HIGH COURT OF AUSTRALIA

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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 27A - Appellant's submissions-Plaintiffs' Submissions
Filing party:	Plaintiffs
Date filed:	28 Oct 2021

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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
Respondent

PLAINTIFFS' SUBMISSIONS

Part I: CERTIFICATION

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

Part II: ISSUES

2. The issues in this case are:

   2.1. Does s 11 of the *Surveillance Devices Act 2007* (NSW) (**the SD Act**) impermissibly burden the implied freedom of political communication?

   2.2. If "yes" to Question 2.1, is that part of s 11 of the SD Act which impermissibly burdens the implied freedom severable from the remainder of s 11, pursuant to s 31(2) of the *Interpretation Act 1987* (NSW)?

   2.3. If "no" to Question 2.2, is s 11 of the SD Act severable from the SD Act?

   2.4. Does s 12 of the SD Act impermissibly burden the implied freedom?

   2.5. If "yes" to Question 2.4, is that part of s 12 of the SD Act which impermissibly burdens the implied freedom severable from the remainder of s 12?

2.6. If "no" to Question 2, is s 12 of the SD Act severable from the SD Act?

2.7. Who should pay costs?

Part III: SECTION 78B NOTICE

3. The plaintiffs have served Notices pursuant to s78B of the *Judiciary Act 1903* (Cth) on all State and Territory Attorneys-General.

Part IV: LEGISLATION

Surveillance devices working group

4. The SD Act is based on the model law on the use of surveillance devices developed by the Joint Working Group of the Standing Committee of Attorneys-General and the Australasian Police Ministers' Council on National Investigation Powers (**the JWG**).[1]

5. The JWG recommended (SCB 422):

> It is appropriate for there to be strict regulation on who may have access to information obtained from surveillance devices and for what purposes such information may be used. The Discussion Paper proposed a general prohibition against the use, communication or publication of 'protected information'.

6. The JWG recommended that the prohibition not extend to situations where the information has otherwise entered the public domain (SCB 424.5).

Surveillance Devices Act 2007 (NSW)

7. On 1 August 2008, the SD Act came into force. The objects of this Act are set out in s 2A of the SD Act, and are:

7.1. to provide law enforcement agencies with a comprehensive framework for the use of surveillance devices in criminal investigations;

[1] SC Annexure 9 p1 (SCB p 609); SC Annexure 5 (SCB p 288).

7.2. to enable law enforcement agencies to covertly gather evidence for the purposes of criminal prosecutions; and

7.3. to ensure that the privacy of individuals is not unnecessarily impinged upon by providing strict requirements around the installation, use and maintenance of surveillance devices.

8. The SD Act deals with a range of subject matter, including:

8.1. the installation, use and maintenance of surveillance devices (in Pt 2);

8.2. warrants for the installation, use and maintenance of surveillance devices (in Pt 3);

10 8.3. mutual recognition of warrants and other authorisations in relation to surveillance devices by other Australian polities (in Pt 4); and

8.4. compliance, enforcement and administration (in Pts 5 and 6).

Part 2 of the SD Act

9. Part 2 of the SD Act sets out offences for the installation, use and maintenance of various surveillance devices.

10. Section 7(1) prohibits a person from knowingly installing, using or maintaining a listening device to overhear, record, monitor or listen to a private conversation, whether or not a person was a party to that conversation. There are exceptions in ss 7(2), 7(3) and 7(4), which do not directly bear on the questions in this case.

20 11. Section 8(1) prohibits a person from knowingly installing, using or maintaining an optical surveillance device to record or observe the carrying on of an activity where the installation, use or maintenance involves entry to a property or vehicle without consent; or interference with a vehicle or other object without consent. There are exceptions in ss 8(2), 8(3) and 8(4) which do not directly bear on the questions in this case.

12. Sections 9 and 10 similarly prohibit knowing installation, use or maintenance of tracking devices and surveillance devices without relevant consent.

13. Section 11 prohibits publication or communication of a private conversation, or the carrying on of an activity, or a record thereof, if that knowledge (i.e., information or record) has been obtained, relevantly, in contravention of ss 7 or 8 of the SD Act.

