

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

Matter No A2/2025

CD & ANOR
AND

PLAINTIFFS

THE COMMONWEALTH OF AUSTRALIA

DEFENDANT

Matter No A24/2024

CD & ANOR
AND

APPELLANTS

DIRECTOR OF PUBLIC PROSECUTIONS (SA)
& ANOR

RESPONDENTS

CD v The Commonwealth of Australia
CD v Director of Public Prosecutions (SA)
[2025] HCA 37
Date of Hearing: 13 May 2025
Date of Judgment: 8 October 2025
A2/2025 & A24/2024

ORDER

Matter No A2/2025

The questions stated for the opinion of the Full Court in the special case filed on 14 March 2025 be answered as follows:

Question (1): Is the Surveillance Legislation (Confirmation of Application) Act 2024 (Cth) invalid, either in whole or in part, because:

2.

- (a) *it is an impermissible exercise by the Parliament of the judicial power of the Commonwealth; or*
- (b) *it impermissibly interferes with and undermines the institutional integrity of courts vested with federal jurisdiction?*

Answer: *No.*

Question (2): Who should pay the costs of the Special Case?

Answer: *The plaintiffs.*

Matter No A24/2024

Special leave to appeal is revoked.

On appeal from the Supreme Court of South Australia (A24/2024 only)

Representation

B W Walker SC with D F O'Leary SC and S Palaniappan for the plaintiffs in A2/2025 and the appellants in A24/2024 (instructed by Agresta Moran Barristers & Solicitors)

S P Donaghue KC, Solicitor-General of the Commonwealth, with M R Salinger and M P A Maynard for the defendant in A2/2025 (instructed by Australian Government Solicitor)

M G Hinton KC with A F Cairney and W M Scobie for the Director of Public Prosecutions (SA), intervening in A2/2025, and for the first respondent in A24/2024 (instructed by Office of the Director of Public Prosecutions (SA))

T M Begbie KC with P J Melican and M R Salinger for the second respondent in A24/2024 (instructed by Australian Government Solicitor)

C S Bydder SC, Solicitor-General for the State of Western Australia, with A K Miller for the Attorney-General for the State of Western Australia and the Attorney-General for the State of Victoria, intervening in A2/2025 (instructed by State Solicitor's Office (WA) and Victorian Government Solicitor)

S Robertson SC with L A Coleman for the Attorney-General for the State of New South Wales, intervening in A2/2025 (instructed by Crown Solicitor (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

CD v The Commonwealth of Australia CD v Director of Public Prosecutions (SA)

Constitutional law (Cth) – Judicial power of Commonwealth – Admissibility of evidence – Where information and records obtained pursuant to warrants – Where *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) ("Confirmation of Application Act") deems information and records obtained under specified warrants to have been lawfully obtained – Whether Confirmation of Application Act invalid – Whether Confirmation of Application Act impermissible exercise by Parliament of judicial power of Commonwealth – Whether Confirmation of Application Act impermissibly interferes with and undermines institutional integrity of courts vested with federal jurisdiction.

Words and phrases – "admissible", "communication", "criminal proceedings", "evidence", "exercise of judicial power", "illegally obtained", "inadmissible", "intercepting a communication", "interfere with the integrity of courts", "judicial power", "legislative power", "statutory concept", "telecommunications system", "undue impairment of judicial power", "unlawfully intercepted", "usurpation of judicial power", "warrant".

Constitution, Ch III.

Surveillance Legislation (Confirmation of Application) Act 2024 (Cth), ss 4, 5, 6, 7.

Telecommunications (Interception and Access) Act 1979 (Cth), ss 7, 63, 77.

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The determinative questions of law in context

1 Before the Court is a special case in a proceeding commenced by writ of summons in which the plaintiffs, CD and TB, seek a declaration that the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) ("the Confirmation of Application Act") is invalid. Before the Court is also an application for revocation of special leave granted to CD and TB to appeal from a decision of the Court of Appeal of the Supreme Court of South Australia which answered questions of law concerning the application of the *Telecommunications (Interception and Access) Act 1979* (Cth) ("the TIA Act") before the enactment of the Confirmation of Application Act.

2 The questions of law stated by the parties for the opinion of the Full Court in the special case are as follows, CD and TB correctly accepting that question 1(b) could not succeed independently from question 1(a):

"1. Is the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) invalid, either in whole or in part, because:

- (a) it is an impermissible exercise by the Parliament of the judicial power of the Commonwealth; or
- (b) it impermissibly interferes with and undermines the institutional integrity of courts vested with federal jurisdiction?

2. Who should pay the costs of the Special Case?"

3 The questions of law stated in the special case arise for determination independently of the outcome of the appeal. Conversely, the appeal would become moot if those questions are answered in the negative. The parties accordingly accept that the questions of law stated in the special case are appropriate to be considered and that special leave to appeal should be revoked if those questions are answered in the negative.

4 The context in which the determinative questions of law arise is recorded in the special case. Both plaintiffs have been arrested and charged and are being held in custody. The information filed in the criminal jurisdiction of the Supreme Court of South Australia alleges that the plaintiffs participated in a "criminal

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organisation" as defined in s 83D(1) of the *Criminal Law Consolidation Act 1935* (SA) and, in contravention of that Act, stored and controlled access to a utility vehicle containing unlawful firearms and, in contravention of the *Firearms Act 2015* (SA), possessed prohibited items, either a firearm or a sound moderator or parts of a firearm.

5 The Director of Public Prosecutions (SA) ("the SA Director") seeks to prove the charges, in whole or in part, by using electronic communications sent and received using an application on mobile phones known as "ANOM" and an associated telecommunications platform known as the ANOM platform. Unbeknown to the users of the ANOM application, and without their consent, communications sent from ANOM-enabled devices were copied and sent to servers able to be accessed by the Australian Federal Police ("the AFP"). The AFP gained access to the ANOM communications under two surveillance device warrants and five computer access warrants issued pursuant to the *Surveillance Devices Act 2004* (Cth). The AFP also gained access to data relating to the ANOM communications under four search warrants issued under s 3E of the *Crimes Act 1914* (Cth). Relevantly, the AFP did not obtain warrants under the TIA Act.

6 CD and TB filed an interlocutory application in the criminal proceedings seeking, amongst other things, an order for the exclusion of the ANOM communications on which the SA Director would otherwise rely as evidence on the ground that the ANOM communications were unlawfully intercepted in contravention of s 7(1) of the TIA Act, and were therefore inadmissible under ss 63(1)(a) and 77(1)(a) of that Act.¹ The trial judge dismissed that application on the basis that the ANOM communications were not unlawfully intercepted as alleged.² The trial judge then stated for the consideration of the Court of Appeal of

1 By s 7(1) of the TIA Act, a "person shall not: (a) intercept ... a communication passing over a telecommunications system", where: "communication" is defined in s 5(1); "a communication passing over a telecommunications system" is given meaning by ss 5F and 5G; and "interception of a communication passing over a telecommunications system" is given meaning by s 6. By s 63(1)(a) of the TIA Act, "a person shall not ... communicate to another person, make use of, or make a record of ... lawfully intercepted information or information obtained by intercepting a communication in contravention of subsection 7(1)". By s 77(1)(a) of the TIA Act, such information or record is not admissible in evidence subject to immaterial exceptions.

