



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 24 Apr 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: A2/2025
File Title: CD & Anor v. The Commonwealth of Australia
Registry: Adelaide
Document filed: Form 27C - A-G WA Intervener's submissions-
Filing party: Interveners
Date filed: 24 Apr 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

A2 of 2025

BETWEEN:

CD

First Plaintiff

TB

Second Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA

Defendant

**SUBMISSIONS OF THE ATTORNEY GENERAL FOR THE STATE OF
WESTERN AUSTRALIA (INTERVENING)**

PART I: CERTIFICATION

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

PART II: INTERVENTION

2. The Attorney General for **Western Australia** intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant.

PART III: LEAVE TO INTERVENE

3. Not applicable.

PART IV: ARGUMENT

4. Western Australia adopts the defendant's submissions and makes the following supplementary submissions.

Introduction

5. When viewed against longstanding authority in this Court, the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) is unremarkable in that it:
 - (a) identifies a class potentially affecting more than 390 people (and therefore cannot be characterised as *ad hominem* legislation);
 - (b) identifies that class by reference to a factum, namely that information or a record was obtained under, or purportedly under, certain "relevant warrant[s]" issued or purportedly issued under the *Surveillance Devices Act 2004* (Cth) or s 3E of the *Crimes Act 1914* (Cth);
 - 20 (c) confirms (or attaches new) legal consequences in relation to that class, including but not limited to those in issue in legal proceedings, by deeming that the information or record in question is taken for all purposes not to have been intercepted, or obtained by intercepting, a communication passing over a telecommunications system within the meaning of the *Telecommunications (Interception and Access) Act 1979* (Cth); and
 - (d) prevents evidence of the information or record being inadmissible on the basis that it was obtained by intercepting a communication passing over a telecommunications system or because it was not validly obtained under warrants issued under the *Surveillance Devices Act* or s 3E of the *Crimes Act*,
30 but preserves a court's discretion to exclude evidence on other bases.

6. What is remarkable, as the defendant has emphasised in its submissions (eg DS [3]), is that the plaintiffs' case is premised on the *Confirmation Act* declaring (or directing a court to find) facts. The *Confirmation Act* neither declares any fact nor directs any court to find any fact. Instead, it confirms (or alters) the legal characterisation of certain facts in the manner described above and in more detail in the defendant's submissions (DS [11]-[20]).
7. Indeed, the facts relating to the ANOM application and platform are relevantly not in dispute (PS [9] and DS [6]; see also in A24/2024, AS [8]-[9], 1RS [9]-[12], 2RS [7]). What is in dispute is the legal characterisation of those facts, including whether as a matter of law a communication passing over a telecommunications system has been intercepted within the meaning of the *Interception Act*, such that messages obtained via ANOM are inadmissible under ss 63 and 77(1) of the *Interception Act*. It is with this legal characterisation that the *Confirmation Act* is concerned.

Question 1(a): no impermissible exercise of the judicial power of the Commonwealth

8. ***The Confirmation Act is materially indistinguishable from Nicholas v The Queen.*** As the *Confirmation Act* does not declare any fact or direct a court to find a fact, it does not impair judicial fact-finding as an essential attribute of Ch III courts in the way for which the plaintiffs contend (PS [26]-[27]).
9. On the contrary, and as the defendant has submitted (DS [36]-[43]), the *Confirmation Act* is materially indistinguishable from the legislation upheld in *Nicholas v The Queen*.¹ It is another example of legislation making admissible evidence that may otherwise have been inadmissible, albeit for a larger class and in a less directive way.
10. ***While not determinative of validity, the Confirmation Act does not entirely exclude a court's discretion to exclude evidence.*** In *Nicholas*, Brennan CJ considered that even a law entirely denying any discretion on the part of a trial judge to exclude the evidence would be a mere procedural law in relation to which no constitutional exception could be taken.² The *Confirmation Act* is not such a law. As the defendant submits (DS [36]), the legislation is not directed to discretionary exclusion of evidence on bases unrelated to matters addressed in ss 5(1) and 6(1).

