



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

and

COMMONWEALTH OF AUSTRALIA

Defendant

INTERVENER'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: BASIS OF INTERVENTION

2. The Director of Public Prosecutions (SA) (**the Director**) seeks leave to intervene in support of the Defendant.
3. Leave to intervene is sought on the basis of the impact of the claim of invalidity of the *Surveillance Legislation (Confirmation of Application) Act 2024* (Cth) (**the Confirmation Act**) on prosecutions for which the Director is the prosecuting authority. The Confirmation Act was passed after the grant of special leave in the appeal A24/2024 in which the Director is the first respondent. It was assented to and came into operation on 10 December 2024.
4. The Confirmation Act provides, properly construed, that for the class of "relevant warrants" defined in s 4, the exclusionary evidentiary rule in s 77 of the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIAA**) does not apply to information or records obtained under those relevant warrants, and that information and records obtained in reliance on the "relevant warrants" is taken to have been regularly obtained under the relevant provisions of the *Surveillance Devices Act 2004* (Cth) (**SDA**), and *Crimes Act 1914* (Cth) (**Crimes Act**).

5. The validity of the Confirmation Act will directly impact the appeal proceedings in A24/2024 and at least 45 prosecutions¹ for major indictable offending (all of which are adjourned pending the outcomes of the appeal 24/2024 and this proceeding); and for which the Director is the prosecutor.

Part III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

6. The principles relating to non-party intervention in this Court are settled.² It must be demonstrated that the non-party's interests will be affected. Where the non-party has a direct legal interest, they are entitled to intervene to protect the interest likely to be affected.
7. The Director has a direct legal interest in the Court's determination of the construction and validity of the Confirmation Act. The Act will, subject to determining the effect of its construction and validity, provide a complete answer to the questions raised in the appeal A24/2024 and any similar questions raised in prosecutions that will involve evidence of information or records obtained under a "relevant warrant" under the Confirmation Act that could otherwise be subject to the exclusionary rule in s 77 of the TIAA. The Confirmation Act provides the basis for the Director's application in the matter A24/2024 that special leave to appeal ought be rescinded.
8. For the above reasons the outcome of this proceeding will have a direct impact on the appeal in A24/2024 as well as the prosecutions, currently in abeyance, in South Australia for which the Director is the prosecuting authority affected by the specific questions of admissibility which the Confirmation Act affects.
9. The Director's intervention, and position in these submissions, will not materially impact the parties' preparation for hearing or the length of the oral hearing itself. It may assist the Court in reaching a correct determination of the questions raised by the Plaintiffs, particularly in exploring the practical effect of the Confirmation Act.³

¹ See Part B of the special case stated. See also the affidavit of Dominic Agresta supporting application for directions filed 24 February 2025 at [6] and annexure "DA2".

² *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, especially [2]-[6]; *Levy v Victoria* (1997) 189 CLR 579 at 600-605.

³ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [4].

Part IV: INTERVENER'S SUBMISSIONS

10. The material facts are set out in Part IV of the Defendant's submissions. The Director observes the appeal A24 of 2024 and this proceeding relate to "Chapter One" of 17 Chapters of pre-trial litigation, largely relating to questions relating to admissibility of evidence, before Kimber J pursuant to Rule 39 of the *Joint Criminal Rules 2022* (SA).

The text, context and purpose of the Confirmation Act

11. Consideration of the Confirmation Act, and any question about its validity, must commence with its construction. Once the legal and practical effect⁴ of the Confirmation Act is properly outlined, it is appropriate to turn to its validity.
12. For the reasons that follow, the Confirmation Act provides that the evidential rule in s 77 of the TIAA is not engaged in litigation involving information and records obtained under a "relevant warrant", and provides that information or records obtained in reliance on warrants under the SDA and Crimes Act were obtained lawfully under the SDA and Crimes Act. It applies generally, and retrospectively,⁵ including in the trials of any person where information and records obtained under "relevant warrants" form part of the evidence sought to be led.
13. Sections 5 and 6 of the Confirmation Act have three relevant aspects:
 - a. The first aspect of s 5 relates to information or records obtained under a "relevant warrant", and provides in s 5(1) that any such information was not intercepted while passing over a telecommunications system, or obtained by intercepting a communication passing over a telecommunications system (within the meaning of the TIAA). The first aspect of s 6, contained in s 6(1), provides that information or records obtained in reliance on a "relevant warrant" was obtained under a warrant regularly issued under the SDA, and Crimes Act.

⁴ See, eg, *South Australia v Totani* (2010) 242 CLR 1 at [138].

⁵ Or "retroactively", noting that difference in terminology does not involve a difference in principle: *Stephens v The Queen* (2022) 273 CLR 635 at [31].

