HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

FARM TRANSPARENCY INTERNATIONAL LIMITED — APPELLANT

AND

THE GAME MEATS COMPANY OF AUSTRALIA PTY LTD — RESPONDENT

Farm Transparency International Limited v The Game Meats Company of Australia Pty Ltd
[2026] HCA 42
Date of Hearing: 5 May 2026
Date of Judgment: 11 November 2026
M105/2025

ORDER

1. *Appeal allowed in part.*

2. *The declaration and orders 2 and 4-8 of the orders of the Full Court of the Federal Court of Australia made on 13 August 2025 be set aside and, in their place, it be ordered that:*

   (a) *the appeal be allowed in part; and*

   (b) *order 5 of the orders of the Federal Court dated 19 December 2024 be set aside and in lieu thereof order that:*

(i) the respondent forthwith permanently delete or destroy (as applicable): (A) all images (and copies of images) of the applicant's business undertaking presently in its possession or control, obtained or captured from the cameras placed in the premises at 319 Hughes Lane, Eurobin, Victoria, 3739 ("the Premises") by the persons who entered the Premises on behalf of the respondent between 9 January 2024 and 13 April 2024; and (B) all copies of such images that come within the respondent's possession or control in future;

(ii) within 14 days of each compliance with order 2(b)(i), the respondent file with the Court an affidavit attesting to the permanent deletion or destruction of all images (and copies of images) of the applicant's business undertaking in the respondent's possession or control, obtained or captured from the cameras placed in the Premises by the persons who entered the Premises on behalf of the respondent between 9 January 2024 and 13 April 2024; and

(iii) pending the respondent's compliance with orders 2(b)(i) and 2(b)(ii) on each occasion, the respondent be restrained from publishing or communicating to any person any images (and copies of images) of the applicant's business undertaking in the respondent's possession or control, obtained or captured from the cameras placed in the Premises by the persons who entered the Premises on behalf of the respondent between 9 January 2024 and 13 April 2024.

3. The orders of the Full Court made on 25 September 2025 be set aside and the matter be remitted to the Full Court for assessment of costs of the proceedings at trial and in the Full Court.

On appeal from the Federal Court of Australia

Representation

N M Wood SC with P G Turner for the appellant (instructed by Bleyer Lawyers Pty Ltd)

P J Hayes KC with A C R Anderson and J A G McComish for the respondent (instructed by Hendersons Legal)

H P T Bevan SC with J E McKenzie and P F Farrell for the Human Rights Law Centre and the Alliance for Journalists' Freedom, appearing as amici curiae (instructed by Thomson Geer)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Farm Transparency International Limited v The Game Meats Company of Australia Pty Ltd

Injunctions – Trespass – Where appellant obtained images through completed trespass on respondent's premises – Where primary judge awarded damages but declined to grant injunction – Whether restorative mandatory injunction available to rectify consequences of appellant's trespass – Whether awards of damages adequate to reverse or prevent consequences of trespass – Extent of restraint necessary.

Trusts – Constructive trust – Where appellant trespassed on premises of respondent – Where appellant installed and removed hidden cameras to obtain footage for publication – Where Full Court of Federal Court declared that appellant held copyright in images on constructive trust for respondent – Where Full Court made ancillary orders including restraining publication and requiring deletion of images – Whether justice best served by more limited remedy.

Words and phrases – "ancillary orders", "auxiliary jurisdiction", "constructive trust", "constructive trustee", "copyright", "equitable discretion", "exemplary damages", "general damages", "inadequacy of damages", "injunction", "institutional constructive trust", "justice between the parties", "legal assignment", "pre-existing right", "public interest", "rectifying consequential effects", "remedial constructive trust", "remedial vehicle", "remedy", "restorative mandatory injunction", "resulting trust", "specific performance", "trespass", "unconscionable", "wrongful conduct".

Bankruptcy Act 1966 (Cth), s 116.
Copyright Act 1968 (Cth), ss 13, 15, 22, 86, 90, 98, 101, 115, 116, 196.
Federal Court of Australia Act 1976 (Cth), ss 5, 19, 21, 22, 23.
Privacy Act 1988 (Cth), Sch 2.

GAGELER CJ AND GLEESON J.

Introduction

1 The *Federal Court of Australia Act 1976* (Cth) establishes the Federal Court of Australia as a "court of law and equity"[1] having "such original jurisdiction as is vested in it by laws made by the [Commonwealth] Parliament".[2] The jurisdiction so vested is conferred under s 77(i) of the *Constitution* with respect to "matters" mentioned in ss 75 and 76 of the *Constitution*.

2 In language adapted from the *Supreme Court of Judicature Act 1873* (UK),[3] replicated in substance in the constating statutes of this Court[4] and of the Supreme Courts of each Australian State and Territory,[5] the *Federal Court of Australia Act* provides that the Federal Court "shall, in every matter before [it], grant, either absolutely or on such terms and conditions as [it] thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by [a party] in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided".[6] The entitlement of a party to a remedy in respect of a legal or equitable

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1 Section 5(2) of the *Federal Court of Australia Act 1976* (Cth).

2 Section 19(1) of the *Federal Court of Australia Act*.

3 Section 24(7) of the *Supreme Court of Judicature Act 1873* (36 & 37 Vict c 66). See *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 489; *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 237 [145].

4 Section 32 of the *Judiciary Act 1903* (Cth).

5 See s 32 of the *Supreme Court Act 1933* (ACT); s 63 of the *Supreme Court Act 1970* (NSW); s 19 of the *Supreme Court Act 1979* (NT); s 244(9) of the *Supreme Court Act 1995* (Qld), continued by s 11(1) of the *Supreme Court of Queensland Act 1991* (Qld); s 27 of the *Supreme Court Act 1935* (SA); s 10(7) of the *Supreme Court Civil Procedure Act 1932* (Tas); s 29 of the *Supreme Court Act 1986* (Vic); s 24(7) of the *Supreme Court Act 1935* (WA). See also *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 184-185 [11]-[12].

6 Section 22 of the *Federal Court of Australia Act*.

claim to which the provision refers is an entitlement at law or in equitable principle.[7]

3 In furtherance of the objective of finally determining matters in controversy between the parties and of avoiding all multiplicity of proceedings, the *Federal Court of Australia Act* provides that the Federal Court "may ... make binding declarations of right"[8] and "has power ... to make orders of such kinds ... as the Court thinks appropriate".[9]

4 This appeal, from a judgment of the Full Court of the Federal Court (Burley, Jackman and Horan JJ)[10] given on appeal from a final judgment of a primary judge of the Federal Court (Snaden J),[11] concerns the exercise by the Federal Court of what has traditionally been referred to as the auxiliary or supplemental jurisdiction of a court of equity to provide an equitable remedy in respect of a substantiated legal claim in the final determination of a matter. In particular, the appeal and its attendant notice of contention respectively concern the permissibility and appropriateness of providing an equitable remedy to an injured party, by way of either the declaration of a constructive trust or the ordering of a restorative injunction, to redress ongoing damage which has been found to have resulted from a completed trespass to property which has been found to have occurred.

The appeal and the notice of contention

5 The appellant ("Farm Transparency") has been described as "a not-for-profit charity" which "seeks to raise public awareness of animal cruelty", "to increase an understanding of the importance of the prevention and alleviation of animal suffering" and "to improve the treatment of animals including through changes to the law, policy, practice and custom".[12] The primary judge found that the "reason for being" of Farm Transparency is to "end all forms of business that

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7 *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428 at 454; *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 238 [145].

8 Section 21(1) of the *Federal Court of Australia Act*.

9 Section 23 of the *Federal Court of Australia Act*.

10 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272.

11 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261.

12 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 544 [1].

involve causing harm to animals".[13] The respondent ("Game Meats") leases premises from which it operates an abattoir where it slaughters and processes goats for export.

6 The primary judge found that agents of Farm Transparency engaged over a period of some three months in deliberate and repeated trespasses to Game Meats' abattoir for the purpose and with the result of covertly filming operations at the abattoir.[14] There is no dispute between the parties that Farm Transparency was from the outset and has remained the legal owner of the copyright in the resultant images captured on film at the abattoir,[15] and that Farm Transparency as the legal owner of that copyright has the exclusive right (subject to such licences as might be or have been created) to copy the images and to communicate them to the public.[16]

7 The images include what the primary judge and the Full Court both referred to as "the 14-minute Footage", which the primary judge described as "difficult to watch" and as depicting, "in gruesome detail", "a number of goats in the final moments of their lives".[17] Farm Transparency provided copies of the 14-minute Footage to the Commonwealth Department of Agriculture, Fisheries and Forestry as well as to a television news network, "Channel Seven", which ran a story on the content of the 14-minute Footage without broadcasting any part of it.[18] Farm Transparency also posted the 14-minute Footage on Farm Transparency's website but later removed the post in compliance with an interlocutory injunction ordered by the primary judge.