2 *R v TB* (2023) 413 ALR 514.

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the Supreme Court of South Australia questions of law including:³ (1) Did the ANOM application and system (together the ANOM platform) involve an interception of a communication passing over a telecommunications system contrary to s 7(1) of the TIA Act; and (2) If the answer to question one is "Yes", is the information and records obtained as a result of that interception inadmissible at trial. The Court of Appeal answered question one "No" and question two "Does not arise".⁴

7 In the meantime, CD filed two further interlocutory applications in the criminal proceedings seeking orders for the exclusion of the ANOM communications on which the SA Director would otherwise rely as evidence on the ground that the various warrants (described above) were invalid. The trial judge has heard but not determined those applications.

8 CD and TB filed an application for and obtained a grant of special leave to appeal to this Court against the Court of Appeal's answers to the questions of law.⁵

9 The Confirmation of Application Act was enacted after the grant of special leave to appeal by this Court. Section 4 of that Act contains definitions. Relevantly, "**intercepting a communication passing over a telecommunications system** has the same meaning as in the" TIA Act and "**intercepted while passing over a telecommunications system** has a corresponding meaning". The definition of "relevant warrant" identifies each of the surveillance device warrants, the computer access warrants, and the search warrants by which the AFP obtained access to the ANOM communications and the data related to them.

10 Section 5 of the Confirmation of Application Act is in these terms:

"(1) Information, 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

3 See *Criminal Procedure Act 1921* (SA), ss 153 and 154.

4 *Questions of Law Reserved (Nos 1 and 2 of 2023)* (2024) 388 FLR 118.

5 *CD v Director of Public Prosecutions* (SA) [2024] HCASL 297.

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(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.

(2) To avoid doubt, anything done, or anything purported to have been done, by a person that would have been wholly, or partly, invalid or unlawful except for subsection (1) is taken for all purposes to be valid and lawful and to have always been valid and lawful, despite any effect that may have on the accrued rights of any person.

(3) Without limiting subsection (1) or (2), evidence that, except for subsection (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, and always not to have been, obtained:

(c) in contravention of an Australian law or in consequence of a contravention of an Australian law; or

(d) improperly or in consequence of an impropriety."

11 Section 6 contains related provisions the effect of which is that: information, or a record, obtained in reliance, or purported reliance, on a "relevant warrant" is taken for all purposes to have been, and to always have been, obtained under a warrant granted under the applicable Act (s 6(1)); anything done, or anything purported to have been done, by a person that would have been wholly, or partly, invalid or unlawful except for s 6(1) is taken for all purposes to be valid and lawful and to have always been valid and lawful, despite any effect that may have on the accrued rights of any person (s 6(2)); and evidence that, except for s 6(1), would have been wholly, or partly, obtained in contravention of an Australian law or in consequence of a contravention of an Australian law, or improperly or in consequence of an impropriety, is taken for all purposes not to have been, and always not to have been, so obtained (s 6(3)).

12 By s 7, the Confirmation of Application Act applies to civil and criminal proceedings instituted: on or after the commencement of the Act; and before

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commencement of the Act if the proceedings are concluded before, on or after such commencement.

- 13 As will be explained, consistent with the submissions of the Solicitor-General of the Commonwealth (supported by interveners, the Attorneys-General for Western Australia, Victoria and New South Wales and, by leave, the SA Director), ss 5 and 6 of the Confirmation of Application Act do not infringe the judicial power of the Commonwealth or impermissibly interfere with the integrity of courts whether exercising federal jurisdiction or otherwise. Those provisions do no more than reflect the law as established in several cases including *Nicholas v The Queen*⁶ and *Duncan v Independent Commission Against Corruption*.⁷ The distinction on which CD and TB relied, between a law which attaches new legal consequences to facts (accepted by CD and TB to involve legislative power) and a law which purports to establish new facts and to attach legal consequences to those new facts (alleged by CD and TB to involve a purported exercise of judicial power), is neither as clear-cut as the plaintiffs' submissions would have it, nor, to the extent the distinction exists, engaged by the provisions of the impugned legislation.

The principles

- 14 The essential principle is that stated by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*:⁸

"The Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers. Chapter III gives effect to that doctrine in so far as the vesting of judicial power is concerned. Its provisions constitute 'an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be

6 (1998) 193 CLR 173.

7 (2015) 256 CLR 83. See also, eg, *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495; *R v Humby*; *Ex parte Rooney* (1973) 129 CLR 231; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117.

8 (1992) 176 CLR 1 at 26-27, quoting *R v Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 and referring to, eg, *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 607, 689, 703-704.

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vested ... No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III' ... [T]he grants of legislative power contained in s 51 of the Constitution, which are expressly 'subject to' the provisions of the Constitution as a whole, do not ... extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power".

15 Although it defies exhaustive definition, judicial power has been described as "the [final and authoritative] quelling of ... controversies [involving rights and liabilities] by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion".⁹ The adjudgment and punishment of criminal guilt is an exclusively judicial function.¹⁰ Fact finding as part of a determination of criminal guilt is an incident of that exclusively judicial function and is therefore inherently an exercise of judicial power,¹¹ but a provision which merely "facilitates the admission of evidence of material facts in aid of correct fact finding"¹² involves neither the exercise of judicial power nor an impermissible legislative intrusion into the exercise of that power. Further, insofar as it has been said that fact finding is an attribute of judicial power, it is well-established that the "Commonwealth Parliament can regulate aspects of judicial fact-finding".¹³

16 It is not possible to state any formula of words against which future legislation may be tested to ascertain if it involves an exercise of or an impermissible constraint on the exercise of judicial power. Usurpation of judicial power is "a concept which is not susceptible of precise and comprehensive

9 *Fencott v Muller* (1983) 152 CLR 570 at 608, referring to *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

10 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

11 eg, *Nicholas v The Queen* (1998) 193 CLR 173 at 187-188 [19].

12 *Nicholas v The Queen* (1998) 193 CLR 173 at 188 [21].

13 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 22 [31].

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definition".¹⁴ The precise terms of any impugned legislation must be construed and considered in terms of its legal and practical operation. Precedent and history matter. This is why, for example, in considering *Liyanage v The Queen*,¹⁵ Mason CJ, Dawson and McHugh JJ said no more than that "legislation may amount to a usurpation of judicial power, particularly in a criminal case, if it prejudices an issue with respect to a particular individual and requires a court to exercise its function accordingly".¹⁶

17 In *Liyanage*, the impugned legislation was directed specifically to certain persons charged and held in custody but the Privy Council was "not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power" and expressly refused to "attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference", observing (as remains the case) that "[e]ach case must be decided in the light of its own facts and circumstances".¹⁷ On the applicable facts and circumstances in *Liyanage* the Privy Council accepted the characterisation of the legislation as "a legislative plan ex post facto to secure the conviction and enhance the punishment of ... particular individuals" taking colour from the ultimate legislative objective of securing those individuals' punishment by compelling them to be sentenced on conviction to not less than ten years' imprisonment and confiscation of property.¹⁸ That attempt involved an impermissible exercise of and intrusion into judicial power.

