HIGH COURT OF AUSTRALIA

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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 OF AUSTRALIA
Second Respondent

APPELLANTS' REPLY

PART I: CERTIFICATION

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

PART II: REPLY

A Revocation inextricably linked to A2 of 2025

2. Both respondents seek revocation of special leave. That application stands or falls with the determination of the validity of ss 5, 6 and 7 of the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) (**Confirmation Act**) in A2 of 2025. That is so for three reasons.

3. *First*, the only basis for revocation is the enactment of the Confirmation Act {DPP [7]; A-G [3], [11]-[16]}. If that Act is invalid, the premise for revocation falls away.

4. *Second*, despite the appeal being an appeal in the strict sense, which would ordinarily preclude the application of a law passed after the determination of the intermediate appeal from applying to the appeal in this Court,[1] the Confirmation Act purports to declare that the information and records obtained from the AN0M application not to have been, *and always not to have been*, intercepted while passing over a telecommunications system: s 5(1)(a).[2] Hence, s 5(1) of the Confirmation Act is expressed to have retrospective operation. Section 7(b) of the Confirmation Act provides expressly for its application to proceedings commenced prior to the commencement of the Act. It follows that if the Confirmation Act is held to be valid in A2 of 2025, then it will apply to these proceedings.

5. *Third*, the appellants accept that if the Confirmation Act is valid, it will determine the entire controversy in these proceedings in the respondents' favour.

6. In light of the above, revocation stands or falls with the validity of the Confirmation Act.

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[1] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203 [12] (Gleeson CJ, Gaudron and Hayne JJ); see also *Mickelberg v The Queen* (1989) at 265-267 (Mason CJ), 298-299 (Toohey and Gaudron JJ).

[2] And for completeness, s 5(1)(b) of the *Confirmation Act* provides that information or records obtained under, or purportedly under, a relevant warrant is taken for all purposes "not to have been, and always not to have been, information or a record obtained by intercepting a communication passing over a telecommunications system".

B Reply to substantive issues

7. ***Respondents' functional approach premised on narrow reading of s 5F***: The respondents submit that determining when a communication is 'passing over' a telecommunications system rests on the functionality of the AN0M application {DPP [19], [24], [43], [48]; A-G [39] & NoC [56]}. Such an argument is premised on an overly narrow reading of the statutory purpose underlying s 5F of the *Telecommunications (Interception and Access) Act 1979* (Cth) (***Interception Act***), namely, that the provision serves the purpose of demarcating communications that are 'passing over' over a telecommunications system from 'stored communications'. There is no warrant for reading s 5F in such a confined way. Indeed, it is inconsistent with the terms of the provision, which are expressed to apply "for the purposes of this Act" (i.e. not simply for the limited purposes of demarcating 'stored communications' from other communications). The text supports the broader proposition underlying the appellants' case, namely, that the purpose of s 5F is to determine when a communication is 'passing over' a telecommunications system. That a secondary purpose served by s 5F is to demarcate communications 'passing over' a telecommunications system from 'stored communications' does not deny the primary purpose of the provision.

8. ***The artifice of layers***: The DPP, supported by the A-G, posit a theoretical model of the passage of communications as one that is broken into layers {DPP [11(i)-(xii)]; A-G [40]}[3]. They do so to prosecute the case that by the time the message arrives at the 'physical layer', the copying of the data in the form of a new message (or the making of a new record of the data) as well as the exfiltration of the additional data from the phone and attaching that additional data to the copied data is complete, with the transmission of the data following thereafter. There are a number of difficulties with that construct.

9. First, given the terms of the Interception Act, including the definitions of 'communication' (which includes 'parts' of a communication), 'telecommunications network' and 'telecommunications system', a ***part*** of the 'telecommunications system' includes 'equipment' connected to a telecommunications network. There can be little doubt that the 'telecommunications device' – here, an AN0M-enabled smartphone – is 'equipment' connected to a telecommunications network. Indeed, even if one adopts the respondents' functional approach to the construction of s 5F and related provisions of the Interception Act, it is plain that the functionality of the AN0M platform depended

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[3] Seneviratne 715.26-38-717 {FRBFM 28-30}.

upon it forming part of a telecommunications system. That is, the AN0M application had to form part of a telecommunications system in order to function as a messaging platform and it relied on equipment connected to a telecommunications network to fulfil its objective as a messaging application. The interconnectedness between the component parts of the AN0M platform – the AN0M-enabled smartphone device, the network and the system – are all component parts captured by the statutory framework. The artifice of "layers" through which communication data flows does not break that interconnectedness. The AN0M application has no independent utility or independent functionality. In order for the application to function, it had to be loaded onto an AN0M-enabled telecommunications device. The application on the AN0M-enabled phone was an integral component of the "equipment" that was connected to a network enabling the application to function.

