



HIGH COURT OF AUSTRALIA

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File Number: M105/2025
File Title: Farm Transparency International Limited v. The Game Meats C
Registry: Melbourne
Document filed: Form 27C - Intervener's submissions (of HRLC & AJF, seeking
Filing party: Intervener
Date filed: 19 Feb 2026

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

No. M105 of 2025

BETWEEN:

FARM TRANSPARENCY INTERNATIONAL LIMITED
Appellant

AND:

THE GAME MEATS COMPANY OF AUSTRALIA PTY LTD
Respondent

10 **SUBMISSIONS OF HUMAN RIGHTS LAW CENTRE AND ALLIANCE FOR
JOURNALISTS' FREEDOM FOR LEAVE TO BE HEARD AS *AMICI CURIAE***

I CERTIFICATION

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

II BASIS OF APPLICATION FOR LEAVE TO BE HEARD

1. The Human Rights Law Centre (**HRLC**) and Alliance for Journalists Freedom (**AJF**) jointly seek leave to be heard as *amici curiae* in this case.
2. The HRLC is an independent, not-for-profit, non-government organisation which operates to preserve, protect and advance human rights, including using legal action and advocacy: affidavit of Kieran Pender affirmed 19 February 2026 at [10]. It has often been granted leave, including in this Court, to make submissions as *amicus curiae* in cases affecting
20 human rights in Australia: Pender [11]. A particular aspect of the work of the HRLC relates to whistleblowing protection issues: Pender [8] and [12].
3. The Alliance for Journalists Freedom (**AJF**) is an independent advocacy group and registered charity which was established in 2017 to support press freedom in Australia and the broader Asia-Pacific region: affidavit of Peter Greste affirmed 19 February 2026 at [14]. The work of the AJF in this regard includes participation in reform (including law reform) with respect to press freedom in Australia and contributing to public debate and awareness on issues as to media freedom: Greste [15].
4. The HRLC and AJF seek leave to be heard on the basis that the interests of the *amici*, and broader public interest which they represent, may be affected by the decision of this Court.

Date of document: 19 February 2026 **Filed on behalf of:** Human Rights Law Centre and Alliance for Journalists' Freedom

III WHY LEAVE SHOULD BE GIVEN

5. The issues presented in this appeal include the principles to be applied to the grant of a non-monetary remedy to the tort of trespass to restrain publication of a copyright work obtained or derived from the commission of the tort.

6. The HRLC and AJF are able to offer a different, larger perspective, in particular with respect to the issues of the availability of injunctive relief for tortious wrong and imposition of a constructive trust, than the parties are otherwise able to offer.¹

7. The imposition of a constructive trust or the grant of injunctive relief, including as a consequence of the tort of trespass to restrain publication and/or transform ownership of material obtained or derived from the commission of the tort, are remedies which may significantly impinge upon the rights and interests of third parties.² Such relief has the potential to intersect with the interests of whistleblowers and news organisations, and by dint of the essential public functions served by both groups, the broader public: Pender at [14]-[27]; Greste at [16]-[23].

IV SUBMISSIONS

1. These submissions are made as to two points of principle: (i) a constructive trust should not be imposed if other orders are capable of doing full justice; (ii) if non-monetary relief (e.g., by way of injunction) is appropriate (such as where damages are an inadequate remedy or in case of extreme or very serious ongoing damage), considerations will include, among others, the balancing of public interests between, on the one hand, the rights of the applicant and, on the other, the public interest in freedom of expression, political communication and the media.

2. The intentional unjustified entry directly by a person on land in the possession of another is an actionable trespass.³ General damages may be awarded as vindication of the person's right to the exclusive use and occupation of the land.⁴ Exemplary damages may also be awarded as an expression of the Court's disapproval of the tortious conduct and, having regard to their punitive nature, to act as a general and specific deterrent against commission of similar conduct

¹ *Levy v Victoria* (1997) 189 CLR 579 at 604-605; *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [4]; see also *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 312.

² See, e.g., *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 458 (where his Honour acknowledged that case was “[i]n many ways...a most significant piece of litigation to citizens at large”).

³ *Entick v Carrington* (1765) 19 St. Tr. 1029 [95 ER 807]; *Plenty v Dillon* (1991) 171 CLR 635 at 639, 647.