14. Section 12 prohibits a person from possessing a record of a private conversation or the carrying on of an activity knowing that it has been obtained, directly or indirectly, by the use of a listening device or optical surveillance device in contravention of Pt 2.

15. Section 13 prohibits the manufacture, supply and possession of certain types of surveillance devices.

16. Section 14 prohibits the publication or communication of information obtained as a result of the use of a data surveillance device in contravention of Pt 2.

Sections 11 and 12 of the SD Act.

17. Sections 11 and 12 build upon the preceding offences in ss 7 and 8, in that they operate only where there has been non-compliance with ss 7 or 8.

18. The expression "private conversation" is defined in s 4, but neither the term "activity" nor the expression "carrying on of an activity" are defined. Importantly, there is no requirement that an "activity" be a *private* activity.

19. The word "knowledge" is used in the sense that involves a fusion of "conscious awareness" and "information". It requires a conscious awareness of a private conversation, or the record of the carrying on of an activity, as has been captured or stored by a surveillance device, or any report thereof (**surveillance device material**).

20. The prohibition in s 11(1) is in relation to publication or communication of surveillance device material in defined circumstances. Those defined circumstances are where that knowledge has "come to" that person "as a" direct or indirect result of the use of a surveillance device.

21. The stipulation "direct or indirect result" puts beyond doubt that the use of intermediaries or circuitous devices in the handling of surveillance device material

does not absolve the publisher of liability; there is no room for "plausible deniability".

22. Section 11 criminalises the "publication or communication" (**publication**) of both a 'record' and a 'report' of surveillance device material.[2] A "record" includes an audio, visual or digital record, or a documentary record prepared from the foregoing. A "report" goes further, and includes a report of the substance, meaning or purport of the conversation or activity. This catches "hearsay" uses, no matter how many degrees removed from the source.

23. The connection made in s 11(1) through the words "as a … result" is as between surveillance device material and the source of that material. It is a connection between the *surveillance device material* and *its* source, and not a connection between the surveillance device material and the publisher's knowledge of it being surveillance device material. That is, s 11(1) does not in terms require that the publisher know (or suspect) that the surveillance device material has come into existence as the direct or indirect result of the use of a surveillance device in contravention of Pt 2 of the SD Act.

24. The "knowledge" to which s 11(1) speaks is part of the *actus reus* of the offence.

25. That s 11(1) does not state any *mens rea* for the offence means that one turns to *He Kaw Teh*[3] to see if a *mens rea* is implied.

26. The plaintiffs submit that s 11(1) of the SD Act leaves no room for the implication of any *mens rea*. It creates an absolute prohibition, subject to tightly drawn exceptions in ss 11(2) and 11(3). An implication of a *mens rea* would substantially undermine the apparent legislative purpose, which is to prevent the dissemination of information obtained by the unlawful use of a surveillance device.

27. If a *mens rea* were implied, surveillance device material obtained in contravention of Pt 2 of the SD Act could be "sanitized", and then passed on to a publisher in a way that "insulates" the publisher from knowledge of the unlawful source. That is

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[2] SD Act s.4.

[3] *He Kaw Teh v The Queen* (1985) 157 CLR 523, 530 (Gibbs CJ).

especially so in relation to a "report" of surveillance device material. This would permit circuitous devices to be developed and allow for "plausible deniability". That would defeat that apparent legislative objectives. This points against the implication of any *mens rea*.

28. Practical considerations point the same way. Would the publisher (subjectively) need to know: (i) that the source of the surveillance device material is the result of the use of a surveillance device; (ii) that any such use of a surveillance device was in breach of Pt 2 of the SD Act; (iii) both? Would mere suspicion of the above be sufficient?

29. Point (i) alone is unlikely because it would create a disharmony between the *actus reus* and the *mens rea* – the *actus reus* applies only to *unlawfully* obtained surveillance device material, whereas point (i) would apply to all surveillance device material, obtained lawfully or unlawfully. But point (ii) is highly unlikely because a publisher is unlikely to know whether surveillance device material is the result of a contravention of ss 7 or 8 of the SD Act, since they will not usually have any information in relation to the exceptions in ss 7(2) and 8(2), and 7(3) and 8(3). That returns the attention to the possibility for "plausible deniability", undermining the legislative purpose.

