



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

A2 of 2025

BETWEEN:

CD

First Plaintiff

TB

Second Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA

Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEYS GENERAL FOR
THE STATE OF WESTERN AUSTRALIA AND THE STATE OF VICTORIA
(INTERVENING)**

PART I: CERTIFICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Confirmation Act materially indistinguishable from *Nicholas v The Queen*

2. The operation of the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) is materially indistinguishable from the legislation held to be valid by this Court in *Nicholas v The Queen* (1998) 193 CLR 173 (**JBA Vol 3 Tab 15, 578**): **WA [9]**. See **NSW [34]-[36]**.
3. As in *Nicholas*, the Confirmation Act makes admissible evidence that may otherwise
10 have been inadmissible. That the Confirmation Act does so in a less directive way and in respect of a larger class further supports the conclusion that its provisions do not infringe Ch III: **WA [5](d), [9]**. See **DS [38]**.

Confirmation Act does not declare any facts

4. The Confirmation Act does not declare any facts or impermissibly interfere with the exercise of judicial power: **WA [8]**.
5. The plaintiffs' submission that the Confirmation Act is not validating legislation must be rejected: **PR [13]**.
 - (a) Sections 5(2), 6(1), and 6(2) of the Confirmation Act confirm the validity of the relevant warrants and associated administrative acts: **WA [27]-[28], DS [17]-[19], NSW [18]-[21]**.
20
 - (b) Section 5(1) of the Confirmation Act is a provision attaching legal consequences or status to things which may not otherwise have had those legal consequences or status: **WA [5](c), [14]**. See also **WA [25]-[26], DS [27], NSW [17]**.
6. The Confirmation Act's operation is not materially distinguishable from the operation of legislation upheld in earlier decisions of this Court including *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 (**JBA Vol 3 Tab 11, 340**) and *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 (**JBA Vol 3 Tab 10, 294**): **WA [14], [29]**.

7. The plaintiffs' submissions at **PR [5]-[8]** are irreconcilable with decisions of this Court confirming that Parliament may pass legislation rendering nugatory pending proceedings, including an appeal: **WA [11]-[12], [15]**. It is of no consequence that the Confirmation Act does not deem judicially found or determined unlawful intercepts to have been validly intercepted: see **PR [6]**.
8. The fact-finding role of the court is left unimpaired by the Confirmation Act; the Confirmation Act attaches legal consequences to a factum (information being obtained pursuant to a "relevant warrant"), if that factum is found to exist by the relevant court: **WA [21]-[24], [29], DS [16]**.
- 10 9. Parliament is not required to await the outcome of judicial proceedings considering a particular trigger or factum before passing legislation declaring rights and liabilities to be applied by a court in relation to that trigger or factum. See **WA [18], DS [29]-[34], [42]**.

Confirmation Act does not abolish discretionary bases for exclusion of evidence

10. It is unclear on what basis the plaintiffs say that the discretionary bases to exclude ANOM evidence are completely curtailed by s 5(3) of the Confirmation Act: **PR [16]**. This is not the case for the reasons explained in **DS [36], NSW [19], [39]** and **SA DPP [32]**. See **WA [10]**.

Confirmation Act does not create two legal regimes

- 20 11. The plaintiffs' submission that the Confirmation Act creates two different legal regimes is without merit: **PR [17]**.
12. The Confirmation Act does not result in such a consequence; it operates in relation to "relevant warrants", capturing the cohort of cases in which evidence of ANOM messages may be used in legal proceedings: see **WA [20]**. It is irrelevant that the Confirmation Act is of no application to cases which do not involve the use of the ANOM application, or to cases not involving a "relevant warrant".

Dated: 13 May 2025



30 Craig Bydder SC

Aleksandra Miller