- b. The second and third aspects are in ss 5(2) and 6(2) and 5(3) and 6(3) respectively, and provide for the validity, lawfulness and propriety of acts done and evidence obtained to “flow on” from the first aspect. These make express what would otherwise be consequences of the operation of the first aspect. Section 7 provides that the Confirmation Act has retrospective operation, including in pending litigation such as this matter.⁶

Section 5(1): information or records obtained pursuant to statutory powers

14. The first aspect requires consideration of a number of interrelated statutory concepts. The starting point in s 5(1) is that it attaches to information or a record obtained under a particular power, pursuant to a warrant of a particular kind, which permits a warrant holder to obtain that information or record in a particular way. The “relevant warrants” are those issued under the SDA or Crimes Act contained in s 4. It may be observed that the first aspect of s 5 is directed toward concepts under the TIAA, given s 4 provides that the phrases “intercepting a communication passing over a telecommunications system” and “intercepted while passing over a telecommunications system” have the same meaning as in the TIAA. This is consistent with the first object of the Confirmation Act.⁷
15. The ANOM communications sought to be led by the DPP at the trial of the Plaintiffs are “information, or a record” obtained under a relevant warrant. The ordinary meaning of “information” is broad, namely, “knowledge communicated or received concerning some fact or circumstance” or “knowledge on various subjects, however acquired”.⁸ The ordinary meaning of “record” includes “information or knowledge preserved in writing or the like”.⁹ Where it appears in any Commonwealth Act, “record” includes information stored or recorded by means of a computer.¹⁰

⁶ Cf *H A Bachrach v Queensland* (1998) 195 CLR 547 at [19]; *The King v Kidman* (1915) 20 CLR 425; *Nicholas v The Queen* (1998) 193 CLR 173.

⁷ *Surveillance Devices (Confirmation of Application) Act 2024* (Cth), s 3(a).

⁸ *Macquarie Dictionary* (7 ed; online as at 23 April 2025).

⁹ *Macquarie Dictionary* (7 ed; online as at 23 April 2025). “Record” in the Confirmation Act will include a “record” within the meaning of that term in s 5 of the TIAA.

¹⁰ *Acts Interpretation Act 1901* (Cth), s 2B.

16. The “relevant warrants” are governed by the SDA¹¹ and Crimes Act¹² which regulate the manner in which coercive power may be used to gather certain information, ensuring statutory powers are exercised only under the relevant justifying conditions.¹³ Each relevantly requires the issuing authority to hold a suspicion on reasonable grounds (generally relating to the commission of offences)¹⁴ before the warrant may issue.¹⁵ The “relevant warrants” authorised the Australian Federal Police to access information and records (relevantly the ANOM communications) pursuant to surveillance device warrants and computer access warrants under the SDA and to obtain a second set of data pursuant to warrants under the Crimes Act.
17. Sections 5(1)(a) and (b) impact the status of the information or records obtained pursuant to the authority outlined above. Sections 5(1)(a) and (b) provide that the legal status of the information or record is taken “for all purposes” not to have been, and always not to have been, intercepted while passing over a telecommunications system, and not to have been, and always not to have been, information or a record obtained by intercepting a communication passing over a telecommunications system. As noted above, section 4 provides that those phrases have the same meaning as in the TIAA.
18. This status is significant in the statutory context of the TIAA, which forms part of a coherent scheme for the protection of telecommunications infrastructure and carefully regulates the interception of communications passing over a telecommunications system as defined in that Act.¹⁶

¹¹ *Surveillance Devices Act 2004* (Cth), Part 2 Division 2.

¹² *Crimes Act 1914* (Cth), Part IAA Division 2.

¹³ *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at [23]-[28].

¹⁴ See, eg, the various matters contained in *Surveillance Devices Act 2004* (Cth), ss 14 and 27A and *Crimes Act 1914* (Cth), s 3E.

¹⁵ See, eg, *Surveillance Devices Act 2004* (Cth), s 16; *Crimes Act 1914* (Cth), s 3E.

¹⁶ The construction of that Act, and the text, context and purpose of the relevant provisions, are the central focus of the appeal proceedings A24/2024 and were considered in detail by Kimber J and the CoA.

Section 77 TIAA and the legal and practical effect of the Confirmation Act on the TIAA: an “evidential rule” and the other rules of evidence that would otherwise apply

19. The scheme of the TIAA provides that communications that are “passing over a telecommunications system” shall not be intercepted, other than in circumstances contemplated by that Act, and in those circumstances, only pursuant to a warrant obtained under Chapter 2. Section 77 of the TIAA contains an evidential rule; that unless information or a record is obtained as provided by the scheme of that Act, then “...neither information, nor a record, obtained by the interception is admissible in evidence in a proceeding.”¹⁷ There is no discretion: the Parliament has provided a carefully calibrated set of powers and evidential rules that apply to circumstances where a communication has, within the meaning of the TIAA, been “intercepted” when “passing over a telecommunications system”. The evidentiary rule in s 77 represents the legislative balancing of the public interests applying to communications obtained while passing over a telecommunications system, within the meaning of that phrase in the TIAA.
20. The relevant parts of the TIAA are adjectival, providing rules relating to the admissibility of information or records that may otherwise disclose relevant evidence of offences and may be highly probative of the issues in dispute. This is particularly so where information or records obtained under a relevant warrant might be admissible pursuant to the “co-conspirator’s rule”.¹⁸
21. The Confirmation Act was enacted in the above statutory context, and cognizant of the significance of whether information or a record was, within the meaning of the TIAA, “intercepted while passing over a telecommunications system” and hence within the proscribed operation of the evidential rule that Parliament had determined represented the appropriate balancing of the relevant public policy considerations in s 77 of the TIAA.

