HIGH COURT OF AUSTRALIA

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Details of Filing

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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

Respondent

PLAINTIFFS' SUBMISSIONS

PART I: FORM OF SUBMISISONS

1. These submissions are suitable for publication on the internet.

PART II: ISSUES IN THE SPECIAL CASE

2. These proceedings concern the validity of ss 5, 6 and 7 of the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) (**Confirmation Act**).

3. The Confirmation Act was enacted[1] after special leave to appeal was granted[2] in proceeding A24 of 2024, being the appeal from *Questions of Law Reserved (Nos 1 and 2 of 2023)* [2024] SASCA 82 (**CAJ**). As its name suggests, the Confirmation Act purports to "confirm" that decision which held, relevantly, that copies of text communications obtained covertly by the Australian Federal Police (**AFP**) via the operation of the AFP-enabled AN0M application placed on AN0M-enabled mobile phones were not obtained as a result of an unlawful interception as proscribed by s 7 of the *Telecommunications (Interception and Access) Act 1979* (Cth) (**Interception Act**), and thus were not inadmissible under ss 63(1)(a) and 77(1)(a) of that Act.

[1] The *Confirmation Act* passed both houses of Parliament on 28 November 2024 and received Royal Assent on 10 December 2024. It commenced on 11 December 2024: *Confirmation Act*, s 2(1) {**SCB** 30 [27]-[28]}.

[2] The plaintiffs were granted special leave to appeal on 7 November 2024: *CD & Anor v Director of Public Prosecutions (SA) & Anor* [2024] HCASL 297; {**SCB** 28 [20]}.

4. The questions posed by the Special Case {**SCB** 30, [29]} are whether ss 5, 6 and 7 are invalid in whole or in part because:

    a. they are an impermissible exercise by the Parliament of the judicial power of the Commonwealth; and/or

    b. are an impermissible interference with, and thereby undermine, the institutional integrity of courts vested with federal jurisdiction.

5. The plaintiffs contend that the legislative declaration of fact in s 5(1) of the Confirmation Act, operating as it does as a new fact for the purposes of any proceeding, including extant proceedings where the facts in issue concern whether the elements of an interception under the Interception Act are satisfied, removes the essential fact-finding function of the courts and is a legislative declaration quelling factual controversies, which is the hallmark of an exercise of judicial power. So understood, it is an invalid exercise of legislative power.

PART III: SECTION 78B NOTICE

6. Notices under s 78B of the *Judiciary Act 1903* (Cth) were served on 7 February 2025.

PART IV: MATERIAL FACTS

A Contextual background

7. The first and second plaintiffs are currently on remand having been charged on **Information** {SCB 26 [12]} by the Director of Public Prosecutions (SA) (**DPP**) alleging:

    a. participation in a "criminal organisation" as defined in s 83D(1) of the *Criminal Law Consolidation Act 1935* (SA) (**CLCA**) (count 1); and

    b. possession of prohibited items (firearms, parts of firearms, and a sound moderator) under the *Firearms Act 2015* (SA) (counts 2 to 4 and 8 to 14). (together, the **charged offences**).

8. The DPP's case against the plaintiffs includes that they each possessed and used AN0M-enabled devices to send or transmit communications over the AN0M

platform and through which the charged offences are said to be disclosed {SCB 26-27 [13]}. The DPP seek to prove the charged offences by recourse to a subset of AN0M Messages received by South Australian Police from the AFP and thus seek to have the messages admitted in the trial for that purpose.[3] The proceedings which are the subject of the appeal in A24 of 2024 emanate from a challenge to the admissibility of the AN0M messages sought to be relied upon by the DPP. That challenge is premised on the contention that the AN0M Messages are communications obtained by the AFP as a result of an unlawful interception of communications for the purposes of ss 6 and 7 of the Interception Act and are therefore inadmissible pursuant to s 63(1) and s 77(1) of that Act. It is accepted by the prosecuting authorities that the statutory prohibition on admissibility in s 77(1) precludes any residual discretion to admit the AN0M Messages if there is a finding that the AN0M messages were obtained as a result of an unlawful interception.

B AN0M platform

9. The operation of the AN0M application is summarised in the Special Case {SCB 85-86, [5]} which is taken from CAJ at [21]-[24]. In short, when a user of the AN0M application (**User A**) composed a message in the application and pressed "send", the application created a copy of that message, attached additional data to it, and sent the copied message to an iBot server where it was re-transmitted to servers in Sydney and was retrieved by the AFP from those servers via the use of a computer access warrant. User A's original message was delivered to the recipient user (**User B**) and both User A and User B were unaware of the making of a copy of the original message and its transmission (with additional data) to servers where it was retrieved by the AFP.

