HIGH COURT OF AUSTRALIA

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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

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PLAINTIFFS' REPLY SUBMISSIONS

PART I: FORM OF SUBMISISONS

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

PART II: REPLY TO ARGUMENTS OF RESPONDENT AND INTERVENORS

A Proper Characterisation of the Confirmation Act

2. As is apparent from the submissions of both the Commonwealth (**CS**) and those of the intervenors,[1] the primary issue in these proceedings is the proper characterisation of the Confirmation Act.

3. It is important to recall at the outset that the task for this Court to determine on appeal in A24/2024 is whether the South Australian Court of Appeal was in error in finding that AN0M communications were not, relevantly, communications "passing over" the "telecommunications system" under the Interception Act.

4. The effect of s 5(1) of the Confirmation Act is to render this Court's decision on that question redundant by declaring the relevant AN0M communications "not to have been …intercepted".[2] This is, the plaintiffs submit, a legislative declaration of fact and thus an impermissible exercise of judicial power by Parliament through the quelling of a live controversy.[3]

5. What the Confirmation Act does not do is identify a judicially determined fact and then attach to that fact a new legal consequence. It is orthodox, for example, for an Act to specify the legal consequences attaching to judicially determined facts. That is the hallmark of "validating legislation". Hence, all parties are agreed that the selection of an established or determined fact as the trigger for particular legislative consequences would not be an exercise of judicial power by Parliament.[4] The controversy is not, therefore, whether Parliament may enact a law that has such an effect. The controversy is whether the Parliament has itself legislated facts to procure a result in its favour in pending litigation.

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1 See eg Submissions of the Attorney-General for **NSW** at [2], Submissions of the Director of Public Prosecutions of **SA** seeking leave to intervene at [46], Submissions of the Attorney-General for **WA** at [6]-[7]. The plaintiffs note that they do not oppose the DPP(SA) being granted leave to intervene.

2 Section 5(1); PS [13]-[14]; SA [16]. This is accepted by the Commonwealth in its submissions on the appeal seeking that special leave be revoked: the Confirmation Act "puts beyond doubt that the AN0M Evidence was not intercepted in contravention of s 7(1) of the Interception Act": at [11] (emphasis added). The Confirmation Act also "confirms" the decisions of the South Australian Courts: see eg CS [34], SA [28].

3 PS [5], [12], [26]. The Commonwealth in this case, quite properly, does not submit that it is within Parliament's purview to itself determine the facts. NSW at [11] suggests that *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [30] is authority for the proposition that finding the facts to which the law is to be applied is not "an invariable feature of the curial process"; however, this, with respect, overstates the relevant finding in *Graham*: see instead PS [27]-[29].

4 See eg *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 178 [25]; ***Duncan*** *v Independent Commission Against Corruption* (2016) 256 CLR 83 at [14]; PS [34], CS [26].

6. Further, contrary to the submissions of the DPP(SA) and WA, the Confirmation Act does not, in its terms, disapply the evidential rule in s 77 of the *Telecommunications (Interception and Access) Act 1979* (Cth) nor does it, for example, deem judicially found or determined unlawful intercepts to be validly intercepted.[5] The distinction is important.

7. Instead of the Confirmation Act operating on judicially determined facts, it removes altogether from this Court consideration of that question. The Commonwealth's attempt to characterise "the direct legal operation" of s 5(1) as merely "deem[ing] certain information and records not to answer a particular statutory description in the Interception Act" should be rejected.[6] Determining whether there had been an intercept required the Supreme Court to make a series of factual findings on the evidence.[7] Those findings formed the basis of the facts stated before the Court of Appeal.[8] It matters not that those findings were made by the Supreme Court after consideration and application of defined terms.[9] It also matters not that those findings were not made as to the "ultimate issue" in the prosecutions themselves, namely, the guilt or otherwise of the plaintiffs.[10]

8. Section 5(1) of the Confirmation Act does not merely alter a "legal conclusion" on the "facts as found".[11] Rather, s 5 both declares the facts (s 5(1)) and dictates the legal consequence (ss 5(2) and (3)). Section 5(1) does not merely alter legal consequences of particular facts. It is directed to the earlier factual stage of the enquiry compelling a fictitious outcome regardless of what the Court may itself find (or may have found). Specifically, s 5(1) re-defines the (undefined) concept in the Interception Act – "intercepted while passing over a

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5 PS [15]; cf SA [4], [12], [36]-[37] ("the Confirmation Act provides that the evidential rule in s 77 of the TIAA is not engaged in litigation involving information and records obtained under a 'relevant warrant'") and WA [26] ("the Confirmation Act amends the scope of the application of the Interception Act").