¹⁷ *Telecommunications (Interception and Access) Act 1979* (Cth), s 77. See also Part 2-6 and ss 63(1)(b) and (2)(d) regulating the communication, sharing and use of information and records so obtained.

¹⁸ See *Ahern v The Queen* (1998) 165 CLR 87; *Tripodi v The Queen* (1961) 104 CLR 1.

22. The practical and legal effect of the first aspect of s 5(1) is to provide that information or records with which the Confirmation Act is concerned¹⁹ were *not* obtained in circumstances prohibited by s 7 of the TIAA and so do not attract the consequence of inadmissibility in s 77 of that Act.

The legal and practical effect of s 6(1): regularising acts done or purportedly done in reliance of the authority of warrants under the SDA and Crimes Act

23. While s 5(1) has the consequence that s 77 of the TIAA does not apply, the question may arise²⁰ whether the information or record was obtained with the relevant authority under the SDA or Crimes Act (i.e. was nonetheless obtained unlawfully or improperly). Sections 6(1)(a)-(c) operate on information or records obtained in reliance (or purported reliance) on a relevant warrant. They provide that the information or record is taken to have been obtained lawfully under a warrant under the SDA and Crimes Act on the relevant statutory criteria.
24. This has the effect that certain information or records are taken to have been obtained under a particular type of warrant, regularly issued under the SDA or Crimes Act. This is consistent with the second object of the Confirmation Act articulated in s 3(b). The scope of s 6(1) is tethered to information or records in fact obtained “in reliance” (or purported reliance) on a warrant under the SDA or Crimes Act. As a result, it is only engaged in circumstances where a person was acting in reliance on a specified warrant. Put another way, it does not deem all information or records obtained under a “relevant warrant” to have been obtained with lawful authority, only those obtained in reliance or purported reliance on a warrant.
25. This reveals that the practical and legal effect of the first aspect of the Confirmation Act is to provide that information or records obtained under a relevant warrant do not attract the consequence of inadmissibility in s 77 of the TIAA, and is taken to have been obtained under the relevant lawful authority under the SDA or Crimes Act. This is consistent with the two objects of the Confirmation Act outlined in s 3(a) and (b): confirming that information obtained under the “relevant warrants” was not done in circumstances attracting

¹⁹ Namely those obtained under a “relevant warrant” as defined in s 4.

²⁰ In connection with *Bunning v Cross* (1978) 151 CLR 54 or s 138 of the *Evidence Act 1994* (Cth).

s 77 of the TIAA (s 3(a)) and that information obtained in reliance under the “relevant warrants” issued under the SDA and Crimes Act was obtained under a regularly issued warrant (s 3(b)).

The reach of the first aspect: “purportedly” under and in “purported” reliance

26. The first aspect of s 5(1) attaches to information or records “obtained under” or “purportedly under” a relevant warrant. The use of the device “purportedly under” is to attach consequences to information or records if they were in fact obtained, but not in law obtained under a relevant authority. An equivalent device is deployed in s 6(1).
27. The effect of that device is to ensure information or records that were in fact obtained, but possibly without the lawful authorisation of the warrants, are attributed the legal consequences in s 5(1)(a) and (b), and s 6(1)(a)-(c), regardless. This broadens the scope of the first aspect of the Confirmation Act to attach to information and records whether there was in fact a properly drawn and executed warrant or not. The effect of the first aspect of s 6(1)(a)-(c) is to provide clarification that even if the authority for the particular “relevant warrant” in s 4 was inadequate, but in fact relied upon, that it is “...taken for all purposes to have been, and always to have been” obtained under the relevant statutory provision with the requisite criteria met.

A consequence of the first aspect: the resulting construction leads to the same conclusion as that reached by Kimber J and the CoA: the ANOM communications are admissible

28. The above demonstrates that the practical and legal effect of the first aspect of ss 5 and 6 will have the same consequence as the construction of the provisions of the SDA, TIAA and Crimes Act reached in the courts below.²¹ So understood, the Parliament has embraced, rather than sought to reverse, the effect of a court’s order.²²

²¹ Hansard, House of Representatives, Thursday 21 November 2024, 38 (Hon M Dreyfus KC). See also the *Surveillance Legislation (Confirmation of Application) Bill 2024* revised explanatory memorandum: 2-3, 4.

²² Cf, eg, *Duncan v ICAC* (2015) 256 CLR 83; *The Queen v Humby; Ex Parte Rooney* (1973) 129 CLR 231.