10. Hence, 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. The plaintiffs contend that that issue is to be resolved by reference to the fact that the copy message (and the additional data attached to it retrieved from the user's phone {SCB 23 [5.2]})

[3] In respect of counts 2-4 and 8-14, the DPP will also adduce evidence obtained under a search warrant on a property belonging to a third party where a vehicle was located and searched and in which the firearms were discovered {**SCB** 26 [12.2.1]}.

occurred within the statutory period of time identified in s 5F of the Interception Act. That contention was rejected by both the trial judge and the Court of Appeal.

11. Following the grant of special leave to this Court in A24 of 2024, the Commonwealth enacted the Confirmation Act, which commenced on 11 December 2024. The Commonwealth contends that the Confirmation Act validly determines any past, existing or future controversy as to whether the AN0M messages were obtained as a result of an unlawful interception.

PART V: ARGUMENT

12. The plaintiffs contend that ss 5, 6 and 7 of the Confirmation Act usurp the judicial power of the Commonwealth and/or impair the institutional integrity of courts vested with federal jurisdiction. The argument is premised on the proposition that the essential function of the judicial power is the quelling of controversies by the ascertainment of the facts and by application of the law to those facts as well as the exercise of any judicial discretion. As is accepted below, while the fact-finding function of courts is an essential attribute of courts, it is not unqualified. Nevertheless, even when fact-finding is understood in qualified terms that accommodate Parliament's capacity to legislate on matters of practice and procedure or regulating evidentiary matters, it is apparent that the exercise of legislative power in this case is in substance the determination or declaration of facts by the Parliament to quell a specific controversy in pending proceedings for a closed cohort of cases. The combination of those factors mark out an invalid incursion into, or a usurpation of, the judicial power of the Commonwealth by the Parliament. In order to demonstrate why that is so, the following submissions address the terms of the Confirmation Act (Part A), the fact-finding function of courts as an essential attribute of judicial power, including instances (of which the Confirmation Act is not one) where Parliament may legitimately legislate to regulate fact-finding by courts (Part B), before addressing why the specific questions raised on the Special Case should have the answers proposed by the plaintiffs (Part C).

A Statutory framework

13. Section 3 of the Confirmation Act states that the object of the Act 'is to support public trust and confidence in the application of surveillance device legislation and related legislation [i.e. the Interception Act] to newer technologies.' The manner in which that object might have been achieved is not, however, by legislative amendment of surveillance device legislation or "related legislation" so as to accommodate nuances occasioned by the development of "newer technologies"[4] but by a legislative declaration of fact that in practical terms renders the application of the provisions of the Interception Act redundant. Similarly, any issues raised concerning the legislative preconditions attaching to the issue of warrants under the *Surveillance Devices Act 2004* (Cth) (**Surveillance Devices Act**) are also rendered redundant.

14. So much is evident in the text of s 5 of the Confirmation Act which declares information or records obtained under a 'relevant warrant' *not* to have been intercepted, with the balance of s 5 sweeping away any secondary arguments concerning the legality or validity of any conduct engaged in, or evidence obtained as a result of, a contravention of an Australian law or impropriety. Relevantly, s 5(1) of the Confirmation Act provides that "[i]nformation 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' (emphasis added). Far from applying the Interception Act to the so-called "newer technologies", the Confirmation Act renders that Act largely otiose.

15. The use of the phrase "taken for all purposes" in s 5(1) is a familiar statutory device, including in the context of "validating" legislation,[5] to attach a new legal consequence to a factum ordinarily determined in a pre-existing administrative decision, or judicial order. For the reasons explained below, that is not so in the present case. That is, the Confirmation Act does not operate by identifying a pre-

[4] Which "newer technologies" are neither identified nor specified.

[5] See, eg, s 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) the subject of *AEU v General Manager of Fair Work Australia* (2012) 246 CLR 117.

existing fact or decision and attaching new or specific legal consequences to that fact or decision. On the contrary, s 5(1) of the Confirmation Act is a legislative finding of fact (i.e. there was not an interception). In essence, the legislature has quelled the pre-existing factual controversy by determining the fact and then pronouncing the legal consequences of that factual determination.

16. Section 5(1) operates on a select cohort of cases, namely, those involving a 'relevant warrant', being a case involving one or all of the eleven warrants specified in s 4 of the Confirmation Act. The defined list is exhaustive, with the consequence that the Confirmation Act only has application to a closed and ascertainable class of cases wherein material obtained under any such warrant is sought to be adduced as evidence in a court. In all other cases, where a question arises as to whether information or records were obtained as a result of an interception under the Interception Act, both the Interception Act and the usual judicial processes, including the application of discretions concerning the exclusion of evidence obtained unlawfully or in contravention of an Australian law, will apply.

17. Section 5(2) provides that anything done by a person that would have been invalid or unlawful is taken for all purposes to be valid and lawful. The provision is plainly directed to any conduct giving rise to, or flowing from, obtaining the information or records referred to in s 5(1).

