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
First Appellant

TB
Second Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)
First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

SUBMISSIONS OF THE SECOND RESPONDENT

PART I: CERTIFICATION

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

PART II: ISSUES

2 This appeal raises three issues.

10 3 The first issue is whether, in light of the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) (the **Confirmation Act**), special leave ought to be revoked. The Attorney-General submits that it should.

4 The second issue, to which both grounds of appeal relate, is a question of statutory construction: when is a message "passing over a telecommunications system" for the purposes of s 7(1) of the *Telecommunications (Interception and Access) Act 1979* (Cth) (**Interception Act**)? Specifically, when does the message *start* passing over a telecommunications system (ground 1) and when does it *stop* (ground 2)? The South Australian Court of Appeal correctly held that a communication does not start passing over a telecommunications system until the completion of such preparatory steps as are
20 necessary for it to commence its actual transmission to its destination in the form of electromagnetic energy, and that it stops passing over that system no later than when it has been received by, or delivered to, the telecommunications service to which the communication is in fact sent.

5 The third issue, raised by the Attorney-General's Notice of Contention, concerns the meaning of "equipment" connected to a "telecommunications network". Much modern technology (such as phones, cars and security systems) can transmit and receive communications in the form of electromagnetic energy, as well as also performing other unrelated functions. The Attorney-General submits that it is only in respect of the former functionality that such multi-function technology is "equipment" connected to a "telecommunications network".

PART III: SECTION 78B NOTICES

6 Notice is not required under s 78B of the *Judiciary Act 1903* (Cth). To the extent the Confirmation Act raises questions of interpretation of the Constitution those questions will be dealt with separately in *CD & Anor v Commonwealth of Australia* (Matter A2/2025).

PART IV: FACTS

7 The facts relevant to the determination of this appeal relate to how the AN0M application and system (the **AN0M Platform**) worked, which is as follows.[1] When a user (**User A**) composed a message to another person (**User B**) and pressed "send", this set in train a series of sequential steps. *First*, a second message was created within the application. This included a copy of the original message and some additional data taken from other locations within the device for law enforcement purposes. *Second*, both messages were encrypted. This also occurred within the application itself. *Third*, the encrypted messages were then prepared to be transmitted, which involved the messages moving from the AN0M application through several different "layers" of the mobile device. Various processes occurred as the encrypted messages moved through different layers including, for example, giving each message the unique IP address of its intended destination. *Fourth*, each message ultimately reached what was referred to as the "physical layer" of the mobile device, at which point it was converted into electromagnetic energy, left the device through a Wi-fi or cellular data connection to the internet, and was transmitted through the telecommunications network. The original message was sent to User B and the second message was sent to a server with the username bot@anom.one (the **iBot Server**), which was able to be accessed by the Australian Federal Police.

[1] These steps are set out in the Reasons at [193]-[197] (ACAB 107-109). The Court of Appeal also provided a more detailed overview of the evidence about these steps at [71]-[118] (ACAB 79-88).

PART V: ARGUMENT — GROUNDS OF APPEAL

A RELEVANT PROCEDURAL BACKGROUND

8 The appellants have been charged with serious criminal offences and await trial in the Supreme Court of South Australia. This appeal arises from an interlocutory application brought by the appellants before the primary judge in which they alleged that copies of communications sent via the AN0M Platform which had been obtained pursuant to various surveillance device warrants and computer access warrants under the *Surveillance Devices Act 2004* (Cth) (the **AN0M Evidence**) were obtained in contravention of s 7(1) of the Interception Act and therefore could not be given in evidence under s 63 of that Act. The
10 primary judge found that the AN0M Evidence was not obtained in contravention of s 7(1) of the Interception Act and dismissed the application.[2]

9 The primary judge then reserved a case stated for the Court of Appeal under s 154 of the *Criminal Procedure Act 1921* (SA) which relevantly stated two questions:[3]

9.1 Whether "the AN0M Platform … [involved] an interception of a communication passing over a telecommunications system contrary to s 7(1) of the [Interception Act]".[4] The Court of Appeal answered that question "No".[5]

9.2 If the answer to the first question was "Yes", whether the AN0M Evidence was inadmissible at the trial of the appellants.[6] Given its answer to question one, the Court of Appeal's answer to question two was "Does not arise".[7]

20 10 The appellants now seek to challenge the Court of Appeal's answers to those two questions.

B SPECIAL LEAVE SHOULD BE REVOKED

11 Unless the appellants succeed in their separate challenge to the constitutional validity of the Confirmation Act, that Act puts beyond doubt that the AN0M Evidence was not intercepted in contravention of s 7(1) of the Interception Act. The Confirmation Act thus provides a complete answer to the appeal. This does not appear to be contentious,[8] but for completeness the Attorney-General makes the following submissions as to why that is so.

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2 *R v TB & Anor* [2023] SASC 45 (ACAB 14-47).