¹ (1998) 193 CLR 173, see especially [23] (Brennan CJ), [55] (Toohey J), [156] (Gummow J) [235]-[238] (Hayne J).

² *Nicholas* [26].

11. ***The Confirmation Act's effect (if any) on rights in pending legislation does not affect its validity.*** That the effect of the *Confirmation Act* (if valid) is to provide a complete answer to the plaintiffs' appeal in A24/2024 does not bolster the plaintiffs' challenge to the *Confirmation Act's* validity. It is well-established that a statute which alters substantive rights is not inconsistent with Ch III of the Constitution, even if those rights are in issue in pending litigation.³
12. 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.⁴ Indeed, decisions of this Court have consistently rejected challenges to validating legislation affecting (or rendering nugatory) pending proceedings.⁵
13. The motive or purpose of the relevant Minister, Government or Parliament in enacting legislation impugned on this basis is immaterial.⁶
14. A provision which declares the legal effect of certain matters or things is, in terms of its constitutional character, materially the same as the following legislation which has been held valid:
- (a) legislation which declared the legal effect of an executive order and the authorising regulation, whatever the true legal position (s 11 of the *Wheat Industry Stabilization Act (No 2) 1946* (Cth) considered in *Nelungaloo*);
 - (b) legislation which declared the force and effect of a proceeding, matter, decree, act or thing purportedly made or done under the *Matrimonial Causes Act 1959* (Cth), which it was accepted was made or done without jurisdiction (s 5 of the *Matrimonial Causes Act 1971* (Cth) considered in *Humby*);
 - (c) legislation which declared the cancellation of the registration of a particular organisation (s 3 of the *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth) considered in the *Commonwealth BLF Case*);

³ *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 [26] (French CJ, Kiefel, Bell and Keane JJ); *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 [85]-[86] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

⁴ *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 [78] (Gummow, Hayne and Bell JJ) (*AEU*), citing *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, 250. See also *AEU* [49]-[50] (French CJ, Crennan and Kiefel JJ).

⁵ See for example *AEU; Duncan; Humby* (1973) 129 CLR 231; *Nelungaloo Pty Ltd v The Commonwealth* (1947) 75 CLR 495, 503-504, 579-580.

⁶ See *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96-97 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ) (*Commonwealth BLF Case*).

- (d) legislation which declared the zoning of particular land, and the effects of such zoning (*Local Government (Morayfield Shopping Centre Zoning) Act 1996* (Qld) considered in *H A Bachrach Pty Ltd v Queensland*);⁷
- (e) legislation which declared the validity of registration for organisations which had not complied with certain rules (s 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) considered in *AEU*);
- (f) legislation which effectively declared certain past conduct to be "corrupt conduct" (ss 34 and 35 of the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) considered in *Duncan*); and
- 10 (g) legislation which declared certain proposals arising under a State Agreement, arbitral awards and arbitration agreements to have no legal effect (ss 9(1), 9(2) and 10(4) to 10(7) of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) considered in *Mineralogy*).
15. Legislative declarations of rights and liabilities in respect of anticipated or pending litigation do not infringe Ch III because constitutional considerations concern a court's function, rather than the law the court is to apply in exercising its function.⁸
16. Where legislation declares rights and liabilities, "new norms of conduct are created by the legislature anterior to the performance of the judicial function".⁹ The legislative declaration does not affect the court's function, but specifies the rights and
- 20 liabilities which the court is to apply in the exercise of its function.
17. Legislation can declare rights and liabilities to be applied by a court based upon any trigger or factum.¹⁰ As *Humby* illustrates, this may include court orders made without jurisdiction and with no legal effect. It is of no constitutional significance whether the matters declared by legislation are a "fiction" as compared with the state of affairs before the legislation took effect.
18. ***The Confirmation Act does not impermissibly direct any court.*** That a practical effect of the *Confirmation Act* is to render the plaintiffs' appeal and interlocutory challenges to the validity of the warrants redundant does not lead to the conclusion

⁷ (1998) 195 CLR 547.