18. Section 5(3) provides that "evidence" that save for s 5(1) would have been wholly or partly obtained: (a) in contravention of an Australian law 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 so obtained. Section 5(3) precludes, or renders futile any application for, the discretionary exclusion of evidence under s 138 of the uniform Evidence Acts[6] (**Evidence Acts**) or the common law.[7]

[6] See, eg, s 138 of the *Evidence Act 1995* (Cth).

[7] *Bunning v Cross* (1978) 141 CLR 54, esp at 74-75 (Stephen and Aickin JJ); ***Ridgeway*** *v The Queen* (1995) 184 CLR 19 at 32-33 (Mason CJ, Deane and Dawson JJ); see also *R v Ireland* (1970) 126 CLR 321 at 335 (Barwick CJ).

19. Section 6 declares that all information or records obtained in reliance, or purported reliance upon a relevant warrant is taken for all purposes to have been obtained under the legislative authority[8] specific to that warrant.

20. Sections 6(2) and 6(3) adopt the same formula as ss 5(2) and 5(3) to legislatively cure any unlawful or invalid conduct engaged in by a person in purported reliance upon a warrant (s 6(2)) and to preclude, or render futile any application for, the discretionary exclusion of evidence purportedly obtained under the warrants pursuant to s 138 of the uniform Evidence Acts or the common law.

21. Section 7 applies the Confirmation Act to any civil or criminal proceedings and applies, relevantly, to criminal proceedings instituted before commencement 'that are concluded …on or after the commencement of this Act' (s 7(b)(ii)). The criminal proceedings in this case were instituted before commencement but are yet to be concluded {SOC [7], SCB 8; Special Case [12], SCB 26}.

22. Section 8 is an orthodox historic shipwrecks clause precluding invalidity of the Confirmation Act on the basis that it infringes s 51(xxxi) of the Constitution.

23. In order to appreciate the nature and effect of the key provisions of the Confirmation Act, and their proper characterisation, it is necessary to have regard to key provisions of the Interception Act. Why? Because the Confirmation Act, and s 5(1) in particular, operates by reference to the statutory concept of 'intercepting a communication passing over a telecommunications system' as that concept is understood under the Interception Act. Relevantly, s 4 of the Confirmation Act defines 'intercepting a communication passing over a telecommunications system', to have 'the same meaning as in the [Interception Act]'. Accordingly, one must turn to the Interception Act to locate that meaning. 'Intercepting a communication passing over a telecommunications system' is not a specifically defined term in the Interception Act. Rather, it takes its meaning from s 6(1) of that Act which provides, subject to presently irrelevant qualifications, 'interception of a communication passing over a

[8] Relevantly, Div 2 of Part 2 of the Surveillance Devices Act for the warrants referred to in subparagraphs (a)(i) and (ii) of the definition of 'relevant warrant'; 27C of the Surveillance Devices Act for the 'computer access warrants' referred to in subparagraphs (a)(iii)-(vii) of the definition; and Part 1AA of the *Crimes Act 1914* (Cth) for the section 3E warrants referred to in paragraph (b) of the definition.

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.'[9] Embedded 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.

24. Relevantly, 'passing over' is defined in s 5(1) as 'includes being carried' with a statutory note[10] referring to s 5F for when a communication is passing over a telecommunications system. Section 5F is the key deeming provisions relied upon by the plaintiffs in the appeal in A24 of 2024 to establish that the AN0M Messages were intercepted while they were 'passing over' the telecommunications system. 'Telecommunications system' is defined in s 5(1) of the Interception Act to mean a 'telecommunications network that is within Australia' (or partly in Australia)[11] and includes 'equipment, a line or other facility that is connected to such a network and is within Australia'. 'Equipment' is defined in s 5(1) to include a 'telecommunications device' which is defined in s 5(1) as a 'terminal device that is capable of being used for transmitting or receiving a communication over a telecommunications system.'[12] 'Communication' is defined as 'includes conversation and a message, and any part of a conversation or message, whether in the form of speech, music or other sounds, data, text, images, signals or any other form or in in any combination of forms.' And 'telecommunications network' is defined, relevantly, to mean 'a system or series of systems, for carrying communications by means of guided or unguided electromagnetic energy or both, but does not include … systems for carrying communications solely by means of radiocommunications'.

25. Hence, the concept of 'intercepting a communication passing over a telecommunications system' in s 5(1) of the Confirmation Act, as defined in s 4(1) of that Act, necessarily picks up the interlocking definitions of the Interception

[9] Interception Act s 6(1).
[10] The statutory note forming part of the Interception Act: *Acts Interpretation Act 1901* (Cth) s 13.
[11] See paragraph (b) of the definition of 'telecommunications system' in s 5(1) of the Interception Act.
[12] For example, a mobile telephone.

