HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	S83/2021
File Title:	Farm Transparency International Ltd & Anor v. State of New S
Registry:	Sydney
Document filed:	Form 27F - (SA intervening) Outline of oral argument
Filing party:	Interveners
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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

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: CERTIFICATION

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

Part II: OUTLINE OF ORAL SUBMISSIONS

Only the incremental burden need be justified

2. Although the parties have agreed the impugned provisions of the *Surveillance Devices Act 2007* (NSW) (SD Act) impose an effective burden on the implied freedom, it is only the "incremental burden" effected by those provisions that requires justification. (SA [7]-[11])

The impugned provisions pursue a legitimate end

3. The illegitimate "ag gag" purpose contended for by the plaintiffs is not discerned at the appropriate level of generality. (SA [17])

4. Construed at the appropriate level of generality, the provisions can be seen to be directed towards a composite purpose of protecting against intrusions into privacy and intrusions into property rights. The plaintiffs have accepted that purposes related to privacy and property rights are legitimate. (SA [14]-[16]; PS [53], [55]; *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 537 [204] **JBA Vol 8, Tab 48**)

The impugned provisions are necessary

5. Pointing to legislation in Victoria, the Northern Territory and South Australia, the plaintiffs submit that in comparison the SD Act fails the test of necessity predominantly in light of the following two features: firstly, that the SD Act does not limit the prohibitions to only private activities; and secondly, that the SD Act does not contain a public interest exception. (PS [65], [71], [74], [75])

6. With respect to the first, it is not apparent that the proffered alternatives, which only prohibit the publication or communication of private activities, share the same composite purpose as the impugned provisions. (SA [24], [26], [27])

7. With respect to the second, the proffered alternatives, which contain a public interest exception, do not achieve the purpose of the impugned provisions to the same extent.

8. The various State legislatures can, and have, made different policy choices about the extent to which they pursue their respective purposes. While the policy choice made by the Parliament of New South Wales to pursue its purpose to a greater extent, and so not to include a public interest exception, increases the extent of the burden, that is not fatal at the necessity stage. The implied freedom is not a "trump over other values". (SA [28]-[29]; *Comcare v Banerji* (2019) 267 CLR 373, 442 [165] **JBA Vol 3, Tab 21**)

The impugned provisions are adequate in their balance

9. At the adequacy in the balance stage, the Court's task is not to decide whether the
10 policy choice made by the Parliament of New South Wales has struck an "ideal" balance. Rather, its role is to supervise the rationality of the choices made by the Parliament. (SA [32]-[33]; *Clubb v Edwards* 267 CLR 171, 199-200 [66], [69] **JBA Vol 3, Tab 19**)

10. The incremental burden effected by the impugned provisions, when assessed by reference to the significant purposes they pursue, is not so grossly disproportionate as to manifest irrationality. (SA [35])

Dated: 10 February 2022

20 ……..

M J Wait SC