might otherwise have existed to the admissibility of that material. It does not offend Ch III in so doing. That the Act renders moot the plaintiffs' pending appeal to this Court in CD & Anor v Director of Public Prosecutions (SA) & Anor (Matter A24 of 2024) (**Pending Appeal**), and that it operates in respect of a defined cohort of cases, are wholly unremarkable features of federal legislation and present no bar to its constitutional validity.

The judicial power of the Commonwealth

6. The judicial power of the Commonwealth is vested by s 71 of the Constitution in Ch III courts comprising this Court, federal courts created by Parliament in accordance with s 72, and State courts exercising federal jurisdiction. It is beyond the competence of the Parliament to vest that power in any other body or person: R v Kirby; Ex parte **Boilermakers**' Society of Australia (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). Evaluating whether a law transgresses that constitutional limitation is a question of substance, not form: Chu Kheng **Lim** v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); **Nicholas** v The Queen (1998) 193 CLR 173 at [148] (Gummow J), [250] (Hayne J).

7. The precise contours of judicial power have proven insusceptible of any definition that is both exclusive and exhaustive: **Polyukhovich** v Commonwealth of Australia (1991) 172 CLR 501 at 532 (Mason CJ). It embraces the "power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects": Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330 at 357 (Griffith CJ); see also R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361 at 374-5 (Kitto J). Its unique and essential function is "the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion": Fencott v Muller (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ). However, the lines between judicial, executive and legislative power are often imprecise: Lim at 67 (McHugh J).

8. One function that is essentially and exclusively judicial in character is the determination and punishment of criminal guilt: **H A Bachrach** Pty Ltd v State of Queensland (1998)

195 CLR 547 at [15] (the Court); Lim at 27 (Brennan, Deane and Dawson JJ). Chapter III therefore precludes the enactment of any law purporting to vest any part of that function in the Parliament or the Executive: Lim at 27 (Brennan, Deane and Dawson JJ). The plaintiffs allege no such infringement here.

9. The legislative powers of the Commonwealth do not extend to the making of a law which authorises or requires a court vested with the judicial power of the Commonwealth to exercise judicial power in a manner that is inconsistent with the essential character of a court or with the nature of judicial power: Nicholas at [146] (Gummow J), citing Lim at 27 (Brennan, Deane and Dawson JJ), 53 (Gaudron J). For instance, the Parliament cannot direct Ch III courts as to the manner and outcome of the exercise of their jurisdiction: Australian Education Union v General Manager, Fair Work Australia (2012) 246 CLR 117 at [48] (French CJ, Crennan and Kiefel JJ) (**AEU**). In Lim, a legislative provision that purported to prevent a Ch III court from ordering the release from custody of a person detained by the Executive was held to be invalid as an impermissible intrusion into the judicial power of the Commonwealth.

10. It is unnecessary for the purpose of the Special Case to explore the full ambit of the judicial power of the Commonwealth. The focal point of the plaintiffs' case is narrow: namely, the "fact-finding function of the courts" (Plaintiffs' Submissions (**PS**) [5]). But as the plaintiffs recognise, the Commonwealth Parliament can regulate various aspects of judicial fact-finding without offending Ch III (PS [12], [27]-[29]). Thus, laws may permissibly regulate the method or burden of proving facts as, for instance, by prescribing the rules of evidence: **Graham** v Minister for Immigration and Border Protection (2017) 263 CLR 1 at [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); Nicholas at [23] (Brennan CJ). The Parliament may alter the onus or standard of proof; it may modify, or abrogate altogether, common law principles governing the discretionary exclusion of evidence (as in Nicholas); and it may legislate so as to affect the availability of privileges: Graham at [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). In short, the courts' fact-finding role is not immune from legislative regulation.