Act upon which courts would ordinarily have regard to when determining, as a step in the fact-finding process undertaken by a court, whether a communication has, in fact, been intercepted for the purposes of that Act. So much is evident in the respective reasons of Kimber J and the Court of Appeal which demonstrate that their Honours considered the evidential basis going to the operation of the AN0M platform and whether the evidence established, as a fact, that the communication data was information or a record obtained in its passage over a telecommunications system, as informed by the deeming provision in s 5F of the Interception Act as well as the other interlocking definitions that bear upon the resolution of that controversy. What is evident from those decisions is that there is a significant fact-finding exercise undertaken by the courts when determining a controversy as to whether a communication or record was obtained as a result of an interception under the Interception Act, and it is the resolution of that controversy that is subject of the pending appeal before this Court in A24 of 2024.

B Relevant Aspects of Judicial Power

26. As Gageler J said in *Palmer v Ayers* (2017) 259 CLR 478, the "difficulty and the danger of attempting to formulate some all-encompassing abstract definition of the judicial power of the Commonwealth" has been "acknowledged from its inception[13]…repeatedly recognised in judicial pronouncements in the twentieth century[14]…and reiterated in this century[15]": at 496 [43]. Nevertheless, it has never been doubted that "[t]he unique and essential function of the judicial power is the quelling of … 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).

27. The statement in *Fencott* has not been doubted, though as noted in ***Graham*** *v Minister for Immigration and Border Protection* (2017) 263 CLR 1, the reference to fact-finding being an essential attribute of Ch III courts requires some

[13] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), p 720; Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910), p 321.
[14] *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 320; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 532; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189.
[15] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 22 [51]; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 553 [27].

qualification: at 22 [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). The qualification has two interrelated aspects.

28. *First*, it is well recognised that the Commonwealth Parliament can regulate matters of practice and procedure, including the rules of evidence. So much was confirmed in ***Nicholas*** *v The Queen* (1998) 193 CLR 173 at [26] (Brennan CJ), [54]-[55] (Toohey J), [154]-[156] (Gummow J); *Graham* at 22 [32]. Thus, as was observed in *Graham*, drawing on the legislation challenged in *Nicholas*, Parliament may regulate fact-finding by requiring a court to "ignore" a fact so as to facilitate a broader fact-finding purpose through the admission of relevant evidence while preserving judicial discretion to exclude evidence: *Graham* at 22 [31]. Requiring a court to "ignore" a discrete fact, such as the commission of an offence by a law enforcement officer in prescribed circumstances and without otherwise intruding on the exercise of judicial discretion[16] is, of course, substantively different from legislating the facts to quell a specific controversy in pending proceedings, such as the present case. The challenged provisions of the law[17] in *Nicholas* were not provisions which declared or determined facts at all; they regulated the exercise of the *Ridgeway* discretion and expressly preserved the judicial discretion to exclude evidence and stay proceedings.[18] That is not the case with the Confirmation Act which by s 5(1) declares that there was no interception under the Interception Act and thus determines that factual controversy pending in this Court. The plaintiffs hasten to add that they accept that Parliament may legislate with retrospective effect to render moot a pending controversy, but it is the means by which it does so that is critical and upon which constitutional validity hinges.

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[16] Section 15G(2) of the *Crimes Act 1914* (Cth) in force immediately following the enactment of the *Crimes Amendment (Controlled Operations) Act 1996* (Cth) expressly preserved the judicial discretion to exclude evidence and stay proceedings, subject only to s 15X, which required courts to "disregard" the fact that an offence was committed where the officer was acting in the course of duty for the purposes of a controlled operation and certain exemptions had been granted to the AFP in accordance with Ministerial Agreements.

[17] As noted in footnote 16, the critical provisions at issue in Nicholas (ss 15X which was to be read with s 15G(2)) required courts to "disregard" the fact that an offence was committed where the officer was acting in the course of duty for the purposes of a controlled operation and certain exemptions had been granted to the AFP in accordance with Ministerial Agreements. Unlike the Confirmation Act, the provisions of the amending Act in *Nicholas* did not include a legislative determination of facts.

[18] Sections 15G(2) and 15X of the *Crimes Act 1914* (Cth) then in force, and now found in s 15GA(2) of the *Crimes Act*.

29. *Second,* legislation may also regulate the method by which facts are proved: *Graham* at 22 [32]. As Brennan CJ explained in *Nicholas*, rules concerning the onus and standard of proof or regulating judicial discretion to exclude evidence, or abrogating privileges, may be enacted without offending Ch III: *Nicholas* at [23]-[24]. Underlying those observations is the acceptance that such laws are properly characterised as laws regulating practice and procedure or "evidential" laws. However, Brennan CJ also observed[19] the significance of the distinction drawn by Isaacs J in *Williamson v Ah On*[20] between a law which identifies or declares a rule of evidence on the one hand, and a provision though in the form of a rule of evidence, is in truth an impairment of the curial function of finding facts and hence a usurpation of judicial power, on the other. Brennan CJ cited Isaacs J in *Williamson* who said:[21]

> It is one thing to say, for instance, in an Act of Parliament, that a man found in possession of stolen goods shall be conclusively deemed to have stolen them, and quite another to say that he shall be deemed to have stolen them unless he personally provides that he got them honestly.

