



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 Appellant

TB

Second Appellant

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and

DIRECTOR OF PUBLIC PROSECUTIONS (SA)

First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA

Second Respondent

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APPELLANTS'

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

Revocation of special leave

1. Revocation of special leave is dependent on the validity of the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) in A2 of 2025 {**AR** [2]-[6]}.

Ground 1

2. **Primary issue:** The primary issue is whether communications, in the form of text messages, were obtained as a result of an unlawful interception within the meaning of s 7(1) read with ss 6(1) and 5F of the *Telecommunications (Interception and Access) Act 1979* (Cth) (**Act**). The trial judge and the Court of Appeal erred in failing to find that the covert copying of the ANOM messages and the sending of those messages (with additional data) to AFP recipients was an interception of communications under the Act.
3. The communications in issue, the ANOM messages copied by the AFP, were created within the statutory window of time identified in s 5F of the Act. That is because the copies were created after the user of the telecommunications device (a smartphone with the ANOM application loaded onto it) sent the message and before it was available to the intended recipient of the message.
4. **Factual context:** The background facts, including the manner in which the ANOM application was designed to operate, as set out by the Court of Appeal is agreed {**ACAB** 70-71, [21]-[24]; **AS** [8]-[9], [11], [13]}. The ANOM application was developed with the assistance of the AFP and a controlled operation authorised the AFP to facilitate the distribution of ANOM-enabled phones to various persons of interest. The AFP received copies of the ANOM messages, which were ultimately accessed from computer servers in Australia. This occurred between October 2018 and June 2021 {**ACAB** 70, [17]}. The appellants were charged with various offences under State law and the DPP intend to adduce the ANOM message to prove those charges. The appellants contend that the messages were intercepted and the prohibition on ‘dealing’ in the information (s 63) and admissibility (s 77) apply {**AS** [14]}.
5. **Statutory context:** Subject to exceptions not presently relevant, s 7(1) of the Act prohibits interception of ‘communications passing over a telecommunication system’.

Section 6(1) identifies that an ‘interception of 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 determines when a communication is passing over a telecommunications system. It is a deeming provision (*‘is taken to start’* and *‘is taken to continue to pass...until’*) identifying points in time, namely: (i) when the communication is sent or transmitted by the person sending it; and (ii) when it is accessible to the intended recipient. Sections 5G and 5H identify the ‘intended recipient’ and when a communication is accessible to that recipient respectively.

6. Other relevant defined terms: ‘communication’, ‘telecommunications device’, ‘telecommunications network’, ‘telecommunications service’, ‘telecommunications system’, ‘equipment’, ‘record’ and ‘stored communication’ are each defined in s 5(1). Further ‘passing over’ and ‘intended recipient’ are defined in s 5(1) by reference to s 5F and 5G respectively.

7. **Argument:** By reference to the aforementioned definitional terms, the appellants submit that the AN0M messages were ‘communications’ (text, data and/or signals) sent or transmitted by means of an application that formed part of the ‘telecommunications device’ (AN0M-enabled smartphone) with both the application and the device being ‘equipment’ that formed part of the ‘telecommunications system’ {**AS** [28]; **ACAB** 104 [178]}.

8. The terms of the Act are meant to be ‘technologically neutral’ {**AS** [21]; Blunn Report [1.1.5] **AFM** 44}. That is, the Act is directed to providing an objective and uniform measure to determine whether a communication has been intercepted. That is to be contrasted with the approach adopted below where the question was resolved by reference to the way in which the AN0M application functioned {eg, **ACAB** (TJ) 38 [94]-[95], 40-41 [99]-[103]; (CA) 77-78 [60]-[67]; 98 [158]; 103 [176]; 107 [193], 109 [[199]-[200]}. This technologically specific analysis was premised on a finding of fact that data copied in its transit in the ‘layers’ in the application was not ‘in its passage’ and that ‘passage’ commenced when the data reached the ‘physical layer’ {**ACAB** 110 [202]; 114-115 [213]}, despite the expert evidence that once the user had pressed ‘send’ the process was instantaneous, irreversible and beyond their control {**AR** [12] and fn

5}. If an approach informed by expert evidence were to be adopted, regard to the critical quality of the instantaneous nature of the process was necessary.

9. The words ‘sent or transmitted’ in s 5F(a) are not defined. They are to be given their ordinary meaning within the composite phrase ‘sent or transmitted by the person sending’. The ordinary meaning of the verb ‘send’ focuses on acts which initiate and contribute to the process of transmission of a thing or object to a particular place: *Pinkstone* (2004) 219 CLR 444 at 463 [51] (McHugh and Gummow JJ) {**AS** [30]; **Vol 3, Tab 9** at 756-757}. The initiating act, pressing ‘send’, conforms with the entirety of the composite phrase in s 5F(a), namely, the words ‘*by the person sending the communication*’. Even if the composite phrase is construed to include ordinary and technical meanings (the technical meaning focusing on the act which sends the message – pressing send), the result is a realistic construction avoiding the artificiality of disaggregating the application’s programming code. Such a construction is neither asynchronous nor absurd {**DPP** [30] **A-G** [44]}. The premise of the appellants’ submission is that the ANOM messages were copied in the period between 5F(a) and 5F(b). There is no lacuna to suggest a message, or its passage, was ever in abeyance.
10. **Ground 2:** The ‘intended recipient’ was not the AFP’s “iBot” server, the latter being a covert recipient. Read in context, the *intended* recipient is the address inserted by the person sending the communication identified in s 5F(a). That is not only consistent with the text and context but serves the broader “privacy” purpose served by the Act {cf **DPP** [41]}. It also renders certain the point in time identified in s 5H(1).
11. **Notice of Contention:** Contrary to **A-G** [64], a finding that the ANOM messages were ‘intercepted’ does not render an absurd construction of ‘equipment’ or any other provision {**AR** [14]-[15]; and **ACAB** 103-4, [176]-[178]}. It is hardly surprising that the use of a messaging application on a phone is part of the telecommunications system. Likewise, it is hardly surprising that the covert copying of a message upon its being sent and before it was available to the intended recipient is an interception.

Dated: 13 May 2025



Bret Walker