6 CS [12]. The Commonwealth's submission as to the nature of the appeal in A24/20204 being on a "question of law" (emphasis in original at CS [25]; see also NSW [27]-[28]) is also of no moment when it is well-settled that an appeal on a question of law encompasses a question of mixed fact and law, see eg *Maurici v Chief Commissioner of State Revenue* (2003) CLR 111 at [8]. This is accepted by SA at [47].

7 The plaintiffs have never submitted that the "Confirmation Act [purports] to direct the courts in relation to the making of factual findings as to the operation of AN0M": cf WA [24]. It is likewise irrelevant that there is an "absence of any material *factual* contest concerning the operation of the AN0M platform": NSW [29] (italicised emphasis in original).

8 SCB 69-72: Factual Basis for Reservation of Questions.

9 Cf SA [47], CS [24], NSW [29]. The factual findings made, for example, as to whether there was "passing over" were and are abundantly "falsifiable", hence the appeal in A24/2024: cf NSW [30].

10 Cf WA [22]-[23]; SA [43], [48]-[50], CS [33.3], [40], [42], [51]; NSW [30], [37].

11 Cf CS [14], SA [50], [52]. Section 5(1) does not attach a consequence to a fact previously "found". The Commonwealth's attempt to uphold the validity of s 5(1) by reference to an "identifiable past fact" that was never relevant to, nor capable of founding, a conclusion that there was no intercept under s 7(1) of the Interception Act should also be rejected: cf CS [17], [26]-[27], WA [5(b)], [17], SA [16], [52], NSW [17], [29]. In fact, SA [16] highlights the absurdity of selecting warrants issued under completely separate regimes which "regulate the manner in which coercive power may be used to gather certain information" to then sidestep those same stringent protections in the Interception Act absent any judicial determination.

telecommunications system" – in a manner that both changes the factual landscape[12] and answers the extant controversy pending before this Court in A24/2024, and in so doing, conclusively usurps this Court's function in determining that controversy. The effect of this, as Edelman J noted in *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [159], is to "undermine the assignment of judicial power to judges", a point his Honour noted was "powerfully made" in dissent by Roberts CJ (Sotomayor J agreeing) in *Bank Markazi v Peterson*:[13]

> No less than if it had passed a law saying 'respondents win,' Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory.

B The Confirmation Act is Not Validating Legislation

9. The Commonwealth rely heavily (CS [30]-[34]) on the decision of ***Lazarus*** *v Independent Commission Against Corruption* (2017) 94 NSWLR 36 which considered the constitutional validity of amendments made to the ICAC Act, considered by this Court in *Duncan*.

10. In *Duncan*, ICAC found that Mr Duncan had engaged in "corrupt conduct" under s 8(2) of the ICAC Act: at [2]. Before his application challenging the validity of the ICAC Report could be determined, the High Court in *Cunneen*[14] narrowed the meaning of "corrupt conduct" under the ICAC Act. The NSW Parliament thereafter enacted the Validation Act, deeming ICAC's activities before 15 April 2015 (when *Cunneen* was handed down) valid by effectively amending the definition of "corrupt conduct": [11]. The plurality (French CJ, Kiefel, Bell and Keane JJ) held that the Validation Act simply operated to amend the definition of "corrupt conduct" in the ICAC Act and that "Parliament thereby changed the meaning of 'corrupt conduct' as a matter of substantive law, from the meaning given to that expression in *Cunneen* in respect of acts occurring before 15 April 2015": [12]. As Gageler J stated at [41], "[t]hat which was 'invalid'…[was] thereby made 'valid'".

11. The NSW Court of Appeal in *Lazarus* considered the same Validation Act: at [54]. The effect of the Validation Act on (relevantly) Ms Michelle Lazarus was again validating in the sense ordinarily understood, that is, deeming a previously held compulsory examination and public inquiry as having been validly convened, notwithstanding *Cunneen*: at [121].

12. What Parliament did not do in respect of the ICAC Act, however, and what it could not do, was conclusively determine through a "Validation Act" that ICAC's conduct in respect of

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[12] The premise for the respondents' argument for revocation of leave in the appeal A24/2024 proceeds on the factual (as well as the legal) landscape identified in the Confirmation Act, which demonstrates that that landscape has changed (were the Constitutional challenge to fail): cf CS [25].

[13] (2016) 578 US 212 at 237.

[14] *Independent Commission Against Corruption (NSW) v* ***Cunneen*** (2015) 256 CLR 1.

