



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
ADELAIDE REGISTRY

BETWEEN:

**CD and TB**

Appellants

and

**DIRECTOR OF PUBLIC PROSECUTIONS (SA)**

and

**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA**

Respondents

**OUTLINE OF ORAL SUBMISSIONS OF THE DIRECTOR OF PUBLIC  
PROSECUTIONS (SA)**

## Part I: CERTIFICATION

The Director certifies that this outline is in a form suitable for publication on the internet.

## Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

### The first ground of appeal:

1. A telecommunications system is defined in s 5 TIAA (**JBA Pt A V 1, 70**) as a telecommunications network which, in turn, is defined in the same section (**JBA Pt A V 1, 69**) as a system, or a series of systems, for carrying communications (defined **JBA Pt A V 1, 37**) by means of guided or unguided electromagnetic energy or both.
  - i. carry includes transmit, switch and receive (**JBA Pt A V 1, 33**),
  - ii. carrying then involves transmitting, switching and receiving communications by means of guided or unguided electromagnetic energy or both,
  - iii. equipment is defined (**JBA Pt A V 1, 41**),
  - iv. telecommunications device is defined (**JBA Pt A V 1, 69**) – an AOS provisioned mobile phone is a telecommunications device.
  
2. The prohibition upon interception of communications contained in s 7 (1) TIAA (**JBA Pt A V 1, 111**) is confined to the interception of communications passing over a telecommunications system (**DPP [15]**).
  - i. a prohibited interception of a communication thus occurs during the period that it is being transmitted, switched and/or received by a telecommunications device by means of guided or unguided electromagnetic energy or both (**DPP [26]**).
  
3. Section 6(1) TIAA (**JBA Pt A V 1, 91**) provides that interception of a communication passing over a telecommunications system consists of listening to or recording, by any means, such communication in its passage over that telecommunications system without the knowledge of the person making the communication.
  - i. passing over may be understood as the period during which the communication is carried by a telecommunications system (**DPP [16]-[18], [23]-[24], [38]-[39]**),
  - ii. when read in light of the definition of a telecommunications network, passing over connotes movement of a communication from a telecommunications device in a particular form (electromagnetic energy) - it is the communication in the form of electromagnetic energy that is transmitted, switched or received by a device or devices (**DPP [16]-[18], [23]-[24], [26]-[28], [35], [38]-[39]**).
  
4. Section 5F TIAA (**JBA Pt A V 1, 90**):
 

Sent or transmitted should be construed as meaning *in the form of electromagnetic energy*:

  - i. the purpose of s 5F(a) was not to expand the period of carriage, but define the period so as to exclude communications at rest which are *not accessible by the carrier* (e.g. draft emails): Supplementary

- Explanatory Memorandum (**JBA Pt E V 5, 1032**) (**DPP [32]-[36], [50]**),
- ii. a communication is not accessible by a carrier until it is carried as electromagnetic energy by the telecommunications system *provided by the carrier* (**DPP [35], [38]-[39]**),
  - iii. such construction is consistent with the intentions of the Blunn Report (**JBA Pt E V 5, 887**):
    - a. the distinction between real time access and stored data is not offended ((**JBA Pt E V 5, 903, 918-9; stored includes not sent 920-921**) (**DPP [35]-[37]**))
    - b. the TIAA remains technologically neutral (**JBA Pt A V 1, 906**) because the means of carriage is not changed (**DPP [36]-[37]**)
  - iv. such construction produces an outcome symmetrical with ss 5H (**JBA Pt A V 1, 90-91**) (**DPP [29]-[31]**).
5. In this case the copy message was made and encrypted in the ANOM application at a point in the functional sequence where it had not been passed through an application programming interface to the AOS where it would be converted to electromagnetic energy:
- i. (**Professor Seneviratne**) **RBFM 20-21, 110, 131, 132, 156, 158, 161-2, 166-7; (Khatri) RBFM 242 - 245, 303 ACAB 79 [73] and 80 [79]; (Jenkins) RBFM 392 – 394 ACAB 80 [80]**.
6. The Court of Appeal was correct:
- i. there are significant textual references in the TIAA that connote “sent or transmitted” is concerned with the movement or transport of a communication over the telecommunications system (**DPP [21]-[24], [27]-[28]; ACAB 105 [182]-[184]**),
  - ii. a focus upon the movement or transport of communications is consistent with the distinction drawn between “interception” and “stored communications” (**DPP [35]-[36]; ACAB 107 [190]**),
  - iii. the communication can only commence its passage once converted to electromagnetic energy (**DPP [33]-[35], [37]; ACAB 109 [197]-[200]**),
  - iv. pressing the send button and activating the send function does not amount to “sent or transmitted” for the purposes of s 5F(a) (**DPP [21], [24], [26], [50]; ACAB 112 [208]**),
  - v. the legislative history supports the construction that s 5F(a) and (b) were not intended to expand the meaning of “passing over” (**DPP [32]-[33]; ACAB 105-106 [185]-[186]**).

**The second ground of appeal**

7. The intended recipient, within the meaning of s 5G TIAA is identified by address, not by the subjective belief of the user. The intended recipient of the ANOM messages was bot@anom.one, which is the address of the iBot server, to which the copy messages were sent. There is no dispute the iBot server was controlled by a person and was accessible to the intended recipient (**TIAA s5H**) (**DPP [53]**).
8. The Court of Appeal was correct to conclude that the intended recipient was not confined to the recipient subjectively intended by the user (**DPP [53]-[54]; ACAB 119 [235]**).
9. The Court of Appeal was correct to conclude that the intended recipient was the iBot server (**DPP [54]; ACAB 119-120 [236]-[238]**).

Dated 13 May 2025



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