18 In contrast to *Liyanage*, described as an example of a "'legislative judgment' directed against specific individuals" which clearly usurped the exclusively judicial function of adjudging and punishing criminal guilt,¹⁹ Gummow J in *Nicholas* described the legislation considered in *Polyukhovich v The*

14 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 249-250.

15 [1967] 1 AC 259.

16 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470.

17 [1967] 1 AC 259 at 289-290.

18 [1967] 1 AC 259 at 290-291.

19 *Nicholas v The Queen* (1998) 193 CLR 173 at 221 [113].

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Commonwealth (War Crimes Act Case),²⁰ which retrospectively created a criminal offence, as a valid exercise of legislative power as it left "for determination by a court the issues which would arise at a trial under the law in question".²¹ As *Nicholas* demonstrates, however, not all issues relevant to a determination of criminal guilt are outside legislative power. In *Nicholas* a law regulating the exercise of the discretion to exclude illegally obtained evidence, despite the importance of that discretion in the common law, was characterised, on its true construction, as "evidentiary",²² not being a law which "deem[ed] to exist, or to have been proved to the satisfaction of the tribunal of fact, any ultimate fact, being an element of the offences with which the accused is charged",²³ and "leav[ing] untouched the elements of the crimes for which the accused is to be tried".²⁴ As such, the law did not impermissibly infringe judicial power.

19 Similarly, in *Duncan*,²⁵ a law which provided that anything done or purporting to have been done by the Commission before a decision of this Court about the meaning of the statutory criterion of "corrupt conduct"²⁶ that would have been validly done if "corrupt conduct" included specified "relevant conduct" was taken to have been, and always to have been, validly done was held neither to trespass on nor to be incompatible with judicial power, it being "well settled that it is open to the legislature to select the fact that ... occurred as the ground for attaching such legal consequences as it may choose".²⁷ Properly construed, the law did no more than "effect[] an alteration in the substantive law as to what constitutes

20 (1991) 172 CLR 501.

21 (1998) 193 CLR 173 at 234 [149].

22 (1998) 193 CLR 173 at 234 [150].

23 (1998) 193 CLR 173 at 236 [156].

24 (1998) 193 CLR 173 at 238 [162].

25 (2015) 256 CLR 83.

26 *Independent Commission Against Corruption (NSW) v Cunneen* (2015) 256 CLR 1.

27 (2015) 256 CLR 83 at 95 [14], referring to *Baker v The Queen* (2004) 223 CLR 513 at 532 [43], citing *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 178 [25], 187-188 [59]-[60], 200 [107], 232-233 [208], 280 [347].

corrupt conduct",²⁸ and did not involve "an impermissible direction to the judiciary".²⁹

20 Further, as *Kable v Director of Public Prosecutions (NSW)*³⁰ "took as a starting point the principles applicable to courts created by the [Commonwealth] Parliament under s 71 [of the *Constitution*] and to the exercise by them of the judicial power of the Commonwealth under Ch III", it follows that if a law would not involve an exercise of or impermissibly confine judicial power as a law of the Commonwealth it would not do so as a law of a State or Territory.³¹

The impugned law

21 Section 5 of the Confirmation of Application Act is properly characterised as indistinguishable from those laws held to be valid in *Nicholas* and *Duncan*. The operation of the impugned law may be said to be directed to criminal or civil proceedings in which information or records obtained under the two surveillance device warrants, five computer access warrants, and four search warrants defined as a "relevant warrant" in s 4 of the Confirmation of Application Act will or may be relevant. In that sense, the law is not general in application, but nor is it confined to or directed specifically at the plaintiffs.

22 To the extent the impugned law operates on pending litigation concerning the admissibility in the criminal proceedings against the plaintiffs of information or records obtained under the "relevant warrants", that fact does not indicate that the law involves an exercise of or impermissible trespass onto judicial power.³² The existence of a controversy capable of being quelled by an exercise of judicial power – in the present case, the admissibility in the criminal proceedings against the plaintiffs of information or records obtained under the "relevant warrants" – does not mean that the Commonwealth is incapable in the exercise of legislative power of regulating the admissibility of evidence by any one or more available

28 (2015) 256 CLR 83 at 99 [29].

29 (2015) 256 CLR 83 at 99 [31].

30 (1996) 189 CLR 51.

31 *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [14].

32 eg, *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88.

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drafting techniques. That legislative power is not diminished merely because an issue in controversy in the criminal proceedings is the admissibility of the information or records under the "relevant warrants". Chapter III of the *Constitution* "contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action".³³

23 The example on which the plaintiffs relied, that of Isaacs J in *Williamson v Ah On*,³⁴ that 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 proves that he got them honestly", does not assist them. In the present case, the analogy would be if the impugned law deemed the plaintiffs to be guilty of the offences with which they have been charged. The impugned law does no such thing. In the context of the criminal proceedings within which the guilt of the plaintiffs will be determined according to law, the impugned law merely facilitates the admission into evidence in those proceedings of the information and records obtained under the "relevant warrants" in circumstances where s 7(1) and related provisions of the TIA Act may have operated to exclude such evidence.

24 It is the criminal and civil proceedings to which the Confirmation of Application Act applies or will apply by s 7 of that Act which determine the scope and essential characteristics of the judicial power affected by that Act. In the context of those existing and future proceedings, the operation and effect of s 5 of the Confirmation of Application Act is and can only be to preclude the exclusion of the ANOM communications as relevant evidence on the ground that such evidence was illegally obtained in contravention of s 7(1) of the TIA Act. That operation and effect is properly characterised as merely evidentiary.

25 Properly construed, therefore, the impugned law in all its potential operations does not trespass on the exclusively judicial function of adjudging and punishing criminal guilt. Rather, the impugned law facilitates the admission of evidence which might otherwise be excluded by either ss 63 and 77 of the TIA Act, s 138 of the Uniform Evidence Law legislation (as enacted by Commonwealth, State or Territory law), or the common law discretion to exclude

33 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250.

34 (1926) 39 CLR 95 at 108.

illegally obtained evidence.³⁵ The impugned law does not involve a "legislative judgment" of criminal guilt or civil liability. It does not deem any fact which establishes or precludes the establishment of an element of any offence or cause of action to exist or not to exist. It leaves untouched the elements of the offences with which the plaintiffs have been charged and, indeed, the elements of any offences with which a person may be charged and in respect of which information obtained under the "relevant warrants" may be probative. It leaves untouched the elements of causes of action in a civil proceeding. The impugned legislation merely selects a fact – being the obtaining of information or a record under a "relevant warrant" as referred to in s 5(1) – and attaches to that fact new legal consequences or, better yet, a new legal character in criminal and civil proceedings. The new legal character is that the obtaining of information or a record under a "relevant warrant" as referred to in s 5(1) is taken for all purposes to not have the legal consequences referred to in each of s 5(1)(a) (not to have been, and always not to have been, intercepted while passing over a telecommunications system) and s 5(1)(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).