3 Notice of Case Stated dated 26 October 2023 (ACAB 52-62).

4 Reasons at [50] (ACAB 75).

5 Reasons at [379] (ACAB 156-157).

6 Reasons at [50] (ACAB 75).

7 Reasons at [379] (ACAB 156-157).

8 See [42] and [47] to [48] of the Plaintiffs' Submissions in Matter A2/2025, in which the appellants contend that s 5(1) conclusively determines the controversy as to whether an interception occurred.

12 Section 5(1) of the Confirmation Act provides as follows:

> Information, or a record obtained under, or purportedly obtained 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.

13 The phrase "relevant warrant" is defined in s 4 of the Confirmation Act by reference to a specified list of warrants, including in paragraph (a) each of the surveillance device and computer access warrants by which the AN0M Evidence was obtained by the AFP.[9] The phrase "intercepting a communication passing over a telecommunications system" is defined in s 4 as having the same meaning as that phrase in the Interception Act, and "intercepted a communication passing over a telecommunications system" bears a corresponding meaning. It follows that the AN0M Evidence is to be taken for all purposes not to have been, and always not to have been, intercepted while passing over a telecommunications system within the meaning of s 7(1) of the Interception Act. The words "always not to have been" make plain that s 5 of the Confirmation Act applies retrospectively. This is put further beyond doubt by s 7, which provides that the Confirmation Act applies in relation to civil or criminal proceedings "instituted before" the Act commenced, including those that are concluded before and after its commencement.

14 There is no dispute that when the appellants' trial is ultimately heard by the Supreme Court of South Australia it will be bound to apply the Confirmation Act (if valid) in determining the appellants' challenges to the admissibility of the AN0M Evidence. Thus the appeal would have no foreseeable consequence for the parties and lacks any practical utility. The questions also no longer raise questions of public importance because the Confirmation Act will apply to all pending and future trials and appeals.[10]

15 The appellants suggest that the Confirmation Act may not be relevant to the determination of the appeal, it being an appeal in the strict sense under s 73(ii) of the Constitution.[11] That does not cure the problem. But in any event that submission should not be accepted.

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9 The Attorney-General does not understand this to be contentious. Each of these warrants were tendered by the Director of Public Prosecutions (South Australia) as VDP3 before the Supreme Court of South Australia and were in evidence before the Court of Appeal: see ACAB 160.

10 See, eg, *Facebook Inc v Australian Information Commissioner* [2023] HCATrans 22.

11 Appellants' submissions (**AS**) fn 3.

16 In an appeal in the strict sense the Court is to determine whether the decision in question was right or wrong on the law as it stood when the decision was given.[12] Here, the law as it stood at the time of the Court of Appeal's decision will include the Confirmation Act because the clearly expressed intention of the legislature is that it will apply retrospectively to matters that have already been the subject of judicial determination. Accordingly, when the Confirmation Act is considered as part of the law as it stood at the time of the Court of Appeal's decision, the answers it gave were plainly correct.

C ALTERNATIVELY, THE APPEAL SHOULD BE DISMISSED

17 In the event the Confirmation Act is invalid, or the Court otherwise considers that special leave should not be revoked, the appeal should be dismissed because neither of the appellants' grounds of appeal disclose error on the part of the Court of Appeal.

18 As will be explained, before the insertion of ss 5F to 5H, it was clear the Interception Act provided that an interception can only occur *after* a communication commences its passage to its destination in the form of electromagnetic energy. It is equally clear that ss 5F to 5H did not alter that position. There is no dispute that the second message was created within the AN0M application before the message to User B was encrypted, before various steps were taken within the AN0M device to prepare that encrypted message for transmission to User B, and before that encrypted message was converted into the form of electromagnetic energy necessary for that transmission. Accordingly, the Court of Appeal was correct to conclude that the AN0M Evidence did not involve an interception in contravention of s 7(1) of the Interception Act.[13]

C.1 Legislative history and statutory context

19 Section 5F provides that a communication "is taken to start passing over a telecommunications system when it is sent or transmitted by the person sending the communication"; and "is taken to continue to pass over the system until it becomes accessible to the intended recipient of the communication". Sections 5G and 5H concern the meaning of "intended recipient" and "accessible". The appellants' arguments ultimately turn upon acceptance of the single idea that s 5F is to be read as simply pointing to the moment in time when the sender of a communication physically presses "send" on a device. That is not what the provision says, and it is not what the provision means.

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12 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [12] (Gleeson CJ, Gaudron and Hayne JJ).

13 Reasons at [197] (ACAB 109).

20 ***Proper regard to statutory context:*** It is axiomatic that ss 5F to 5H are to be read in context. In particular, they must be understood in light of the legislative history that led to their insertion into the Interception Act in 2006 and the mischief to which they were directed. To have regard to this legislative history and context does not detract from the central importance of the text of those provisions. Rather, it is a necessary step in understanding the meaning of the text.[14]

21 That context and legislative history reveals that ss 5F to 5H were intended to ensure there was a clear distinction between a communication that is "passing over a telecommunications system", so as to be regulated by Chapter 2 of the Interception Act, and a communication that is a "stored communication", so as to be regulated by Chapter 3 of the Interception Act. Contrary to the appellants' position, it is equally apparent that ss 5F to 5H were not intended to *expand* the statutory window during which a communication is "passing over a telecommunications system". As will be explained further below, the context and legislative history serve to confirm what is otherwise apparent from the ordinary and natural meaning of the text of the provisions themselves.