The second aspect: “flow on” effect of the first aspect – validation of “things done”

29. The second aspect of ss 5 and 6 makes express, “for the avoidance of doubt”, the legal consequences of things done in connection with “relevant warrants”. The Director observes that, in making that consequence express, Parliament has ensured the principle of legality does not operate to otherwise confine the consequence of the first aspect.²³
30. Its terms make clear it is to “...avoid doubt”, and does so by, in ss 5(1) and 6(1), deploying the drafting device of referring to information obtained “...purportedly under” and acts done in “...purported reliance”, and in ss 5(2) and 6(2) by reference to things “...purported to have been done”. This aspect operates on information obtained or acts done even if done in circumstances “...devoid of legal effect.”²⁴ This does not disturb the fact the information was obtained or acts were done on a particular basis; they remain as “acts in the law” or as a relevant “factum” to which the Confirmation Act ascribes particular legal consequences.²⁵
31. The second aspect operates to make express that acts done, or purportedly done, in reliance, or purported reliance, on a relevant warrant that would – were it not for the first aspect of the Confirmation Act – be wholly, or partly, invalid or unlawful are valid and lawful. That it applies “...for all purposes” and to “...purported” acts means it is broad, and its terms contemplate that it is so despite any effect that validation might have “...on the accrued rights of any person.” That is a clear statement that the Confirmation Act has retrospective operation.²⁶ The second aspect applies to decisions made, powers exercised, functions performed, obligations complied with and duties discharged in

²³ See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [15]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [11].

²⁴ *AEU v Fair Work Australia & Ors* (2012) 246 CLR 117 at [38]; see also *Duncan v ICAC* (2015) 256 CLR 83 at [40].

²⁵ *Duncan v ICAC* (2015) 256 CLR 83 at [14]; See also *The Queen v Humby; Ex Parte Rooney* (1973) 129 CLR 231; *Re Macks & Ors; Ex Parte Saint* (2000) 204 CLR 158; *Haskins v Commonwealth* (2011) 244 CLR 22; *AEU v Fair Work Australia & Ors* (2012) 246 CLR 117.

²⁶ *Nicholas v The Queen* (1998) 193 CLR 173 at [59]; *Stephens v The Queen* (2022) 273 CLR 635 at [31].

connection with the first aspect, consistent with the broad definition of “do a thing” in s 4.

The third aspect: “flow on” effect of the first two aspects – lawfulness and propriety of evidence obtained

32. The third aspect, contained in ss 5(3) and 6(3), makes express the legal consequences of things done that would (apart from the first aspect of the Confirmation Act) otherwise have been in contravention of Australian law or done improperly, as being taken “...not to have been, and always not to have been”, in contravention of Australian law, or improperly done. It does not attach to illegality or impropriety that would exist other than the effect of ss 5(1) and 6(1) respectively. This primarily addresses the possibility of discretionary exclusion founded on illegality or impropriety.²⁷ It does not impact any other challenge to the admissibility of the evidence (including as to its relevance, potential prejudicial effect²⁸ or “general unfairness”²⁹), or of other substantive questions about its effect in proceedings that might be considered on any application to stay proceedings as an abuse of process.³⁰
33. The terms of the third aspect operate independently, and explicate what would be an effect of the first aspect of the Confirmation Act in altering the circumstances relevant to the application of existing legal principles or doctrines, primarily relating to the exclusion of evidence.

The consequences of the second and third aspects

34. The drafting devices in the second and third aspects are apt retrospectively to create, by reference to “purported” acts, the legal consequences of a regularly issued and operating warrant, and to alter the curial analysis of the legality and propriety of the receipt of information or records and acts done in connection

²⁷ *Bunning v Cross* (1978) 151 CLR 54; *Evidence Act 1994* (Cth), s 138.

²⁸ See, eg, *R v Christie* [1914] AC 545.

²⁹ See, eg, *Police v Dunstall* (2015) 256 CLR 403.

³⁰ See *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325.

with the information or records.³¹ The above construction is supported by the secondary materials.³²

35. The second and third aspects of the Confirmation Act are “avoidance of doubt” provisions and make express what would otherwise be consequences of the first aspect.³³ Acts done, or purportedly done, by persons that would, if not for the first aspect, have been invalid or lawful are taken to be valid and lawful and always have been valid and lawful, ensuring that the clarification provided by the first aspect “flows through” to the subsequent aspects, including, in the third, expressly clarifying there is no derivative impropriety or illegality relevant to evidence obtained under a relevant warrant that would arise if it were not for the first aspect in each of ss 5(1) and 6(1).³⁴

Construction of the Confirmation Act: conclusion

36. The text, context and purpose of the Confirmation Act reveal that, consistently with its objects in s 3, it disengages an existing evidential rule (s 77 TIAA) from application to information of a particular kind, obtained under specified warrants, issued under a particular statutory regime, permitting access to that information in a particular way. It also provides that information or records obtained in reliance on specified warrants are taken to have been, and always have been, obtained under a warrant under the relevant Act. Each of those matters then has the consequences made explicit in the second and third aspects of the Confirmation Act outlined above.
37. The Confirmation Act does not conclusively determine exclusively judicial controversies, but instead operates to provide that information or records obtained under a “relevant warrant” do not attract the operation of the

³¹ Such as those construed in *The Queen v Humby; Ex Parte Rooney* (1973) 129 CLR 231 and the following line of authority.

³² Hansard, House of Representatives, Thursday 21 November 2024, 38 (Hon M Dreyfus KC). See also the *Surveillance Legislation (Confirmation of Application) Bill 2024* revised explanatory memorandum: 2-3, 5-7.

³³ They make the consequence “irresistibly clear”, see, eg *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [119], [125], [158]; see also D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (8th ed, Butterworths, 2014) at 12.27.