30. This is not to argue for the most draconian construction available to increase the objectionability of a law (as is sometimes done in *Kable* cases). It is to identify the correct construction of the law before testing against the implied freedom.

31. The exceptions in s 11(2) are not directed to constitutional political communication, and do not relevantly ameliorate the burden on the freedom of political communication.

32. Section 11(3) is there as an abundance of caution. The prohibitions in ss 7-10 are not engaged in the circumstances contemplated by s 11(3). This provision is declaratory of what would have been implied in any event – that knowledge of a private conversation or activity obtained otherwise than in contravention of Pt 2 of the SD Act remains within the ordinary freedom to publish and communicate under Australian law. It is not a "carve out" to the offence.

33. Section 12(1) is a prohibition on the possession of a record of surveillance device material, *knowing* that it has been obtained in contravention of the SD Act. The offence is clear, as is its *mens rea* clear: a person must know that any record of surveillance device material that they possess has been obtained in breach of Pt 2 of the SD Act.

34. The structure of s 12(1) indicates that a person could come into possession of a record not knowing at the time of taking possession that the record was obtained in contravention of Pt 2 of the SD Act (and thus not be in breach of s 12(1)), but if they later *learn* that the record was obtained unlawfully, they commit the offence at the very moment when that comes into their knowledge. The offence would be committed, seemingly, prior to that person having an opportunity to dispose of the record.

35. In many situations where a person might seek to publish surveillance device material in the course of engaging in political communication, a breach of s 12(1) would occur prior to a breach of s 11(1).

Rejection of possible amendment to the SD Act

36. In 2018, the NSW Select Committee on Landowner Protection from Unauthorised Filming or Surveillance recommended that the NSW Government review the *Surveillance Devices Act 2007* to consider whether to insert a public interest exemption for unauthorised filming or surveillance,[4] noting that "there will continue to be circumstances where genuine whistleblowers will be the only way to expose animal cruelty".[5] In response, the NSW Government established a working group to consider the recommendation. The working group rejected a public interest exemption as it "risks encouraging people to unlawfully enter agricultural land in order to install or use optical surveillance devices to record purported animal cruelty".[6]

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[4] SC Annexure 23 (SCB p 954).
[5] SC Annexure 23 (SCB p 954); SCB 989, [3.53]ff.
[6] SC Annexure 19 (SCB p 709).

Part V: FACTS

37. The facts are set out in the SC. They do not require restatement.

38. The facts in the SC about the plaintiffs and their activities are relevant primarily to establish standing. Standing is conceded. In any event, the plaintiffs intend to engage in activities that would be in contravention of ss 11 and 12 of the SD Act,[7] and thus have a "sufficient interest" in the relief sought.[8]

39. It is necessary to mention that this case is not about the plaintiffs *per se*. It is about the law that is challenged. Whether the plaintiffs are viewed as admirable activists, or vulgar vigilantes, or something in between, is irrelevant. If anything, the case is about the publishers whose freedom to publish is curtailed.

Part VI: ARGUMENT

Relevant principles

40. In *LibertyWorks*, Steward J invited consideration as to whether implied freedom of political communication exists.[9] NSW has not taken up this invitation.

41. The implied freedom is a qualified limitation on legislative power to ensure that the people of the Commonwealth may exercise a free and informed choice as electors.[10] Whether a law exceeds the limitation depends on the answers to the three-part test as articulated in a series of cases, traced most recently in *Libertyworks*.[11] The test is:

    1. Does the law effectively burden the implied freedom in its terms, operation or effect?
    2. "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

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[7] Affidavit of Dorottya Kiss affirmed 3 September 2021 at SC Annexure 2 (SCB 98); Affidavit of Christopher James Delforce affirmed 2 September 2021 at SC Annexure 3 (SCB 175).
[8] *Croome v Tasmania* (1997) 191 CLR 119, 125.
[9] *LibertyWorks Inc v The Commonwealth* [2021] HCA 18 (***LibertyWorks***) [2021] HCA 18, [249] (Steward J).
[10] *Lange v ABC* (1997) 189 CLR 520, 560, *McCloy v NSW* (2015) 257 CLR 178 (***McCloy***), [101] (Gageler J).
[11] *McCloy*, 194-195; *LibertyWorks*, [45]-[46] (Kiefel CJ, Keane and Gleeson JJ), [200] (Edelman J).

