



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**
(ACN 641 242 579)

First Plaintiff

CHRISTOPHER JAMES DELFORCE

Second Plaintiff

AND: **STATE OF NEW SOUTH WALES**
Defendant

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**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
COMMONWEALTH (INTERVENING)**

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Proper construction of s 11 of the *Surveillance Devices Act*

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2. Section 11 of the *Surveillance Devices Act 2007* (NSW) (NSW Act) (JBA 1, Tab 1) operates distributively by reference to other provisions in Part 2. It is appropriate to focus on the construction of s 11 as it is engaged by s 8 (Cth [6]-[13]).

3. The offence provision in s 11(1) contains two external elements: the act of publishing or communicating to any person a record or report of the carrying on of an activity (*first element*), and the circumstance that the matter published or communicated came to the person's knowledge as a direct or indirect result of the use of an optical surveillance device in contravention of s 8 (*second element*).

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4. Applying the general principles of criminal responsibility, it is to be presumed that each external element is accompanied by a fault element. With respect to s 11(1), the position is presumed to be that the first element must be accompanied by an intention to do the relevant act, and the second element must be accompanied by knowledge of the circumstance that makes doing the act an offence (Cth [14]-[20]). It is for the plaintiffs

to displace that presumption: *He Kaw Teh* (1985) 157 CLR 523 at 582 (**JBA 4, Tab 25**).

Implied freedom of political communication

5. **Burden:** It is important to identify precisely the extent of the burden imposed, as that calibrates the justification inquiry: *LibertyWorks v Commonwealth* (2021) 95 ALJR 490 (**JBA 8, Tab 48**) at [63], [94], [136].
6. The relevant burden is the incremental effect of the impugned law on the ability of a person to engage in the communication which the law prohibits (**Cth [24]-[30]**).
 - *Levy* (1997) 189 CLR 579 at 622, 625-626 (McHugh J) (**JBA 4, Tab 30**).
 - *Mulholland* (2004) 220 CLR 181 at [108] (McHugh J), [184] (Gummow and Hayne JJ), [337] (Callinan J), [354] (Heydon J) (**JBA 5, Tab 33**).
 - *Brown* (2017) 261 CLR 328 at [109] (Kiefel CJ, Bell and Keane JJ), [181], [188] (Gageler J), [259] (Nettle J), [357], [393], [397], [411], [420] (Gordon J), [557], [558], [566] (Edelman J) (**JBA 3, Tab 18**).
7. In this case, ss 11 and 12 of the NSW Act burden political communication only to the extent that, but for those provisions, a person would otherwise have been free to engage in the communication that it prohibits. For that reason, it is significant that the general law already restricts the ability of a person to publish information obtained as a direct or indirect result of trespass in two relevant respects.
8. *First*, private activities recorded in consequence of a trespass may have the necessary quality of “confidence” such that their publication could be restrained pursuant to the law of breach of confidence: *Lenah Game Meats* (2001) 208 CLR 199 at [39], [43], [47], [52]-[55] (Gleeson CJ) (**JBA 2, Tab 15**).
9. *Second*, the jurisdiction to grant an injunction against trespass may extend to granting an injunction against the publication of the products of trespass even if the information is not confidential: *Meagher, Gummow and Lehane* (5th ed, 2015) at [21-110] (**JBA 11, Tab 61**).
10. There is at least significant overlap between those general law restraints on publishing the products of trespass and the conduct prohibited by s 11 of the NSW Act. It is only to the extent that the prohibition in s 11 of that Act is wider than those general law doctrines that it requires justification (**Cth [33]-[34]**).

11. **Necessity:** The purported alternatives identified by the plaintiffs are not obvious and compelling alternatives that are equally practicable and available, and that would result in a significantly lesser burden on the implied freedom: cf *Comcare v Banerji* (2019) 267 CLR 373 at [35] (**JBA 3, Tab 21**). In part, that is because where the burden on the implied freedom is slight, it will ordinarily be impossible to establish that an alternative measure would impose a significantly less burden on the freedom.
12. There are key differences between the comparator legislative schemes and the NSW Act. In particular, the public interest exception in the *Surveillance Devices Act 1999* (Vic) (**JBA 1, Tab 12**) limits an offence that prohibits publication only of a record or report of a private activity made as a direct or indirect result of the use of an optical surveillance device. There is no equivalent “private activity” limitation in the NSW Act. As a result, the Victorian and NSW prohibitions present fundamentally different starting points for the analysis (**Cth [46]-[47]**). For that reason, it cannot be said that the Victorian Act imposes a significantly lesser burden than the NSW Act simply because the former contains a public interest exception, whereas the latter does not. Rather, the differences between these schemes illustrate that there may be a range of permissible legislative alternatives to address the same legitimate purpose (**Cth [48]-[49], [51]**).

Severance

13. If ss 11 and 12 of the NSW Act infringe the implied freedom in some of their operations, s 31(2) of the *Interpretation Act 1987* (NSW) (**JBA 1, Tab 7**) requires the Court to preserve as much of their valid operation as possible. Only those operations of ss 11 and 12 that infringe the constitutional limitation should be disapplied: *Clubb v Edwards* (2019) 267 CLR 171 (**JBA 3, Tab 19**) at [148]-[149] (Gageler J), [341]-[342] (Gordon J), [440] (Edelman J). As the implied freedom of political communication is a constitutional limitation on unjustified burdens on political communication, Questions 2 and 4 should be answered: “The section operates except to the extent that it imposes an unjustified burden on the freedom of political communication” (**Cth [58]-[62]**).

Dated: 10 February 2022

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Stephen Donaghue

Thomas Wood

Julia Wang