



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
 SYDNEY REGISTRY

BETWEEN:

FARM TRANSPARENCY INTERNATIONAL LTD

First Plaintiff

CHRISTOPHER JAMES DELFORCE

Second Plaintiff

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and

STATE OF NEW SOUTH WALES

Defendant

DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS

20 **Part I: Publication**

1. This outline is in a form suitable for publication on the internet.

Part II: Argument

2. *The Special Case.* The Special Case, read in the context of the annexed affidavits upon which the plaintiffs rely at **SCB 30 ASC [12] and [16]**, is to be understood as demonstrating that the plaintiffs are prepared to publish footage of the treatment of animals in farming properties obtained by the second plaintiff or by others in contravention of s 8 of the Surveillance Devices Act 2007 (NSW) ("SD Act"), but wish to do so without the constraining effect of ss 11 and 12: **SCB 29 ASC [5](e)(i); SCB 30 ASC [10], [11], [14] and [15]; SCB 101 [10]; SCB 102 [19](b); SCB 104 [25] and [26]; SCB 177 [9] and [10]; SCB 191 [144], [145] and [149], and SCB 193 [159]**. It is unnecessary to consider ss 11 and 12 as engaged by ss 7 and 9 in order to resolve the plaintiffs' rights and liabilities in this matter: **DS [2]-[8], [11]-[15]**.
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3. ***The purpose of the SD Act.*** The purpose of the SD Act is to protect ‘privacy’, narrowly conceived in NSW as the interests created by ss 7-9 of the SD Act. Section 11 and 12 recognise ‘privacy’, narrowly conceived, is harmed when material obtained in contravention of ss 7-9 is possessed, communicated or published. Section 8 of the SD Act protects the interest in privacy arising out of the enjoyment of private property: see eg TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333 at [52] per Spigelman CJ; **DS [19]-[29], [35]-[40]**.
4. ***Construction of Section 11.*** Section 11 prohibits the communication or publication of a record or report of activity that has come to the person’s knowledge as a result of a violation of ss 7-9. As the plaintiffs concede at **Reply [3]**, the mental element to be inferred into s 11 makes only a small difference in the burden they postulate is imposed on political communication. But absent a contrary reason, a mental element is to be inferred. A mental element encompassing recklessness and actual knowledge reflects that surveillance material is of a nature that will give rise to an objective apprehension in a reasonable person that it has been obtained unlawfully. Strict or absolute liability therefore adds little to the deterrent scope of s 11: **DS [41]-[50]**.
5. ***The burden is insubstantial.*** The burden imposed by ss 11 and 12 on political communication is indirect and not substantial. Sections 11 and 12 apply only to unlawfully obtained surveillance. The prohibition is not content-based. Lawfully obtained surveillance material may be published without restriction: **DS [59]-[60]**.
6. ***The comparator Acts are not true alternatives to the SD Act.*** The plaintiffs argue that the lack of necessity of ss 11 and 12 is demonstrated by the ‘comparator Acts’ (being the Surveillance Devices Act 1999 (Vic) (“the Victorian Act”), the Surveillance Devices Act 2007 (NT), the Surveillance Devices Act 2016 (SA), the Surveillance Devices Act 1998 (WA) and the Invasion of Privacy Act 1971 (Qld). None of the comparator Acts provide an equally practicable alternative to the SD Act. They conceive of the mischief differently—by prohibiting the publication of “private activity” instead of tying the prohibition to an underlying unlawful act of surveillance—and their ‘public interest exceptions’ balance the conception native to each comparator Act. These differences reflect legislative choices as to how to render concrete the abstract conception of ‘privacy’: Wainwright v Home Office [2004] 2 AC 406 at [18]-[19], [33]; **DS [25]-[28], [56], [61], [68]-[71]**.

7. **Trespass.** The burden imposed by ss 11 and 12 as engaged by s 8 is only upon the political communication of material obtained through trespassory surveillance. Persons on property for a permitted purpose—such as would-be ‘whistleblower’ employees—are therefore not subject to ss 11 and 12 at all: Barker v The Queen (1994) 54 FCR 451 at 472F – 473A: **DS [40], [68]**.

8. **Comparison with private activity.** The comparator Acts burden political communications that involve ‘private activity.’ A private activity is “an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves”: see eg s 3 of the Victorian Act. That conception is broad and complicated: Pinto v Kinkela [2003] WASC 126 at [44]-[45]. However, activity on private property is not necessarily ‘private activity’, and so trespassory surveillance would not axiomatically be of ‘private activity’: ABC v Lenah Game Meats (2001) 208 CLR 199 at [42]-[43] per Gleeson CJ; **DS [69]**.

9. **Farming is not inevitably ‘private activity’.** A private activity must have “parties” and does not include, in Victoria, activity that occurs outside of a building. In those circumstances, a prohibition based on private activity would not apply to some farming activity: **DS [15], SCB 772-773**. The effect would be that the prohibition against publication would not apply at all, and the question of whether such publication is in the public interest would not arise.

10. **The ‘public interest’ exception would further reduce the protection offered to the privacy of property by a ‘private activity’ prohibition.** A public interest exception would be, in terms, a less effective protection of the interest in privacy created by s 8. This Court can infer that a public interest exception would incentivise farm trespass in NSW for the purposes of facilitating publication: **DS [11]-[14], [57]; SCB 696**.

11. **Sections 11 and 12 are adequate in their balance.** Privacy is an important constitutional value and its protection is accomplished by ss 11 and 12 in a narrow way. Public benefits cannot be pursued at all costs, particularly when its pursuit involves contraventions of s 8 and the cost is to significantly compromise the protection of privacy presently conferred by the SD Act: **DS [84]**.

30 Dated: 9 February 2022

M G Sexton SC SG

M W R Adams