22 ***Position prior to enactment of ss 5F to 5H:*** Prior to the introduction of ss 5F to 5H, there were no deeming provisions about when a communication is taken to start and stop passing over a telecommunications system. However, various provisions of the Interception Act informed the interpretation of the phrase "passing over a telecommunications system" in s 7(1). Those provisions made plain that an interception involves copying or recording a communication in its passage over the telecommunications system in the form of electromagnetic energy. In particular:

22.1 Section 6(1), which has remained in essentially the same terms since the Interception Act was enacted, provides that intercepting a communication passing over a 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".

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14 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ), citing *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

22.2 Section 5(1) defines various terms that inform the interpretation of ss 6(1) and 7(1), each of which was inserted into the Interception Act in relevantly the same form as they presently exist by no later than 1991,[15] namely:

(a) "telecommunications system" means a "telecommunications network" and "includes equipment, a line or other facility that is connected to such a network and is within Australia";

(b) "telecommunications network" in turn relevantly means "a system, or series of systems, for carrying communications by means of guided or unguided electromagnetic energy or both"; and

10 (c) "passing over" is defined to include "being carried"; and "carry" is in turn defined to include "transmit, switch and receive".

23 The defining characteristic of a "telecommunications network" (and thus also a "telecommunications system") is that it carries communications in the form of electromagnetic energy. The reference in ss 6(1) and 7(1) to communications "in passage over" or "passing over" that system is necessarily a reference to the movement of communications in the form of electromagnetic energy, that being the form in which communications pass over a "telecommunications network". So much is reinforced by the definitions of "passing over" and "carry", from which it follows that a communication is "passing over" if it is being "transmitted".

20 24 That position gave effect to a central purpose of the Interception Act, which was (and remains) to protect the privacy of communications *while they are passing over* the telecommunications system.[16] In that regard, courts have consistently held that recording a communication before it commences its passage over a telecommunications system, or after it has completed that passage — for example, holding a recording device near the handset of a telephone to record sound after it passes over the telecommunications system

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15 See *Telecommunications (Interception) Act 1979* (Cth), Reprint No. 2, which takes in amendments up to and including the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1991* (Cth).

16 See the authorities cited at Reasons [143] (ACAB 94), namely *Edelsten v Investigating Committee of New South Wales* (1986) 7 NSWLR 222 at 229 (Lee J), approved in *R v Edelsten* (1990) 21 NSWLR 542 at 549 (Carruthers, Allen and Badgery-Parker JJ), *T v Medical Board (SA)* (1992) 58 SASR 382 at 398 (Matheson J), *Taciak v Commissioner of Australian Federal Police* (1995) 59 FCR 285 at 297-298 (Sackville J), *Green v The Queen* (1996) 124 FLR 423 at 432 (Franklyn J, Pidgeon and Rowland JJ agreeing).

— is not an interception of a communication "passing over a telecommunications system".[17]

25 Such was the position prior to the insertion of ss 5F to 5H. The legislative history leading to the insertion of those provisions suggests that they were not intended to alter this position.[18]

26 ***Circumstances in which ss 5F to 5H were enacted:*** Sections 5F to 5H were inserted by the *Telecommunications (Interception) Amendment Act 2006* (Cth) (**Amendment Act**). The Amendment Act implemented recommendations made in the *Report of the Review of the Regulation of Access to Communications* by Anthony Blunn AO (**Blunn Report**).[19] The extrinsic materials to the Amendment Act, including the Blunn Report, make clear that a key focus of the Amendment Act was to introduce a new regime to regulate "stored communications" (which had not previously been the subject of regulation under the Interception Act), and that the regulation of "stored communications" be kept distinct from the existing regime for the regulation of communications "passing over a telecommunications system".[20] The Amendment Act effected that change by placing the existing regime for regulating interceptions in Chapter 2 of the Interception Act, whilst the new regime for regulating stored communications was placed under the new Chapter 3.

27 It was in this context that ss 5F to 5H were introduced to the Interception Act. The extrinsic materials indicate that those provisions were inserted in order to maintain a distinction between communications passing over the telecommunications system and stored communications,[21] which, by definition, are communications which are *not* passing over a telecommunications system.[22] The point at which a communication was "passing over" a telecommunications system was considered in the Blunn Report. Relevantly, that report suggested that the concept of passing over is "effectively resolved by acceptance of the

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17 See the cases discussed at [147]-[148] and [153]-[155] of the Reasons (ACAB 95, 97-98), namely *R v Giaccio* (1997) 68 SASR 484 at 491 (Cox J, Millhouse and Perry JJ agreeing), *Violi v Berrivale Orchards Ltd* (2000) 99 FCR 580 at [7]-[8] (Branson J), *Furnari v Ziegert* [2016] FCA 1080 at [23]-[29] (Murphy J), *Morad v El-Ashey* [2017] FCA 1136 at [41]-[46] (Kenny J), *R v Metcalfe* (2018) 338 FLR 357 at [11]-[12] (Blokland J).