⁸ *Leeth v Commonwealth* (1992) 174 CLR 455, 469-470 (Mason CJ, Dawson and McHugh JJ).

⁹ *Kuczborski v Queensland* (2014) 254 CLR 51 [225] (Crennan, Kiefel, Gageler and Keane JJ).

¹⁰ *Duncan* [42] (Gageler J), citing *Baker v The Queen* (2004) 223 CLR 513 [43] (McHugh, Gummow, Hayne and Heydon JJ).

that the *Confirmation Act* has impermissibly directed the outcome of those proceedings. Legislation to similar effect in the *Commonwealth BLF Case* and *Bachrach* was held not to interfere with the exercise of judicial power.¹¹

19. As with the legislation considered in *Duncan*, the *Confirmation Act* does not purport to confer any power or function upon a court, and does not purport to give a direction to a court to treat as valid that which the legislature has left invalid.¹²

20. It is also notable that the impact of the *Confirmation Act* on the plaintiffs' appeal is only one practical effect of the provisions. The *Confirmation Act* only has this effect because of the particular circumstances arising in this matter. Evidence obtained pursuant to the relevant warrants is not limited to evidence intended to be used in criminal proceedings against the plaintiffs. More than 390 people were arrested and charged as a result of Operation Ironside.¹³ The same observations arise with respect to the challenges to the validity of any "relevant warrant" (as that term is defined by s 4 of the *Confirmation Act*).

21. Further, the provisions of the *Confirmation Act* do not purport to direct the outcome of the substantive criminal proceedings against the plaintiffs (or indeed any criminal proceedings relying on evidence of ANOM messages), nor direct any court as to the conduct of those proceedings. Whether or not the plaintiffs (or any others) are ultimately convicted of any offending with which they have been charged will be determined by the relevant court by reference to the evidence adduced in accordance with the ordinary procedures of the court and the applicable rules of evidence. The plaintiffs' submission (PS [49], [53]) that a court's function is reduced to a formality in relation to the cases to which it applies must be rejected.

22. Other than potentially affecting the admissibility of evidence, the *Confirmation Act* does not touch upon the fact-finding process at any future trial involving evidence of ANOM messages. The plaintiffs' reliance on *Williamson v Ah On*¹⁴ is therefore misconceived. The plaintiffs' submissions conflate, with respect, circumstances where a legislature changes a law rendering nugatory pending proceedings (here,

¹¹ *Bachrach* [16]-[20] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Commonwealth BLF Case* 96-97 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).

¹² See *Duncan* [27] (French CJ, Kiefel, Bell and Keane JJ).

¹³ Special case [9].

¹⁴ (1926) 39 CLR 95.

relevantly, the appeal to this Court on two questions of statutory construction) and circumstances where a legislature impermissibly determines the guilt of an accused.

23. Whether obtaining ANOM messages involved an interception of a communication as described in the *Interception Act* is not the ultimate issue in the prosecution of any accused that relies upon evidence of ANOM messages. This point is illustrated by the New South Wales Court of Appeal's decision in *Lazarus v Independent Commissioner Against Corruption*,¹⁵ where Leeming JA (with whom McColl and Simpson JJA relevantly agreed) observed at [131]:

10 Even if the validity of the compulsory examination or public hearing is the only *live* issue in the prosecution of Michelle, a law retrospectively validating the examination and hearing is not a law determining the ultimate issue of guilt or innocence. It remains the case that the Crown must establish, beyond reasonable doubt, all the factual elements of the offences with which Michelle has been charged (emphasis in original).