⁴ *Plenty v Dillon* at 645, 655.

in the future.⁵ A plaintiff ordinarily does not obtain an injunction for actionable wrongs for which damages are the proper remedy.⁶

3. Copyright may be brought into existence in any number of ways in connexion with a trespass. A person walking across or through a property without permission may take notes, draw sketches or paintings or take photographs, giving rise to literary works or artistic works.⁷ Footage may be captured in ways giving rise to a cinematograph film,⁸ as part of an exercise in confrontation journalism⁹ or surreptitious surveillance.¹⁰ Further, copyright material, whether created in such a way or already in existence, may form part of the process of creation of new and varied original works or subject-matter in which copyright separately subsists, such as artworks, stories, articles, exposés and documentaries, and whose dissemination by publication (in its ordinary meaning), broadcast, streaming or via the internet may involve an exercise of one or more rights comprised in the copyright¹¹ in circumstances where neither their creation nor dissemination would be an infringement¹² because it does not involve a substantial part of

⁵ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 158; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471-472; *Lamb v Cotogno* (1987) 164 CLR 1 at 9; *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [15].

⁶ *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [33]; *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at [177]; [149], [156].

⁷ *Copyright Act*, Pt III (Copyright in original works), ss 31 (nature), 32 (subsistence), 33 (duration) and 35 (ownership).

⁸ *Copyright Act 1968* (Cth), Pt IV (Copyright in subject matter other than works), ss 86 (nature of copyright in cinematograph films), 90 (subsistence), 93 (duration) and 97 (ownership).

⁹ As was the case in *Lincoln Hunt, Emcorp Pty Ltd v Australian Broadcasting Corporation* [1986] 2 Qd R 169, *Church of Scientology Inc v Transmedia Productions Pty Ltd* (1987) Aust Torts Reports ¶80-101, *Heritage Real Estate Pty Ltd v Australian Broadcasting Corporation* (Supreme Court of NSW (Sharpe J), 21 July 1992, unreported); *Rinsale Pty Ltd v Australian Broadcasting Corporation* (1993) Aust Torts Reports ¶81-231. Each of these concerned an application for interlocutory injunctive relief.

¹⁰ As was the case in *Takhar v Animal Liberation SA Inc* [2000] SASC 400, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 and *Windridge Farm Pty Ltd v Grassi* (2011) 254 FLR 87. Of these, only *Windridge* was a final hearing.

¹¹ For original works, reproduction in a material form, first publication or communication of the work to the public (i.e., to make available online or electronically transmit) (s 31(1)(a)(i), (ii) and (iv)), and s 10 (“communicate” and “to the public”); for cinematograph films, making of a copy or communication of the film to the public (s 86); for broadcast, making respectively a film or sound recording, re-broadcasting or communication to the public (s 87).

¹² *Copyright Act*, ss 14, 36 and 101.

the copyright material,¹³ it was expressly or impliedly licensed,¹⁴ or by the operation of a statutory defence.¹⁵

4. The following points should be made. *First*, and against the background of notorious advances in technology, it must be remembered that the mere generation of text, images or footage may not, of itself, result in copyright because original works require a human author¹⁶ and cinematograph films require a maker.¹⁷ While this does not arise here as subsistence and ownership of copyright was admitted,¹⁸ it serves to focus attention on the need, in any given case, to consider the availability of remedies other than the imposition of a constructive trust in respect of proprietary interests.

10 5. *Secondly*, care should be taken not to conflate underlying interests with the rights afforded by copyright. The diverse ways in which copyright material may be created, in varying degrees of proximity to or remoteness from the commission of an initial unlawful act, exposes the potential divergence of interests between, on the one hand, a wronged person and, on the other, a copyright owner. Those interests may range from avoiding scrutiny (informed or otherwise), exposing impropriety or wrongdoing (moral, ethical or allegedly criminal), advancing political opinions or promoting discussion and debate. Where they diverge or are in conflict, the distribution of copyright material may promote or hinder those respective interests. This potential clash of underlying interests, however, should not be conflated with the

¹³ *Copyright Act*, s 14.

¹⁴ *Realestate.com.au Pty Ltd v Hardingham* (2022) 277 CLR 115 at [98], citing *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525 at 533; *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 276 CLR 170 at [90]. See also *Copyright Act*, s 196(4) which provides that a licence granted in respect of a copyright by the owner of the copyright binds every successor in title to the interest in the copyright of the grantor of the licence to the same extent as the licence was binding on the grantor.

¹⁵ Fair dealings for purposes of research or study (s 40, s 103C), criticism or review (s 41, s 103A), parody or satire (s 41A, s103AA), reporting news (s 42, s 103B) or a judicial proceeding or professional advice (s 43, s 104).

A non-statutory common law defence of public interest would likely not be available under the *Copyright Act*. In *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 56-57, Mason J assumed, without deciding, the availability of such a defence to infringement of copyright but noted its limited scope as making “*legitimate the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm*”. In *Collier Constructions Pty Ltd v Foskett* (1990) 97 ALR 460 at 471-474, after reviewing the statutory history and authorities, Gummow J, in obiter, would have held that there is no such defence known at law. The point has not been authoritatively decided by the High Court.