26 The best characterisation of s 5(1)(a) and (b), therefore, is that advanced by the Solicitor-General of the Commonwealth that these provisions specify "how certain facts should be characterised against a 'statutory concept' (being a legal characterisation that would otherwise have turned upon how various defined terms and deeming provisions in the [TIA] Act applied in light of the facts as found)". That is, the provisions deem "certain facts not to answer, and never to have answered, a particular statutory description".³⁶

27 The evidentiary character of s 5(1)(a) and (b) – their operation to merely facilitate the admission of relevant evidence which might otherwise be excluded by either ss 63 and 77 of the TIA Act, s 138 of the Uniform Evidence Law legislation (as enacted by Commonwealth, State or Territory law), or the common law discretion to exclude illegally obtained evidence³⁷ – also leaves unaffected other statutory and common law discretions to exclude otherwise relevant evidence unrelated to the discretion to exclude illegally obtained evidence. Accordingly,

35 *Ridgeway v The Queen* (1995) 184 CLR 19.

36 eg, *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36.

37 *Ridgeway v The Queen* (1995) 184 CLR 19.

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there is no principled distinction between that operation of the impugned law and the law challenged in *Nicholas*.

28 That the impugned law involves no exercise of or impermissible trespass onto judicial power also emerges from consideration of the terms of the provision, s 7(1) of the TIA Act, in respect of which s 5(1)(a) and (b) operate. Section 7(1) creates a statutory prohibition (interception of a communication passing over a telecommunications system), contravention of which has statutory consequences including those in ss 63 and 77 of the TIA Act. It was always open to the Commonwealth in the exercise of its legislative power to define facts within and outside of the scope of the statutory prohibition. The Commonwealth did so in several ways in the TIA Act including, for example, ss 7(2) (s 7(1) "does not apply to or in relation to" the facts in paras (a)-(d)) and 7(4) (s 7(1) "does not apply to, or in relation to" the facts in paras (a)-(c)). Further, when giving meaning to certain key concepts in ss 5F, 5G, 5H and 6, the TIA Act uses several drafting techniques including deeming (s 5F(a) and (b), "is taken to"), conditional application (ss 5G and 5H(1), "if" ... then), and defining (s 6(1), "... consists of"). It would have been within legislative power for the Commonwealth, at the time of enactment of the TIA Act, to deem s 7(1) not to apply to certain information and records (such as information and records obtained under specified warrants). It therefore follows that it is within the legislative power of the Commonwealth, after the enactment of the TIA Act, to deem s 7(1) not to apply to certain information and records either by amendment to the TIA Act or by another Act. That the Commonwealth has achieved the same effect by a different drafting technique in the impugned law does not take the impugned law outside of the Commonwealth's legislative power.

29 Although argument focused on s 5, no independent argument was put with respect to s 6. Accordingly, these conclusions apply with equal force to ss 5 and 6 of the Confirmation of Application Act.

Conclusion and orders

30 For these reasons, the questions of law stated in the special case are to be answered in the negative. The plaintiffs should pay the defendant's costs of the special case. It also follows that the grant of special leave to appeal must be revoked.

EDELMAN J.

A cunning plan, a legal issue, and a challenge to a legislative fix

31 Between October 2018 and June 2021, the Australian Federal Police ("the AFP") conducted a large-scale operation. The operation, named "Operation Ironside", was conducted alongside operations by the Federal Bureau of Investigations in the United States and, later, also by State police in Australia. The genesis of Operation Ironside was the discovery by the AFP that an end-to-end encryption application called ANOM was being privately developed. The AFP obtained control of that development process and installed the ANOM application on mobile phones which had their usual telephone and messaging features disabled. The AFP caused 921 of the mobile phones with ANOM installed to be distributed to 21 people across Australia in circumstances where it was anticipated that they would be used by people engaged in criminal activities.

32 Operation Ironside had one ingenious feature. Unknown to the users of the ANOM application, clicking the "send" icon for any message (including those with photo or voice memo attachments) composed on an ANOM-enabled device would trigger the creation of a second message in the ANOM application which was a copy of the user's message together with some additional data from the user's device. The secretly copied message and data were sent at the same time as the user's message, via the same server, to a server described as the iBot server from which it was re-transmitted to servers in Sydney that the AFP could access through retrieval software. The AFP received copies of approximately 28 million messages from the ANOM application as part of Operation Ironside.

33 Operation Ironside led to the arrest of more than 390 people and many prosecutions in Australia. The appellants in the appeal before this Court, who are also the plaintiffs in the special case before this Court, were among those who were arrested and charged with offences including participating in a criminal organisation³⁸ and possession of prohibited items, including firearms.³⁹ The prosecution case against each appellant includes evidence that each of them possessed and used an ANOM device to send or transmit communications which disclosed the offences.

34 The AFP obtained the copies of the ANOM communications under two surveillance device warrants and five computer access warrants issued pursuant to the *Surveillance Devices Act 2004* (Cth). The AFP also accessed a second set of data relating to the ANOM communications under four search warrants issued pursuant to s 3E of the *Crimes Act 1914* (Cth). But the AFP made a considered

38 *Criminal Law Consolidation Act 1935* (SA), s 83E(1).

39 *Firearms Act 2015* (SA), ss 9(1), 39(1).

decision not to seek a warrant under the *Telecommunications (Interception and Access) Act 1979* (Cth) ("the TIA Act"), due to an assumption that the TIA Act did not apply to the information obtained by the AFP.

35 In the prosecutions of the appellants, the assumption that the TIA Act did not apply to the ANOM communications was challenged. One basis upon which the appellants sought to exclude evidence of, and evidence related to, those communications from the prosecutions was that in the absence of a warrant under the TIA Act, those communications were unlawfully intercepted, contrary to s 7(1) of the TIA Act, and were inadmissible under ss 63(1)(a) and 77(1)(a) of the TIA Act. The appellants' challenge failed before the primary judge. The appellants' challenge also failed on one of the questions of law reserved for the determination of the Court of Appeal of the Supreme Court of South Australia⁴⁰ which concerned this issue.⁴¹ On 7 November 2024, special leave to appeal from the Court of Appeal was granted by this Court.

36 Only a fortnight after the grant of special leave to appeal, the Attorney-General of the Commonwealth introduced the *Surveillance Legislation (Confirmation of Application) Bill 2024* (Cth) into the House of Representatives. As the Attorney-General explained in his Second Reading Speech for the Bill that became "the Confirmation Act",⁴² the Confirmation Act was designed to "clarify that information collected by the Australian Federal Police during Operation Ironside was lawfully obtained ... consistent with the decisions of the Supreme Court of South Australia and the South Australian Court of Appeal".⁴³ The Confirmation Act commenced on 11 December 2024.⁴⁴ The appellants, as plaintiffs, challenged the validity of the Confirmation Act.

37 By a special case, the plaintiffs and the Commonwealth agreed to state questions for the opinion of this Court asking whether the Confirmation Act is invalid, in whole or in part, because: (i) it is an impermissible exercise by the Commonwealth Parliament of the judicial power of the Commonwealth; or (ii) it impermissibly interferes with and undermines the institutional integrity of courts vested with federal jurisdiction.