30. As Brennan CJ went on to observe, a "legislative instruction to find that the accused stole the goods might prove not to be the fact. The legislature itself would have found the fact of stealing".[22] That situation was, in Isaacs J's words, "an arbitrary creation of a new offence leaving no room for judicial inquiry as to the ordinary offence"[23] and hence amounts to a usurpation of judicial power. In contrast, a provision that reverses the onus of proof in theft cases not only recognises that an accused best knows the facts but critically, leaves "the Court to examine the facts and determine the matter".[24]

31. Hence, while it is well accepted that laws of evidence concerning the standard and onus of proof,[25] abolishing the need for corroboration in existing proceedings,[26] or even a law compelling the admission of an illegal importation in a trial,[27] would

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[19] *Nicholas* at 189-190 [24].
[20] *Williamson v Ah On* (1926) 39 CLR 95 at 108.
[21] *Williamson v Ah On* (1926) 39 CLR 95 at 108.
[22] *Nicholas* at 190 [24] (Brennan CJ).
[23] *Williamson v Ah On* (1926) 39 CLR 95 at 108 (Isaacs J)
[24] *Williamson v Ah On* (1926) 39 CLR 95 at 108 (Isaacs J) cited by Brennan CJ in *Nicholas* at 190 [24].
[25] *Nicholas* at [190] [24] (Brennan CJ); *Milicevic v Campbell* (1975) 132 CLR 307 at 316-317, 318-319; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 298 (Gibbs CJ).
[26] *Rodway v The Queen* (1990) 169 CLR 515 at 521 (the Court).
[27] The example used by Brennan CJ in *Nicholas* at 191 [26].

be laws regulating the manner in which facts are ascertained, it has also been recognised that a legislative determination of a fact which may be contrary to the actual fact will have "reduced the judicial function of fact finding to the merest formality".[28] Where such a law determines the very fact forming the judicial controversy before a court, it serves to reinforce rather than detract from its characterisation as something other than a law of evidence or practice and procedure.

32. It is trite to observe that the line between laws which usurp judicial power and laws which do not cannot be reduced to rigidities. Indeed, the notion of a usurpation of judicial power which infringes Ch III has been regarded as insusceptible to "precise and comprehensible definition"[29] and cannot proceed by a "purely abstract conceptual analysis".[30] However, the cases identify clear guideposts.

33. Relevantly, in *Liyanage v The Queen*[31] the Privy Council found invalid legislation enacted, *inter alia*, to render lawful otherwise unlawful acts underlying admissions to ensure the admissibility of those admissions in furtherance of supporting a conviction for the underlying offence. Invalidity arose on the basis that the legislation interfered with the function of the judiciary. Their Lordships stated (at 290):[32]

> The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they designed, and they take their colour, in particular from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere.

34. *Liyanage* has often been referred to in Ch III cases where this Court has been confronted by cases positing invalidity by usurpation of judicial power or interference with court processes so as to undermine the institutional integrity of

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[28] *Nicholas* at 190 [24] (Brennan CJ).
[29] ***R v Humby**; Ex parte Rooney* (1973) 129 CLR 231 at 249-250 (Mason J).
[30] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 (Windeyer J) cited in *Nicholas* at 233 [148] (Gummow J).
[31] *Liyanage v The Queen* [1967] 1 AC 259.
[32] *Liyanage v The Queen* [1967] 1 AC 259 at 290.

courts exercising the judicial power of the Commonwealth.[33] It stands at one end of the spectrum of (in)validity. At the other end of that spectrum are cases to which the label of "validating" legislation may be attached, where 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. Thus, it has been observed that "in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence": *Baker v The Queen* (2004) 223 CLR 513 at [43] citing ***Re Macks****; Ex parte Saint* (2000) 204 CLR 158 at [25], [59]-[60], [107], [208], [347]. Nevertheless, it has been recognised that between those two ends issues may arise that suggest the line between validity and invalidity becomes more difficult.

35. Thus, it has been observed that it is important to consider whether, and to what extent, a law may direct the outcome in a pending controversy. Relevantly, in ***A****ustralian* ***E****ducation* ***U****nion v Fair Work Australia* (2012) 246 CLR 117, Gummow, Hayne and Bell JJ observed: (at [87] (emphasis added))

> At least in cases which are still pending in the judicial system, it will be important to consider whether or to what extent the impugned law amounts to a legislative direction about how specific litigation should be decided. That is, as one author has written, **a balance must be struck between the recognition that the Parliament may change the law in a way that has an effect on pending proceedings (a proposition that has been described as "the changed law rule" and the recognition that the Parliament cannot direct the courts as to the conclusions they should reach in the exercise of their jurisdiction (a proposition that has been described as "the direction principle"**. But again no decision is called for in this case about how such a balance should be struck in respect of legislation that affects pending litigation.