8 The primary judge found that, unless permanently restrained or otherwise prevented from doing so, Farm Transparency would seek to continue to publish the 14-minute Footage and would do so for the purpose of damaging Game Meats'

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13 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 287 [123], 288 [127], 289 [142].

14 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 280 [81], 280-281 [84]-[85], 297 [180].

15 See ss 90 and 98 of the *Copyright Act 1968* (Cth).

16 See s 86 of the *Copyright Act*.

17 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 271 [51].

18 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 265 [8]-[9]; *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 274-275 [6].

business. The primary judge also found that publication of the 14-minute Footage would be likely to achieve or assist in the achievement of that purpose, at least in so far as the further publication would assist Farm Transparency "in turning people away from the consumption of meat processed by commercial operations such as [Game Meats']".[19] These findings are sufficient to constitute a finding of ongoing damage to Game Meats' business resulting from Farm Transparency's past trespasses to Game Meats' abattoir.[20] That is so whether or not the damage is sufficient to be characterised as damage to its goodwill.[21]

9 Notwithstanding these findings of ongoing damage resulting from Farm Transparency's trespasses, the primary judge refused to grant equitable relief sought by Game Meats against Farm Transparency either by way of the declaration of a trust over the copyright in the images captured at the abattoir or alternatively by way of the ordering of an injunction requiring the destruction of the images or restraining their further publication.[22] The primary judge determined that the only remedy to which Game Meats was entitled in respect of the trespasses was damages. His Honour made an order for damages, comprising compensatory damages and exemplary damages.[23]

10 On appeal, the Full Court upheld the order for compensatory and exemplary damages made by the primary judge but supplemented that order with a declaration to the effect that Farm Transparency holds the copyright in the images (including the 14-minute Footage) captured at the abattoir on trust for Game Meats.[24] The Full Court went on to make further orders which appeared to it to "flow[] from"[25]

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19 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 290 [144].

20 *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 213 [73], 229 [120]-[121]. See also *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 208 [30]-[31], 239-240 [140].

21 Cf *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457.

22 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 298 [189], 303 [218].

23 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 306 [234], 311 [263].

24 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 284 [42], 288.

25 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 284 [43].

that declaration of the trust. Those further orders, which can conveniently (although not entirely accurately) be referred to as "the consequential orders", included: permanently restraining Farm Transparency from publishing any of the images other than to the Commonwealth Department of Agriculture, Fisheries and Forestry ("the proscriptive injunction"); requiring Farm Transparency to execute an assignment to Game Meats of the copyright in the images ("the first prescriptive injunction"); requiring Farm Transparency to delete all images in its possession or control ("the second prescriptive injunction"); and requiring Farm Transparency to file an affidavit attesting to the identities of all persons or entities to whom it had provided the images and to the times and means of such provisions ("the discovery order").[26]

11 By its appeal by special leave to this Court, Farm Transparency seeks to overturn the declaration of the trust over the copyright in the images and with it the totality of the consequential orders made by the Full Court. By its notice of contention (which it seeks, and should be granted leave, to amend), Game Meats seeks to uphold the proscriptive injunction, the second prescriptive injunction and the discovery order independently of the declaration of the constructive trust.

The "prize"

12 In submissions in response to Farm Transparency's appeal and in support of its notice of contention, Game Meats refers repeatedly to "control of the images" as "the prize in this litigation". So it is.

13 Important to be borne in mind in the adjudication of the contest between the parties for the "prize" as so identified is that the copyright in the images is not a positive right to the images themselves. The copyright is a "negative right":[27] a right to prevent others from doing an act comprised in the copyright, relevantly by copying the images or communicating the images to the public[28] other than in circumstances of "fair dealing".[29] The negative right is one which, were it to be obtained by Game Meats as a remedy provided as part of the final determination of this litigation, would fall to be enforced by Game Meats against those others in

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26 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 284 [43], 288-289.

27 *Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation* (1970) 121 CLR 154 at 167; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 31 [36].

28 See ss 86 and 101 of the *Copyright Act*.

29 See ss 103A-103C of the *Copyright Act.*

separate and subsequent litigation in which Game Meats would seek further remedies against them for infringement of the copyright.

14 Without the trust over the copyright in the images, what Game Meats would achieve were it successful on its notice of contention to the extent of maintaining either the proscriptive injunction or the second prescriptive injunction would be to prevent Farm Transparency from further copying or communicating the images to the public. That would be close to enough to prevent continuing damage resulting from Farm Transparency's past trespasses to the extent that damage might be contributed to by Farm Transparency copying and communicating those images in the future. It would not be enough to prevent continuing damage resulting from Farm Transparency's trespasses to the extent that damage might be contributed to by Farm Transparency having communicated the images in the past.

15 What Game Meats would achieve in addition were it successful in resisting the appeal so as to maintain the declaration of the trust over the copyright in the images would be a capacity to bring further proceedings for infringement of copyright to prevent persons other than Farm Transparency who have come into possession of any of the images in the past or who might come into possession of any of the images in the future from further copying or communicating the images to the public. Those other persons are known on the facts that have been found to include the Commonwealth of Australia, of which the Department of Agriculture, Fisheries and Forestry is an emanation,[30] together with Channel Seven.

16 Exactly who, apart from the Commonwealth and Channel Seven, might be exposed to further proceedings for infringement of copyright in the images were the declaration of the trust over the copyright to be maintained cannot be known on the facts that have been found. The identities of some of them are sought to be elucidated by the discovery order. Who they might include in the future can only be speculated upon. Those other persons might nevertheless be expected to include other individuals and corporate and governmental entities who were not in any way involved in the trespasses through which the images were created and against whom Game Meats might therefore otherwise have no entitlement to any remedy at law or in equity.[31] Amongst them might also be expected to be those who might seek to copy or communicate the images in the exercise of or for the purpose of exercising their recognised common law freedom of expression,[32] including for the

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30 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 55.

31 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 556 [42], 618 [255].

32 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

purpose of engaging in communications on matters of political and governmental concern.

17 In the wider contest framed by the appeal as distinct from the narrower contest framed by the notice of contention, the "prize" for which Game Meats contends can therefore be identified with greater precision as the capacity for Game Meats to bring further proceedings for infringement of copyright against persons: who are strangers to the litigation in which that "prize" is sought; whose identities remain largely unrevealed by the facts that have been found; against whom Game Meats would otherwise have no remedy; and who include persons whose common law freedom of expression, including for the purpose of engaging in communications on matters of political and governmental concern, would thereby be at risk of being curtailed. In the provision of a remedy for the final determination of the matter in controversy between Game Meats and Farm Transparency, that is a "prize" which ought not to have been awarded.

18 For reasons to be explained, the declaration of the trust over the copyright in images created through a trespass to property was the declaration of a constructive trust, which is a remedy of a kind that is available to be provided in the auxiliary jurisdiction of a court of equity. However, for the reasons which have been indicated and which are further to be elaborated, a constructive trust over the copyright in images captured at the abattoir is not a remedy appropriate to be provided in the circumstances of the present case. The sufficient and appropriate equitable remedy to be provided in the circumstances of the present case is limited to a variation of the second prescriptive injunction by which Farm Transparency was compelled to delete all images that remain in its possession or control.

19 The appeal is for that reason to be allowed, with the result that the declaration of a constructive trust is to be set aside. The consequential orders made by the Full Court are also to be set aside, save that the notice of contention is to be upheld to the extent of maintaining a variation of the second prescriptive injunction.

The auxiliary jurisdiction of a court of equity

Overview

20 Sir William Blackstone explained the functions of a court of equity to include "to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law".[33] Joseph Story characterised the function so described by Blackstone as within the "auxiliary, or supplemental jurisdiction" of a court of

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33 Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), vol 1 at 92.

equity.[34] Story explained that jurisdiction of a court of equity to be auxiliary or supplemental to the jurisdiction of a court of common law in the sense of involving an authority to provide a more case-specific equitable remedy for the infringement of a common law right than would be capable of being provided by a common law court in the final determination of a common law action for the enforcement or protection of that common law right.[35]

21 Describing that auxiliary or supplemental jurisdiction of a court of equity in language recognised to have retained currency despite the intervening centuries,[36] Story wrote:[37]

> "Perhaps the most general, if not the most precise, description of a Court of Equity ... is, that it has jurisdiction in cases of rights recognised and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law. The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in Equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time and in future; otherwise Equity will interfere, and give such relief and aid, as the exigency of the particular case may require." (footnotes omitted)

22 Fundamental to an appreciation of the contemporary scope and operation of the auxiliary or supplemental jurisdiction of a court of equity as so described by Story are three principled considerations.

23 The first is that the remedy capable of being provided by a common law court in the final determination of a common law action for the tortious infringement of a common law right, although varying from time to time according

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34 Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (1836), vol 1 at 92 §75. See Yale, "A Trichotomy of Equity" (1985) 6 *Journal of Legal History* 194.