40 *Criminal Procedure Act 1921* (SA), ss 153, 154.

41 *Questions of Law Reserved (Nos 1 and 2 of 2023)* (2024) 388 FLR 118 at 202 [379].

42 *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth).

43 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 21 November 2024 at 8302.

44 *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth), s 2.

38 The special case was listed for hearing concurrently with the appeal. The questions raised by the special case are anterior to the issues raised by the appeal. If valid, the Confirmation Act would have the effect that the issues concerning the interpretation of s 7(1) of the TIA Act would be moot in this case. The plaintiffs accepted that if the Confirmation Act is valid then special leave to appeal should be revoked. Oral submissions concerning the appeal were therefore deferred until the resolution of the anterior questions raised by the special case. For the reasons below, those anterior questions concerning the validity of the Confirmation Act should be answered adversely to the plaintiffs. Special leave to appeal should be revoked.

The legal proceedings prior to the special case

39 Section 7(1)(c) of the TIA Act provides that "[a] person shall not ... do any act or thing that will enable him or her or another person to intercept ... a communication passing over a telecommunications system". Section 6(1) of the TIA Act relevantly provides that "interception of 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". Section 5F of the TIA Act 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". Section 5G(a) of the TIA Act relevantly provides that "if the communication is addressed to an individual" then "the intended recipient of [the] communication" is the individual.

40 The appellants brought an interlocutory application challenging the admissibility of the ANOM communications on the basis that they were unlawfully intercepted contrary to s 7(1) of the TIA Act. The primary judge dismissed the appellants' interlocutory application. The primary judge reasoned that although the mobile phones were part of the telecommunications system, the ANOM application installed on those phones was not.⁴⁵ The primary judge also held that the word "sent", read in the context of the word "transmitted", requires more than the pressing of a button on a mobile phone. The primary judge then reasoned that the copies of the ANOM communications were created before encryption and before the message passed to the operating system of the mobile phone so that there was no "interception" contrary to s 7(1) of the TIA Act.⁴⁶

41 The primary judge subsequently stated two questions of law for the consideration of the Court of Appeal. In broad terms, those questions

45 *R v TB* (2023) 413 ALR 514 at 536-537 [101]-[102].

46 *R v TB* (2023) 413 ALR 514 at 537-538 [105]-[109].

asked: (i) whether the ANOM application and system involved an interception of a communication passing over a telecommunications system contrary to s 7(1) of the TIA Act; and (ii) if so, whether the information and records obtained as a result of that interception were admissible at the appellants' trial.

42 The Court of Appeal held that the mobile phones and the ANOM application installed on those phones were part of the telecommunications system.⁴⁷ But the Court of Appeal did not accept that the ANOM communications had been copied and the additional data added while the communications were "passing over" the telecommunications system (having been "sent or transmitted"). The Court of Appeal accepted that its conclusion might be thought by some to "lack intuitive appeal" and accepted that the creation of a copy of the original message, and the additional data added to the copy, by the ANOM application processes occurred after the user clicked "send". But the Court of Appeal held that even when the mobile phone was connected to the internet: (i) those processes took place while the data representing the original message was still being processed by the ANOM application as a preparatory step before sending; and (ii) the process of encryption of the original message and the copy was also a step preparatory to the message being sent.⁴⁸

43 The appellants obtained a grant of special leave to appeal to this Court from the decision of the Court of Appeal. The notices of appeal and contention before this Court raise the same issues as in the courts below, including whether the processes of copying the ANOM communications and adding additional data involved an interception of a communication passing over a telecommunications system contrary to s 7(1) of the TIA Act. But this appeal is not concerned with other exclusion applications brought in the Supreme Court of South Australia, including by one of the appellants seeking the exclusion of some or all of the evidence of the ANOM communications on the basis of the invalidity of some or all of the warrants obtained under the *Surveillance Devices Act* and the *Crimes Act*.

44 The Confirmation Act, with which the special case is concerned, was enacted against this background and while the present appeal was pending before this Court.

The Confirmation Act and the questions in the special case

45 The Bill that became the Confirmation Act was said to be "targeted in its scope and will only apply to information or records obtained under a specified

47 *Questions of Law Reserved (Nos 1 and 2 of 2023)* (2024) 388 FLR 118 at 156 [178].

48 *Questions of Law Reserved (Nos 1 and 2 of 2023)* (2024) 388 FLR 118 at 159-166 [193]-[216].

range of warrants issued in connection with Operation Ironside".⁴⁹ In the Revised Explanatory Memorandum, it was explained that, once in force, the Confirmation Act would:⁵⁰

"clarify that information or a record obtained under specified warrants issued to the Australian Federal Police under the *Crimes Act 1914* (Crimes Act) and *Surveillance Devices Act 2004* (SD Act) was not intercepted while passing over a telecommunications system and was lawfully obtained under those warrants, consistent with the Parliament's intention".

46 The submissions of the plaintiffs focused primarily upon s 5 of the Confirmation Act; the plaintiffs accepted that if s 5 is valid then there was no independent argument by which s 6 could be invalid.

47 Section 5 of the Confirmation Act is set out in full in the joint reasons. Section 5 (when read with the definitions in s 4) is confined in its operation to information and records obtained pursuant to the seven warrants issued under the *Surveillance Devices Act* and the four warrants issued under the *Crimes Act*. Section 5(1) provides that the information and records are "taken for all purposes" not to have been (and always not to have been): (i) "intercepted while passing over a telecommunications system"; or (ii) "obtained by intercepting a communication passing over a telecommunications system" (within the meaning of the TIA Act⁵¹).

48 Section 5(2) then provides that "[t]o avoid doubt, anything done, or anything purported to have been done, by a person that would have been wholly, or partly, invalid or unlawful except for subsection (1) is taken for all purposes to be valid and lawful and to have always been valid and lawful, despite any effect that may have on the accrued rights of any person".

49 Section 5(3) further protects, as evidence, the information and records referred to in s 5(1) by providing that they are "taken for all purposes" not to have been (and always not to have been) obtained "in contravention of an Australian law or in consequence of a contravention of an Australian law; or ... improperly or in consequence of an impropriety".

49 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 21 November 2024 at 8302.

50 Australia, Senate, *Surveillance Legislation (Confirmation of Application) Bill 2024*, Revised Explanatory Memorandum at 2 [1].

51 *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth), s 4 (definition of "intercepting a communication passing over a telecommunications system").