36. Finally, the constitutional principle concerning the institutional integrity of courts vested with federal jurisdiction recognised in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and enunciated in ***Forge*** *v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] and

[33] See, e.g., *R v Humby* at 249-250 (Mason J); *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ); *Nicholas* at 192 [28] (Brennan CJ), 203 [57] (Toohey J), 211 [83] (Gaudron J), 221 [113] (McHugh J), 233 [147]-[148] (Gummow J), 245 [201], 257 [201], 261 [205], 263 [206] (Kirby J), 278-279 [252]-[253] (Hayne J); *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ); *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [17] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), *Knight v Victoria* (2017) 261 CLR 306 at [26] (the Court).

subsequent cases,[34] "hinges upon maintenance of the defining characteristics of a 'court'": *Forge* at 76 [63]. Relevantly, if the "institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies:" *Forge* at 76 [63].

37. One of the number of ways in which the institutional integrity of a court may be undermined is where legislation confers on a court a function (judicial or otherwise) incompatible with the role of the court as a repository of federal jurisdiction: *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [46] (French CJ and Kiefel J). Encapsulated within that formulation is the notion that Parliament cannot reduce the essential function of a court to the merest of formalities by legislating the facts upon which a court is to proceed to a determination of law. To do so is in substance to borrow the institutional integrity of courts to secure a desired end. It is to "cloak" the "work of the legislature in the neutral colours of judicial action".[35] Moreover, concerns about the nature of the 'distortion' of the institution are heightened in circumstances where a law applies to a specific cohort of people in a closed class of cases in criminal proceedings, leaving all other cases to be determined in the ordinary course. Such a law exhibits characteristics which undermine the independence of the courts by precluding those courts in a select and closed category of cases only from exercising the function of ascertaining the relevant facts and then applying the law to those facts. In this case, for the reasons submitted below, the terms of the Confirmation Act reduce the role of the court to the merest of formalities – there is no scope for a court to proceed otherwise than in accordance with the factual paradigm legislated by s 5(1) and 6(1) and to proceed to determine a legislatively designed outcome.

38. It is against that background that the questions posed by the Special Case are to be answered.

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[34] See eg, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 164 [32]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 593-594 [39]-[40] (French CK, Kiefel and Bell JJ); *Vunilagi v The Queen* (2023) 97 ALJR 627 at 636-637 [12] (Kiefel CJ, Gleeson and Jagot JJ).

[35] *Mistretta v United States* (1989) 488 US 361 at 407 cited in *South Australia v Totani* (2010) 242 CLR 1 at 172 [479] (Kiefel J).

C The Questions of Law in the Special Case

C1 Question 1(a) – The Confirmation Act usurps judicial power

39. Question 1(a) of the Special Case asks whether the Confirmation Act is invalid either in whole or part because it is an impermissible exercise by the Parliament of the judicial power of the Commonwealth. The answer to that question turns on whether the provisions of the Confirmation Act accrete to the Parliament an aspect of judicial power or an essential function of a court exercising judicial power. For the reasons that follow, the answer to question 1(a) is "Yes".

40. The vice with the Confirmation Act is that ss 5(1) and 6(1)(a) declare the very facts upon which the Court is called upon to determine in the present controversy, namely, whether the AN0M Messages (i.e. the data containing the information or records) were obtained as a result of an interception under the Interception Act. Put simply, the vice arises from the combination of factors that locate this case on the *Liyanage* end of the spectrum and cannot be reconciled, or characterised consistently with, the legislation at issue in *Nicholas* or *AEU*.

41. Relevantly by ss 5 and 6 (and 5(1) and 6(1) in particular), Parliament has declared the very facts which courts would otherwise have ascertained and found through the exercise of judicial power when determining whether the AN0M data was obtained as a result of an unlawful interception under the Interception Act. The Confirmation Act purports to determine that controversy conclusively.

42. Further, by s 7(b), the Confirmation Act has determined that fact in pending proceedings and in that regard has determined the judicial controversy at stake in the A24 of 2024 appeal proceedings pending before this Court. While it may be accepted that legislation will not offend Ch III by reason that it validates pre-existing administrative acts or judicial acts by attaching new legal consequences to those acts, the provisions in this case determine the facts relevant to any such controversy anew. So understood, s 5(1) bears the hallmarks of the postulated law that was the subject of the observations by Isaacs J in *Williamson* and Brennan CJ in *Nicholas*, namely, a law that conclusively determines the facts irrespective of whether they are true or not. To do so in pending litigation that affects a select cohort of cases involving criminal prosecutions where the admissibility of

evidence may be determinative, serves to reinforce the characterisation of the law as one that in substance intrudes into the fact-finding role of courts in order to more likely secure criminal convictions for a select group of people.