Ms Cunneen (or anyone else) was valid by itself declaring that her conduct amounted to "corrupt conduct" while that controversy was on foot.[15] Such legislation would have constituted an impermissible interference with the judicial process.

13. So understood, it is immediately apparent that the Confirmation Act is not a form of "validating" legislation.[16] In neither s 5(1) (nor 6(1)) of the Confirmation Act is there any "retrospective validation of an administrative Act"[17] by reference to a judicially found fact.[18] Rather, there is a pre-emptive legislative declaration that there was no intercept, before this Court has had an opportunity to rule on that issue, which amounts to an impermissible usurpation of this Court's function.[19] If Parliament could, in any extant proceeding, legislatively declare (as here) facts to exist or not to suit the case at hand, thereby altering the factual landscape and pre-empting judicial decision making, it would at worst render nugatory the separate exercise of judicial power provided for by Chapter III and at best reduce it to the merest of formalities. Neither can sit with orthodox understandings of judicial power.

C Operation of s 5(3) of the Confirmation Act

14. Section 5(3) does not operate, by any measure, on the terms of s 77(1)(a) of the Interception Act where s 77(1)(a) applies to render evidence inadmissible "[w]here a communication has been intercepted, whether or not in contravention of subsection 7(1)" (emphasis added). That is, even if s 5(3) deems that evidence was not obtained in contravention of s 7(1), this does not affect the inadmissibility of that evidence under s 77(1)(a),[20] and nor s 63(1)(b).[21] For that reason alone, the Commonwealth's and Intervenors' reliance on ***Nicholas*** *v The Queen* (1998) 193 CLR 173 is inapposite.

15. *Nicholas* otherwise does not assist in the characterisation of s 5(1) of the Confirmation Act more generally, because, although s 5(1) may have been enacted in respect of an extant proceeding which commenced its life as a challenge to admissibility, s 5(1) is plainly not an evidentiary provision in the same terms as s 15X which was expressly directed to the

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[15] See *Cunneen* at [1]: "The principal question for determination is what is meant by the expression 'adversely affects, or that could adversely affect ... the exercise of official functions by any public official' in the definition of 'corrupt conduct' in s 8(2) of [the ICAC Act]." Cf WA [14(f)].

[16] Cf CS [27], WA [14], [29], SA [38], [41], [51], and in particular, SA's unjustified reliance on the model adopted in *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, which was true validating legislation and a long way from s 5(1) in this case.

[17] *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 579 (Dixon J).

[18] Cf CS [19]; SA [41].

[19] See eg WA [15].

[20] Cf CS [36.1]; WA [9]; SA [22].

[21] Section 63(1)(b) operates both "[s]ubject to this part" (ie Part 2-6 which also contains s 77(1)(a)) and applies to "lawfully intercepted information" as defined in s 6E of the Interception Act.

admission of evidence.[22] It is no answer in considering the proper characterisation of s 5(1) to resort to its ultimate "operation" as affecting the evidence that will be admissible at the plaintiffs' trials.[23]

16. In any event, on a plain reading of s 5(3), properly construed, there is nothing to indicate that a court's discretion to exclude the AN0M evidence "on other bases" or "for reasons unrelated to the matters addressed in ss 5(1) and 6(1)" remains.[24] While the relevant exclusion may only be in respect of the AN0M evidence, the discretionary bases to so exclude it are completely curtailed by s 5(3).[25]

D Impairment of the institutional integrity of courts

17. The plaintiffs accept that the success of Question 2 stands on Question 1: CS [49]. However, the plaintiffs do not accept that the Confirmation Act's purported application to only a closed cohort of defendants is irrelevant simply because that Act is not *ad hominem* legislation (which the plaintiffs have never alleged). Rather, the Confirmation Act creates two different legal regimes for determining whether there has been an unlawful "intercept" under the Interception Act, thereby preventing a court from proceeding in a manner that ensures "equality before the law"[26] and reinforcing the characterisation of s 5(1) as a legislative determination of fact for a select cohort of cases only.

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22 See s 15X set out at *Nicholas* at [5]; PS [28]; cf SA [41], [44], NSW [34].

23 Cf CS [50]; NSW [36].

24 CS [36], WA [5(d)], [10], SA [32], NSW [39].

25 PS [18], [20], [44], [52]. Notably, the plaintiffs do not submit that the Confirmation Act "compels" admission of any evidence (cf SA [54]), rather, they contend that it forecloses any application for the exclusion of that evidence.

26 See eg *Nicholas* at [74] per Gaudron J; PS [50]; cf NSW [57]-[60].