11. The plaintiffs' repeated references to fact-finding being an "essential function" of the courts, or an "essential attribute" of judicial power, also require qualification (PS [5], [12], [37], [39], [43], [45], [51], [54]). While the work of courts often involves finding the facts to which the law is to be applied, that is not an invariable feature of the curial

process: Graham at [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). Once that is recognised, the premise for much of the plaintiffs' argument falls away.

The Confirmation Act

12. Question 1 of the Special Case invites careful scrutiny of the substantive operation and effect of the Confirmation Act: H A Bachrach at [12] (the Court).

13. The Confirmation Act commenced on 11 December 2024. Its stated object (s 3) is to support public trust and confidence in the application of surveillance device and related legislation to newer technologies, by: (a) confirming that information obtained under specified warrants was not intercepted while passing over a communications system; and (b) confirming that information obtained in reliance on specified warrants was obtained under a warrant issued under the relevant Act.

14. To that end, ss 5 and 6 deal with information or records obtained under, or in reliance on, a "relevant warrant". A "relevant warrant" is defined by s 4 to mean one of 11 warrants issued or purportedly issued to the Australian Federal Police (**AFP**) under the Surveillance Devices Act 2004 (Cth) or the Crimes Act 1914 (Cth) on various dates between 16 October 2018 and 22 December 2021. Those warrants resulted in the covert collection by the AFP of approximately 28 million electronic communications transmitted on the "AN0M" platform (the **AN0M data**): Special Case Book (**SCB**) 24 [6.2]. The method by which this outcome was achieved is uncontroversial; it was explained by the South Australian Court of Appeal in Questions of Law Reserved (Nos. 1 and 2 of 2023) [2024] SASCA 82 (**CA**) at [21]-[24] (SCB 85-86).

15. Section 5 of the Confirmation Act deals with the interplay between the AN0M data obtained by the AFP, and the Telecommunications (Interception and Access) Act 1979 (Cth) (**Interception Act**). Section 5(1) provides as follows:

> 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.

16. The phrase "intercepting a communication passing over a telecommunications system" has the same meaning as in the Interception Act, and "intercepted while passing over a telecommunications system" has a corresponding meaning: s 4. Both phrases therefore

direct attention to s 6 of the Interception Act. It provides that interception of a communication passing over a telecommunications system consists 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 definition itself invokes various other defined terms. Relevantly, the deeming provision in s 5F (supplemented by ss 5G to 5H) of the Interception Act addresses when a communication is taken to start and cease passing over a telecommunications system. That is the sole component of the definition in s 6 of the Interception Act which is in dispute in the Pending Appeal: see CA [130] (SCB 106).

17. Section 5(1) of the Confirmation Act therefore deems that information and records obtained under the relevant warrants do not meet the statutory description in s 6 of the Interception Act. That mirrors the conclusion reached by the Court of Appeal. The legal consequence of s 5(1) is that the AN0M data was not obtained in contravention of s 7 of the Interception Act, and is not rendered inadmissible by ss 63(1) and 77(1) of that Act. By the use of the phrase "taken … always not to have been", those legal consequences attach to the information or record as though they had always attached to it: AEU at [36] (French CJ, Crennan and Kiefel JJ). In its terms and operation, s 5(1) is a deeming provision. It operates in a familiar way by selecting a particular fact (the obtaining of information or a record under a "relevant warrant") and attaching specific legal consequences to that fact: Baker v The Queen (2004) 223 CLR 513 at [43] (McHugh, Gummow, Hayne and Heydon JJ). It does not itself declare any fact.

18. Section 5(2) provides that, to avoid doubt, anything done or purported to have been done by a person that would have been wholly or partly invalid or unlawful except for subsection (1) is taken for all purposes to be valid and lawful, and to have always been valid and lawful, despite any effect that may have on the accrued rights of any person. That is a declaration as to the validity and lawfulness of certain acts, and not a declaration of fact.