24. Further, even in relation to the confined question of whether obtaining ANOM messages involved a relevant interception of communications, this is not simply a fact-finding exercise as suggested by the plaintiffs. It is a question of statutory construction. The *Confirmation Act* does not purport to direct the courts in relation to the making of factual findings as to the operation of ANOM.

20 25. ***The Confirmation Act is valid.*** To the extent that the *Interception Act* did not already operate consistently with the *Confirmation Act*, as noted above at [5]-[6] the *Confirmation Act* amends the scope of the application of the *Interception Act* so that obtaining material using ANOM is taken not to have involved (and to never have involved) intercepting communications in circumstances where Chapter 2 of the *Interception Act* applies.

26. A legislature may amend the scope of legislation regulating matters falling within its legislative powers as it sees fit. The Commonwealth Parliament may choose which activities, data and technologies are captured by the *Interception Act* and legislate accordingly. No constitutional invalidity can arise on this basis alone.

30 27. In relation to s 6(1) of the *Confirmation Act*, that the Commonwealth Parliament has declared certain warrants obtained, or purportedly obtained, under the *Surveillance Devices Act* or the *Crimes Act*, as the case may be, to have been validly obtained under that legislation is unremarkable in light of the authorities referred to above.

¹⁵ (2017) 94 NSWLR 36.

28. Sections 5(2), 5(3), 6(2) and 6(3) of the *Confirmation Act* complement these provisions by curing the effects of any potential invalidity or any contravention of the *Interception Act*. They do so by, in effect, declaring evidence of ANOM messages not to have been obtained in contravention of an Australian law, in consequence of a contravention of an Australian law, improperly or in consequence of an impropriety.
29. There is no relevant distinction between the provisions of the *Confirmation Act* and the legislation considered in *AEU*, *Duncan* and *Nelungaloo*. The *Confirmation Act* simply attaches legal consequences and status to things which otherwise may not have had those legal consequences or that legal status.¹⁶ In doing so, the *Confirmation Act* is not inconsistent with Ch III of the Constitution.

Question 1(b): no impermissible interference with or undermining of the institutional integrity of courts vested with federal jurisdiction

30. For the reasons already submitted, the *Confirmation Act* does not reduce any court's functions to a formality for the cohort of cases to which the *Confirmation Act* applies. The legislation does not impermissibly direct any court in the performance of its judicial functions and stands within a well-established line of authority where declaratory or validating legislation has been held not to be inconsistent with Ch III of the Constitution.

PART V: LENGTH OF ORAL ARGUMENT

31. It is estimated that oral argument for Western Australia will take no more than 15 minutes.

Dated: 24 April 2025



C S Bydder SC
Solicitor-General for Western Australia
Email: c.bydder@sg.wa.gov.au
Ph: 08 9264 1806



A K Miller
Assistant State Solicitor
Email: a.miller@sso.wa.gov.au
Ph: 08 9264 1864

¹⁶ See *Duncan* [25] (French CJ, Kiefel, Bell and Keane JJ).

IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

A2 of 2025

BETWEEN:

CD

First Plaintiff

TB

Second Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA

Defendant

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR THE
STATE OF WESTERN AUSTRALIA (INTERVENING)

Pursuant to Practice Direction No 1 of 2024, the Attorney General for the State of Western Australia sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in the submissions.

| No | Description | Version | Provisions | Reason for version | Applicable dates |
|----------------------------------|---|---|----------------|--|---|
| Constitutional provisions | | | | | |
| 1. | <i>Commonwealth Constitution</i> | Compilation No 6 (29 July 1997 to present) | Ch III, s 71 | In force at all relevant times. | All relevant times. |
| Statutory provisions | | | | | |
| <i>Commonwealth legislation</i> | | | | | |
| 2. | <i>Builders Labourers' Federation (Cancellation of Registration) Act 1986 (Cth)</i> | As made (14 April 1986 to 28 February 1989) | s 3 | Version considered in <i>Commonwealth BLF Case</i> . | 13 August 1986 (date of judgment in <i>Commonwealth BLF Case</i>). |
| 3. | <i>Crimes Act 1914 (Cth)</i> | Compilation No 136 (17 February 2021 to 31) | Part IAA, s 3E | In force when warrants referred to in paras (b)(i)-(iii) of the definition of a 'relevant warrant' | 30 July 2021 (date of first warrant) to 22 December 2021 |