43. Moreover, to state new facts in pending litigation so as to determine the result and quell the controversy cannot be characterised as an exercise in legislating on matters of practice and procedure in the sense recognised in *Nicholas*. The ascertainment of facts may be *regulated* by procedural laws, but procedural laws do not as a matter of form or substance declare facts or state in conclusive terms the facts. That is an essential function of the exercise of judicial power.

10 44. Nor can the various subsections of s 5 be regarded as laws relating to matters of evidence. None of ss 5(1), 5(2) or 5(3) regulate matters such as the burden of proof, or the exercise of a judicial discretion. Rather, the combination of the determination of the fact in s 5(1) with the declarations of validity and lawfulness effected by ss 5(2) and 5(3) remove from any criminal proceedings reliant on AN0M data any question as to the admissibility of that data by want of compliance with the Interception Act, as well as any residual discretion that may have been available under the uniform Evidence Acts or the common law. That fact has been conclusively determined by the Parliament. In that regard, the Confirmation Act stands in stark contrast to the provisions impugned in *Nicholas*, where judicial
20 discretion was expressly preserved.[36]

45. Having declared the central fact of "no interception" in s 5(1), the further legislative declarations of fact in ss 5(2) and 5(3) quarantine any derivative argument that may serve as a foundation for an attack on the admissibility of the information or records. In so doing, the Parliament has more than reduced the fact-finding function of courts to the merest of formalities,[37] it has withdrawn that function of the court and accreted that function to itself. Such an accretion is quintessentially a usurpation of an essential function of a court exercising the judicial power of the Commonwealth.

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[36] Section 15G(2) of the *Crimes Act 1914* (Cth) as amended by the *Crimes Amendment (Controlled Operations) Act 1996* (Cth) preserved the *Ridgeway* discretion, but s 15X modified its operation.
[37] Cf *Nicholas* at 190 [24] (Brennan CJ).

46. In contradistinction to cases such as *R v Humby, Re Macks, AEU* or *Duncan v New South Wales* (2015) 255 CLR 388, the Confirmation Act does not alter existing rights and liabilities on the basis of a pre-existing state of affairs to which a new law is to apply. Rather, the Confirmation Act declares a new fact (indeed, the ultimate fact) upon which the very subject of the legal controversy turns. In so doing, it thereby removes from the courts the function of determining the facts before applying the substantive law to those facts so as to determine an existing controversy. Here, the Confirmation Act quells an existing controversy by declaring the facts and indeed declaring them to be other than what the appellants say those facts are if they were to be determined in accordance with the existing terms of the Interception Act.

47. As a matter of construction, it is accepted that neither s 5(1) nor s 6(1) are couched in terms of a direction to a court, but they cannot be construed as simply evidencing a change in law with respect to the Interception Act or the Surveillance Devices Act. Rather, the Confirmation Act establishes a new factual paradigm that determines in conclusive terms the existing controversy.

48. Section 5(1) determines conclusively whether an interception occurred via the use of AN0M Platform by declaring that no such interception occurred. In doing so, the Confirmation Act has purported to remove from courts their orthodox fact-finding and law-application function which is the essence of judicial power.

C2 Question 1(b) – Confirmation Act impairs the institutional integrity of courts

49. Question 1(b) of the Special Case asks whether the Confirmation Act is invalid because it impermissibly interferes with or undermines the institutional integrity of courts vested with federal jurisdiction. The answer to that question turns on whether and how the terms of the Confirmation Act impact on courts as institutions. The answer is informed by determining how a court is to exercise its functions consistently with (or outside of) the Confirmation Act. In short, a court's function under the Confirmation Act is reduced to a formality for the select cohort of cases to which the Confirmation Act applies. Accordingly, question 1(b) is to be answered in the affirmative.

50. The Confirmation Act applies to a select group of cases. Unlike the case in *Nicholas,* there is no amendment to the underlying law. Neither the Interception Act nor the Surveillance Devices Act have been amended to accommodate the application of those Acts to the so-called "newer technologies". Instead, the Parliament has carved out a new factual and legal regime applicable to the select cohort of cases involving information or records obtained under a "relevant warrant". In so doing, the Parliament has established two legal regimes that will apply to resolve whether information or records have been obtained as a result of an unlawful interception under the Interception Act or whether warrants obtained under the Surveillance Devices Act are invalid.

51. In the case of the select cohort of cases covered by the Confirmation Act, the Parliament has determined both the facts and the law to be applied to resolve those questions. In all other cases, the factual and legal determination has been left to the courts. Hence, in cases other than those concerning the "relevant warrants", courts will proceed to ascertain the evidence concerning how communications data was transmitted, when it was transmitted, whether it occurred during its passage over a telecommunications system, whether it occurred via the use of a telecommunications device or equipment forming part of the telecommunications system and so on. These questions are to be answered by evidence adduced to enable a court to make the necessary findings upon which the terms of the Interception Act will apply. Likewise, courts will be required to determine whether information or records obtained under warrants purportedly issued under the Surveillance Devices Act were the product of unlawful acts, including, for example, unlawful interceptions. All of those factual determinations that lie at the heart of the essential function of a court when determining those issues have been rendered nugatory in the case of the Confirmation Act.