19. Section 5(3) provides that evidence that, except for subsection (1), would have been wholly or partly obtained (a) in, or in consequence of a, contravention of an Australian law, or (b) improperly or in consequence of an impropriety, is taken for all purposes not to have been, and always not to have been, so obtained. The legal consequence of s 5(3) is that the evidence in question is deemed not to enliven s 138 of the uniform Evidence Acts or analogue common law principles on account of any interception under

the Interception Act. Again, that legal consequence attaches to the evidence as though it had always attached. However, in terms, s 5(3) does not preclude any other matter or circumstance from enlivening s 138 or analogue principles or provisions. Nor does s 5(3) limit any other power to exclude or limit the use of the evidence in question, including that conferred by ss 135 to 137 of the uniform Evidence Acts or analog principles or provisions (contrary to PS [44], [52]).

20. Section 6 addresses the validity of the relevant warrants. Section 6(1) 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 to always have been, obtained under a warrant issued under the identified provisions of the Surveillance Devices Act 2004 or the Crimes Act 1914 (as applicable). It therefore operates in orthodox fashion to "validate" or confirm the validity of activities that might otherwise have been regarded as unlawful — namely, the obtaining of information or records in purported reliance on an invalid warrant: see e.g. **Duncan** v Independent Commission Against Corruption (2015) 256 CLR 83 at [15], [25] (French CJ, Kiefel, Bell and Keane JJ), [40]-[42] (Gageler J). It makes no declaration of fact.

21. Sections 6(2) and (3) are in identical terms to ss 5(2) and (3) respectively, and give rise to corresponding legal consequences. Again, they contain no declaration of fact.

22. Section 7 provides that the Confirmation Act applies in relation to civil and criminal proceedings that are instituted before, on or after the commencement of the Act, and includes those that conclude before, on or after the commencement of the Act. It therefore puts beyond doubt what is apparent in any event from the terms of ss 5 and 6, namely, the retrospective operation of the Act.

Question 1(a): The Confirmation Act is not an exercise by the Parliament of judicial power

23. The plaintiffs' argument rests upon three asserted features of the Confirmation Act which are together said to reflect an invalid usurpation by the Parliament of the judicial power of the Commonwealth: *first*, that it represents a legislative declaration or determination of fact and so accretes to the Parliament the fact-finding role of the courts; *second*, that it renders moot a pending controversy before this Court, being the Pending Appeal; and *third*, that it operates on a closed cohort of cases.

24. The first of those propositions mischaracterises the operation of the Confirmation Act. The second and third present no bar to its constitutional validity, either individually or cumulatively. Each is addressed in turn below.

The Confirmation Act does not usurp or remove the courts' fact-finding function

25. The plaintiffs' submissions are replete with assertions to the effect that the Confirmation Act is invalid because it declares or "determines anew" the facts dictating the admissibility of the AN0M data under the Interception Act: e.g. PS [5], [12]-[13], [15], [28], [37], [40]-[48], [51]-[52], [54].

26. That argument should be rejected, for two reasons. *First*, it does not accurately reflect the operation of the Confirmation Act, nor for that matter the nature of the pending controversy over the admissibility of the AN0M data. *Second*, it misconceives the constitutional limits on regulation by the Parliament of the fact-finding function of Ch III courts.

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

27. As the plaintiffs themselves acknowledge, there is no real dispute as to how the AN0M platform operated, and most of the evidence relevant to that question was either agreed or not disputed in the courts below: Appellants' Submissions in A24 of 2024 at [9]; CA [59] (SCB 92); TJ [95], [99] (SCB 58-60). By the Pending Appeal, the plaintiffs appeal from the Court of Appeal's judgment on a "question of law" stated by the trial judge under s 154 of the Criminal Procedure Act 1921 (SA) — namely, whether the AN0M platform involved an "interception of a communication passing over a telecommunications system contrary to s 7(1)" of the Interception Act: SCB 28 [17]; SCB 68.