35 Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (1836), vol 1 at 32-33 §33.

36 See American Law Institute, *Restatement (Third) of Torts: Remedies, Tentative Draft No 2* (2023), §43 (reporters' note (e)), approved at the 2026 Annual Meeting.

37 Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (1836), vol 1 at 32 §33.

to the precise cause of action pursued, has historically been and for the most part remains limited to the entry of a judgment awarding the injured party compensatory damages. The principle informing an award of compensatory damages is and has long been recognised[38] to be that "the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as [the party] would have been in if ... the tort had not been committed".[39] The purpose of awarding compensatory damages at common law for the tortious infringement of a common law right is "restoration".[40]

24 Against this common law background, the auxiliary or supplemental jurisdiction of a court of equity has typically arisen to be exercised in cases, or classes of cases,[41] in which an award of compensatory damages would be incapable of satisfactorily achieving its restorative purpose.[42] To invoke the auxiliary or supplemental jurisdiction, an injured party has traditionally been said in the parlance of equity to be required to demonstrate "irreparable injury" or "the inadequacy of the remedy" in damages.[43] These expressions, however, have never been entirely apt: all that has been meant by the former is that "the injury ... [could] not [be] adequately reparable by damages" and all that has been meant by the latter is that "the remedy by damages is not such a compensation as will in effect ... place the parties in the position in which they formerly stood".[44] That is to say, "all damage is in equity considered irremediable or irreparable if [it is] not adequately compensable in [common law] damages".[45] For damage to be considered to be adequately compensable in common law damages, "[i]t is not enough that there is

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38 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39.

39 *Haines v Bendall* (1991) 172 CLR 60 at 63; *Stewart v Metro North Hospital and Health Service* (2025) 282 CLR 655 at 669-670 [24].

40 *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 246 [150], quoting *Watson, Laidlaw, & Co Ltd v Pott, Cassels, & Williamson* 1914 SC (HL) 18 at 29.

41 Eg *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 58.

42 See *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 at 665 [11]. See also *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd* [2010] NSWCA 283 at [5].

43 See *Heavener v Loomes* (1924) 34 CLR 306 at 325.

44 Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 14.

45 Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies*, 5th ed (2015) at 706 [21-040]. See also Spry, *The Principles of Equitable Remedies*, 9th ed (2014) at 396, 402-403.

a remedy at law" – the common law remedy "must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity".[46]

25 Hence, subject to the other considerations to be mentioned, it has been and can continue to be said in Australia that "damages and injunction are merely two different forms of remedy against the same wrong"[47] and that "[i]f damage is irreparable in the sense that pecuniary compensation would be inadequate protection, injunction may, and in the absence of countervailing circumstances will, be granted to protect a legal right".[48]

26 The second consideration fundamental to an appreciation of the contemporary scope and operation of the auxiliary or supplemental jurisdiction of a court of equity is an outworking of the first. The consideration is that, in choosing an appropriate equitable remedy from the "armoury of equitable remedies"[49] available to be deployed and in tailoring that remedy to the circumstances of the particular case, a court of equity will seek to ensure that such equitable remedy as it determines to grant is within the "limits set by the purpose which it can properly be intended to serve"[50] and is "the minimum relief necessary to 'do justice' between the parties".[51] This means that the court will in principle seek to ensure that such equitable remedy as it grants is no more intrusive on rights and freedoms

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46 *Boyce's Executors v Grundy* (1830) 28 US 210 at 215. See Gummow, "The Injunction in Aid of Legal Rights – An Australian Perspective" (1993) 56(3) *Law and Contemporary Problems* 83 at 94.

47 *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 at 550, quoting *White v Mellin* [1895] AC 154 at 167.

48 *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 at 550. See Gummow, "The Injunction in Aid of Legal Rights – An Australian Perspective" (1993) 56(3) *Law and Contemporary Problems* 83 at 95-96.

49 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 247 [103].

50 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 428-429 [124], quoting *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625.

51 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 416. See also at 411; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 409 [70]; *Giumelli v Giumelli* (1999) 196 CLR 101 at 113 [10]; *Hogan v Baseden* (1997) 8 BPR 15,723 at 15,726.

recognised by the common law than is appropriate to achieve the purpose of its grant.

27 The third and presently critical of the considerations is that the granting or withholding and conditioning of an equitable remedy is inherently an exercise of discretion.[52] The concept of discretion in this context is not that of the toleration of a range of potential outcomes[53] such as would indicate a standard of appellate review involving restraint as distinct from correctness.[54] To the contrary, an equitable remedy "is available [and appropriate] only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles".[55] The concept of equitable discretion is an acknowledgement of the breadth of the considerations which have the potential to bear on the metaphorical "conscience of equity"[56] in the application of equitable principle to determine the appropriate remedial outcome in the totality of the circumstances.[57]

28 Flowing from this understanding of the discretionary nature of equitable relief is that it is a "cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts".[58] Whereas "[a] court of law works its way to short issues, and confines its views to them ... [a] court of equity

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52 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 396 [32], quoting *Bristol City Council v Lovell* [1998] 1 WLR 446 at 453; [1998] 1 All ER 775 at 782. See also *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 114.

53 See *Steven Moore (a pseudonym) v The King* (2024) 282 CLR 460 at 467 [14]; *The King v HCZ* [2026] HCA 24 at [29]-[31].

54 See *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 590 [148].

55 *Muschinski v Dodds* (1985) 160 CLR 583 at 615; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 241 [91].

56 See *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 400 [15]-[16], referring to Pomeroy, *A Treatise on Equity Jurisprudence*, 5th ed (1941), vol 1 at 74 and Gummow, *Change and Continuity: Statute, Equity, and Federalism* (1999) at 44-51.

57 See generally Evans, "Defending Discretionary Remedialism" (2001) 23 *Sydney Law Review* 463 at 482-489.

58 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559; *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296 at 402 [503].

takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case".[59] Accordingly:[60]

> "In the auxiliary jurisdiction of the court ... equitable discretions are exercised by taking into account all relevant matters that tend towards the justice or injustice of granting the remedy that is sought, such as hardship, laches, unfairness, the lack of clean hands and similar matters, and by weighing them against each other in order to decide whether the particular relief that is in question should be granted in an absolute, partial or conditional form or else refused. Any particular discretionary matter may be subject to countervailing matters of equal or greater weight. Indeed, as to any particular set of circumstances that would induce the court to exercise its discretion in a particular way it is possible to postulate additional circumstances that would lead to the exercise of that discretion in a different way."

29 Of particular significance to the remedial outcome in the present case is that the potential for an equitable remedy to impact on rights and freedoms of third parties[61] or on an identifiable public interest[62] has long been recognised to have the potential to result in the withholding or conditioning of an equitable remedy which might be considered appropriate were attention to be confined solely to the conduct and relative positions of the parties.

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59 *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 119, quoting *The Juliana* (1822) 2 Dods 504 at 522 [165 ER 1560 at 1567].

60 Spry, *The Principles of Equitable Remedies*, 9th ed (2014) at 4.

61 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 41-42 [65], quoting *Wood v Sutcliffe* (1851) 2 Sim (NS) 163 at 165-166 [61 ER 303 at 303-304], *Miller v Jackson* [1977] QB 966 at 988 and Spry, *The Principles of Equitable Remedies*, 5th ed (1997) at 402-403. See also *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45-46 [128]-[129].

62 *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51-52; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 68 [19]. See also *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 285 [274].

The restorative injunction

30 Conspicuous within the armoury of equitable remedies available to a court of equity in its auxiliary or supplemental jurisdiction is and has long been recognised to be the "injunction", a term which in its widest connotation "has come ... to mean any order by which a court commands a person to do or refrain from doing some particular act"[63] albeit that "in the parlance of equity [the term] has no fixed definition and that it is legal usage which decides which court orders are to be identified as injunctions".[64]

31 Nomenclature follows function. Story referred to an injunction ordered by a court of equity as "generally preventive, and protective, rather than restorative; though it is by no means confined to the former".[65] Sir Frederick Jordan referred to "an order which affirmatively directs the undoing of something which ought not to have been done, or the restoration of something which ought not to have been interfered with" as a "mandatory injunction".[66] A "mandatory" or "restorative" injunction of that nature can equally be described as "reparative".[67]

32 In respect of an injunction of the nature which Story referred to as "restorative" and which Jordan referred to as "mandatory", the majority in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*[68] observed that "for over a century it has been established that 'there is no rule which prevents [a court of equity] from granting a mandatory injunction where the injury sought to be restrained has been completed before the commencement of the action'".

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63 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 231 [60]; *White Australia Party Inc v The Commonwealth* (2026) 100 ALJR 977 at 980 [10].

64 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 390.

65 Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (1836), vol 2 at 155 §862.