| | | | | | |
|----|--|---|-----------------|--|---|
| | | August 2021) | | in s 4 of the <i>Confirmation Act</i> were issued. Relevantly identical to the version in force when the warrant referred to at para (b)(iv) was issued. | (date of last warrant). |
| 4. | <i>Crimes Amendment (Controlled Operations) Act 1996</i> (Cth) | C2004C0131 8 (8 July 1996 to 9 March 2016) | s 15X | Inserted s 15X into the <i>Crimes Act 1914</i> (Cth); considered in <i>Nicholas</i> . | 2 February 1998 (date of judgment in <i>Nicholas</i>). |
| 5. | <i>Fair Work (Registered Organisations) Act 2009</i> (Cth) | C2012C0024 4 (27 December 2011 to 31 May 2012) | s 26A | Version considered in <i>AEU</i> . | 4 May 2012 (date of judgment in <i>AEU</i>). |
| 6. | <i>Matrimonial Causes Act 1971</i> (Cth) | As made (17 November 1971 to 30 December 1973) | s 5 | Version considered in <i>Humby</i> . | 21 December 1973 (date of judgment in <i>Humby</i>). |
| 7. | <i>Surveillance Devices Act 2004</i> (Cth) | Compilation No 43 (30 June 2018 to 21 November 2018) | Part 2, Div 2 | In force when warrants referred to in paras (a)(i)-(ii) of the definition of a 'relevant warrant' in s 4 of the <i>Confirmation Act</i> were issued. Relevantly identical to the version in force when the warrants referred to in paras (a)(iii)-(vii) were issued. | 16 October 2018 – 3 March 2021 (dates of the issue of the 'relevant warrants'). |
| 8. | <i>Surveillance Legislation (Confirmation of Application) Act 2024</i> (Cth) | As made (10 December 2024 – current) | ss 4, 5, 6 | Currently in force and in force at time of originating application. | From 11 December 2024. |
| 9. | <i>Telecommunications (Interception and Access) Act 1979</i> (Cth) | Compilation No 108 (13 December 2019 to 17 February 2020) | Ch 2, ss 63, 77 | In force when at least some of the ANOM Messages Subset were sent and is the version considered by the Court of Appeal. | 12 January 2020 (date at least some of the ANOM Messages Subset were sent); 27 June 2024 (date of the decision of |

| | | | | | |
|--------------------------|--|--|-----------------------------|--|---|
| | | | | | the Court of Appeal). |
| 10. | <i>Wheat Industry Stabilization Act (No 2) 1946 (Cth)</i> | As made (14 December 1946 to 25 November 1948) | s 11 | Version considered in <i>Nelungaloo</i> . | 2 July 1948 (date of judgment in <i>Nelungaloo</i>). |
| <i>State legislation</i> | | | | | |
| 11. | <i>Independent Commission Against Corruption Amendment (Validation) Act 2015 (NSW)</i> | As made | ss 34 and 35 | Amending Act considered in <i>Duncan</i> . | 15 April 2015 (date of judgment in <i>Duncan</i>). |
| 12. | <i>Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA)</i> | As made | s 7 (inserting ss 9 and 10) | Amending Act considered in <i>Mineralogy</i> . | 13 October 2021 (date of judgment in <i>Mineralogy</i>). |
| 13. | <i>Local Government (Morayfield Shopping Centre Zoning) Act 1996 (Qld)</i> | As made (31 July 1996 – 31 July 1997) | Entire Act | Act considered in <i>Bachrach</i> . | 2 September 1998 (date of judgment in <i>Bachrach</i>). |