28. Resolution of that question of law turns on the proper construction of discrete parts of the Interception Act, and the application of that Act to the facts — in particular, whether the act of pressing "send" in the AN0M application represents the point in time when a communication starts its passage over a telecommunications system (as the plaintiffs contend), and whether a server identified as "iBot" was an "intended recipient" within the meaning of s 5F(b) whose ability to access the relevant communication marked the end of the statutory window of time in s 5F. Those are again questions of legal characterisation. They are reflected in the two grounds of the appellants' Notice of Appeal in the Pending Appeal.

29. The Confirmation Act answers the question of law stated by the trial judge principally by declaring (in s 5(1)), consistently with the decision of the Court of Appeal, that the AN0M data was not intercepted while passing over a telecommunications system within the meaning of s 6 of the Interception Act. That is not a declaration of fact, but a declaration as to the legal character or consequence of a particular fact (the fact that information or a record was obtained under a "relevant warrant"). Section 5(1) deems that those facts do not bear the legal characteristics or status described in s 6 of the Interception Act. So much is apparent from the terms of s 5(1) itself. It is confirmed by the "interlocking defined terms which are necessarily imported into the meaning of s 5(1)" (PS [23]), including critical deeming provisions such as s 5F of the Interception Act; and it is fortified by the absence of any material *factual* contest concerning the operation of the AN0M platform. The plaintiffs implicitly recognise as much, describing s 5(1) as the embodiment of a "statutory concept" or "descriptive concept" of "interception" within the meaning of the Interception Act: PS [23].

30. The Confirmation Act therefore cannot be compared with a law that "conclusively determines the facts irrespective of whether they are true or not" (PS [42]), for it is dealing with a statutory construct and not a falsifiable fact. That is fatal to the plaintiffs' core contention that the Act usurps the courts' fact-finding function. Tellingly, it is a far cry from the lone example proffered by the plaintiffs of a law which impairs the curial fact-finding function — namely, a law which directs a court to find conclusively that a person found in possession of stolen goods has stolen them, when that might prove to be false: PS [29]-[31], [42]. Such a law purports to find an ultimate fact, being an element of the offence charged: Nicholas at [156] (Gummow J); cf. PS [46]. It is a legislative finding of theft leaving "no room for judicial inquiry as to the ordinary offence" of theft: **Williamson** v Ah On (1926) 39 CLR 95 at 108 (Isaacs J), quoted in Nicholas at [24] (Brennan CJ). By contrast, the Confirmation Act says nothing at all about the elements of the offences with which the plaintiffs, or indeed any other accused, are charged.

31. Though the plaintiffs' argument in this respect focuses predominantly on s 5(1), no credible basis has been advanced for the suggestion that the balance of ss 5 and 6 comprise declarations or determinations of fact: see [18] to [21] above (cf. PS [40]-[41], [45]). It follows that the critical premise for the plaintiffs' challenge to the Confirmation Act cannot be sustained.

(b) Parliament may permissibly regulate the method of proving the ultimate facts

32. The Confirmation Act does not offend Ch III by regulating the admissibility of the evidence by which any criminal offence or civil liability may be proved.

33. The finding of facts is a curial determination of the actual existence or occurrence of the acts, matters and things on which criminal liability for the offence charged depends: Nicholas at [19] (Brennan CJ). However, a law regulating the method of proving the ultimate facts does not impair the curial fact-finding function nor usurp the judicial power of the Commonwealth: Nicholas at [23]-[24] (Brennan CJ); The Commonwealth v Melbourne Harbour Trust Commissioners (1922) 31 CLR 1 at 12 (Knox CJ, Gavan Duffy and Starke JJ); Graham at [32]-[33] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

34. In substance, that is what ss 5 and 6 of the Confirmation Act do. The effect of s 5(1) is to ensure that the nominated information and records are not inadmissible under the Interception Act. The effect of ss 5(3) and 6(3) is to remove barriers to the admissibility of the AN0M data that might have existed *but for* ss 5(1) and 6(1) respectively. That is relevantly analogous to the effect of the impugned provision in Nicholas.