³⁴ See *Surveillance Legislation (Confirmation of Application) Bill 2024* revised explanatory memorandum: 10-11, [15]-[16], [19]-[20].

evidentiary rule in s 77 of the TIAA and were obtained under a warrant regularly issued under the SDA or Crimes Act.

The Confirmation Act: subject matter and bases of validity

38. The Confirmation Act deploys the drafting technique considered by this Court in the line of authority commencing with *The Queen v Humby*.³⁵
39. The controversy that the Confirmation Act relates to is proof of guilt of crimes charged on Information laid in a competent court,³⁶ engaging that court's jurisdiction. The act of laying the Information marks the call upon the empowered tribunal vested with judicial power to take action.³⁷ The practical and legal effect of the Confirmation Act deals with steps in the practice and procedure governing the exercise of judicial power, rather than the exercise of judicial power itself.³⁸ It determines no right, entitlement or interest.
40. The Director observes that the terms of s 7 of the Confirmation Act provide that the Act is applicable in both civil and criminal proceedings instituted before, on, or after, its commencement.
41. The Confirmation Act does not purport to determine conclusively the guilt of any person, or any element of any particular criminal offence. Instead, as outlined above, it confirms that the rule in s 77 TIAA is not engaged and that information and records obtained in reliance on a relevant warrant were obtained with lawful authority. It does so by adopting the legislative technique first upheld in *The Queen v Humby*³⁹ in respect of the applicability of the rule in s 77 of the TIAA and the authority under which information or records obtained in reliance or purported reliance of a relevant warrant were obtained under the SDA and Crimes Act. In doing so, it goes no further than the legislation considered in *Nicholas v The Queen*.⁴⁰

³⁵ *The Queen v Humby; Ex Parte Rooney* (1973) 129 CLR 231.

³⁶ *Criminal Procedure Act 1921* (SA), s 103.

³⁷ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357; *Lipohar v The Queen* (1999) 200 CLR 485.

³⁸ See *Nicholas v The Queen* (1998) 193 CLR 173 at [14]-[23].

³⁹ *The Queen v Humby; Ex Parte Rooney* (1973) 129 CLR 231 ("the *Humby* technique").

⁴⁰ *Nicholas v The Queen* (1998) 193 CLR 173.

42. The Director observes that the Confirmation Act also has application beyond the Plaintiffs' criminal trials. Consistent with s 7, it would apply in any civil litigation in which evidence of information or records obtained from a "relevant warrant" is sought to be led.⁴¹ Further, the terms of the Confirmation Act are not directed toward any person's guilt of any particular crime; it is not a bill of pains and penalties.⁴² As articulated above it addresses specific legal questions in s 5(1) and 6(1) respectively.

Validity: is the Confirmation Act an impermissible exercise by the Parliament of the judicial power of the Commonwealth?⁴³

The context in which the Confirmation Act is to be considered

43. The Confirmation Act impacts the status of information or records that might be evidence in proceedings, subject to the potential application of certain provisions of the TIAA (on the Plaintiffs' interpretation). If the information or records were subject to the common law, no question – save for relevance, or discretionary exclusion on bases other than relating to the matters addressed in ss 5(1) and 6(1) of the Confirmation Act – would arise about their admissibility in a trial of an alleged offence.
44. Hence, the question about the Confirmation Act's validity arises in a context where it relates to the rules of evidence that are otherwise validly regulated by Commonwealth Acts including the TIAA, and in trials in South Australia otherwise subject to the common law and the *Evidence Act 1929* (SA).

The Confirmation Act has no impact on the balance of the issues in the Plaintiffs' trials

45. In the Plaintiffs' trials, while the ANOM communications will be relevant to any joint criminal enterprise, the participants in that enterprise, and participation in that enterprise, other matters of proof will require evidence untouched by the Confirmation Act. As outlined in the Special Case,⁴⁴ the prosecution will need to, independently, prove issues including issues of identity and attribution, as

⁴¹ Including, for example, civil proceedings for confiscation or forfeiture of property or in connection with unexplained wealth, both "relevant proceedings" for the purposes of s 6F TIAA.

⁴² *Haskins v The Commonwealth* (2011) 244 CLR 22 at [25].

⁴³ Writ of summons at [33], Plaintiffs' written submissions at [39]-[48].

⁴⁴ See [12] of the Special Case Stated.

well as prove the elements of the offences themselves contrary to the provisions of the *Criminal Law Consolidation Act 1935* (SA) and *Firearms Act 2015* (SA). For example, matters relating to the existence of, and participation in, a criminal organisation, and possession of firearms, firearm parts and ammunition; and that, if possession of those firearms, firearm parts and ammunition is proved, that it was done without a relevant licence or permit, or without the approval of the Registrar of Firearms.