66 Jordan, *Chapters on Equity in New South Wales*, 6th ed (1947) at 141.

67 Dobbs and Roberts, *Law of Remedies: Damages – Equity – Restitution*, 3rd ed (2017) at 165, referring to Fiss, *The Civil Rights Injunction* (1978). See also American Law Institute, *Restatement (Third) of Torts: Remedies, Tentative Draft No 2* (2023), §44 (reporters' note (c)), approved at the 2026 Annual Meeting.

68 (1998) 195 CLR 1 at 31 [33], quoting Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 50.

33 Reference to an early explanation given by Lord Westbury LC in *Isenberg v East India House Estate Co Ltd*,[69] quoted in full in a more recent case noted in *Patrick Stevedores*,[70] serves to emphasise that the considerations upon which an injunction of that nature might be granted are instantiations of the considerations already explained to inform the scope and operation of the auxiliary or supplemental jurisdiction of a court of equity. The explanation, given in a case in which the common law cause of action was in nuisance and in which the injunction sought would have required the tearing down of a building, was as follows:

> "Every one of this class of cases must depend upon its own peculiar circumstances.
>
> The common law remedy for a grievance of this description is an action for damages: an action liable to be resorted to as long as the cause of damage continues. Upon that ground, and by reason also of the damage in many cases not admitting of being estimated in money, this Court has assumed jurisdiction.
>
> This jurisdiction of this Court, so far as it partakes of the nature of a preventive remedy, that is, prohibition of further damage or an intended damage, is a jurisdiction that may be exercised without difficulty, and rests upon the clearest principles.
>
> But there has been superadded to that the power of the Court to grant what has been denominated a mandatory injunction, that is, an order compelling a Defendant to restore things to the condition in which they were at the time when the Plaintiff's complaint was made. The exercise of that power is one that must be attended with the greatest possible caution. I think, without intending to lay down any rule, that it is confined to cases where the injury done to the Plaintiff cannot be estimated and sufficiently compensated by a pecuniary sum. Where it admits of being so estimated, and where the evil sustained by the Plaintiff may be abundantly compensated in money, there appears to me to be no necessity to superadd the exercise of that extraordinary power by this Court."

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69 (1863) 3 De G J & S 263 at 271-272 [46 ER 637 at 641]. See also *Smith v Smith* (1875) LR 20 Eq 500 at 504.

70 See *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 810; [1974] 2 All ER 321 at 336-337, cited in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [33] fn 77.

34 The further statement in *Patrick Stevedores*,[71] in language drawn from *Durell v Pritchard*,[72] that "[w]here the damage caused by tortious conduct is ongoing and is 'extreme, or at all events very serious', a mandatory injunction may issue compelling the wrongdoer to prevent the occurrence of further damage" ought not to be taken to indicate a more restrictive approach to the granting or withholding of the equitable remedy than is apparent from the explanation given by Lord Westbury LC in *Isenberg*. In *Durell*, the main obstructions caused by erection of a newly constructed building were said to be matters of "comparative convenience" and "merely of temporary and occasional inconvenience".[73] As a matter of discretion, a mandatory injunction for the demolition and removal of the new building and restoration of land and buildings to their state prior to the erection of the new building was refused. Such references to ongoing damage being "extreme" or "very serious" should rather be understood as pointing to the heightened significance in the granting or withholding of a restorative injunction of the general consideration that the granting of a remedy in the auxiliary or supplemental jurisdiction of a court of equity is "confined to cases where the remedy by damages is inadequate for the purposes of justice, and the restoring things to their former condition is the only remedy which will meet the requirements of the case".[74]

35 Nor should *Smethurst v Commissioner of the Australian Federal Police*,[75] in which injunctions to compel the delivery up or destruction of data retrieved by police from mobile phones as a result of unlawful searches and seizures were refused in the original jurisdiction of this Court, be understood to indicate a more restrictive approach than is apparent from the explanation given in *Isenberg*. The reasoning of three members of the majority in *Smethurst* rested on the proposition that the ongoing damage suffered by the plaintiffs by being deprived of the data in the context of a continuing criminal investigation was not damage that was recognised by law.[76] Their Honours' observation to the effect that where a trespass is complete the courts "will only [interfere] if the damage which has occurred is

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71 (1998) 195 CLR 1 at 31 [33].

72 (1865) LR 1 Ch App 244 at 250.

73 (1865) LR 1 Ch App 244 at 251.

74 Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 49. See also *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 242 [156]; Spry, *The Principles of Equitable Remedies*, 9th ed (2014) at 573.

75 (2020) 272 CLR 177.

76 (2020) 272 CLR 177 at 213 [72].

serious or the trespass is continuing in its effects"[77] should not be read as a statement about the conditions for the grant of a mandatory injunction. The reasoning of the remaining member of the majority turned on the discretionary consideration that an injunction ordinarily "will not go to restrain publication of information where the consequence of restraint would be to prevent disclosure of criminality which, in all the circumstances, it would be in the public interest to reveal".[78] Importantly, all members of the majority proceeded upon an express acceptance of what was said in *Patrick Stevedores*.[79]

36 Two examples of forms of restorative injunctions, or of equitable orders akin to restorative injunctions, are appropriate to be mentioned at this stage of the analysis. There might be room for debate as to whether each is to be identified as an injunction according to the usages of equity.[80] There is no reason to doubt that the granting or withholding of each is informed by the considerations generally applicable to the granting or withholding of equitable relief in the auxiliary or supplemental jurisdiction of a court of equity.[81]

37 The first example is that of an order for the return of personal property to a plaintiff entitled to possession of that personal property in circumstances where the bringing of a common law action in conversion could result only in damages[82] and where the bringing of a common law action in detinue (such as might at some times and in some places have or have had the potential to result or have resulted in a statutory order for return of the property in specie being made by a court of

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77 (2020) 272 CLR 177 at 212 [68].

78 (2020) 272 CLR 177 at 244 [160]. See also at 244-245 [161]-[162].

79 (2020) 272 CLR 177 at 212 [71], 242-243 [156].

80 See *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 390 and *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 395 [30], each referring to *Doulton Potteries Ltd v Bronotte* [1971] 1 NSWLR 591 at 596.

81 See *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 279 [260]; *Doulton Potteries Ltd v Bronotte* [1971] 1 NSWLR 591 at 597, referring to *North v Great Northern Railway Co* (1860) 2 Giff 64 at 69 [66 ER 28 at 30].

82 See *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 at 649; [1963] 2 All ER 314 at 318.

common law)[83] would not be available or in the circumstances would be less efficient.[84] The classic example of such a remedy being granted in the auxiliary jurisdiction of a court of equity is the case of a defendant in possession of goods stolen from the plaintiff,[85] to which the defendant will therefore ordinarily have no title.[86] The exercise of the auxiliary or supplemental jurisdiction of the court of equity in such a case is limited to making an order which compels the defendant to return the goods to the plaintiff. No interposition of a constructive trust is necessary to achieve that result as the plaintiff remains at all times entitled as against the defendant to possession of the goods both at law and in equity.[87] The order of the court does no more than to enforce the plaintiff's existing legal entitlement.

38 The second example is demonstrative of the availability in the present case of the second prescriptive injunction ordered by the Full Court independently of the declaration of constructive trust over the copyright in the images. The example is that of an order for the delivery up for destruction of an article created by a defendant as a result of a tortious infringement of the plaintiff's legal right.[88] On this basis, it has been said to be difficult to see how journalists who entered a hospital room without permission and there photographed a patient, if sued by the hospital in a common law action for trespass to its premises, could have resisted a final order for delivery up for destruction of the offending photographic negative and copies (and in the meantime an injunction restraining them from publishing or parting with possession).[89]

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83 See *City Motors (1993) Pty Ltd v South Aerial Super Service Pty Ltd* (1961) 106 CLR 477 at 491; *Gollan v Nugent* (1988) 166 CLR 18 at 25. Statutory innovations began with s 78 of the *Common Law Procedure Act 1854* (UK) (17 & 18 Vict c 125).

84 See *Doulton Potteries Ltd v Bronotte* [1971] 1 NSWLR 591 at 596-597, 599.

85 Eg *Duke of Somerset v Cookson* (1735) 3 P Wms 390 [24 ER 1114] and *Earl of Macclesfield v Davis* (1814) 3 Ves & B 16 [35 ER 385].

86 *Tobin v Broadbent* (1947) 75 CLR 378 at 386; *Ilich v The Queen* (1987) 162 CLR 110 at 117-118, 128.

87 See Crawford, "Theft, Trust and Property Rights: Is Equity's Cure Worse than the Disease?" (2014) 8 *Journal of Equity* 338 at 343-345.

88 Eg *Hole v Bradbury* (1879) 12 Ch D 886 at 903; *Chappell & Co Ltd v Columbia Graphophone Co* [1914] 2 Ch 745 at 752, 754, 756.