35. In Nicholas, a majority of this Court upheld the validity of s 15X of the Crimes Act 1914 (Cth). That section provided that, in determining in specified circumstances whether to admit evidence that narcotic goods were imported into Australia in contravention of the Customs Act 1901 (Cth), for the purposes of a prosecution for an offence against s 233B of the Customs Act or an associated offence, the court was to disregard "the fact that a law enforcement officer committed an offence in importing the narcotic goods". It therefore operated to displace the common law principle propounded in Ridgeway v The Queen (1995) 184 CLR 19. The Court held that s 15X was a procedural or evidentiary law, and worked to facilitate the proof by the prosecution of its case by the admission of evidence that was otherwise liable to exclusion: at [21], [26], [41] (Brennan CJ), [53], [55] (Toohey J), [151], [162], [165] (Gummow J), [235], [249]-[250] (Hayne J). That was so, notwithstanding that s 15X directed the court to disregard the fact that the illegal conduct of law enforcement officers had procured the very offence with which the accused was charged.

36. Like s 15X in Nicholas, the Confirmation Act has the substantive effect of prescribing a rule of evidence. It facilitates the admission of evidence of the AN0M data in aid of

the court's ascertainment of the ultimate facts. Recalling Ch III's focus upon substance over form, the plaintiffs' argument that the Act infringes Ch III cannot be reconciled with the analysis in Nicholas.

37. Contrary to the plaintiffs' assertion, the court's fact-finding function is not reduced "to the merest of formalities" by the Confirmation Act (cf. PS [45]). That Act does not deem any ultimate fact to exist, or to have been proved to the satisfaction of the tribunal of fact: Nicholas at [156], [162] (Gummow J). It "leaves untouched the elements of the crimes" for which the plaintiffs, and any other accused, are to be tried: Nicholas at [162] (Gummow J); see also [165], [168] (Gummow J), [249] (Hayne J). It remains for the Court in each case to determine whether those elements have been proved: Nicholas at [29] (Brennan CJ). The Confirmation Act provides no direction to the courts about how specific litigation should be decided, being of potential relevance to civil and criminal proceedings against hundreds of different individuals for different conduct invoking different legal consequences: cf. AEU at [87] (Gummow, Hayne and Bell JJ). Nor does it purport to give a direction to a court to treat as valid that which the legislature has left invalid: cf. Duncan at [27] (French CJ, Kiefel, Bell and Keane JJ).

38. In so far as the plaintiffs suggest that the Confirmation Act bears any resemblance to the legislation considered in **Liyanage** v The Queen [1967] 1 AC 259 (PS [40]), that suggestion is untenable. The legislation in Liyanage "was of an unusual character" and "constituted a marked interference with the judicial process": **R v Humby**; Ex parte Rooney (1973) 129 CLR 231 at 250 (Mason J; Gibbs J agreeing). It was directed specifically at securing the conviction and punishment of particular persons who had been charged with particular offences on a particular occasion (being an attempted coup d'etat against the Government of Ceylon). The Confirmation Act displays none of those features.

39. The plaintiffs' bald assertion that the Confirmation Act removes "any residual discretion that may have been available under the uniform Evidence Acts or the common law" (PS [44]) must also be rejected. The courts retain their powers to exclude, or limit the use of, evidence comprising the AN0M data under ss 135 to 137 of the uniform Evidence Acts or analog principles or provisions. Nor does the Confirmation Act purport to dictate the outcome of *all* applications for exclusion of the AN0M data under s 138 or analogue common law principles (contrary to PS [18], [20]). In terms, ss 5(3) and 6(3) deal only with evidence that "except for subsection (1)" would

have answered the descriptions in ss 5(3)(a)-(b) and 6(3)(a)-(b) respectively. That is, they prevent any ruling that the AN0M data is inadmissible on the grounds that it was intercepted while passing over a telecommunications system, or that it was unlawfully obtained under the relevant warrant, but they do not foreclose any other grounds for exclusion: see the Commonwealth's Submissions at [36]. The "stark contrast" which the plaintiffs seek to draw with the impugned provision in Nicholas is therefore illusory: cf. PS [44].