3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

42. The third question may be examined by applying a three-stage structured proportionality enquiry, assessing whether the law is justified as suitable, necessary, and adequate.[12] If the answer is 'no' to any of these steps, then the law is invalid.

43. An alternative approach to the third question is to ask whether the law is "reasonably appropriate and adapted to advance that legitimate purpose in a manner consistent with the maintenance of the constitutionally prescribed system of government".[13]

Effective burden

44. Whether a law effectively burdens the implied freedom in its terms, operation or effect requires consideration of how the law "affects the freedom generally".[14] A "law which prohibits or limits political communication to any extent will generally be found to impose an effective burden on the implied freedom of political communication".[15]

45. In cases where a law imposes an effective burden on political communication, it is necessary to identify the nature and extent of the burden with precision, and the Court is required to consider the justification for *that* burden (cf. PS [31]).[16] Identification of the extent or weight of the burden is critical to applying the second and third steps.

46. Sections 11 and 12 of the SD Act burden the implied freedom, in a significant degree. It is an absolute prohibition on political communication in circumstances

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[12] *McCloy*, 193-196 [2]-[4] (French CJ, Kiefel, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171 (***Clubb***), 200-202 [70]-[74] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks*, [46].

[13] *LibertyWorks*, [134] (Gordon J), also [93] (Gageler J).

[14] *Unions NSW v NSW* (2013) 252 CLR 530, [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[15] *Comcare v Banerji* (2019) 93 ALJR 900 (***Banerji***), [29] (Kiefel CJ, Bell, Keane and Nettle JJ).

[16] *McCloy*, [127] (Gageler J), [68] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328, [90] (Kiefel CJ, Bell and Keane JJ), [180], [192]-[195] (Gageler J), [269] (Nettle J), [397] (Gordon J).

where the subject matter of the communication derives from a contravention of ss 7-10 of the SD Act. An absolute prohibition is always a significant burden.

Legislative purpose

47. The "purpose" of a law is what the law is designed to achieve or the mischief which the law is designed to address. It is to be ascertained by the text and context of the law,[17] which includes the historical background and any apparent social objectives.[18] As developed below, the legislative purpose may be "dynamic".

Balancing law enforcement with privacy

48. The SD Act seeks primarily to regulate the use of surveillance devices by law enforcement agencies.

49. The regular use, and the avoidance of abuse, of surveillance devices by law enforcement agencies, balanced against privacy interests, is a legitimate purpose.[19]

More general protection of privacy

50. The Court can take notice that at the time of its development and later commencement into force (between the years 2003-2008), surveillance devices were at a stage of technical development that they were beyond the easy reach of the ordinary citizen. Technology has moved along so far since the commencement of the SD Act that many people now carry a sophisticated surveillance device in their pocket.

51. This reality highlights a "dynamic" component to legislative purpose. Currently, it is fair to ascribe to the SD Act a more general concern with privacy, outside of the law enforcement context, arising from the technological developments mentioned above.

52. The possibility for dynamic identification of legislative purpose should be accepted as an available constitutional principle in situations where legislative purpose must

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[17] *Brown*, [100]-[101] (Kiefel CJ, Bell and Keane JJ), [209] (Gageler J), [321]-[322] (Gordon J); *McCloy*, [132] (Gageler J).
[18] *McCloy*, [132] (Gageler J), [232] (Nettle J), [320] (Gordon J); *Brown*, [321] (Gordon J).
[19] See also SC Annexure 5 (SCB pp 345-348).

be identified for constitutional purposes; it is an appropriate response to a fast-changing world.[20]

An alternative way to consider the same issue may be that the matters advanced in "justification" for a burden may be affected by the changing of the times.

53. This more general concern for privacy, in the age of pocket-sized surveillance devices, is also a legitimate purpose.