50 The two substantive questions raised by the special case are overlapping but distinct. The first question essentially asks whether the Confirmation Act is a purported, but invalid, exercise of judicial power by the Commonwealth Parliament. In short, the first question asks whether judicial power has been usurped. The implication that Ch III of the *Constitution* exhaustively states the manner in which the judicial power of the Commonwealth may be vested carries with it a prohibition upon judicial power being exercised by the Commonwealth Parliament.⁵²

51 The second, overlapping but distinct, question essentially asks whether the Confirmation Act unduly interferes with, or "infringe[s]",⁵³ the exercise of judicial power by courts vested with federal jurisdiction. It is well established that Ch III of the *Constitution* impliedly prohibits "a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power".⁵⁴ That implication was extended to apply also to State courts in *Kable v Director of Public Prosecutions (NSW)*.⁵⁵

52 The plaintiffs submitted that s 5(1) of the Confirmation Act was a "legislative declaration of fact in a pending controversy", being the matter of fact (or at least partly fact and partly law) of whether a communication has been unlawfully intercepted under the TIA Act. The plaintiffs submitted that s 5 usurped judicial power by a legislative quelling of controversies by ascertaining facts and applying the law to those facts. Alternatively, the plaintiffs submitted that s 5 of the Confirmation Act unduly impaired the institutional integrity of courts vested with federal jurisdiction due to a number of factors. These factors were said to establish that the Parliament had borrowed the reputation of the judiciary "to cloak their work in the neutral colors of judicial action".⁵⁶

52 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26-27.

53 *Nicholas v The Queen* (1998) 193 CLR 173 at 220 [112].

54 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27, citing *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607, 689, 703-704.

55 (1996) 189 CLR 51.

56 *Mistretta v United States* (1989) 488 US 361 at 407.

Is the Confirmation Act a usurpation of judicial power?

When will an Act of Parliament usurp judicial power?

53 The concept of "usurpation" of judicial power is a common feature of discourse in this area of constitutional law concerning the exclusive power of the judiciary. "Usurp" in this context has its ordinary meaning of impermissible appropriation of judicial power, although it is sometimes conflated with the overlapping concept of undue interference with judicial power.

54 There is a point at which an Act of a Parliament will cease to be properly characterised as an exercise of legislative power and be characterised as a wrongful appropriation of judicial power. That point is notoriously difficult to identify. The plaintiffs in this special case pointed to cases where a purported exercise of legislative power had been held to be properly characterised as an exercise of judicial power. The Commonwealth, supported by the Attorneys-General for the States of Western Australia, Victoria, and New South Wales and the Director of Public Prosecutions for South Australia, pointed to cases where such a characterisation was denied. A consideration of those cases is illuminating but they must be understood in the context of the underlying principle.

55 The starting point is the trite observation that judicial power cannot be exhaustively defined but that its identification depends upon "consideration of predominant characteristics" and "historic functions and processes of courts of law".⁵⁷ Those characteristics and historic functions are "at the very centre of judicial power",⁵⁸ marked by the authoritative determination of "a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between [defined] persons or classes of persons".⁵⁹ Although it is neither an exhaustive definition nor even a complete description, the essence of judicial power can thus generally be described as the "quelling of ... controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial

57 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394.

58 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 307.

59 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374, quoted in *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 655.

discretion".⁶⁰ By contrast with legislative power, which usually creates generalised norms that apply prospectively, judicial power generally creates particular legal relations between people by applying to facts the legal rules that existed at the time of the controversy.⁶¹

56 An exercise of power by the legislature will often be easily characterised as judicial where the *purpose* of Parliament is to perform a role that falls within the core of judicial power by aiming to affect legal relations (rights, duties, liabilities) by resolving controversies between persons, or classes of persons, based upon the application of a legal rule to reach a legislative conclusion about past facts. A famous example, repeatedly cited,⁶² of the exercise of judicial power by Parliament was given by Isaacs J in 1926.⁶³ The example was an Act of Parliament which did not merely reverse the onus of proof of receipt of stolen goods but conclusively deemed a person in possession of stolen goods to have stolen them. Another example is from the famous case of *Liyanage v The Queen*,⁶⁴ in which the Privy Council described the "pith and substance" of the ad hominem legislation of Ceylon in that case as "a legislative plan ex post facto to secure the conviction and enhance the punishment of ... particular individuals".

57 On the other hand, it is more difficult to characterise a legislative exercise of power as judicial where it is only the *effect* of a law that is said to mimic the application of judicial power, such as where the incidental effect of a law is substantively to resolve a controversy. This will be so even where the law operates in some similar ways to the exercise of judicial power. For instance, a retrospective, or even retroactive,⁶⁵ change to the law by Parliament, which leaves to courts the ability to determine the application of the law, is not usually sufficient

60 *Fencott v Muller* (1983) 152 CLR 570 at 608. See also *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11.

61 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 368 [96], discussing *Ha v New South Wales* (1997) 189 CLR 465 at 504, 515.

62 *Nicholas v The Queen* (1998) 193 CLR 173 at 190 [24]; *Silbert v Director of Public Prosecutions (WA)* (2002) 25 WAR 330 at 335 [22], 347 [81]; *Commissioner of Taxation v Price* [2006] 2 Qd R 316 at 333 [42]. See also *Police v Dunstall* (2015) 256 CLR 403 at 420 [36].

63 *Williamson v Ah On* (1926) 39 CLR 95 at 108.

64 [1967] 1 AC 259 at 290.

65 See *Stephens v The Queen* (2022) 273 CLR 635 at 651 [29].

to amount to a usurpation of judicial power⁶⁶ even though one of the central attributes of judicial power is ascertaining the law that existed at the time of the facts. Similarly, an ad hominem law is not necessarily an exercise of judicial power despite the particularised nature of judicial power compared with the usual role of legislative power in creating generalised norms.⁶⁷

Nicholas v The Queen

58

The focus of submissions concerning usurpation of judicial power was the decision of this Court in *Nicholas v The Queen*.⁶⁸ The background to *Nicholas* was that a permanent stay had been ordered of the prosecution of offences with which Mr Nicholas had been charged where evidence necessary for conviction was likely to be held inadmissible as a consequence of the decision of this Court in *Ridgeway v The Queen*.⁶⁹ The Commonwealth Parliament subsequently enacted legislation intended to reverse the effect of the decision in *Ridgeway*. One provision of the legislation⁷⁰ effectively provided that, subject to certain conditions, the admissibility of evidence for a prosecution of an offence of the relevant nature was to be determined by "disregard[ing]" the fact that a law enforcement officer committed an offence in importing narcotic goods. Mr Nicholas challenged the constitutional validity of that provision in various ways,⁷¹ but perhaps the best way of expressing his challenge was that the provision either usurped or impermissibly intruded upon ("infringed") judicial power.⁷² A majority of this Court held that the provision was valid. In dissent, McHugh J⁷³ and Kirby J⁷⁴ noted the relevance of the extent of the impairment of judicial power when determining invalidity, given the rationale for the exclusionary rule in *Ridgeway* (namely, to preserve "the public

⁶⁶ *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

⁶⁷ *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 281 [159]. See also *United States v Lovett* (1946) 328 US 303 at 315-318; *Bank Markazi v Peterson* (2016) 578 US 212 at 233-234.

⁶⁸ (1998) 193 CLR 173.

⁶⁹ (1995) 184 CLR 19.

⁷⁰ *Crimes Amendment (Controlled Operations) Act 1996* (Cth), s 3, Sch 1, item 2, inserting s 15X into the *Crimes Act 1914* (Cth).

⁷¹ Compare *Nicholas v The Queen* (1998) 193 CLR 173 at 185 [12], 200 [49].

⁷² *Nicholas v The Queen* (1998) 193 CLR 173 at 218 [106].