89 Prescott, "*Kaye v Robertson* – a reply" (1991) 54 *Modern Law Review* 451 at 452-453, commenting on *Kaye v Robertson* [1991] FSR 62.

The constructive trust

39 Less prominent in practice but no less secure in principle, existing within the armoury of equitable remedies capable of being deployed by a court of equity in its auxiliary or supplemental jurisdiction is the constructive trust. The earliest recognition of the concept of a trust "raised or created by act or construction of law" appears to have been by Lord Nottingham in *Cook v Fountain*.[90]

40 The earliest deployment of the constructive trust in the auxiliary or supplemental jurisdiction of a court of equity is generally understood to have been in the decision of the New York Court of Appeals in *Newton v Porter*.[91] There a constructive trust was declared over the proceeds of sale of negotiable securities transferable by delivery which were stolen from the plaintiff and sold by the felons to bona fide purchasers who thereby acquired title to them.[92] The proceeds of sale were traced into the hands of the defendants, who received them from the felons with knowledge of the theft. Holding "the absence of a conventional relation of trustee and *cestui que trust*" between the plaintiff and the felons to be "no obstacle to giving the plaintiff the benefit of the [proceeds]",[93] and speaking on behalf of the Court of Appeals, Andrews J said:[94]

> "The plaintiff, by the sale of the bonds to *bona fide* purchasers, lost her title to the securities. She could not further follow them. She could maintain an action as for a conversion of the property against the felons. But this remedy in this case would be fruitless, as they are wholly insolvent. Unless she can elect to regard the securities in which the bonds were invested as a substitute, *pro tanto*, for the bonds, she has no effectual remedy."

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90 (1676) 3 Swans 585 at 591 [36 ER 984 at 987]. See also Scott and Fratcher, *The Law of Trusts*, 4th ed (1989), vol 5 at 322-323 §462.4; Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (1836), vol 2 at 501 §1254.

91 (1877) 69 NY 133. See Powell, "'Cardozo's Foot': The Chancellor's Conscience and Constructive Trusts" (1993) 56(3) *Law and Contemporary Problems* 7 at 12; Scott and Fratcher, *The Law of Trusts*, 4th ed (1989), vol 5 at 565 §508.1, referring to an earlier view epitomised by *Campbell v Drake* (1844) 39 NC 94.

92 Cf *Miller v Race* (1758) 1 Burr 452 at 457-458 [97 ER 398 at 401], referred to in *Ilich v The Queen* (1987) 162 CLR 110 at 117-118, 128, 139.

93 (1877) 69 NY 133 at 140.

94 (1877) 69 NY 133 at 137.

The imposition of the constructive trust over the proceeds of sale in the hands of the defendants in *Newton v Porter* in that way turned on the inadequacy of the plaintiff's common law action in conversion to compensate her for the theft of her personal property in the circumstances of the case where the property had been sold and where the proceeds of sale were in the hands of the defendants.

41 The precise "rule" formulated and applied in *Newton v Porter* was subsequently expressed by the Supreme Court of the United States as one which applies "with respect to the proceeds of property tortiously misappropriated and found in the hands of the tort feasor or his transferee with notice".[95]

42 Writing in 1906, and citing *Newton v Porter* amongst other cases, James Barr Ames described it as then "well settled that one who has been deprived of his property by ... theft, or by any wrongful conversion, may charge ... the thief, or other wrongful converter as a constructive trustee of any property received in exchange for the misappropriated property".[96] Although criticised elsewhere[97] and from time to time attempted to be explained on a variety of other grounds,[98] this Court's ex tempore decision just four years after Ames' article in *Black v S Freedman & Co*[99] can be seen to have turned on precisely that proposition. The property stolen by Mr Black in that case having been money, an action for money had and received against Mr and Mrs Black was a common law action available to

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95 *United States v Dunn* (1925) 268 US 121 at 133. So the rule has remained in the United States: "A Thief as a Constructive Trustee" (1928) 37 *Yale Law Journal* 654 at 658-659; Scott and Fratcher, *The Law of Trusts*, 4th ed (1989), vol 5 at 562-567 §508.1; *US Securities & Exchange Commission v Universal Express Inc* (unreported, US District Court, SD New York, Lynch J, 30 April 2008) at 3; Bryant, "Imposition of Constructive Trust in Property Bought with Stolen or Embezzled Funds", 38 *American Law Reports* 3d 1354, §3; Hess and Bogert, *The Law of Trusts and Trustees*, 2025 ed, §476.

96 Ames, "Following Misappropriated Property into its Product" (1906) 19 *Harvard Law Review* 511 at 513.

97 Eg Millett, "Tracing the Proceeds of Fraud" (1991) 107 *Law Quarterly Review* 71 at 76 and in Goldstein (ed), *Equity and Contemporary Legal Developments* (1992) 407 at 413.

98 Eg *Evans v European Bank Ltd* (2004) 61 NSWLR 75 at 100 [112]; Handley, "The *Black v Freedman* Trust: Vindicating Proprietary Rights or Remedying Wrongs?", in Bant and Bryan (eds), *Principles of Proprietary Remedies* (2013) 117 at 122.

99 (1910) 12 CLR 105.

S Freedman & Co.[100] But the result of the declaration of a constructive trust over property constituting the proceeds of stolen property in the hands of a volunteer was the same. The property constituting the proceeds of the money stolen by Mr Black comprised a chose in action, represented by an amount standing to the credit of Mrs Black in a bank account into which Mr Black had paid the stolen money, as well as bank notes purchased by Mrs Black using funds drawn from the account which were issued to Mrs Black and found in the possession of Mr Black.[101] The sweeping statement in the concurring reasons for judgment of O'Connor J that "[w]here money has been stolen, it is trust money in the hands of the thief"[102] must be understood in the context of the contest in that case being a contest for the control of the property constituting the proceeds of Mr Black's theft in the possession of Mrs Black. Two years afterwards, in *Creak v James Moore & Sons Pty Ltd*,[103] Griffith CJ accurately summarised the holding in *Black v Freedman* as having been that "the owner of stolen goods which have been sold by the thief may follow the fund representing the proceeds, if they can be identified, into the hands of a third person who cannot set up a better title".

43 In this context, the constructive trust is conceived of in Australia as a "remedial institution":[104] a "formula through which the conscience of equity finds expression".[105] Consistently with the underlying conception, the constructive trust might equally be described as an "institutional remedy": an equitable proprietary remedy[106] granted by way of the declaration of a trust over property held by a party,

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100 See Stoljar, *The Law of Quasi-Contract* (1964) at 101-103; Dodd and Chitty, *Bullen and Leake's Precedents of Pleadings*, 6th ed (1905) at 258.

101 See *S Freedman & Co Ltd v Black* (unreported, Supreme Court of Western Australia, McMillan J, 2 September 1910).

102 (1910) 12 CLR 105 at 110.

103 (1912) 15 CLR 426 at 432.

104 *Muschinski v Dodds* (1985) 160 CLR 583 at 614, following Pound, "The Progress of the Law, 1918-1919: Equity" (1920) 33 *Harvard Law Review* 420 at 421.

105 *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 at 386, quoted in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 108. See also (1984) 156 CLR 41 at 125.

106 See *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 [4]-[5], noting that the term "constructive trust" has also been used to refer to the grant of an equitable remedy by way of the imposition of a personal liability to account.

which is ordinarily no more than a "bare trust"[107] and which is ordinarily accompanied by an ancillary order for the transfer of legal title or possession to the resultant beneficial owner of that property. The constructive trust constitutes "an in personam remedy attaching to property which may be moulded and adjusted to give effect to the application and interplay of equitable principles in the circumstances of the particular case",[108] including as to the time at which and conditions upon which the constructive trust is declared to take effect,[109] "available if applicable principles of the law of equity require that the person in whom the ownership of property is vested should hold it to the use or for the benefit of another".[110] This adherence to equitable principle in the imposition and in the moulding of the incidents of a constructive trust is what allows it to be said without contradiction that, in granting the remedy in the circumstances of the particular case, a court of equity "construes the circumstances" to create a constructive trust and does not "construct them".[111]

44 Accordingly, as the Full Court of the Federal Court observed in *Grimaldi v Chameleon Mining NL [No 2]* with reference to *Black v Freedman*,[112] "it is well accepted in this country that, where property is acquired from another by theft, proprietary relief by way of imposition of a constructive trust should be granted *if appropriate*". Scepticism has been expressed as to whether equitable discretion in the granting or withholding of an equitable remedy by way of the declaration of a constructive trust has room to operate in a case of theft.[113] However, it is not difficult to imagine a variety of circumstances, some not distant from those of the

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107 See *CGU Insurance Ltd v One.Tel Ltd (In liq)* (2010) 242 CLR 174 at 182 [36]; *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 281-282.

108 *Muschinski v Dodds* (1985) 160 CLR 583 at 615; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45 [126] fn 123.