18 The Court of Appeal accurately summarised the relevant legislative history at [149]-[152] of the Reasons (ACAB 95-97).

19 Explanatory Memorandum at p 1.

20 See, eg, Explanatory Memorandum at pp 1 and 4-5; Blunn Report, recommendations ii, ix, x and xi, p 10, see also section 1.4.

21 See Explanatory Memorandum at p 6.

22 The definition of "stored communication" also requires, in essence, that the communication is held and can only be accessed by a carrier: Amendment Act, Schedule 1, s 1.

idea of the communication being automatically processed as electromagnetic energy up to the point at which it can be directly accessed by the intended recipient".[23]

28 The Telecommunications (Interception) Amendment Bill 2006 (Cth), in its original form, sought to introduce ss 5F to 5H in terms which only addressed when a communication was taken to have stopped passing over a telecommunications system, but not when a communication was taken to start passing over that system.[24] However, this was seen to create potential uncertainty about whether a stored communication could be accessed via the sender of the communication rather than the recipient. In particular, the Legal and Constitutional Legislation Committee reported that it had received submissions about the original Bill and whether emails in a sender's sent folder or saved by them in draft had passed over the telecommunications system. Following the Committee's report, a further version of s 5F, which reflected the current drafting, was circulated. The purpose of this amendment was "to give express recognition to the fact that a communication is not in its passage over the telecommunications system (and therefore subject to the telecommunications interception regime) until it is sent or transmitted" and to address "concerns raised about draft emails and sent items during the Senate Committee process".[25]

29 ***Conclusion regarding legislative history and context:*** It is apparent from the legislative history outlined above that the purpose of ss 5F to 5H was not to expand the statutory window in which a communication was passing over a telecommunications system. Rather, ss 5F to 5H built upon and reinforced the existing regime to ensure that communications that were not properly considered to be passing over a telecommunications system — such as items in a draft or sent emails folder — were not captured by the interception regime. Those provisions did not effect a fundamental change to the existing position, inherent in the definitional provisions discussed above, that a communication is not "passing over" a telecommunications system until it is in its passage in the form of electromagnetic energy.

C.2 Ground one discloses no error

30 The appellants' first ground is that the Court of Appeal erred in failing to find, consistently with s 5F(a) of the Interception Act, that the composing of a message and pressing "send" on a mobile phone which is connected to a telecommunications system "is the start of the process for sending that message over the system" and that the covert copying of a text

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23 Blunn Report at section 7.5.

24 Explanatory Memorandum at p 6. That is, they did not contain the equivalent to what is now s 5F(a).

25 Supplementary Explanatory Memorandum at p 3.

message upon the pressing of "send" is an unlawful interception under ss 6(1) and 7(1) of the Interception Act absent a relevant warrant.

31 Ground one is premised on a construction of s 5F that is centrally concerned with the action of a person pressing "send" or activating some other "trigger" to cause the message to be sent (see AS [15]-[16], [26]-[28] and [30]). On that construction, whether the communication has been converted to electromagnetic energy is not relevant (see AS [25]). The appellants' construction is not supported by the text, context, legislative history or purpose of s 5F.

32 ***Text:*** There are various interrelated textual indicators that the phrase "sent or transmitted" in s 5F refers to the movement of communications across the telecommunications system in the form of electromagnetic energy.

33 *First*, the words "sent" and "transmitted" are not defined in the Interception Act, but the ordinary meaning of those words suggests that the communication has actually been put in motion, rather than just taking a step which is necessary, but will not always be sufficient, to achieve that outcome (such as clicking "send"). The Macquarie Dictionary, on which the Court of Appeal relied, defines "send" to mean "1. to cause to go; direct or order to go … ; 2. to cause to be conveyed or transmitted to a destination"; and defines "transmit" to mean "1. to send over or along, as to a recipient or destination; forward, dispatch, or convey".[26] On the appellants' construction, an email that is drafted on a computer that does not have an internet connection would be "sent or transmitted" as soon as the user clicks "send", even though it never enters a telecommunications network. However, one would not naturally describe such an email as having been "sent or transmitted".

34 *Second,* s 5F(a) uses the past participle of the words "sent" or "transmitted". The appellants incorrectly assert that the words "sent" or "transmitted" in s 5F(a) are not in the past tense (AS [32]). Section 5F(a) uses the past participle as a passive verb, which suggests that s 5F(a) is referring to the point in time when that process is completed.[27] Understood in this way, the expression "when it is sent or transmitted by the person" directs attention to the point at which the communication is in a state of having been sent by the person, *not* the particular step the person takes to initiate or trigger the sending or transmitting of the communication.

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26 Reasons at [183] (ACAB 105); Macquarie Dictionary Online, accessed 9 April 2025.

27 See Pam Peters, *The Cambridge Guide to Australian English Usage* (Cambridge University Press, 2007, 2nd ed) at pp 602-603.