Disincentivising farm trespass; "ag-gag" law

54. On the dynamic approach to legislative purpose, ss 11 and 12 of the SD Act pursue the further purposes of dissuading "farm trespass" by depriving would-be farm trespassers of the publicity that seek to achieve for the "product" of their trespass (images, audio or video recordings of the treatment of animals).

55. The dissuasion of farm trespass may be accepted as a legitimate purpose (although that purpose is pursued disproportionately as set out below).

56. The SD Act also operates as an effective "gag" on communication about agricultural practices (outside of the farm trespass context). Sections 7-10 prohibit the use of a surveillance device where a person has lawfully entered land, premises, or a vehicle, and ss 11 and 12 prohibit publication in those circumstances.

57. This purpose is apparent as a matter of statutory construction, from the breadth of the prohibitions in ss 7-12, as well as from the agreed facts at SC [24] and Annexure 10 to the SC, and SC [37]-[39] and the annexures mentioned in those paragraphs.

58. Plainly, the SD Act is intended by the NSW Parliament to operate without any "public interest" (or other) exemption, to protect, amongst other things, the financial interests of farmers.[21]

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[20] William N Eskridge Jr, Dynamic Statutory Interpretation (Harvard University Press, 1994); Suzanne Corcoran "The Architecture of Interpretation: Dynamic Practice and Constitutional Principles" [2005] ELECD 8, in Corcoran, Suzanne; Bottomley, Stephen (eds), "Interpreting Statutes" (The Federation Press, 2005) 31; Stephen Gageler, "Legislative Intention" (2015) 41(1) Monash University Law Review 1, 14.

[21] SC Annexure 10 (SCB pp 627); SC Annexure 23; (SCB pp 971-974, 1001).

59. Images, audio, or video of animal agriculture, and their publication, is as important to the cause of animal welfare activism as is on-site protest to the environmental movement. The "ag-gag" purpose is the practical, socio-political, equivalent to a ban on on-site protests, as considered in *Brown v Tasmania*.[22] The "ag-gag" purpose is not a legitimate purpose consistent with the implied freedom.[23]

60. It is also worth mentioning that there is an obvious disconnect between disincentivising farm trespass and prohibiting communication. Disincentivisation of farm trespass may be achieved by increasing the penalty for breach of ss 7-10 if it occurs in the context of farm trespass, perhaps by an appropriately calibrated "aggravated" form of the offences in ss 7-10. The penalty could be as high as the death penalty. That could be done without imposing any burden on the implied freedom.

Proportionality

61. *Suitability*: a law is suitable, if it "exhibits a rational connection to its purpose", in the sense that "the means for which it provides are capable of realising that purpose".[24]

62. *Necessity*: a law remains valid unless there is an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom.[25]

63. *Adequacy in the balance*: a law is adequate in its balance unless the benefit sought to be achieved by the law is outweighed by the adverse detriment on the implied freedom.[26]

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[22] *Brown*, [33].
[23] *Brown*, [210] (Gageler J).
[24] *Banerji*, [33] (Kiefel CJ, Bell, Keane and Nettle JJ); *McCloy*, [80] (French CJ, Kiefel, Bell and Keane JJ).
[25] *Banerji*, [35] (Kiefel CJ, Bell, Keane and Nettle JJ).
[26] *Banerji*, [38] (Kiefel CJ, Bell, Keane and Nettle JJ); *Brown*, [290] (Nettle J).

Suitability

64. The plaintiffs accept that the SD Act, including ss 11 and 12 may be viewed as suitable in a general sense, in that its provisions achieve the legislative purpose.

Necessity

65. Sections 11-12 fail the test of necessity as there are compelling alternatives. This is exemplified by the legislation in Victoria, the Northern Territory, and South Australia, and to a lesser degree, the legislation in Western Australia and Queensland.

66. The *Surveillance Devices Act 1999* (Vic) (**the Victorian Act**) is an alternative model to ss 11-12 of the SD Act that is equally practical and available.

66.1. Sections 6-8 prohibit the knowing installation, use and maintenance of various surveillance devices. Section 9 prohibits unauthorised installation, use and maintenance of a data surveillance device by a law enforcement officer.

