



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

CD

First Plaintiff

TB

Second Plaintiff

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and

THE COMMONWEALTH OF AUSTRALIA

Defendant

**PLAINTIFFS’
OUTLINE OF ORAL SUBMISSIONS**

Part I: INTERNET PUBLICATION

These submissions are suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. **Question 1:** The plaintiffs' contention that ss 5, 6 and 7 of the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) (**Confirmation Act**) are an invalid exercise by the Parliament of the judicial power of the Commonwealth involves four interrelated propositions:

- 1) determining whether a communication has been unlawfully intercepted under the *Telecommunications (Interception and Access) Act 1979* (Cth) (**Interception Act**) is a question of fact (or at least a question of mixed fact and law);
- 2) section 5(1) of the Confirmation Act is a legislative declaration of fact in a pending controversy and is not an evidential provision regulating practice and procedure of the sort in *Nicholas* (1998) 193 CLR 173 {**Vol 3, Tab 15, 578**}
- 3) the quelling of controversies by the ascertainment of facts and by the application of the law to those facts is an essential function of the judicial power of the Commonwealth; and
- 4) the Commonwealth Parliament may not exercise the judicial power of the Commonwealth nor legislate so as to impair the institutional integrity of courts exercising the judicial power of the Commonwealth.

2. **The Confirmation Act:** The primary object of the Confirmation Act is to establish that communications sent through the ANOM application ('relevant warrant' (s 4)) and covertly copied to the AFP were 'not intercepted while passing over a telecommunication system': s 3(a) {**PS [13]**}. That object is achieved by s 5(1) which, relevantly, provides that information/records obtained under a 'relevant warrant' (see s 4) are 'taken for all purposes not to have been, and always not to have been, intercepted while passing over a telecommunication system' {**PS [14]**}. 'Taken for all purposes' is a familiar device used in "validating legislation". However, s 5(1) does not operate by reference to facts *ascertained*; it purports to establish the fact ("no interception") then attaches legal consequences {**PS 15**}. 'Intercepting a communication passing over...' and 'intercepted while passing over...' in s 5(1) are defined (s 4) by reference to the Interception Act.

3. Sections 5(2) and 5(3) immunise 'conduct' and 'evidence' that, but for subsection (1), may have been challenged {**PS [16]-[17]**}. Section 6(1) adopts a similar drafting

technique and declares information/records to have been obtained under the specified statutory provisions. Section 6 is parasitic upon s 5(1). It does not purport to immunise information obtained under a warrant where the information/records were the result of an interception. The Confirmation Act purports to apply retrospectively (s 7) {**PS** [21]}.

4. **(1) Interception is a question of fact** Determining whether information/records resulted from an interception involves the determination of a number of interrelated facts: (i) is there a ‘communication’; (ii) in its passage (cf Interception Act, s 5F); (iii) a ‘telecommunication system’; (iv) forming part of a ‘telecommunications network’; (v) that is within (or partly within) Australia; (vi) without the knowledge of the person making the communication; (vii) was the communication obtained from ‘equipment’/‘telecommunications device’ forming part of the ‘telecommunications system.’ Those were all matters addressed by reference to evidence in the judgments appealed in A24 of 2024. That is not to deny that a conclusion will be drawn from ascertaining those facts, but that conclusion of “no interception” does not arise in a factual vacuum {**PS** [15], [23]-[25], [40]-[41]; **PR** [7]-[8]; cf **DS** [12]}.

5. **(2) Section 5(1) is a declaration of fact** Section 5(1) is to be characterised by reference to its legal and practical operation. The legal and practical operation is to quell the controversy in A24 of 2024 by conclusively determining there to have not been an interception. That this conclusion involves a factual determination is evident from the respondents’ reliance on the functionality of the ANOM application and the findings on the expert evidence in the appeal. That undermines the defendant’s assertion that deeming there to be no interception is merely the legal characterisation of facts as found. The assertion begs the question, what facts as found does s 5(1) operate upon? It can only be the facts found concerning the functionality of the ANOM application. That is a far cry from ‘disregarding’ previous facts as in *Nicholas* and does not operate on an earlier decision as in *Duncan* {**PS** [15], [40]-[41]; **PR** [7]-[8]}.

6. At the very least, the question must be one of mixed fact and law, given the construction of ‘sent or transmitted’ as words of ordinary meaning {**DPP** [46]-[47]}.

7. **(3) Ascertainment of facts an essential function of judicial power.** Section 5(1) is thus properly characterised as a declaration of fact, rather than a provision merely regulating matters of evidence or practice and procedure. The plaintiffs accept that

Parliament may legislate with respect to evidential matters as held in *Nicholas* and affirmed in *Graham* {**PS** [28]-[31]; **Vol 3, Tabs 15 and 13** respectively}.

8. *Nicholas* is distinguishable. The statutory provision in *Nicholas* not only expressly preserved judicial discretion to exclude evidence and thus had a more confined operation (unlike ss 5(2), 5(3), 6(2) and 6(3)), but required courts to ‘disregard’ a previously ascertained fact, namely, that an offence had been committed. ‘Disregarding’ a previously ascertained fact is akin to attaching a new legal consequence to a previously ascertained fact {**PS** [28]-[31]; **PR** [15]; cf **DS** [37]-[41]}. The Confirmation Act does not adopt that approach. *AEU*, *Duncan* and *Lazarus* are also distinguishable because they did not purport to legislate a fact regardless of evidence or judicial adjudication {**PR** [9]-[13], [15], **Vol 3, Tabs 10, 11 and Vol 5, Tab 19**}.

9. **(4) Legislature cannot exercise judicial power or impair integrity of courts.** Save for whether s 5(1) is a declaration of fact and/or is to be characterised as regulating matters of practice and procedure as in *Nicholas*, there is no dispute that the Commonwealth Parliament cannot exercise the judicial power of the Commonwealth. This case does not involve the related question of whether State Parliaments may exercise judicial power.

10. **Question 2:** Question 2 is premised on a combination of factors, including an affirmative answer to Q1 {**PR** [17]}. The further factors (select cohort of cases thus establishing two legal regimes for determining interceptions; rendering futile any application seeking exclusion) together reduce the role of courts to the merest of formalities, such that the legislation is appropriately characterised as cloaking a targeted legislative outcome in the neutral colours of judicial action {**PR** [17]}.

Dated: 12 May 2025



Bret Walker