35 *Third*, s 5F must be read as a whole. It is significant that s 5F(b) provides that the communication is taken to stop passing over a telecommunications system once it becomes "accessible" to the intended recipient. Section 5G(c) makes plain that the intended recipient need not be an individual, and s 5H is clear that a communication is "accessible" notwithstanding it has not in fact been accessed (such as by clicking on it). If s 5F(a) operated by reference to a human pressing send or activating some other trigger then there would be a "peculiar asymmetry" in the operation of s 5F.[28]

36 *Finally*, the only textual argument made by the appellants in support of their preferred interpretation of s 5F(a) is to focus on the words "by the person sending" (AS [16], [30]). Those words do not require that s 5F(a) provides that a communication commences passing over a telecommunications system when a person presses "send". Had that been the intention it could easily have been stated. The words of s 5F(a) need to be read as a whole. Relevantly, that subsection provides that a communication is taken to start passing over a telecommunications system "when it is sent or transmitted by the person sending the communication". It is the words "when it is sent or transmitted" that designate the start of the statutory window. The words "by the person sending" identify *who* does the sending or transmitting of the communication; they do not specify *when* the sending or transmitting takes place. As the Court of Appeal correctly held, the words "by the person" is "intended merely to invite a focus upon the sending activity".[29]

37 ***Context:*** The Court of Appeal's focus on the movement of communications over a telecommunications system in the form of electromagnetic energy appropriately recognised the distinction drawn in the Interception Act between the regulation of communications in their passage over a telecommunications system and the regulation of stored communications which are not in their passage over a telecommunications network. This distinction is reinforced by the definitions of "telecommunications system", "telecommunications network", "passing over" and "carry" outlined above.

38 The fact that the telecommunications system includes equipment connected to a telecommunications network does not detract from this analysis (cf AS [17]-[18], [20], [23], [26], [28]). The question of whether the internal functioning of the AN0M application on a mobile device is properly characterised as "equipment" for the purposes of s 5(1) is the subject of the Attorney-General's notice of contention and is considered in Part VI

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28 Reasons at [209] (ACAB 112).

29 Reasons at [209] (ACAB 112).

below. But even assuming that the device in its entirety constituted "equipment", it does not follow that the copying of communications within the AN0M application after the user pressed "send" occurred while the communication was *passing over* the telecommunications system. That is for two reasons.

39 *First*, as a matter of construction, it is inapt to describe the creation and processing of a communication *within* a singular device as the communication "passing over" the telecommunications system. As already discussed, the defining characteristic of the "telecommunications network" that comprises the "telecommunications system" is that it carries communications in the form of electromagnetic energy. To the extent a communication may be said to "move" within a piece of equipment so as to prepare it for transmission in the form of electromagnetic energy, it is not "passing over" the telecommunications system. Put simply, it cannot commence its passage over that system until it is in a form capable of being transmitted via the telecommunications network.

40 *Second*, contrary to AS [17] and fn 18 and 19, the Court of Appeal did not determine that the original message was copied "in the course of" its movement after User A pressed "send". The Court accepted that pressing "send" triggered the immediate steps of the AN0M device transferring certain data to a server. However, that data was not the message but, rather, a virtual "handshake" to establish a connection between the device and server.[30] The Court of Appeal found that the copy of the original message was made at this early stage and *before* either message moved through the various "layers" between the application and the physical layer of the device.[31]

41 The above analysis does not "artificially divide the [telecommunications] system into disparate parts" (cf AS [23]). Rather, it gives appropriate focus to the nature of the telecommunications system — that is, a system for carrying communications by means of electromagnetic energy, and gives proper attention to what it means for a communication to be "passing over" that system.

42 ***Legislative history:*** This is particularly important in assessing what should be made of the fact that s 5F is a deeming provision. The appellants seek to make much of this characterisation of s 5F (see AS [3], [16], [26], [29]). In particular the appellants suggest that s 5F created a statutory fiction such that there was no need for the Court of Appeal to have recourse to a detailed consideration of how the AN0M Platform functioned in order

30 Reasons at [193] (ACAB 107-108).

31 Reasons at [194]-[197] (ACAB 108-109).

to determine whether communications made via that platform were intercepted while passing over a telecommunications system — it was sufficient to show that the messages were copied after User A pressed "send" (AS [26]). Of course, a deeming provision may be used to expand the natural or ordinary meaning of a particular word or expression, including through the use of a statutory fiction.[32] However, as the Court of Appeal held, a deeming provision may also be used "merely to confirm, or clarify, how the legislature intended that a word or phrase should be understood".[33] Which of these two roles a deeming provision plays will largely depend on the context in which it appears.[34]

43 As outlined above, the legislative history of the Interception Act suggests s 5F was inserted in order to maintain clear boundaries between the regime regulating intercepted communications under Chapter 2 of the Interception Act and the regime for regulating stored communications under Chapter 3 of that Act. The Court of Appeal was correct to conclude that the legislative history "does not provide any support for an intention to expand the notion of when a communication should be treated as passing over a telecommunications system, or to otherwise expand the reach of the prohibition against the interception of communications".[35] By contrast, the appellants' case necessarily assumes that s 5F was intended to expand the scope of communications captured by the interception regime in Chapter 2. However, this is contrary to the purpose of s 5F as disclosed by the legislative history examined earlier in these submissions. Acceptance of the appellants' argument would in fact undermine that purpose by blurring the lines between communications that are passing over the telecommunications system and those that are not.