109 *Muschinski v Dodds* (1985) 160 CLR 583 at 623; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45 [126] fn 123; *Secretary, Department of Social Security v Agnew* (2000) 96 FCR 357 at 365 [18].

110 *Muschinski v Dodds* (1985) 160 CLR 583 at 616.

111 *Giumelli v Giumelli* (1999) 196 CLR 101 at 111 [2], quoting Scott and Fratcher, *The Law of Trusts*, 4th ed (1989), vol 5 at 322-323 §462.4. See also *Muschinski v Dodds* (1985) 160 CLR 583 at 614.

112 (2012) 200 FCR 296 at 360 [255] (emphasis added). See also at 405 [511], 422 [582].

113 See *Sze Tu v Lowe* (2014) 89 NSWLR 317 at 347-348 [156]-[158].

present case, which might raise a range of issues bearing on the appropriateness of the declaration of a constructive trust over property acquired by theft.

45 Having regard to the gravity of its consequences for the exercise of recognised common law rights, equitable principle requires that the constructive trust ought not to be imposed as an equitable remedy "if there are other orders capable of doing full justice" between the parties.[114] Importantly to the outcome in the present case, equitable principle likewise requires that the constructive trust ought not to be imposed as an equitable remedy "in a manner injurious to third parties merely because the plaintiff has no other useful remedy against a defendant".[115]

The *Lincoln Hunt* proscriptive injunction and the *Lenah Game Meats* constructive trust

46 In determining that a trust should be declared over the copyright in the images captured at the abattoir in the present case, the Full Court relied on the "considered dicta"[116] of Gummow and Hayne JJ, with whom Gaudron J and Callinan J agreed, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[117] To understand those dicta in *Lenah Game Meats*, it is necessary to understand *Lincoln Hunt Australia Pty Ltd v Willesee*.[118]

47 Like *Lenah Game Meats*, *Lincoln Hunt* concerned the adverse consequences likely to be suffered by a business owner from the future broadcasting of images which had been created as a result of a putative trespass to its premises. And, like *Lenah Game Meats*, *Lincoln Hunt* concerned the availability and appropriateness of an interlocutory injunction to restrain that broadcasting from occurring pending the final determination of a common law

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114 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45 [128]. See also *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585 [42]; *Giumelli v Giumelli* (1999) 196 CLR 101 at 113 [10]; *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1 at 32 [74].

115 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 46 [129]. See also *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585 [42]; *Giumelli v Giumelli* (1999) 196 CLR 101 at 113-114 [10].

116 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 155 [147], 159 [158].

117 (2001) 208 CLR 199 at 231 [58], 246-247 [102], 320 [309].

118 (1986) 4 NSWLR 457.

action commenced by the business owner. Unlike *Lenah Game Meats*, the business owner's action in *Lincoln Hunt* was against the putative trespasser.

48 In *Lincoln Hunt*, Young J accepted that the business owner had established the existence of a serious question to be tried as to the occurrence of a trespass resulting through the prospective publication of the images in damage to its goodwill and did not doubt the existence of the "power to grant an injunction in the appropriate case to prevent publication of a videotape or photograph taken by a trespasser even though no confidentiality is involved". His Honour added that the power would only be exercised in circumstances where the publication was "unconscionable".[119] In the result, his Honour declined to grant the interlocutory injunction sought by the business owner against the trespasser on the basis that he considered that damages were an adequate remedy.[120]

49 In *Lenah Game Meats*, Gummow and Hayne JJ noted that the remarks of Young J had been treated in subsequent cases "as supporting orders enjoining the publication by the defendant of films it made or caused to be made in the course of trespass upon the premises of the plaintiff"[121] and had been suggested to have opened up a "new possibility" of restraining the publication of materials obtained by trespassers "through the medium of unconscionability".[122]

50 Responding to that suggestion of novelty in the provision of an interlocutory injunction, their Honours proffered the view that the approach taken in *Lincoln Hunt* and in the subsequent cases might be "supported upon a basis which, whilst not articulated in those cases, is directly referable to principle".[123] The principled basis which their Honours proffered was that the trespasser having made and obtained copyright in images "in circumstances involving the invasion of the legal or equitable rights" of the business owner was sufficient to make it "inequitable and against good conscience" for the trespasser "to assert ownership

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119 (1986) 4 NSWLR 457 at 463.

120 (1986) 4 NSWLR 457 at 465.

121 (2001) 208 CLR 199 at 246 [100], referring to *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169 and *Rinsale Pty Ltd v Australian Broadcasting Corporation* [1993] Aust Torts Reports ¶81-231. See also *Takhar v Animal Liberation SA Inc* [2000] SASC 400. Cf *Windridge Farm Pty Ltd v Grassi* (2001) 254 FLR 87; *Brighten Pty Ltd v Nine Network Australia Pty Ltd* [2009] NSWSC 319.

122 (2001) 208 CLR 199 at 246 [100], quoting Hudson, "Consumer Protection, Trespass and Injunctions" (1988) 104 *Law Quarterly Review* 18 at 21.

123 (2001) 208 CLR 199 at 246 [101].

of the copyright against the [business owner]" and to allow the trespasser to "be regarded as a constructive trustee" of the copyright such that the business owner could obtain a declaration as to the subsistence of the trust and a mandatory order requiring an assignment of the copyright to it.[124] "In the meantime", their Honours said, "the making of any broadcast would be subject to interlocutory restraint, as an invasion of the equitable interest in the copyright of the [business owner]".[125] The armoury of equitable remedies available to the business owner in that interlocutory context was identified by their Honours to include a "species of discovery" which evidently provided the inspiration for the discovery order made by the Full Court as a final order in the present case.

51 There is no reason to doubt the veracity of the reasoning contained in those dicta or its consistency with the holding in *Black v Freedman* as explained in *Creak v James Moore* and understood in *Grimaldi v Chameleon Mining*. However, three aspects of that reasoning need to be emphasised.

52 The first is that the trust over the copyright which their Honours postulated was unambiguously a constructive trust imposed in the auxiliary or supplemental jurisdiction of equity in circumstances of ongoing damage resulting from a past trespass to property where damages at common law would have failed to provide an adequate remedy. Their Honours' reasoning was directed to the availability of that remedy. Their Honours did not address its appropriateness.

53 The second is that their Honours' comments about the availability of orders in the nature of discovery were made wholly in the context of referring to the suite of interlocutory orders available to be made against the trespasser given the prospect of the business owner obtaining final relief by way of the declaration of a constructive trust. Their Honours did not address the availability or appropriateness of a court of equity making an order in the nature of discovery as an equitable remedy granted in the final determination of a matter before it.

54 The third is that their Honours did not suggest the declaration of a constructive trust over images created by a defendant as a result of a trespass to premises of the plaintiff to be exhaustive of the equitable remedies available to be granted in the auxiliary or supplemental jurisdiction of equity in the final determination of an action for trespass brought by the plaintiff against the defendant. Their Honours' concern was not to explore other, less restrictive remedies by which a court of equity might ultimately prevent the publication of the images by the defendant in the event of a trespass being found. Their concern was rather to rebut the suggestion that those remedies were only able to be

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124 (2001) 208 CLR 199 at 246 [102].

125 (2001) 208 CLR 199 at 247 [103].

provided through the application of a generalised and unprincipled criterion of unconscionability unconstrained by equitable principle.[126]

Determining the appropriate equitable remedy

55 Having regard to the reasoning in *Lenah Game Meats*, it may be accepted that the jurisdiction of the Federal Court as a court of equity extended to the declaration of a constructive trust over the copyright in the images created by Farm Transparency through its trespasses to Game Meats' abattoir for the purpose of alleviating the ongoing damage to Game Meats' business attributable to past and future copying and communication of those images.

56 The question is not whether such a declaration could have been made. The question, which was unexplored in the reasoning of the Full Court, is whether such a declaration should have been made. The answer is that it should not.

57 Informing that answer is the constitutional context. "The development of the common law in Australia cannot run counter to constitutional imperatives."[127] Nor can equitable doctrine be developed[128] or equitable remedies be provided without reference to relevant constitutional context.[129] The present relevance of the longstanding recognition of the constitutionally implied freedom of political communication lies in highlighting the constitutional significance of the freedom of communication that exists at common law,[130] exercise of which in relation to matters of political and governmental concern is an "indispensable incident" of the constitutional system contributing in turn to "the public welfare".[131] Within the system of representative and responsible government established by the *Constitution*, as Gleeson CJ and Crennan J put it in *Australian Broadcasting*

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126 See *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 241-242 [155].

127 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566.

128 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 555-556 [44].

129 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 569-570 [90].

130 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

131 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 555-556 [44]-[45].

Corporation v O'Neill,[132] "[t]he public interest in free speech goes beyond the public benefit that may be associated with a particular communication", such that failure to recognise the extent of that public interest in the provision of an equitable remedy which would operate to constrain a particular communication would amount to an error of equitable principle.