⁷³ *Nicholas v The Queen* (1998) 193 CLR 173 at 226 [126].

⁷⁴ *Nicholas v The Queen* (1998) 193 CLR 173 at 265 [213].

interest in maintaining the integrity of the courts"⁷⁵). No such argument was made in the present special case.

59 Two central matters upon which the members of the majority relied were: (i) the evidentiary nature of the provision (and consequently the absence of any adjudication by Parliament of any ultimate fact); and (ii) that it was not the purpose of the legislation to target an individual or a particular category of people. Brennan CJ said that a "law prescribing a rule of evidence does not impair the curial function of finding facts, applying the law or exercising any available discretion".⁷⁶ The application of the provision was not limited to cases "in which prosecutions were pending"⁷⁷ and the provision simply "enlarged the evidentiary material available to a jury".⁷⁸ Toohey J held that as an evidentiary provision, the provision neither determined whether the charge would succeed or fail nor singled out any individual or category of persons.⁷⁹ Gaudron J held that the provision did no more than exclude illegality on the part of law enforcement officers from consideration in the exercise of the discretion recognised in *Ridgeway*⁸⁰ and did not infringe the requirements of equal justice.⁸¹ Gummow J reiterated that "the section does not deem any ultimate fact to exist, or to have been proved"⁸² and held that the identity of those affected by the provision might not be established for some time after the legislation came into force.⁸³ And Hayne J held that, as a matter of substance, the provision did not deal with questions of guilt or innocence and was concerned "not with a single identified, or identifiable, prosecution but with several prosecutions (albeit prosecutions which ... can be identified and are relatively few)".⁸⁴

75 *Ridgeway v The Queen* (1995) 184 CLR 19 at 41.

76 *Nicholas v The Queen* (1998) 193 CLR 173 at 189 [23].

77 *Nicholas v The Queen* (1998) 193 CLR 173 at 192 [28].

78 *Nicholas v The Queen* (1998) 193 CLR 173 at 191 [26].

79 *Nicholas v The Queen* (1998) 193 CLR 173 at 202 [53], 203 [57].

80 *Nicholas v The Queen* (1998) 193 CLR 173 at 210-211 [80].

81 *Nicholas v The Queen* (1998) 193 CLR 173 at 212 [83].

82 *Nicholas v The Queen* (1998) 193 CLR 173 at 238 [162].

83 *Nicholas v The Queen* (1998) 193 CLR 173 at 238-239 [163].

84 *Nicholas v The Queen* (1998) 193 CLR 173 at 277 [249]. See also at 278 [250]-[252].

The Confirmation Act does not usurp judicial power

60 The plaintiffs submitted that the difference between *Nicholas* and the circumstances of this special case is that the Commonwealth Parliament made a "legislative declaration of fact" in s 5(1) of the Confirmation Act when it provided, relevantly, that the information and records were "taken for all purposes" not to have been "obtained by intercepting a communication passing over a telecommunications system" within the meaning of the TIA Act. In other words, even if a communication fell within the meaning of "passing over a telecommunications system" by being sent or transmitted by the person sending the communication, as defined in s 5F of the TIA Act, the communication would be deemed not to have been passing over a telecommunications system.

61 The relevant expressions in s 5F, "sen[ding]" or "transmitt[ing]" a communication, do not invite legal characterisations of facts like "contracting", "assaulting", or "stealing". They are ordinary English expressions which, properly interpreted as a matter of law, require processes of characterisation of primary facts. The facts of a person being seen in a bathing suit in a pool, moving by self-propulsion, might be characterised as a person "swimming". That remains a question of fact. But a legal question is asked as soon as it is necessary to ask whether that factual characterisation satisfies a legal rule. Thus, a question of whether the factual characterisation of "swimming" falls within a regulation at the pool that creates a rule of "no swimming" on a particular day is a question of law. For these reasons, it is too simplistic to say even of a statutory expression involving ordinary concepts of fact that meaning is a question of fact and interpretation is a question of law.⁸⁵

62 So too, the factual characterisations of "sending" or "transmitting" become questions of law when it is asked whether those characterisations fall within a legislative provision. To apply the analogy above to the Confirmation Act, s 5(1) operates at the level of the "no swimming" rule. It changes the legal effect of s 7(1) of the TIA Act relevantly by denying that a communication which fell within the meaning of s 7(1) was "obtained by intercepting a communication passing over a telecommunications system". This level of operation of s 5(1) of the Confirmation Act is clear from the provision in s 5(2), "[t]o avoid doubt", that the effect of s 5(1) is to make the relevant acts "valid and lawful" at all times. It is also confirmed by the complementary provision in s 5(3), which provides that the evidence comprised of the relevant information and records obtained "in contravention of an Australian law or in consequence of a contravention of an Australian law; or ... improperly or in consequence of an impropriety" is "taken for all purposes" not to have been so obtained.

85 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397.

63 In short, s 5 of the Confirmation Act alters the legal application of s 7(1) of the TIA Act and the rules of evidence to the extent that they would exclude from evidence in any proceeding the information and records received under the warrants obtained in Operation Ironside. But the Confirmation Act does not have the purpose of being a legislative declaration of facts. Nor does it have the purpose of ultimately resolving the criminal proceedings against the plaintiffs or a class of persons including the plaintiffs. Further, although the Confirmation Act operates retrospectively, it does not operate at the level of finding facts. The Confirmation Act simply removes the need for a judicial finding of the time at which the relevant communication had been "sent" or "transmitted". The Confirmation Act does not usurp judicial power.

Undue impairment of judicial power

64 The concept of an undue impairment of judicial power can overlap with the concept of a usurpation of judicial power. An example is a law of Congress or Parliament that directed that in "Smith v Jones", "Smith wins".⁸⁶ Whether the litigation was pending or had been resolved in favour of Jones, the law would be invalid. As Hamilton wrote, "[a] legislature, without exceeding its province, cannot reverse a determination once made, in a particular case".⁸⁷ Such a law, directing the result that courts must reach or should have reached to resolve a controversy, could be seen either as an extreme form of impairment of judicial power or as a usurpation of judicial power by Parliament.⁸⁸

65 An undue impairment of judicial power can arise from interferences falling short of directions to the judiciary about the result that must be reached or should have been reached. An example is legislation that requires courts to re-open final judgments entered on a particular basis before the legislation was enacted.⁸⁹ Other examples are legislation that deprives a court of one of its defining characteristics (such as decisional independence or impartiality),⁹⁰ or substantially impairs one of those defining characteristics (such as legislation that requires a court to act in a procedurally unfair way), which cannot be justified as reasonably necessary for a

86 *Bank Markazi v Peterson* (2016) 578 US 212 at 231. See also at 237.

87 Hamilton, *The Federalist* No 81, in *The Federalist, on the New Constitution* (1802), vol 2 at 234.

88 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27, 36-37, 68; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470; *Nicholas v The Queen* (1998) 193 CLR 173 at 188 [20].

89 See, for instance, *Plaut v Spendthrift Farm Inc* (1995) 514 US 211.

90 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67].

legitimate legislative purpose.⁹¹ The categories of case that can amount to an undue impairment of judicial power are not closed. In every case, close attention should be given to both the purpose and the effect of the impugned legislation.