66.2. Section 11 prohibits a person to knowingly communicate or publish a record or report of a private conversation or private activity that has been made as a direct or indirect result of the use of listening device, optical surveillance device or tracking device.

66.3. The offence under s 11 of the Victorian Act is different to s 11 of the SD Act because it applies whether or not the recording has been made pursuant to a lawful, or unlawful, use of a surveillance device.

66.4. The Victorian Act is more closely aligned with the protection of individual privacy. It requires that any record or report of an activity be that of a 'private activity', which is defined to be an activity carried on in circumstances that may reasonably be taken to indicate that the parties desire it to be observed only by themselves. A 'private activity' does not include an activity carried on outside a building, or in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else.

66.5. Critically, in the Victorian Act:

i. Section 11(2)(b)(i) creates an exception to the offence for circumstances where a communication or publication is no more than is reasonably necessary in the public interest.

ii. There is no equivalent to section 12 of the SD Act in relation to possession of a record obtained in contravention of the Victorian Act.

67. The *Surveillance Devices Act 2007* (NT) (**the NT Act**) is an alternative model to ss 11-12 of the SD Act that is equally practical and available.

67.1. Sections 11-13 prohibit the knowing installation, use and maintenance of various surveillance devices. Section 15 prohibits a person from communicating or publishing a record or report of a private conversation or private activity knowing that the record or report has been made as a direct or indirect result of the use of a surveillance device. Section 15(1) makes it an offence to publish whether or not the recording was obtained lawfully or unlawfully.

67.2. Critically, the prohibition is subject to exceptions, including where a communication or publication is reasonably necessary in the public interest (s 15(2)(b)(i)).

67.3. Also, a 'private activity' is defined in the NT Act to mean an activity carried on in circumstances that may reasonably be taken to indicate the parties to the activity desire it to be observed only by themselves but does not include an activity carried on in circumstances in which the parties to the activity ought reasonably to expect the activity may be observed by someone else.

68. The *Surveillance Devices Act 2016* (SA) (**the SA Act**) is an alternative model to ss 11-12 of the SD Act that is equally practical and available.

68.1. The SA Act prohibits knowing installation, use and maintenance of a listening device, optical surveillance device, tracking device, and data surveillance device.

68.2. Section 12 prohibits knowing use, communication or publication of information or material derived from the use (whether by that person or another

person) of a surveillance device in contravention of the relevant part of the SA Act.

68.3. Similar to the Victorian Act, the prohibition on recording or observing the carrying on of an activity using an optical surveillance device is limited to a "private activity". A "private activity" means activities carried on either:

i. by only one person in circumstances that may reasonably be taken to indicate that the person does not desire it to be observed by any other person; or

ii. by more than one person in circumstances where at least one party desires it to be observed only by the other parties to the activity; and

iii. does not include an activity carried on in a public place, on or in premises or vehicles that can be observed from a public place, or in circumstances in which the person ought to reasonably to expect that it may be observed by some other person.

68.4. Critically, s 6 of the SA Act specifically allows for the use of a listening device and an optical surveillance device in the public interest. Sections 10 and 11 work to permit a person to use, communicate or publish information or material derived from the use of a surveillance device in the public interest pursuant to an order of a judge made under s 11.

69. The *Surveillance Devices Act 1998* (WA) (**the WA Act**) is an alternative model to ss 11-12 of the SD Act that is equally practical and available.

69.1. The WA Act prohibits the installation, use and maintenance of listening devices, optical surveillance devices and tracking devices. Section 9 prohibits a person from knowingly publishing or communicating a private conversation, or report or record of a private conversation or a private activity that has come to the persons knowledge as a direct and indirect result of the use of a listening optical surveillance device. A 'private activity' means any activity carried on in circumstances that may reasonably be taken to indicate that any of the parties

to the activity desires it to be observed only by themselves but does not include where the parties ought reasonably to expect that the activity may be observed.

69.2. Section 9(2)(a)(viii) exempts publication or communication in accordance with Pt 5 of the WA Act, which establishes a process for judicial authorisation of such publication or communication (subject to the limitation under s 9(3) of the WA Act). The procedure for judicial authorisation is limited to situations where the information has been obtained pursuant to the lawful use of a surveillance device.