¹⁶ *Copyright Act*, s 32; *IceTV Pty Ltd v Nine Networks Australia Pty Ltd* (2009) 239 CLR 458 at [33], [98]; *Telstra Corp Ltd v Phone Directories Co Pty Ltd* (2010) 194 FCR 142 at [89]-[90], [96]; [104], [119]; [169].

¹⁷ *Copyright Act*, s 22(4) and s 98.

¹⁸ J [158] CAB 47.

recognition or assertion of the particular rights afforded by copyright. Recognition of the former (differing interests) does not require denial of the latter (copyright rights). This is especially so where copyright protects the particular form of expression and does not protect facts or information.¹⁹

6. The Court has power to grant an injunction in equity's auxiliary jurisdiction, interlocutory or final, in aid of a legal or equitable right which the injunction will protect.²⁰ Different considerations might apply depending upon the stage at which the analysis occurs. Thus, in the context of an application for interlocutory injunctive relief,²¹ the identification of a serious question to be tried with respect to claims for final relief (whether tortious, equitable or statutory) and the assessment of the balance of convenience at that stage, including as to the adequacy of damages as a remedy, may result in the discretionary grant of an interlocutory injunction restraining publication of copyright material pending trial.²² But once the trial has occurred and the parties' rights have been determined, the question is the appropriate remedy for any established wrong. Put another way, the parties' respective legal or equitable rights and liabilities have been established and the appropriateness and adequacy of remedies are assessed in accordance with established principle. Provisions such as s 22 and s 23 of the *Federal Court of Australia Act* do not confer authority to grant an injunction in circumstances where a plaintiff has no case for relief by way of injunction under the general law or by statute and do not provide authority for granting an injunction where there is otherwise no case for injunctive relief.²³

20 There is no remedy without a wrong.²⁴

7. In *Patrick Stevedores*, this Court stated that a mandatory injunction may issue compelling a wrongdoer to prevent the occurrence of further damage where the damage caused

¹⁹ *IceTV* at [28] (“Copyright does not protect facts or information. That facts are not protected is a crucial part of the balancing of competing policy considerations in copyright legislation. The information/expression dichotomy, in copyright law, is rooted in considerations of social utility. Copyright, being an exception to the law's general abhorrence of monopolies, does not confer a monopoly on facts or information because to do so would impede the reading public's access to and use of facts and information.”); see also at [40].

²⁰ *Federal Court of Australia Act 1976* (Cth), ss 5(2), 22 and 23; *Patrick Stevedores* at [27].

²¹ *Australian Broadcasting Corporation v O'Neill* (2007) 227 CLR 57 at [19], [65].

²² Each case will turn on its own facts, as seen from the cases in fn 7; see also *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570 and *Lenah Game Meats*.

²³ *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 151 at 161.

²⁴ See also *Smethurst* at [70], [76].

by the tortious conduct “*is ongoing and is ‘extreme, or at all events very serious’*”.²⁵ Their Honours’ adoption of the language of “*extreme*” or “*very serious*” suggests that, in such a case, damages may not be adequate.

8. While the potential for the inadequacy of damages to have greater significance may perhaps be seen in the context of personal privacy and dignity for natural persons,²⁶ the development of the law in that context will be affected by the new statutory cause of action in tort for serious invasions of privacy.²⁷ Three points of present significance may be made. *First*, the Parliament recognised the balancing of countervailing public interests between the protection of privacy and other public interests such as, among others, freedom of expression (including political communication and artistic expression), freedom of the media and the proper administration of government.²⁸ *Secondly*, Parliament has made express provision for non-monetary relief by way injunction and other orders such as requiring an apology or correction or for delivery-up or destruction of material.²⁹ Where the invasion involves publishing information relating to the plaintiff, the Court must have “*particular regard to the public interest in the publication of the information when considering whether to grant the injunction*”.³⁰ *Thirdly*, there are exemptions for journalists.³¹ In this way, Parliament has expressly recognised by statute and for the common law of tort in Australia the balancing of differing interests of protecting privacy and freedoms of expression of political communication and the media and, specifically for injunctions, the public interest in the publication of information.

9. In the case of corporations (for which, as bodies corporate, privacy is inapt) and where the principle in *Patrick Stevedores* applies or damages are an inadequate remedy, factors in any

²⁵ *Patrick Stevedores* at [33], citing *Durell v Pritchard* (1865) LR 1 Ch 244 at 250 (other citations omitted).

²⁶ See, e.g., Edelman J’s discussion of the nature of private information that is personal in *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [229]-[237].

²⁷ *Privacy Act 1988* (Cth), s 94A and Sch 2.