66 One authority which must be approached with care is *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*.⁹² In a passage from that authority relied upon in this case by the Commonwealth, this Court said of an argument that the legislation in that case had interfered with judicial power that "[i]t matters not that the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to circumvent the proceedings and forestall any decision which might be given in those proceedings".⁹³ However, that statement was prefaced by an emphasis that the relevant legislation "does not deal with any aspect of the judicial process" and by a contrast with circumstances where the legislation "interferes with the judicial process itself".⁹⁴ The purpose of Parliament in enacting a law cannot create an undue interference with judicial power if there is no interference with any aspect of the judicial process but merely a consequential or incidental effect upon the rights that have been, or will be, adjudicated by a court. But the purpose of Parliament is important where legislation does interfere with the judicial process.

Duncan v Independent Commission Against Corruption

67 The authority concerning undue impairment of judicial power which was the focus of submissions in this case is *Duncan v Independent Commission Against Corruption*.⁹⁵ The background to *Duncan* was the decision of this Court in *Independent Commission Against Corruption v Cunneen*⁹⁶ that the meaning of "corrupt conduct" in s 8 of the *Independent Commission Against Corruption Act 1988* (NSW), conferring investigative jurisdiction on the Commission, did not extend to conduct that did not compromise the probity of public administration.

91 See *SDCV v Director-General of Security* (2022) 277 CLR 241 at 293-294 [138], 307 [176], 326 [231]. See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 167-170 [222]-[227]; *MJZP v Director-General of Security* (2025) 99 ALJR 1108 at 1122 [63]; 423 ALR 378 at 395.

92 (1986) 161 CLR 88.

93 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96-97.

94 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96.

95 (2015) 256 CLR 83.

96 (2015) 256 CLR 1.

Mr Duncan could have successfully relied upon the decision in *Cunneen* in his application for leave to appeal from a decision which refused his challenge to findings of corrupt conduct made against him by the Commission. But while Mr Duncan's application for leave to appeal was pending, the Parliament of New South Wales enacted validating legislation to ensure the validity of the Commission's activities despite the decision in *Cunneen*.⁹⁷ Mr Duncan challenged the validity of that validating legislation. Mr Duncan asserted that the validating legislation unduly impaired the institutional integrity of the Supreme Court of New South Wales by directing the Court to treat acts as valid when those acts were invalid.⁹⁸ This Court unanimously rejected Mr Duncan's claim.

68 The joint judgment of French CJ, Kiefel, Bell and Keane JJ held that the validating legislation merely amended the *Independent Commission Against Corruption Act 1988* (NSW).⁹⁹ Although that amendment retrospectively changed the legal position of the Commission and may have affected Mr Duncan's rights, including his reputation, it was open to the legislature to attach new legal consequences to events which occurred prior to the date specified in the validating legislation (being the date of judgment delivery in *Cunneen*).¹⁰⁰

Section 5 of the Confirmation Act is not an undue impairment of judicial power

69 Section 5 of the Confirmation Act does, and is intended to, interfere with the judicial process. Section 5 is properly characterised as a law that changes the manner in which a select, but undetermined, group of cases are to be decided in the future. But the mere interference with the judicial process, particularly by laws concerned with the rules of procedure or evidence, will not, without more, be an undue impairment of judicial power. The plaintiffs properly did not suggest otherwise.

70 Apart from their assertion that s 5 of the Confirmation Act was an exercise of judicial power, addressed separately above, the plaintiffs relied upon two

97 *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW).

98 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 93 [9].

99 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 94 [12].

100 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at 94-95 [13]-[15]. See also *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW), Sch 1, inserting Sch 4, Pt 13, cll 34-35 into the *Independent Commission Against Corruption Act 1988* (NSW).

matters in support of their submission that s 5 was an undue interference with judicial power. The first was that s 5 applied only to a select cohort of cases, thus establishing two separate regimes for the application of s 7 of the TIA Act. The second was that any application for the exclusion of evidence obtained under the relevant warrants was rendered futile.

71 As to the first matter, the plaintiffs are correct that s 5 of the Confirmation Act applies only to a select cohort of cases. But that cohort are not necessarily identified people. Section 5 is not confined in its application to the 390 people who are presently charged; it could apply to others if further charges are laid as a result of information obtained under the relevant Operation Ironside warrants. Further, s 5 operates in the same usual manner as legislative amendments to the rules of evidence or procedure; in changing the manner in which the affected group of cases are to be decided, the section does not operate retroactively¹⁰¹ "because it will prescribe the manner in which something may or must be done in the future, even if what is to be done relates to, or is based upon, past events".¹⁰² And the creation of two different procedures for the future judicial application of a statutory rule, based on different factual circumstances, is not uncommon and entirely within the province of Parliament.

72 As to the second matter, there are three reasons that the redundancy of any application for the exclusion of evidence, within the select cohort of people to whom s 5 applies, does not establish an undue interference with judicial power. First, it was not suggested that in every case the admission of the relevant evidence was intended to, or would necessarily, have the effect that the accused person would be found guilty. The interference by s 5 with the judicial process leaves intact the court's ultimate decisional independence. Secondly, s 5 does not address the requirement for the Crown to prove that the ANOM communications were sent by the relevant accused persons. Thirdly, there remain other important judicial discretions to exclude the relevant evidence on grounds such as: (i) the prejudicial effect of the evidence exceeding its probative value;¹⁰³ or (ii) the effect that the evidence would have on the fairness of the trial independently of the legality of the warrants under which the evidence was obtained.¹⁰⁴

101 See *Stephens v The Queen* (2022) 273 CLR 635 at 651 [29].

102 *Rodway v The Queen* (1990) 169 CLR 515 at 518.

103 *R v Christie* [1914] AC 545; *Driscoll v The Queen* (1977) 137 CLR 517 at 541; *R v Swaffield* (1998) 192 CLR 159 at 191-193 [62]-[64].

104 *R v Lee* (1950) 82 CLR 133 at 159; *R v Swaffield* (1998) 192 CLR 159 at 189-190 [53]-[54]; *Police v Dunstall* (2015) 256 CLR 403.

73 Section 5 of the Confirmation Act does not unduly impair judicial power.

Conclusion

74 The questions in the special case should be answered as follows:

Question 1(a): Is the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) invalid, either in whole or in part, because it is an impermissible exercise by the Parliament of the judicial power of the Commonwealth?

Answer: No.

Question 1(b): Is the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) invalid, either in whole or in part, because it impermissibly interferes with and undermines the institutional integrity of courts vested with federal jurisdiction?

Answer: No.

Question 2: Who should pay the costs of the special case?

Answer: The plaintiffs.

75 An effect of these answers is that the issues raised in the appeal concerning the interpretation and application of s 7(1) of the TIA Act have no consequences for the parties to the appeal other than with respect to costs. Of course, by leaving without final resolution by this Court the important issues concerning the interpretation and application of s 7(1) there will remain residual uncertainty for an applicant seeking a warrant in related circumstances in the future. Nevertheless, and in light of the proper concession made by the plaintiffs, special leave to appeal should be revoked.