40. In short, the suggestion that the Confirmation Act usurps the judicial power of the Commonwealth by regulating what evidence might be received by the courts is "destitute of foundation": Williamson at 122 (Higgins J), quoted in Nicholas at [24] (Brennan CJ).

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

41. The circumstance that the Confirmation Act renders moot the Pending Appeal does not give rise to any inconsistency with Ch III.

42. It is well-established that the Parliament may enact a law which affects, and even renders nugatory, pending proceedings in a court exercising federal jurisdiction and that it may do so without interfering impermissibly with the exercise of the judicial power of the Commonwealth: AEU at [49] (French CJ, Crennan and Kiefel JJ); Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth (1986) 161 CLR 88 at 96 (the Court) (**ABC Federation**); Duncan at [26] (French CJ, Kiefel, Bell and Keane JJ). Chapter III "contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action": R v Humby at 250 (Mason J), adopted in AEU at [78] (Gummow, Hayne and Bell JJ). That is so, even where the legislative purpose in enacting a given statute is to circumvent or forestall particular proceedings (which is not directly alleged here): ABC Federation at 96-97 (the Court); H A Bachrach at [12] (the Court), quoted with approval in Mineralogy Pty Ltd v Western Australia (2021) 274 CLR 219 at [83] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); **Re Macks**; Ex parte Saint (2000) 204 CLR 158 at [198] (Gummow J).

43. Those principles are exemplified in several decisions of this Court. In Nelungaloo Pty Ltd v The Commonwealth (1948) 75 CLR 495, the validity of the Wheat Industry Stabilization Act (No 2) 1946 (Cth) was upheld even though it "validated" an order for

the acquisition of wheat, the validity of which was in issue in proceedings pending when the statute was enacted: see Polyukhovich at 533 (Mason CJ). In ABC Federation, the Builders Labourers' Federation (Cancellation of Registration) Act 1986 (Cth) was not invalid as an exercise of, or interference with, the judicial power of the Commonwealth notwithstanding that it made redundant pending proceedings in this Court: at 96-97 (the Court). In H A Bachrach, the impugned legislation did not constitute an impermissible interference with judicial power, despite being directed at the specific parcel of land which was the subject of pending curial proceedings.

44. What Parliament cannot do is purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction, or as to how specific litigation should be decided: Lim at 36-7 (Brennan, Deane and Dawson JJ); AEU at [87] (Gummow, Hayne and Bell JJ). Nor can the Parliament purport to set aside the decision of a court exercising federal jurisdiction: AEU at [53] (French CJ, Crennan and Kiefel JJ).

45. But the Confirmation Act displays neither vice. It confirms the correctness of the decision of the Court of Appeal as regards the proper construction of the Interception Act and its application to the AN0M data. It says nothing about the outcome of any civil or criminal proceedings. It leaves it to the courts to determine whether the accused have engaged in the conduct comprising the relevant offence: Nicholas at [162] (Gummow J); cf. Polyukhovich at 536 (Mason CJ). Nor does it change the "amount or degree of proof essential to convict [the plaintiffs] from that which was required when the alleged offences were committed": cf. Nicholas at [162] (Gummow J).