Fact, law and fact-finding

46. The Plaintiffs' challenge hinges on the characterization of the Confirmation Act as involving a factual determination as to whether information or records were "intercepted" for the purposes of the TIAA. The respondent contends that both Kimber J and the CoA's reasons reveal that determining whether there has been an interception for the purposes of the TIAA involves, at least, a mixed question of law and fact for which the construction of the relevant aspects of the TIAA are crucial. The characterization of the effect of s 5(1) and 6(1)(a) as wholly factual cannot be sustained.
47. That "intercepting a communication passing over a telecommunications system" and "intercepted while passing over a telecommunications system" are defined in s 4 of the Confirmation Act is significant to the Plaintiffs' claim that s 5(1) is solely a factual determination. That definition means that the effect s 5(1) has is upon the legal meaning of these phrases as deployed in the TIAA. The question of whether in the circumstances attending the "relevant warrants" the communications were "passing over a telecommunications system" must be considered in the relevant statutory context. That is a question of law, or at least, a mixed one of fact and law.⁴⁵

⁴⁵ In the sense discussed in *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [24]-[27], and *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8. See also *Collector of Customs v Agfa-Gevaert Ltd* (1986) 186 CLR 389 at 397 – to the extent the legal meaning of the terms of the TIAA are used in a sense other than in ordinary speech, questions surrounding that meaning will always be a question of law.

The relevant “justiciable controversy” for the Plaintiffs is whether guilt is proved

48. In any event, the Confirmation Act does not involve the adjudging and punishing of criminal guilt. The most important fact-finding function it is said invalidly to impact relates to whether, in matters involving a “relevant warrant”, there are, within the meaning of the TIAA, communications which have been “passing over” a telecommunications system. That controversy relates to a challenge to the admissibility of evidence of those communications in a trial. It is a question of adjectival law.⁴⁶
49. Justice Kimber’s ruling was on the *voir dire* and the CoA answered questions of law reserved pursuant to s 153 of the *Criminal Procedure Act 1921* (SA) arising from that *voir dire*. As outlined above, the legal and practical effect of the Confirmation Act is to disapply the rule in s 77 of the TIAA and provide that information obtained in reliance on a relevant warrant was done with lawful authority. This Court has previously held that the Legislative or Executive declaration facilitating proof of an element of an offence was not an exercise of judicial power, and that in any event the proof of the balance of the elements was to be done in the ordinary way.⁴⁷ The modification of the mode of proof in which the justiciable controversy of whether guilt is proved between an individual and the state does not involve any exercise by the Parliament of judicial power.⁴⁸ It neither proves an element of the offence, or an offence, nor has the effect of directing that an element of the offence be taken as proved.
50. The core exercise of judicial power – the adjudication and conclusive settlement of a dispute between parties as to the rights and duties under the law⁴⁹ – is not usurped by the Confirmation Act. The rights and duties impacted by the Confirmation Act relate to the legal meaning of parts of various legislative instruments governing, amongst other things, the collection and admissibility of evidence in connection with suspected criminal offending. It does not purport

⁴⁶ See, eg, *Nicholas v The Queen* (1998) 193 CLR 173 at [20]; see also *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at [122].

⁴⁷ See *Kuczborski v The Commonwealth* (2014) 254 CLR 51 at [234]–[235], [238].

⁴⁸ See *Magaming v The Queen* (2013) 252 CLR 381 at [63].

⁴⁹ See, eg, *Zines and Stellios* at pages 234–235; *Huddart, Parker & Co v Moorehead* (1909) 8 CLR 353 at 387.

to, or in fact, adjudicate guilt or direct punishment for certain crimes. It will remain for the Director in the trials of the Plaintiffs, and any other person impacted by the Confirmation Act, to present evidence to the tribunal of fact relevant to the elements of the offences on the Information, for it to be weighed in determining whether it proves, or assists in proof, of the elements of the offences charged according to the rules of evidence and procedure.

The Confirmation Act is a conservative instance of the “Humby” technique

51. The Confirmation Act has the effect of providing that the evidential rule in s 77 of the TIAA is not engaged for information and records obtained under a “relevant warrant.” In doing so, it adopts the same drafting device, originally from *Humby*, that was held to have been validly used in *Australian Education Union*⁵⁰ in circumstances where the equivalent provision, s 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) had the effect of validating the past registration of a particular body that had been declared invalid in *Australian Education Union v Lawler*.⁵¹ Similarly, a validating provision that used, in effect, the same drafting device, was upheld as valid in *Duncan v Independent Commission Against Corruption*.⁵² In this matter, as in those matters, there is no interference – purported or actual – with the record or orders of the courts below; judicial power is not exercised. The Confirmation Act does not direct findings or compel admission of evidence.
52. In *AEU*, French CJ, Crennan and Kiefel JJ held it was within the constitutional competence of the Parliament to pass a law which “...attaches new legal consequences to an act or event which the court had held, on the previous state of the law, not to attract such consequences.”⁵³ Here the relevant act or event is the obtaining of information or a record under or purportedly under a relevant warrant. Contrary to the Plaintiffs’ submission,⁵⁴ that is the pre-existing fact or decision to which legal consequences are attached.

⁵⁰ *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 (“*AEU*”).

⁵¹ *Australian Education Union v Lawler* (2008) 169 FCR 327.

⁵² *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83.

⁵³ *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at [53].

⁵⁴ Plaintiffs’ submissions at [14]-[15].