44 ***Purpose:*** The appellants' construction of s 5F could lead to absurd consequences. As noted above, it would flow from the appellants' construction that an email drafted on a computer that was not connected to the internet would commence "passing over a telecommunications system" as soon as the user clicked send even though the email never enters the telecommunications network.[36] On the appellants' case, the making of a copy of

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32 *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696 (Griffith CJ), cited in Reasons at [186] (ACAB 106).

33 Reasons at [186] (ACAB 105-106), referring to *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65-67 (Windeyer J); *Macquarie Bank Ltd v Fociri Pty Ltd* (1992) 27 NSWLR 203 at 207 (Gleeson CJ); *Lesi v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 27 at [41] (Mansfield, Selway and Bennett JJ).

34 *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65-67 (Windeyer J).

35 Reasons at [186] (ACAB 105-106).

36 See Reasons at [203] (ACAB 110-111).

that email would be a contravention of s 7(1) of the Interception Act. The Court of Appeal was correct to note that it was unlikely this was intended to be an interception under s 7(1), particularly given that the extrinsic materials to the Amendment Act suggest s 5F was inserted to avoid this very situation.[37]

45 The appellants' submissions on purpose refer to the purpose of s 5F as being "to render certainty in the context of a statutory regime" (AS [17]). That s 5F was intended to create certainty is plain, but this says nothing of how s 5F delineates when a communication starts and finishes passing over a telecommunications system. The appellants later submit that the evident purpose underlying the scheme as a whole is to protect the privacy of communications "from the point at which the user presses 'send' until the message becomes accessible to the intended recipient" (AS [26], see also AS [30]). As noted above, a central purpose of the Interception Act is relevantly to protect the privacy of communications *while they are passing over* a telecommunications system. The question is when a communication is relevantly "passing over" that system. To say, as the appellants do, that the purpose of the scheme is to protect the privacy of communications from the point "at which the user presses 'send'" is simply to assert their preferred interpretation of s 5F.

46 The appellants attempt to support this statement of purpose by saying that the Interception Act is intended to be technologically neutral (AS [16], [21]). In so doing the appellants assume that their preferred construction of s 5F assists to achieve a technologically neutral determination of when a communication is "passing over a telecommunications system". That ignores the fact that the Interception Act was already considered to be working in a technologically neutral way at the time when ss 5F to 5H were inserted.[38] And on the appellants' approach this technological neutrality would tend to be undermined, not enhanced. For example, a communication may be transmitted via electromagnetic energy in a programmed or automated way that does not require a specific human action such as pressing "send" (eg an automated out-of-office message). On the appellants' case, such communications would never be taken to start passing over a telecommunications system and could therefore be intercepted while moving across the telecommunications network without engaging Chapter 2 of the Interception Act. That outcome would be incongruous

37 Reasons at [204] (ACAB 111). See also Supplementary Explanatory Memorandum at p 3.

38 Blunn Report at sections 1.1.5 and 1.3.2.

with how Chapter 2 otherwise applies to email communications. It is most unlikely this was how Parliament intended s 5F to operate.

C.3 Ground two discloses no error

47 Ground two is that the Court of Appeal erred in its construction of the term "intended recipient" by finding that the iBot server was an intended recipient within the terms of s 5F(b) and s 5G of the Interception Act.

48 As outlined above, s 5F(b) provides that a communication that has commenced its passage over the telecommunications system "is taken to continue to pass over the system until it becomes accessible to the intended recipient of the communication".

10 49 Section 5G deems the "intended recipient" of a communication to be:

> (a) if the communication is addressed to an individual (either in the individual's own capacity or in the capacity of an employee or agent of another person)—the individual; or
>
> (b) if the communication is addressed to a person who is not an individual—the person; or
>
> (c) if the communication is not addressed to a person—the person who has, or whose employee or agent has, control over the telecommunications service to which the communication is sent.

50 Section 5H provides that a communication is "accessible to its intended recipient" when it is received by the telecommunications service provided to the intended recipient, is under control of the intended recipient or has been delivered to the telecommunications service provided to the intended recipient. That is, there is simply no requirement that a human
20 recipient has in fact accessed the communication (eg by clicking on it).

51 The Court of Appeal held that the identity of the "intended recipient" of a communication was to be determined by reference to s 5G, and that the terms of that section indicate that the "intended recipient" should be ascertained by reference to the address to which the communication was directed.[39] The Court of Appeal rejected the appellants' argument below that the "intended recipient" was confined to the person to whom the sender subjectively intended to send the communication.[40] The Court of Appeal noted that, while ordinarily the address might be known to, and selected by, the person who sent the communication, there was no basis in the legislative text or otherwise to confine the notion of "intended recipient" in this way.[41]

30 52 The appellants submit the Court of Appeal erred in this respect because users of the AN0M Platform did not know that a copy of their communication was being secretly made,

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39 Reasons at [234] (ACAB 118-119).

