



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: S83/2021  
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Registry: Sydney  
Document filed: Form 27F - (WA) Outline of oral argument  
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#### Important Information

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**IN THE HIGH COURT OF AUSTRALIA**  
**SYDNEY REGISTRY**

B E T W E E N:

**FARM TRANSPARENCY INTERNATIONAL LTD**  
**(ACN 641 242 579)**  
First Plaintiff

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**CHRISTOPHER JAMES DELFORCE**  
Second Plaintiff

AND

**STATE OF NEW SOUTH WALES**  
Defendant

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**ORAL OUTLINE OF SUBMISSIONS ON BEHALF OF THE ATTORNEY**  
**GENERAL FOR WESTERN AUSTRALIA (INTERVENING)**

**PART I: SUITABILITY FOR PUBLICATION**

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

**PART II: ORAL OUTLINE**

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2. The plaintiffs seek to: trespass upon private land; install, use and maintain optical surveillance devices upon that land (contrary to s 8 of the SD Act); and publish the resulting surveillance records (contrary to s 11 and 12 of the SD Act).
3. The critical question is whether legislation (such as ss 11 and 12 of the SD Act) burdens the implied freedom where it prohibits communication of material which has been independently obtained by trespass. The answer should be "no".

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**Issue 1: Scope of the questions to be determined by this Court**

4. The amended special case only provides a sufficient factual basis to support a challenge to ss 11 and 12 as engaged by section 8 of the SD Act. The plaintiffs' rights and liabilities are not affected by ss 11 and 12 as engaged by ss 7 or 9. The plaintiffs accept this: Reply [2].

**Issue 2: There is no freedom to obtain surveillance records by trespass, nor to publish any records so obtained**

5. Contrary to the plaintiff's oral submissions, there is a live issue about whether there is any burden at all upon a freedom or ability (whether by a trespasser or a third party) to communicate surveillance records obtained by trespass.
6. The implied freedom of political communication is an implied constitutional limit upon statutory power, and does not create any private law right enforceable by an individual: *Lange v Australian Broadcasting Corporation* at 560, 567 (JBA 4, tab 29); *Levy v Victoria* at 625-626 (JBA 4, tab 30).
- 10 7. No implication of a freedom from legislative interference with the ability to communicate surveillance records obtained by trespass should be made, as this would be inconsistent with the constitutional assumption of the rule of law necessary to prevent trespass occurring. See *Brown v Tasmania* at [491], [558] (JBA 3, tab 18) and *Kadir v The Queen* at [13] (JBA 4, tab 26).

**Issue 3: The validity of sections 11 and 12 of the SD Act applying the *McCloy* test**

***Question 1: Identification of a burden on the implied freedom***

8. The *McCloy* questions only arise if (contrary to issue 2) there is an implied freedom from legislative interference with the freedom or ability to communicate surveillance records obtained by trespass.

20 ***Question 2: Purpose of the law is legitimate***

9. The purposes of ss 11 and 12 of the SD Act are legitimate. They are: to recognise the interest of privacy to prevent wrongful surveillance; to deter contraventions of ss 7 to 9 of the SD Act; and to limit the damage to privacy caused by publication of wrongful surveillance.
10. The plaintiffs submit that the purpose of ss 11 and 12 is to dissuade farm trespass specifically, and to operate as an "ag-gag" law suppressing communication about agricultural practices. While this may be one effect of ss 11 and 12, it is not the same as their purpose: *McCloy v NSW* at [40] (JBA 5, tab 31).

**Question 3: Law is reasonably appropriate, adapted or proportionate**

11. Sections 11 and 12 adequately balance their legislative purpose with freedom of political communication:

(a) the balancing calculus allows a range of legislative outcomes without mandating that only one statutory model can be adopted: *Clubb v Edwards* at [69] (JBA 3, tab 19). It is a matter of legislative choice for each Parliament as to which model to adopt, so long as the legislation does not impose measures which are manifestly excessive by comparison to the legitimate purpose;

10 (b) the statutory primacy given to privacy over permitting publication of surveillance records which have been unlawfully obtained by a private citizen (rather than a public investigating officer) is one appropriate way of carrying out the balancing calculus. It does not create any new statutory right of privacy subject to public interest exceptions. Instead, it re-inforces existing property rights and has no effect upon surveillance which does not infringe these existing rights. This model is at least equally acceptable as the alternative, as it is based upon confirming the consequences of contravening recognised legal rights, rather than creating new statutory rights.

20 Dated: 10 February 2022




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J A Thomson SC




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G M Mullins