46. For the same reasons, the plaintiffs are wrong to suggest that the Confirmation Act seeks to "secure criminal convictions for a select group of people" (PS [42]): see, by way of analogy, Nicholas at [29] (Brennan CJ). It deals only with anterior questions regarding the admissibility of the evidence that might be marshalled in aid of the ultimate fact-finding task, and the validity of the means by which that evidence was procured. That proposition is not gainsaid by the circumstance that the AN0M data "may be determinative" of the plaintiffs' guilt at trial (PS [42]): cf. Nicholas at [162] (Gummow J); Graham at [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). The plaintiffs' submission to the contrary conflates the nature and operation of the Confirmation Act, with the contents of the data whose admissibility is facilitated by that Act in the particular case at hand.

The existence of a "closed cohort of cases" does not support a conclusion of invalidity

47. The plaintiffs' third contention rests on the closed cohort of cases to which the Confirmation Act applies, being those where information or records have been obtained under or in reliance on a "relevant warrant" as defined in s 4. More than 390 people have been arrested and charged as a result of the AFP's Operation Ironside, and that number may grow: SCB 25 [9]-[10].

48. That the Confirmation Act applies to a finite number of cases is "not significant", either alone or in combination with the two features already addressed: Nicholas at [163] (Gummow J); Re Macks at [212] (Gummow J). In Nicholas, s 15X was valid notwithstanding that it would (apart from the applicant) affect "only five or six people whose identities [were] known to the relevant law enforcement authorities": at [67] (Gaudron J); see also [27] (Brennan CJ), [57] (Toohey J), [163] (Gummow J), [247], [249] (Hayne J). In Re Macks, the impugned legislation was not invalid despite its application "to a limited group of identifiable cases": at [212] (Gummow J); so too, the Matrimonial Causes Act 1971 (Cth), the validity of which was upheld in R v Humby.

49. The position is otherwise where, as in Liyanage, legislation is designed to achieve a particular outcome upon the determination by judicial process of the criminal guilt of particular individuals by reason of their identity or their conduct on particular occasions: see Nicholas at [164] (Gummow J). That is not this case. Thus, there is nothing in the Confirmation Act that singles out any particular individual or any category of conduct on any particular occasion, or that otherwise purports to direct the court about how specific litigation should be decided: cf. Nicholas at [57] (Toohey J), [83] (Gaudron J); AEU at [87] (Gummow, Hayne and Bell JJ). It does not judge any person to be guilty of a crime, nor impose any punishment: cf. Polyukhovich at 536 (Mason CJ), 721 (McHugh J).

50. Absent features of that kind, the Act's finite sphere of operation is unremarkable and does not support a conclusion of invalidity.

Conclusion

51. For those reasons, the Confirmation Act is neither an impermissible exercise nor a usurpation of the judicial power of the Commonwealth.

Question 1(b): The Confirmation Act does not undermine courts' institutional integrity

52. The plaintiffs' argument in respect of Question 1(b) of the Special Case rests on the very same matters that are advanced in connection with Question 1(a). It again depends critically upon the flawed premise that the Confirmation Act compels the courts to accept a legislative declaration of fact: PS [51]-[52], [54]. From that premise, the plaintiffs reason to the erroneous conclusion that the court's role as fact-finder is "rendered nugatory" and its function reduced to "the merest of formalities" because there is "no truly judicial role left for a court in the select cohort of cases to which the Confirmation Act applies" (PS [52]-[53]; see also PS [49]).

10 53. Those contentions do not reflect the operation or effect of the Confirmation Act, which leaves untouched the courts' inalienable role of determining the guilt of those who stand trial before it, and imposing punishment accordingly. The assertion that the Parliament has "borrowed the institutional integrity of courts to secure a desired end" (PS [54]) pays no heed to that circumstance. Contrary to PS [50], whether or not the Confirmation Act on its face purports to effect any amendment to the Interception Act is not to the point, even if that is its true import: Duncan at [12] (French CJ, Kiefel, Bell and Keane JJ).