The Confirmation Act's regulation of fact-finding is procedural

53. It is not controversial that the Confirmation Act regulates a means or a method of proof. That does not mean it is invalid. Consistent with *Nicholas*,⁵⁵ applied in *Graham*,⁵⁶ the Parliament may, without offending Chapter III, and in a way that has a “serious outcome of proceedings”, regulate the method or burden of proving facts.⁵⁷
54. The impact of the Confirmation Act is not to usurp or replace a court’s fact-finding function (or a jury’s fact-finding function in its exercise of judicial power as the constitutional tribunal of fact at trial) but to prescribe the relevant rules and principles of evidence and procedure that regulate the admissibility of certain evidence (obtained under a “relevant warrant”) in a trial involving the exercise of judicial power.⁵⁸ There is substantial pedigree to laws that regulate the method or burden of proof of facts in criminal litigation.⁵⁹ Legislation that creates obligations (as a matter of fact) in other legislative contexts, including by way of “conclusive evidence” provisions, has also been held to be valid.⁶⁰
55. The Confirmation Act does not compel admission of any evidence, whether obtained under a “relevant warrant” or otherwise. Nor does it impact the application of other rules of evidence and procedure in litigation that would otherwise involve information or records obtained under a relevant warrant. In that litigation, courts will consider and apply the relevant rules of evidence and procedure in determining the controversies brought before them.
56. Consistent with *Nicholas* and *Graham*, that prescription does not result in invalidity. It is an example of the legitimate regulation of the regulation of the mode of proof of facts. It does so in a manner contemplated by Brennan CJ in

⁵⁵ *Nicholas v The Queen* (1998) 193 CLR 173.

⁵⁶ *Graham v Minister for Immigration* (2017) 263 CLR 1.

⁵⁷ *Graham v Minister for Immigration* (2017) 263 CLR 1 at [31]-[33].

⁵⁸ For example, the “co-conspirator’s rule”: *Ahern v The Queen* (1998) 165 CLR 87; *Tripodi v The Queen* (1961) 104 CLR 1.

⁵⁹ See, eg, the authorities collated by Brennan CJ in *Nicholas v The Queen* (1998) 193 CLR 173 at [23]-[25] including *Grassby v The Queen* (1989) 168 CLR 1 at 16; *The Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1 at 12; *Williamson v Ah On* (1926) 39 CLR 95 at 122, cf 108, 127; *Rodway v The Queen* (1990) 169 CLR 515 at 521.

⁶⁰ See *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at [51]-[52]; *Deputy Commissioner of Taxation v Buzadzic* (2019) 348 FLR 213 at [92], [94].

Nicholas that will “...facilitate the admission of evidence of material facts in aid of correct fact finding.”⁶¹

Validity: does the Confirmation Act impermissibly interfere with and undermine the institutional integrity of courts vested with federal jurisdiction?⁶²

The Confirmation Act is not ad hominem

57. The fact the Confirmation Act has a confined scope – its operation being tethered to the class of “relevant warrants” defined in s 4 – does not bespeak invalidity. The fact it applies to “relevant warrants” does not close the cohort of proceedings to which the Confirmation Act can apply. There is no basis in the fact that the Confirmation Act’s scope is limited to the “relevant warrants” to say that the Plaintiffs are the sole and direct “target” of the Act.⁶³

There is no “abolition” of discretionary powers

58. The Confirmation Act provides (in the class of matters where evidence is obtained in connection with a “relevant warrant”) that the evidentiary rule in s 77 of the TIAA is not engaged, and that information and records obtained, or acts done, in reliance on specified warrants issued under the SDA and Crimes Act were done with lawful authority. One consequence of that is that discretionary powers contingent on primary or derivative unlawful or improper conduct⁶⁴ will not be enlivened.
59. The powers remain, but will not be enlivened in the respects covered by ss 5-6 of the Confirmation Act. The Confirmation Act does not otherwise impact the ordinary course of litigation in matters involving relevant warrants. Its terms do not speak to any impact on the “general unfairness discretion”⁶⁵ or the power to

⁶¹ *Nicholas v The Queen* (1998) 193 CLR 173 at [21].

⁶² Writ of summons at [34], Plaintiffs’ written submissions at [49]-[54].

⁶³ *Nicholas v The Queen* (1998) 193 CLR 173 at [27]-[29], [57], [83]-[84], [163]-[167], [246]-[255]; *Baker v The Queen* (2004) 223 CLR 513 at [50].

⁶⁴ *Bunning v Cross* (1978) 141 CLR 54; *Ridgeway v The Queen* (1995) 184 CLR 19, *Evidence Act 1995* (Cth), s 138.

⁶⁵ See *Police v Dunstall* (2015) 256 CLR 403.

stay proceedings.⁶⁶ The Confirmation Act does not purport to abolish any law or principle applying to the admissibility or exclusion of evidence more broadly.

60. The aspect of the Confirmation Act addressing the lawfulness and propriety of acts done in connection with a relevant warrant has the effect of altering the balance of competing public interests on the questions of admissibility addressed by ss 5-6 in a way this Court has held is permissible.⁶⁷ In the third aspect of the Confirmation Act, for evidence obtained in connection with relevant warrants, the voice of the Parliament has validly declared "...where the balance of public interest lies."⁶⁸

The application to pending litigation is uncontroversial

61. The Director observes that the fact the Confirmation Act applies to pending litigation, even in this Court, does not represent any invalid interference with the judicial process relevant to the institutional integrity of courts vested with federal jurisdiction.⁶⁹ Parliament may act to affect and alter rights in pending litigation without interfering with judicial power or impairing the institutional integrity of courts.⁷⁰ Doing so does no violence to the decisional independence of the courts in proceedings in which the Confirmation Act applies.⁷¹

Courts will consider proceedings impacted by the Confirmation Act in the ordinary way

62. The courts who must apply the Confirmation Act are not impacted such that they "...no longer exhibit in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies."⁷² The Confirmation Act provides a legal meaning for aspects of certain legislative

⁶⁶ See *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325.