58 Here, as has been noted, the ongoing damage to its business which Game Meats faces as a result of Farm Transparency's past trespasses to Game Meats' abattoir arises from the images created by Farm Transparency through the trespass, having been copied and communicated by Farm Transparency in the past, remaining to be copied and communicated by Farm Transparency and other persons in the future. Plainly, the damages ordered by the primary judge cannot adequately compensate for that ongoing damage because the nature and extent of possible future copying and communicating of the images cannot be known. And plainly, no injunction or other order against Farm Transparency could redress the ongoing damage in so far as it is attributable to the images previously communicated by Farm Transparency remaining able to be copied and communicated by other persons in the future.

59 Were attention to be confined solely to the conduct and relative positions of Farm Transparency and Game Meats, and noting the primary judge to have made no finding that the images created disclosed criminality or regulatory breach on the part of Game Meats, there might accordingly be little difficulty in seeing the declaration of a constructive trust over the copyright in the images to be an appropriate equitable remedy. Undoubtedly, the declaration of the constructive trust would have the potential to redress the ongoing damage to Game Meats' business resulting from Farm Transparency's past trespasses more comprehensively than would a mere injunction or order akin to an injunction restraining or compelling conduct on the part of Farm Transparency.

60 The fundamental difficulty, to which attention has already been drawn, is that the declaration of the constructive trust would provide that more complete remedy for the ongoing damage to Game Meats' business resulting from Farm Transparency's past trespasses only because of the negative rights which having the copyright would confer on Game Meats. The rights conferred through the declaration of the constructive trust would be exercisable to prevent the further copying and communication of the images by diverse and largely unknown persons other than Farm Transparency. Exercise of those rights against those persons would involve separate and subsequent proceedings against those persons for breach of copyright. The potential impact on the common law freedom of communication of those persons, and in turn on political communication and on the public interest in free speech, cannot be ignored and cannot be gainsaid. That

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132 (2006) 227 CLR 57 at 72-73 [31].

impact tells in equitable principle against the grant of the remedy. So too does the spectre of the remedy facilitating future litigation to an unknown extent, counter to the objective of avoiding a multiplicity of proceedings.

61 The second prescriptive injunction, by which it will be recalled that Farm Transparency was compelled to delete all images that remain in its possession or control, is a sufficient equitable remedy to prevent Farm Transparency from further copying or communicating such images to the public and is available and appropriate to be made independently of the declaration of the constructive trust. For the reasons given by Gordon, Edelman and Steward JJ,[133] it is appropriate to expand that prescriptive injunction to cover further copies of the images that might come into the possession of Farm Transparency in the future.

62 If the second prescriptive injunction is so expanded, the proscriptive injunction which Game Meats also seeks to uphold independently of the declaration of the constructive trust is unnecessary. No other remedy is appropriate.

63 Absent the declaration of the constructive trust, the discovery order would serve no legitimate purpose. Whether the discovery order is an order of a nature that is available to be made by a court of equity as a final order, as distinct from a preliminary order[134] or an interlocutory order,[135] in light of the two-fold objective of quelling the matters in controversy between the parties before the court and avoiding a multiplicity of proceedings may be doubted. For present purposes, that doubt need not be resolved.

Disposition

64 For the trespasses that Farm Transparency has committed, it is to be recalled that Game Meats retains the common law remedy of compensatory and exemplary damages ordered by the primary judge. The supplementary equitable remedy appropriate to be provided to Game Meats in the circumstances of the case is limited to the second prescriptive injunction made by the Full Court, as expanded, by which Farm Transparency is compelled to delete all images in its possession or control.

65 We agree with the orders proposed by Gordon, Edelman and Steward JJ.

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133 See reasons of Gordon, Edelman and Steward JJ at [105].

134 See r 7.22 of the *Federal Court Rules 2011* (Cth).

135 See Div 20.2 of the *Federal Court Rules*.

GORDON, EDELMAN AND STEWARD JJ.

Introduction

66 This appeal concerns the scope of specific remedies as relief ordered by a court for the consequences of a tort where damages are not adequate to fulfil the purposes for which the damages were awarded. The appellant ("Farm Transparency") wilfully trespassed on the abattoir of the respondent ("Game Meats"), installed hidden cameras, and then trespassed again to remove the hidden cameras. Farm Transparency's objective in trespassing was to obtain footage of the treatment of animals at the abattoir and to publish that footage to the public. Unless restrained, it will publish the footage widely.

67 The primary judge in the Federal Court of Australia (Snaden J) awarded $30,000 in general damages and $100,000 in exemplary damages to Game Meats for the trespasses but declined to grant an injunction restraining Farm Transparency from publishing the images contained in the footage and held that Farm Transparency's copyright in the images was not held on constructive trust for Game Meats. The primary judge also declined to make an order for the permanent deletion of the images.

68 The Full Court of the Federal Court (Jackman J; Burley and Horan JJ agreeing) allowed Game Meats' appeal and declared that Farm Transparency held its copyright in the images on (constructive) trust for Game Meats. The declaration by the Full Court of a constructive trust over Farm Transparency's copyright in the images was a novel step in Australian law. Although that step had been foreshadowed in this Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[136] it is a step that should only be taken where no lesser remedy is capable of doing full justice in the circumstances of the case.[137]

69 The declaration by the Full Court that Farm Transparency held its copyright in the images on constructive trust for Game Meats provided a vehicle for Game Meats to obtain a legal assignment of that copyright and potential remedies against any third party who publishes the images. But forensic decisions made by Game Meats meant that affected third parties were not joined to the proceedings. There was no exploration of any public interest in those parties broadcasting a film

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136 (2001) 208 CLR 199 ("*Lenah Game Meats*").

137 See *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585 [42]; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 172 [200]; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45 [128].

made from those images and there was no consideration of the coherence of such a constructive trust with legislation such as the *Privacy Act 1988* (Cth).

70 The Full Court also made ancillary orders consequent upon the constructive trust, including injunctions (with limited exceptions) to restrain Farm Transparency from publishing the images and to require it to delete all images obtained from the trespasses, and requiring Farm Transparency to provide affidavit evidence including evidence attesting to the deletion of the images and the identities of all persons or entities to whom the images had been provided.

71 Although damages were inadequate to rectify the consequences of Farm Transparency's wrongdoing, the only orders that were needed in equity in order to address the adverse consequences to Game Meats of Farm Transparency's trespasses were orders to ensure that Farm Transparency delete or destroy all images (and copies) that it obtained from its trespasses. The appeal should therefore be allowed in part.

Background

72 Since 1996, Game Meats has conducted a licensed, Halal abattoir in the small Victorian town of Eurobin. At its abattoir, Game Meats slaughters and processes game animals, mainly feral goats, for export to overseas markets. The revenue from Game Meats' abattoir in the 2021/2022 financial year was over $37 million.

73 Farm Transparency is a company with the charitable purpose of preventing or relieving the suffering of animals. One of the three directors of Farm Transparency is Mr Delforce. Mr Delforce described Farm Transparency's "overarching wish" as being to "end all forms of business that involve causing harm to animals". One of the six employees of Farm Transparency is Ms McDonald-Eckersall, who is the architect of Farm Transparency's "Shut Down Slaughterhouses" campaign.

74 Game Meats' premises were vulnerable to biosecurity hazards. The premises were heavily secured. The premises were surrounded by a six-foot metal chain and barbed wire fence. The premises could be entered through an electronically controlled iron gate which displayed signs saying: "Q Fever risk site", "Restricted Area. Do not Enter, Authorised Personnel Only", and "Stop. All Visitors Must Report to the Office".

75 On seven occasions between 9 January 2024 and 13 April 2024, Mr Delforce and Ms McDonald-Eckersall (accompanied by another person on three occasions) trespassed onto the premises of Game Meats. The trespassers entered at night, secretly crawling under a section of the fence surrounding Game

Meats' premises. During those trespasses, they installed hidden cameras in the ceiling of the abattoir and later retrieved those cameras. The cameras were installed by drilling or cutting holes in the ceiling and by removing sections of insulation. One hole was close to a 415-volt power cable. There is no dispute that the acts of the trespassers were acts that should be attributed to Farm Transparency.

76 Footage from the cameras was used by Farm Transparency to create a film of almost 14 minutes in duration. On 3 May 2024, an employee of Farm Transparency provided the film to the Commonwealth Department of Agriculture, Fisheries and Forestry ("the Department") by an email containing an internet link to the film and seeking "nothing less than the immediate suspension of this slaughterhouse's license to operate while an independent investigation takes place" and including a table itemising alleged welfare breaches depicted in the film. On 5 May 2024, an officer of the Department sent a copy of the complaint, including a link to the film, to Game Meats. That is how Game Meats discovered the trespasses.