54. The plaintiffs seek to invoke the principle articulated in **Kable** v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 (at PS [36]), being an implied restriction on
20 State and Territory legislative powers: see Attorney-General (NT) v Emmerson (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); **Garlett** v Western Australia (2022) 277 CLR 1 at [116], [118] (Gageler J). The Kable principle is derivative of the Boilermakers restriction on Commonwealth legislative power with the result that a Commonwealth law that would offend the Kable principle if it were a State law will also offend the Boilermakers restriction: see Garlett at [112]-[122] (Gageler J); Graham at [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); see also Vella v Commissioner of Police (2019) 269 CLR 219 at [147] (Gageler J).

55. For the reasons already given, the Confirmation Act does not affect any defining characteristic of a court nor otherwise undermine the independence of the courts so as
30 to offend the Kable principle (cf. PS [36]-[37], [52], [54]). It regulates the admissibility of evidence by declaring certain matters of law applicable to hundreds of defendants and any manner of offences. The contention that it distorts the courts' institutional integrity in so doing is without merit.

PART V: ESTIMATED TIME

56. The NSW Attorney estimates that he will require no more than 15 minutes to present his oral argument.

Dated: 24 April 2025

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ANNEXURE TO INTERVENER'S SUBMISSIONS

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

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
Constitutional provisions					
1.	Constitution	Compilation No 6 (29 July 1997 to present)	Chapter III	Currently in force	N/A
Statutory provisions – Commonwealth legislation					
2.	*Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth)	As made (14 April 1986 to present)	Whole Act	In force when ABC Federation decided	13 August 1968 (date of judgment in ABC Federation)
3.	*Crimes Act 1914* (Cth)	C2004C03168 (1 January 1998 to 28 June 1998)	s 15X	In force when Nicholas decided	2 February 1998 (date of judgment in Nicholas)
4.	*Crimes Act 1914* (Cth)	Compilation No 136 (17 February 2021 to 31 August 2021)	s 3E	In force when warrants referred to in the definition of "relevant warrant" in the Confirmation Act were issued.	30 July 2021 (date of first s 3E warrant); 22 December 2021 (date of last s 3E warrant)
5.	*Customs Act 1901* (Cth)	C2004C03256 (1 February 1998 to 30	s 233B	In force when Nicholas decided	2 February 1998 (date of judgment in Nicholas)

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
		March 1998)			
6.	*Evidence Act 1995* (Cth)	Compilation No 34 (1 September 2021 to 2 November 2021)	ss 135, 136, 138	In force when Confirmation Act commenced	11 December 2024 (date of commencement of the Confirmation Act)
7.	*Matrimonial Causes Act 1971* (Cth)	As made (17 November 1971 to 30 December 1973)	Whole Act	In force when R v Humby decided	21 December 1973 (date of judgment in R v Humby)
8.	*Surveillance Devices Act 2004* (Cth)	Compilation No 43 (30 June 2018 to 21 November 2018)	s 27C	In force when warrants referred to in the definition of "relevant warrant" in the Confirmation Act were issued.	16 October 2018 to 3 March 2021 (dates of issue of relevant warrants)
9.	*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 (date of commencement of the Confirmation Act)
10.	*Telecommunications (Interception and Access) Act 1979* (Cth)	Compilation No 108 (13 December 2019 to 17 February 2020)	ss 4, 5, 5F, 5G, 5H, 6(1), 7, 63, 77	In force at time of decision of Court of Appeal.	27 June 2024 (date of decision of the Court of Appeal)
11.	*Wheat Industry Stabilization*	As made (10 May 1946 to 25	s 11	In force when Nelungaloo Pty Ltd v The	31 May 1948 (date of judgment in Nelungaloo Pty

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
	Act (No 2) 1946 (Cth)	November 1948)		Commonwealth decided	Ltd v The Commonwealth)
Statutory provisions – State legislation					
12.	*Criminal Procedure Act 1921* (SA)	As in force 22 June 2023 to 21 March 2025	s 154	In force at time of decision of Court of Appeal.	27 June 2024 (date of decision of the Court of Appeal)