69.3. Sections 28-29 set out an exemption to the prohibition on publication where the "matter is so serious and the matter is of such urgency that the use of the OSD is in the public interest". The notions of “seriousness” and “urgency” are obviously intended to have their primary operation in the law enforcement and public safety context. However, the construction of these provisions would take account of the implied freedom, and it is apparent that at least a substantial degree of political communication would be lawful under ss 28-29 of the WA Act.

70. The *Invasion of Privacy Act 1971* (Qld) (**the Qld Act**) is also an alternative model to ss 11-12 of the SD Act that is equally practical and available. The Qld Act goes further than the SD Act in restricting publication of material derived from a listening device (see ss 44-45), but the Qld Act does not limit the publication of material obtained using an optical surveillance device (it does not regulate optical surveillance devices at all).

Analysis of the Alternative Models

71. As can be seen from the above, the Victorian, NT, SA and WA Acts provide for a measure of political communication to occur. The Victorian, NT, and SA Acts exemplify a workable (and valid) carve-out which accommodates the implied freedom, whilst adequately addressing the purposes to which the SD Act is directed.

72. No doubt the defendant will place heavy reliance on the observation that the SD Act prohibits the publication of surveillance device material only where it has been obtained unlawfully, whereas the Victorian, NT and SA Acts prohibit publication of

all surveillance device material, whether obtained lawfully or unlawfully. Upon analysis, this is immaterial.

73. The prohibitions on publication under the SD Act, and the Victorian, NT and SA Acts can be divided into two types: (i) lawfully obtained surveillance device material; and (ii) unlawfully obtained surveillance device material.

74. The Victorian, NT and SA Acts impose a greater burden on political communication in relation to lawfully obtained surveillance device material than does the SD Act. The SD Act allows (essentially) unregulated publication or communication of lawfully obtained surveillance device material, whereas the Victorian, NT and SA Acts regulate such use.

75. But that is immaterial when it comes to *unlawfully* obtained surveillance device material, which is the premise of this case. The SD Act imposes a far greater burden on political communication in relation to unlawfully obtained surveillance device material than do the Victorian, NT and SA Acts.

76. *First*, the lack of regulation on the use of lawfully obtained surveillance device material is directed to reduce the burden on law enforcement. Under the SD Act, only "law enforcement officers" may apply for a warrant to use a surveillance device (s 17 of the SD Act). The same is true in Victoria (s 15 of the Victorian Act) and the Northern Territory (s 19 of the NT Act), and only officers of investigating agencies may apply for a warrant in South Australia (Pt 3 of the SA Act).

77. Thus, the SD Act burdening only unlawfully obtained surveillance device material is a *de minimis* relief of the burden on the implied freedom, as compared with legislation in Victoria, the Northern Territory and South Australia. That is especially so when one appreciates that law enforcement officers are unlikely, in the extreme, to seek to publish surveillance device material (to do so would likely prejudice operations).

78. The SD Act operates as an absolute prohibition on publication. This is highlighted by giving attention to the exceptions in s 11(2) of the SD Act. These exemptions would not even permit a person with footage of serious criminality to give that footage to police. Section 11(2)(b) of the SD Act would first require that there be an

imminent threat of serious violence or substantial damage to property, and such "imminence" might not be established easily (and who would take the risk?). It would also prohibit giving footage to police in cases of "less-than-serious" violence, including e.g., sweatshops staffed by unlawful non-citizens or unlawful logging or clearing of native flora. Nor would it permit giving footage to police in relation to non-imminent, or "less-than-serious" narcotics offences, or perhaps kidnapping offences.

Adequacy in the balance

79. To the extent that the Court reaches the question of adequacy in the balance, the objectives of ss 11-12 are pursued too zealously. This is not a case where ss 11 and 12 of the SD Act can be viewed as one choice, being more restrictive than other options, albeit all from within a range of valid options.

80. That is essentially because the blanket prohibition is too great a burden on speech, having regard to the legitimate social interests in the publication of surveillance device material, especially to "blow the whistle".

81. It is not to be overlooked that vigilantism cannot be condoned. But this is to highlight the importance of careful balancing – in each case – of where the public interest lies, which in turn, highlights the importance of a "public interest" exemption in legislation such as ss 11 and 12 of the SD Act.