⁶⁷ *Nicholas v The Queen* (1998) 193 CLR 173 at [37], [55], [167] and [233]; *SDCV v Director-General of Security* (2022) 277 CLR 241 at [85], [90].

⁶⁸ *Nicholas v The Queen* (1998) 193 CLR 173 at [38].

⁶⁹ See, eg, *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [16]; *The King v Kidman* (1915) 20 CLR 425; *Nicholas v The Queen* (1998) 193 CLR 173.

⁷⁰ *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96.

⁷¹ *Totani v South Australia* (2010) 242 CLR 1 at [62]. See also [149], [236], [428], [436].

⁷² *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 76 at [63]. See also *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [100]-[105].

instruments relevant to evidence that will be tendered in aid of fact-finding in litigation. In that litigation, while the legal effect of the Confirmation Act will mean s 77 of the TIAA is not engaged in connection with information or records obtained under a relevant warrant in the litigation, and there will not be able to be a challenge to the legality of information or records obtained in reliance on a relevant warrant, the Confirmation Act's operation will not result in the court being "...enlisted or co-opted by the executive to perform a task which did not engage the courts' independent judicial power to quell controversies."⁷³ As articulated above, all other aspects of the criminal litigation, including and most importantly the resolution of the controversy of guilt of any offence, remain untouched by the Confirmation Act.

63. Similarly, the Confirmation Act does not usurp the role of the constitutional tribunal of fact in any criminal trial. The facts to be found on the basis of the evidence admitted at trial will remain a matter for a properly instructed jury.

Conclusion – validity

64. The Confirmation Act does not in any way usurp or interfere with the judicial power of the Commonwealth or interfere with or undermine the institutional integrity of courts exercising federal jurisdiction. The Confirmation Act is valid. The questions stated in (1)(a) and (b) of the Special Case ought to be answered in the negative.

Part V: TIME ESTIMATE

65. The Director estimates that 15 minutes would be required for the presentation of his oral argument.

Dated 24 April 2025



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⁷³ *TCL Air Conditioner (Zongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [105].

ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	<i>Constitution</i>		51(v), (xxxi), 71	Act in force at time	
2	<i>Surveillance (Confirmation of Application Act) 2024 (Cth)</i>	C2024A00130 Registered 12/12/2024	Whole Act	Act currently in force and at time of originating application	11 December 2024, being the date of commencement of the Act
3	<i>Telecommunications (Interception and Access) Act 1979 (Cth)</i>	Compilation No 108 Compilation Date: 13 December 2019 Includes amendments up to: Act No 124, 2019 Registered: 13 January 2020	5, 5F, 6(1), 6F, 7, 46, 61, 77	Act in force at time of decision of Court of Appeal	27 June 2024, being the date of the decision of the Court of Appeal
4	<i>Surveillance Devices Act 2004 (Cth)</i>	Compilation No 43 Compilation date: 30 June 2018 Includes amendments up to: Act No 67, 2018 Registered: 10 July 2018	Part 2 Division 2, 16, 27C	This was the version in force at the time of the issue of the "relevant warrants" in s 4 of the Confirmation Act	16 October 2018 – 3 March 2021 being the dates of issue of the "relevant warrants" in s 4 of the Confirmation Act
5	<i>Crimes Act 1914 (Cth)</i>	Compilation No 136 Compilation date: 17 February 2021 Includes amendments up to: Act No 3, 2021 Registered: 26 February 2021	Part IAA Division 2, 3E, 15GA(2)	This was the version in force at the time of the issue of the "relevant warrants" in s 4 of the Confirmation Act	13 August 2021, being the date of the first warrants issued pursuant to s 3E referred to in the Confirmation Act
6	<i>Evidence Act 1995 (Cth)</i>	Compilation No 34 Compilation	138	This is a current version applicable at	11 December 2024

		date: 1 September 2021 Includes amendments up to: Act no 13, 2021 Registered: 2 November 2021		the time of the passage of the Confirmation Act	
7	<i>Crimes Amendment (Controlled Operations) Act 1996 (Cth)</i>	C2004C01318 8 July 1996-9 March 2016 This Act, No 28 of 1996 was amended by Act No 41 of 2013 but has been repealed.	15X	This was the version in force at the time of the decision in <i>Nicholas v The Queen</i> (1998) 193 CLR 173.	2 February 1998
8	<i>Fair Work (Registered Organisations) Act 2009 (Cth)</i>	C2012C00244 This compilation was prepared on 24 January 2012 taking into account amendments up to Act No 46 of 2011	26A	This was the version in force at the time of the decision in <i>AEU v Fair Work Australia</i> (2012) 246 CLR 117	4 May 2012