40 Reasons at [235] (ACAB 119).

41 Reasons at [234] (ACAB 118-119).

addressed and sent to the iBot server (AS [35]). The appellants submit that, in so finding, the Court of Appeal failed to give the words "intended", "addressed" and "by the person" any, or any sufficient, work to do (AS [36]).

53 There was no error in the Court of Appeal's construction of "intended recipient", nor did it fail to give the word "intended" work to do. The phrase "intended recipient" is defined in three ways in s 5G, each of which is defined by reference to the person to whom the communication is addressed. There is no reference in any of those three definitions to the *sender* taking some intentional action to enter the address. It would have been an error for the Court of Appeal to read in some requirement of intentional action on the part of the sender where none is present in the text of the definitions in s 5G. The terms of s 5G make plain that the "intended recipient" is objectively ascertained by reference to the address to which the communication was sent (here, the iBot Server) regardless of how the address was selected.

54 Further, the word "addressed" was central to the Court of Appeal's interpretation of s 5G — it held that the intended recipient should "be determined by reference to the address to which the communication was directed".[42] It therefore cannot be said that it failed to give that word any, or any sufficient, work to do.

55 Nor did the Court of Appeal err by failing to give the words "by the person" work to do. Neither s 5F(b) nor s 5G use those words (c.f. AS [37]). They appear in s 5F(a), in the context of deeming when a communication is taken to *start* passing over a telecommunications system. They are not replicated in s 5F(b) or s 5G, which are concerned with when a communication is taken to *stop* passing over a telecommunications system. If anything, the inclusion of those words in s 5F(a) and their omission in s 5F(b) points against the appellants' construction — it suggests that there was no legislative intention to limit the "intended recipient" to recipients to whom the communication was addressed *by the person* sending the communication. The appellants' submission that the Court of Appeal failed to give those words work to do is essentially an argument that it failed to read those words in to s 5F(b) or s 5G. The appellants have not given any reason why it would be appropriate for the Court to read those words in to s 5F(b) or 5G. The Court of Appeal did not err in this respect.

42 Reasons at [234] (ACAB 118-119).

PART VI: ARGUMENT — NOTICE OF CONTENTION

56 In addition to the reasons outlined above as to why the Court of Appeal was correct to answer Question 1 "No" and Question 2 "Does not arise", the Court should have identified as a further reason for these conclusions that only so much of the functioning and capability of the mobile device as was capable of being used for transmitting or receiving a communication by means of electromagnetic energy was "equipment" connected to a "telecommunications network".[43] It would follow from such a conclusion that the messages were not copied whilst they were on part of the "telecommunications system", and so could not have been copied while "passing over" such a system.

57 As outlined above, "telecommunications system" is defined in s 5(1) to mean a "telecommunications network" — that is a system or series of systems for carrying communications by means of electromagnetic energy — and to "include" equipment "that is connected to such a network".

58 The term "equipment" is in turn defined in s 5(1) as "any apparatus or equipment used, or intended for use, in or in connection with a telecommunications network, and includes a telecommunications device but does not include a line". A "telecommunications device" is in turn defined in s 5(1) to mean "a terminal device that is capable of being used for transmitting or receiving a communication over a telecommunications system".

59 This raises the question of whether the entirety of a physical unit such as a modern smartphone is "equipment" for the purposes of the definition of "telecommunications system". Such a device has capabilities and functions that are capable of transmitting or receiving communications over a telecommunications network and must, to that extent, be part of the telecommunications system. However, it also has functions and capabilities that have nothing to with transmitting or receiving communications over a telecommunications network, such as a camera and calculator. These separate functions and capabilities do not form part of the "telecommunications system" for the following reasons.

60 *First*, as already explained, a telecommunications system is a system for carrying communications by means of electromagnetic energy. Insofar as a system, or equipment connected to a system, does not do this, it is therefore somewhat unnatural to describe that separate functioning as being a "telecommunications system".

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[43] Cf Reasons at [176]-[178] (ACAB 103-104).

61 *Second*, the definitions of "telecommunications network" and "telecommunications system" direct attention to a "system" or "series of systems". A system is "an assemblage or combination of things or parts forming a complex or unitary whole".[44] In the context of the Interception Act, the use of the word "system" can therefore be seen to be directed to the overall collection of components that operate as a whole to carry communications by means of electromagnetic energy.

62 *Third*, "equipment" in the definition of "telecommunications network" means "equipment" which is "used, or intended for use, in connection with a telecommunications network". In this context, "in connection with" means something akin to "forming part of", or "having to do with", the network.[45]

63 *Fourth*, the definition of "telecommunications device" refers to a device "that is capable of being used for transmitting or receiving a communication over a telecommunications system". As with the definition of "equipment", the definition of "telecommunications device" directs attention to the specific parts of a mobile phone that are used for sending and receiving communications by means of electromagnetic energy.