10. Second, the fact that some of the expert evidence made use of the theoretical construct of "layers" to explain the function of the system should not obscure two critical facts. Once a message had been composed on the platform and the user pressed send (or more accurately, activated the icon representing the 'send' function) the process of copying the data and sending the data to the two addresses was 'instantaneous' and could not be reversed or halted by the user.[4] The instantaneous nature of the AN0M-application highlights the highly artificial compartmentalisation of the process adopted by the respondents to identify a theoretical point in time outside of the statutory window specified by s 5F. Further, while the respondents' make much of the *theoretical* possibility that a message could be composed on the AN0M application and with the user pressing 'send' all in the absence of a connection to a telecommunications network, critically, there is no evidence or finding that any of the AN0M messages to be adduced in evidence in this case were copied in the **absence** of a connection. This has implications for the respondents' assertions concerning the proper construction of the words 'sent or transmitted' in s 5F(a).

11. Relevantly, with respect to the submission that the appellants' construction of s 5F would mean that a message composed but literally not 'sent' (i.e. one remaining in a state of abeyance pending a connection to a network), would be 'passing over' for the purposes of s 5F {see A-G [44]}, as submitted below, not only was there no evidence to

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[4] Jenkins T1090:32-35 (instantaneous); Jenkins T1090.22-29 (inexorable) {**ABFM** 14}, Khatri T918:34-38 (inexorable){**ABFM** 12}.

indicate that that occurred in respect of any of the messages at issue in these proceedings {**CAB** [205]}such that the respondents' premise should be rejected on the facts, the appellants' case proceeds on the premise that the entirety of the process in paragraphs (a) and (b) of s 5F applied. That is, that the AN0M message was copied in the instant *between* the user pressing send and the message being accessible to the intended recipient. That is the statutory window of time relevant to the determination of the question of whether the message was copied when it was 'passing over' a telecommunications system.

12. As was submitted below, the slim reed upon which the 'layers' thesis underlying the respondents' cases rest is a theoretical abstraction that fails properly to bring to account that which its own evidence establishes, namely, the indivisible, instantaneous and thus inevitable process put in train upon the triggering of the 'send' function on the application, rendered useable by the telecommunications system. The expert evidence (especially of Jenkins and Khatri) was to the effect that once the send button is pressed, the sender loses control of the message and they are powerless as to what the Operating System will do with the message.[5] In short, as Jenkins made clear, once the send function is activated, it is *inevitable* that the message will travel up and down the layers of the telecommunication system and be sent or transmitted by that system.

13. Contra the DPP's submission concerning the Court of Appeal's focus on the 'movement' of data within the AN0M application {DPP [16]}, there is no warrant for descending into an analysis of the movement of data within and across 'layers' of an application on a smartphone to determine if a message has been intercepted. The answer is supplied by s 5F. However, even if that functional analysis is accepted, the relevant 'movement' in this case all occurs between the original 'authentication handshake' (which occurs over a telecommunications system) and the AN0M message being accessible to the intended recipient. That 'instantaneous' process occurred within the statutory window provided for by s 5F.

C Notice of Contention

14. Contrary to the *reductio ad absurdum* posited at {A-G [64]}, the appellants' argument does not depend upon a rendering of 'equipment' that is absurd or overly broad. This is a case about the covert recording and copying of data transmitted over a *telephone*

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[5] Khatri: T918: 27 – 38 {**ABFM** 12}; Jenkins: T1090: 15 – T1091: 2 {**ABFM** 14-15}.

connected to a telecommunications network which forms part of a telecommunications system. Indeed, if anything, the A-G's submissions, which concentrate only on those aspects of a device that render communications over a telecommunications system possible, reinforces the orthodoxy of the appellants' submission that the equipment in this case – a smartphone – must include that which is intended to be used for the transmission of telecommunications. That is its very purpose, and how it was used to produce the messages sought to be adduced. Hence, this is not a case that is dependent upon an expansive definition of 'equipment' that would pick-up smart TVs or the computer systems of cars (though that would not deny the possibility that a message that was sent via a communications system in a car that was connected to a telecommunications network could in fact be 'intercepted' under the Interception Act).

15. With respect to the Court of Appeal's finding that the AN0M application formed part of the mobile device and was part of the telecommunications system {CAB 102, [178]}, the Attorney-General asserts that it made that finding without engaging with the reasoning of the primary judge or the submissions of Commonwealth {A-G [67]}. That is not so, as the reasons of the Court of Appeal make clear. Relevantly, the Court of Appeal addressed the reasoning of the primary judge at [175] of its Reasons before going on at [176] to [178] to analyse how the AN0M application was to be understood within the terms of the statutory scheme and the statutory definition of 'equipment'. It found, correctly, that the AN0M application was part of the device because it satisfied the broad definition of 'any apparatus or equipment used, or intended for use, in connection with a telecommunications network, and includes a telecommunications device'. It is, therefore, incorrect to assert that the Court of Appeal failed to address the question posed by the statute. That is precisely what the Court of Appeal did at [178] of its Reasons.

Dated: 30 April 2025

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