82. The "Greyhound Live Baiting" scandal was brought to notoriety by a publication on 16 February 2015 by the Australian Broadcasting Corporation 'Four Corners' program. The ABC published an exposé featuring covertly obtained footage showing the use of live baits to train greyhounds in Queensland, NSW and Victoria.[27] The footage obtained in NSW was obtained in contravention of s 8 of the SD Act.[28]

83. This generated public debate, and Victoria, Queensland and NSW undertook inquiries into the greyhound racing industry. NSW established the Special

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[27] SC [41], Annexure 34 (SCB p 1420).
[28] *Kadir v The Queen* (2020) 267 CLR 109 (***Kadir***).

Commission of Inquiry into the Greyhound Racing Industry. Commissioner Michael McHugh AC QC delivered his report to the NSW government on 16 June 2016,[29] recommending that the NSW Parliament consider whether the industry has lost its social licence and should no longer be permitted to operate.[30] For a time, the industry in NSW was banned.

84. Although it arose in a different context, this Court in *Kadir* considered whether to allow evidence to be adduced in a criminal prosecution where that evidence was traced to a contravention of the SD Act. The Court held that the public interest required allowing some such evidence to be adduced, despite the need to discourage and deprecate breaches of the law (and vigilantism). The case highlights that the "public interest" may be served in publication of surveillance material obtained in contravention of the SD Act. At least, to keep that under judicial control as does the SA Act, does not undermine the legitimate purposes of surveillance device legislation.

85. It should be accepted that animal agricultural practices are a topic of political debate of considerable importance. Images, audio, or video of animal cruelty are compelling. Publication of such imagery is as central to animal welfare activism as is protesting on-site to the environmental movement.[31] The weight to be accorded to this consideration, in the balance, leaves ss 11 and 12 of the SD Act wanting.

Not appropriate and adapted

86. The above discussion establishes that ss 11 and 12 of the SD Act are not *reasonably adapted* to advance their purpose compatibly with the implied freedom; the provisions could easily be adapted to allow for some political communication in the public interest (at least, where a Judge finds that the publication is in the public interest). Failing to do so is too great a burden on the possibility for legitimate publication of surveillance device material that blows a whistle.

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[29] SC [44]-[45].
[30] SC Annexure 36 (SCB p 1865).
[31] *Brown*, [33].

Severance

87. If ss 11 and 12 of the SD Act are invalid, it is not possible to sever that part of their operation which impermissibly burdens the political communication from the rest of their operation. This kind of severance is sometimes called "reading down" – it is not possible to "read down" ss 11 and 12 so as to exclude political communication.[32]

88. Sections 11-12 are *intended* to apply to political communication. To sever this aspect of their operation is to undercut the choice made by Parliament. This Court should not do so, and instead, it should declare that the whole of ss 11 and 12 are invalid.

10 89. It is possible to sever the whole of ss 11 and 12 from the balance of the SD Act. That is a workable outcome, as it leaves in place the prohibitions under ss 7-10, as well as the balance of the SD Act. The NSW Parliament would have enacted the balance of the SD Act anyway, even without ss 11-12.

Part VI: ORDERS SOUGHT

90. The plaintiffs seek the relief set out in the statement of claim.

Part VII: TIME FOR ORAL ARGUMENT

91. The plaintiffs require up to 3 hours for oral submissions.

Dated: 27 October 2021

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[32] *Clubb*, [139]-[153] (Gageler J).

ANNEXURE

List of the particular constitutional provisions, statutes and statutory instruments referred to in the Plaintiffs' submissions including the correct version relevant to the case

	Title	Correct version
1.	*Surveillance Devices Act 2007* (NSW)	In force version
2.	*Judiciary Act 1903*	In force version
3.	*Surveillance Devices Act 1999* (Vic)	In force version
4.	*Surveillance Devices Act 2007* (NT)	In force version
5.	*Surveillance Devices Act 2016* (SA)	In force version
6.	*Surveillance Devices Act 1998* (WA)	In force version
7.	*Invasion of Privacy Act 1971* (Qld)	In force version