²⁸ *Privacy Act*, Sch 2, cl 1 (Objects of the schedule) and cl 7 (esp. subcll (1)(e) and (3)).

²⁹ *Privacy Act*, Sch 2, cl 9 and cl 12.

³⁰ *Privacy Act*, Sch 2, cl 9(2).

³¹ *Privacy Act*, Sch 2, cl 15.

given case that may be relevant to the discretion to grant an injunction may include (among others):

- (a) the nature, gravity and contumacy of the trespass committed.³² In this regard, and as Gleeson CJ observed in *Lenah Game Meats*, the circumstance that the information or material was tortiously obtained in the first place may not be sufficient.³³
- (b) the balancing of public interests between, on the one hand, the rights of the applicant and, on the other, the public interest in freedom of expression, political communication and the media. These considerations were mentioned, in obiter, in *Lincoln Hunt*.³⁴ The development of the law should be consistent with the constitutional guarantee of political communication. As Gageler J said in *Farm Transparency v NSW*:³⁵

“... any development would need itself to follow a path consistent with the constitutional guarantee of freedom of political communication. That is so for development of the substantive law demarcating those activities that will and those that will not be afforded some measure of protection against public scrutiny at common law or in equity. That must also be so for development of the adjectival law identifying considerations that are appropriate to be weighed in determining whether or not publication or possession will be the subject of discretionary relief. What is inconceivable is that any rule of law or principle of equity would ever develop to the extent of prescribing and enforcing a blanket prohibition on communication or possession of any visual record known to have been created as a result of a trespass to private property irrespective of the nature of the activities revealed and irrespective of the systemic importance of electors, legislators and offices of the executive become aware of those activities.”

10. A “constructive trust ought not to be imposed if there are other orders capable of doing full justice”.³⁶ The imposition of a constructive trust over copyright created in connexion with a trespass, with consequential orders for assignment, has the effect of conferring statutory rights

³² See, e.g., *Smethurst* at [158] (Nettle J).

³³ *Lenah Game Meats* at [55]. The Chief Justice’s observation was made in the context of a discussion of unconscionability deriving, at least in part, from the decision of Young J in *Lincoln Hunt*. While Young J framed the consideration by reference to “unconscionability”, this must be read in the light of *Lenah Game Meats* at [16]-[17] (Gleeson CJ) and [90] (Gummow and Hayne JJ; “the notion of unconscionability does not operate wholly at large”. As to the reception of *Lincoln Hunt* in *Lenah Game Meats*, see *Smethurst* at [77]-[85]; [129][155]-[158]; [240]-[244] and *Farm Transparency v NSW* at [41]-[42][90]; [233]-[237].

³⁴ *Lincoln Hunt* at 464-465 (repeating the qualification in fn 33).

³⁵ *Farm Transparency v NSW* at [90] (citations omitted).

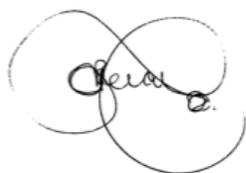
³⁶ *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [128].

in respect of that copyright material that could in turn be used to stop third parties from communicating or possessing that material. Where there are other means available to quell a controversy, or orders capable of doing justice, those courses are to be preferred.³⁷ Having regard to the principles discussed above, the flexibility of equity to adapt the terms of any injunction to the particular facts of the case in order to do justice is to be preferred.

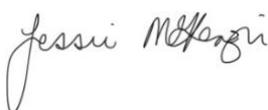
V ESTIMATE

11. If granted leave to make oral submissions, the *amici* estimate that they require 10 to 15 minutes to present their oral argument.

Dated: 19 February 2026



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10 The Human Rights Law Centre and Alliance for Journalists' Freedom are represented by Thomson Geer (Marlia Saunders).

³⁷ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [505]-[508].

ANNEXURE TO HRLC'S AND AJF'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	<i>Copyright Act 1968</i> (Cth)	Compilation No. 64 (11 December 2024)	Sections 10 (“communicate”, “to the public”), 14, 22(4), 31, 32, 33, 35, 36, 40, 41, 41A, 42, 43, 85, 86, 87, 90, 93, 98, 101, 103A, 103AA, 103B, 103C, 104 and 196	Latest compilation. The relevant provisions remain unchanged.	2024 to current
2	<i>Federal Court of Australia Act 1976</i> (Cth)	Compilation No. 59 (11 December 2024)	Sections 5, 22 and 23	Latest compilation. The relevant provisions remain unchanged.	2024 to current
3	<i>Privacy Act 1988</i> (Cth)	Compilation No. 103 (10 June 2025)	Section 94A; Sch 2, cl 1, 7, 9, 11, 12 and 15	Latest compilation. The relevant provisions remain unchanged.	From 10 June 2025