64 Each of these matters is a statutory indication that "equipment" is not a simplistic reference to a physical object and does not refer to the parts or functioning of a physical object that simply have no role to play in sending and receiving communications by means of electromagnetic energy. Surprising results would follow if it were otherwise. A wide and disparate array of items have a capacity to transmit or receive communications by means of electromagnetic energy such as cars, televisions, security systems and household appliances. While they may have this capability for some aspect of their functioning, they may in all other respects be far-removed from any device which would be used to send communications between persons. Yet if the entire physical object were "equipment" for the purposes of s 5(1) of the TIA then each part of each of those objects would form part of the telecommunications system. So, for example, the wheels, transmission and steering of a car would, on that approach, be part of the telecommunications system. That cannot have been intended.

65 If the argument outlined above is accepted, then it follows on the uncontentious evidence before the primary judge and the Court of Appeal that the AN0M application was not part

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44 Macquarie Dictionary Online, accessed 9 April 2025, meaning 1. See also *Edelsten v Investigating Committee of New South Wales* (1986) 7 NSWLR 222 at 228-229 (Lee J).

45 See *Hurstville City Council v Hutchison 3G Australia Pty Ltd* (2003) 200 ALR 308 at [67] (Mason P, with whom Handley and McColl JJA agreed).

of the "telecommunications system". This was effectively the approach taken by the primary judge. His Honour held that, while a "terminal device" may include a mobile phone, the AN0M application did not form part of that "device" because there was a "boundary" between the application and the operating system of the mobile phone, and there a further boundary between the operating system and the infrastructure comprising the telecommunications network that connected terminal devices.[46]

66 The Court of Appeal held that there was "no doubt" that the evidence required that conceptual and functional distinctions be drawn between a user's mobile device, the AN0M application, the operating system and the infrastructure forming part of the telecommunications network connecting users' devices. It nevertheless departed from the primary judge on this issue. Its explanation for this departure was that each of these different functions and capabilities were *physically* located in a mobile device.[47]

67 However, this analysis did not really engage with the reasoning of the primary judge or the Attorney-General's submissions. The question was not whether the AN0M application was *physically* co-located with the AN0M device, but whether the statutory provisions operated so as to render all the components and functioning of that device part of the "telecommunications system". As explained above, that was not the intention or effect of the statutory provisions. The Court of Appeal should have held accordingly.

PART VII: ESTIMATE OF TIME

68 It is estimated that [1] hour will be required for the Attorney-General's oral argument.

Dated: 17 April 2025

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46 *R v TB & Anor* [2023] SASC 45 at [101]-[102] (ACAB 40-41).

47 Reasons at [162]-[163], [175]-[179] (ACAB 99, 103-104).

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

CD
First Appellant

TB
Second Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)
First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

ANNEXURE TO THE SUBMISSIONS OF THE SECOND RESPONDENT

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
Statutory provisions					
1.	*Surveillance Legislation (Confirmation of Application) Act 2024* (Cth)	10 December 2024	ss 4, 5, 6, 7	This is the current and only version, no amendment having been made since the passage of the Act.	10 December 2024 (being the date of Royal Assent)
2.	*Telecommunications (Interception) Act 1979* (Cth)	30 September 1992 Reprint No 2	ss 5(1), 6, 7	This shows that the current form of the definitions of "telecommunications system", "telecommunications network", "passing over" and "carry" have	N/A

				been substantially in the same form since this version of the Interception Act. This also picks up the definition of "equipment" in the *Telecommunications Act 1991* (Cth).	
3.	*Telecommunications Act 1991* (Cth)	As enacted	s 5	This shows that the current form of the definition of "equipment" is substantially the same as the definition in the *Telecommunications (Interception) Act 1979* (Cth) (Reprint No. 2)	N/A
4.	*Telecommunications (Interception and Access) Act 1979* (Cth)	Compilation date: 13 December 2019 Compilation No. 108	ss 5, 5F, 5G, 5H, 6, 7, 63, 77	This is the Act as it stood at the time when at least some of the messages constituting the AN0M Evidence in the appellants' case were sent. To the extent some such messages may have been sent when previous or later versions of this Act were in force, it is noted that the provisions in this version were relevantly in the same form at all material times.	12 January 2020 (being the date at least some of the messages constituting the AN0M Evidence in the appellants' case were sent.
5.	*Telecommunications (Interception and Access) Act 1979* (Cth)	Compilation date: 22 May 2024 Compilation No. 126	ss 5, 5F, 5G, 5H, 6, 7, 63, 77	This is the Act as it stood at the time of the judgment of the Court of Appeal. The provisions relied upon are in substantially the same form as compilation	27 June 2024 (the date of the Court of Appeal judgment)

				No. 108	
6.	*Telecommunications (Interception) Amendment Act 2006* (Cth)	As made (No. 40 of 2006)	Schedule 1, Part 1	This was the version of the Amendment Act that inserted ss 5F to 5H into the Interception Act.	N/A