52. The Confirmation Act compels a court to proceed on the facts determined by the Parliament and compels the court to proceed on the basis that no conduct that is the product of those facts can be impugned by the exercise of any residual discretion. In short, the court is compelled to accept a fact and to pronounce a legal conclusion accordingly. The role of the court as a fact-finder is rendered nugatory.

53. The function of courts under the Confirmation Act is aptly characterised as being reduced to the merest of formalities. There is no truly judicial role left for a court in the select cohort of cases to which the Confirmation Act applies.

54. By legislating the factual conclusion to determine the existing controversy, and in securing the outcome favourable to the prosecuting authorities as revealed by the text of the Confirmation Act, the Parliament has, in substance, borrowed the institutional integrity of courts to secure a desired end. In achieving that object, the institution has not only been borrowed but its essential fact-finding functions have been so diminished that its integrity as a repository of federal jurisdiction is undermined and impaired.

55. For these reasons, question 1(b) should be answered in the affirmative.

PART VI: ORDERS SOUGHT

56. For the reasons set out above, the plaintiffs submit that the Court should answer the questions stated in the Special Case {SCB 30 [29(1)(a) and (b)]} in the affirmative and that the Commonwealth should pay the plaintiffs' costs.

PART VII: ESTIMATE OF TIME

57. The plaintiffs estimate approximately 2 hours will be required to present oral submissions on the Special Case, including reply.

Dated: 31 March 2025

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ANNEXURE TO PLAINTIFFS' SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	*Constitution*		51(xxxi), 71	Act in force at time	
2.	*Surveillance Legislation (Confirmation of Application Act) 2024* (Cth)	C2024A00130 Registered 12/12/2024	Whole Act	Act currently in force and at time of originating application	11 December 2024, being the date of commencement of the Act.
3.	*Telecommunications (Interception and Access) Act 1979 (Cth)*	Compilation No. 108 Compilation date: 13 December 2019 Includes amendments up to: Act No. 124, 2019 Registered: 13 January 2020	5, 5F, 6(1), 7, 77	Act in force at time of decision of Court of Appeal	27 June 2024, being the date of the decision of the Court of Appeal
4.	*Surveillance Devices Act 2004 (Cth)*	Compilation No. 43 Compilation date: 30 June 2018 Includes amendments up to: Act No. 67, 2018 Registered: 10 July 2018	27C	This was the version in force at the time of the issue of 'relevant warrants' as defined in the Confirmation Act	16 October 2018 – 3 March 2021 being the dates of the issue of the 'relevant warrants.
5.	*Firearms Act 2015* (SA)	As at 20 January 2020	ss 9, 29, 31, 32, 39	This is a current version and all relevant provisions are the same	20 January 2020 being the date of the offences alleged in the Information
6.	*Criminal Law Consolidation Act 1935* (SA)	As at 20 January 2020	83D, 83E	This is a current version and all relevant provisions are the same	20 January 2020 (being the date of the charges in the Information)
7.	*Acts Interpretation Act 1901* (Cth)	Compilation No. 38	13	This is a current version applicable at	11 December 2024 being the date of

		Compilation date: 11 December 2024 Includes amendments up to: Act No. 115, 2024		time of the passage of the Confirmation Act	commencement of the Conformation Act
8.	*Crimes Act 1914* (Cth)	Compilation No. 136 Compilation date: 17 February 2021 Includes amendments up to: Act No. 3, 2021 Registered: 26 February 2021	3E, 15GA(2)	This is the version in force at the time of the issue of s3E warrants as defined in the Confirmation Act	13 August 2021, being the date of the first s3E warrants referred to in the Confirmation Act
9.	*Evidence Act 1995* (Cth)	Compilation No. 34 Compilation date: 1 September 2021 Includes amendments up to: Act No. 13, 2021 Registered: 2 November 2021	138	This is a current version applicable at the time of the passage of the Confirmation Act	11 December 2024
10	*Fair Work (Registered Organisations) Act 2009* (Cth)	C2012C00244 This compilation was prepared on 24 January 2012 taking into account amendments up to Act No. 46 of 2011	26A	This was the version in force at the time of the decision of the Court in *AEU v General Manager of Fair Work Australia* (2012) 246 CLR 117, namely 4 May 2012	4 May 2012
11	*Crimes Amendment (Controlled Operations) Act 1996* (Cth)	C2004C01318 08 July 1996 - 09 March 2016 This Act, No. 28 of 1996 was amended by Act No. 41 of 2003 but is now repealed.	15X	This was the version in force at the time of the decision of the Court in *Nicholas v The Queen* (1998) 193 CLR 173, namely 2 February 1998.	2 February 1998