77 Less than two weeks after sending the complaint to the Department, an employee of Farm Transparency sent a copy of the film to Channel Seven. On 16 May 2024, after hearing that the film might have been sent to Channel Seven, Game Meats wrote to Channel Seven, informing the network that the footage had been obtained unlawfully and requesting that Channel Seven refrain from publishing any story about the footage without notice to Game Meats. The next day, on 17 May 2024, Channel Seven broadcast a story in a local news bulletin in which commentators described the film as "showing goats having their throats cut, while they appear to be still alive" and as showing "newborn goats ... being left in a room alone for hours, as they cry out in pain". But Channel Seven did not broadcast any of the film made from footage obtained from Game Meats' premises.

78 In the early evening shortly after the broadcast by Channel Seven, Farm Transparency published the film on its website. Shortly after 6.30 pm on the same day, following receipt of an interlocutory injunction obtained by Game Meats restraining publication of the film, Farm Transparency removed the film from its website. Farm Transparency continued to publish descriptions of the content of the film on social media.

79 Game Meats brought proceedings against Farm Transparency in the Federal Court. Game Meats sought remedies based on the torts of trespass and injurious falsehood, and on contraventions of s 18 of the *Australian Consumer*

Law.[138] Game Meats also sought a declaration that the copyright in the images obtained by Farm Transparency was held on constructive trust for Game Meats.

The decisions below and this appeal

The primary judge

80 The primary judge made the following relevant findings.[139] Although the primary judge refrained from making any finding that the events portrayed in the film did not involve illegal conduct, such illegal conduct was not "clear". It was always Mr Delforce's intention to make public the footage taken from Game Meats' premises. Farm Transparency published the film made from the footage twice: by giving the film to Channel Seven and by publishing it on the Farm Transparency website for (at most) a couple of hours. By publishing the film, the intention of Mr Delforce and Farm Transparency was to shame Game Meats and to harm Game Meats' business. The primary judge concluded that it seemed "more likely than not that, if it is able to publish the footage that it has obtained, [Farm Transparency] will use (or seek to use) the ensuing publicity to further its objectives".

81 The primary judge rejected the claims by Game Meats based on injurious falsehood and contraventions of s 18 of the *Australian Consumer Law*.[140] The primary judge also refused to grant an injunction to restrain Farm Transparency from publishing the images and refused to declare that the copyright in the images was held on constructive trust for Game Meats.[141] As to the injunction sought, the primary judge held that publication of the footage by Farm Transparency would not infringe any rights of Game Meats and that, although the consequences for Game Meats of publication of the footage "would unlikely be positive", the damage to the goodwill of Game Meats was not "so significant" as to amount to

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138 *Competition and Consumer Act 2010* (Cth), Sch 2.

139 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 281 [87], 286-287 [122]-[123], 288 [128], 295 [168], 298 [185], [187].

140 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 285 [113], 288 [132], 290 [145], 291 [150]-[151].

141 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 297 [182], 303 [218].

"immeasurable or extreme damage".[142] The primary judge also declined to make an order for the permanent deletion of the images.[143]

82 However, the primary judge upheld the claim for trespass and ordered that Farm Transparency pay damages to Game Meats of $30,000 in general damages and $100,000 in exemplary damages.[144] The damages awards by the primary judge did not extend to potential financial or non-financial consequences to Game Meats of publication of the images. As to the financial consequences, the primary judge held that although there had been a downturn in production at the Game Meats abattoir, there was "no obvious basis upon which the court might confidently attribute" the downturn to the conduct of Farm Transparency.[145] As to the non-financial consequences, the primary judge held that there was not much that could be made of evidence of reduced morale among the staff of Game Meats.[146]

The Full Court

83 Game Meats appealed to the Full Court from the refusal by the primary judge to grant injunctive relief against Farm Transparency and from the refusal to declare that Farm Transparency held its copyright in the images on constructive trust for Game Meats. Farm Transparency cross-appealed against the quantum of exemplary damages. The Full Court allowed the appeal and dismissed the cross-appeal. The Full Court declared that Farm Transparency held on trust for Game Meats the copyright in the images (including copies) that were obtained as a result of Farm Transparency's trespasses. An associated order was made directing Farm Transparency to execute a legal assignment of that copyright to Game Meats.

84 The consequence of the Full Court recognising that constructive trust was that the Full Court made ancillary orders permanently restraining Farm Transparency from publishing (other than to the Department) any of the images

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142 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 302-303 [214].

143 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 303 [218].

144 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 311 [264].

145 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 280 [78].

146 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 279 [76].

(and copies) obtained as a result of the trespasses, and requiring Farm Transparency to delete all those images and provide an affidavit attesting to the deletion and to the identity of all persons to whom the images had been provided together with the date and time and means by which such images were provided.

85 There were two aspects to the reasoning by which Jackman J concluded that Farm Transparency held the copyright in the images on constructive trust for Game Meats. The first aspect of his Honour's reasoning was an analogy with other categories of cases, some of which were said to arise in "broadly similar circumstances",[147] where a constructive trust had been imposed. These categories were as follows: (i) constructive trusts over property obtained by theft[148] or fraud;[149] (ii) constructive trusts over money paid by mistake where the payee was, or became, aware of the mistake;[150] and (iii) constructive trusts over property acquired contrary to a "firm arrangement" or agreement that one party should buy property for the advantage of both where the agreement induced the other party not to bid against the buyer.[151] The second aspect of his Honour's reasoning was to rely upon the decision of this Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[152] in which four Justices foreshadowed the recognition of a constructive trust over property obtained as a result of a trespass.

The appeal to this Court

86 Farm Transparency's three substantive grounds of appeal in this Court challenge the constructive trust recognised by the Full Court, and therefore all the ancillary orders consequent upon that trust, on the basis that: (i) there was no legal, equitable, or statutory wrong to justify the constructive trust; (ii) the facts and circumstances did not justify a constructive trust; and (iii) a constructive trust

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147 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 277 [16].

148 *Black v S Freedman & Co* (1910) 12 CLR 105 at 110.

149 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716.

150 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 715.

151 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 29-30 [68]-[69], referring to *Pallant v Morgan* [1953] Ch 43 and *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch 372.

152 (2001) 208 CLR 199.

should only have been awarded if there were no more appropriate form of relief that was available to quell the controversy.

87 Although the ancillary orders made by the Full Court, including injunctions, were orders consequent upon the constructive trust, Game Meats sought, by a notice of contention, to uphold the "injunctive relief against publication of the images" as an independent remedy in equity's auxiliary jurisdiction for the trespasses by Farm Transparency. Following the oral hearing of the appeal, Game Meats sought to amend its notice of contention to support all of the Full Court's orders (albeit without provision for time for deletion of the images or preparation of affidavits) other than the constructive trust (and associated execution of a legal assignment of copyright) as independent remedies for the trespasses.

88 As explained below, all the relief sought in Game Meats' proposed amended notice of contention was, consistently with its oral submissions which prompted the application to amend, a lesser form of relief than the constructive trust. As a vehicle to obtain the legal assignment of the copyright, the effect of the constructive trust was to permit even third parties to be restrained from publishing the images. The orders sought in the proposed amended notice of contention did not extend that far. Game Meats should have leave to rely on its proposed amended notice of contention, since the matters raised in it were fully argued and there is no relevant prejudice to Farm Transparency.

89 The issue raised by Game Meats' amended notice of contention, concerning the availability of orders as a response to the consequences of Farm Transparency's trespasses, is logically anterior to a consideration of whether there was no more appropriate form of relief than a constructive trust that was available to quell the controversy in this case.

Remedies short of a constructive trust as a response to the consequences of trespass

Injunctions to rectify the consequences of a tort

90 Injunctions are generally described as orders made in equity to "protect an equitable or legal right" or "prevent an equitable or legal wrong", including a

"public wrong".[153] But "the term 'injunction' ... has no fixed definition".[154] And although injunctions "more often" seek "to prevent a meditated wrong", they can also seek "to redress an injury already done", including for legal wrongs in the auxiliary jurisdiction of equity.[155] For instance, although not always historically described as injunctions,[156] it has long been recognised that courts of equity have power to make orders, without the requirement for any continuing or threatened wrong against, or any title of, a plaintiff,[157] for delivery up, destruction, or deletion of goods or hard or electronic copies of documents,[158] as a "complete remedy" whenever "the remedy afforded by the ordinary courts is incomplete".[159]

91 Just as damages for a wrong aim to restore by rectifying both the wrongful conduct and its consequences,[160] so too, where damages would be inadequate sufficiently to achieve either of those goals, there is power to order an injunction to "undo the wrong" and also to rectify the consequential effects of the wrongful conduct to put the plaintiff in the position they were in "before the injury was

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153 *Lenah Game Meats* (2001) 208 CLR 199 at 232 [60] and fn 153, citing *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257-260 [24]-[32], 267-268 [49]-[52]. See also *Law Debenture Trust Corporation v Ural Caspian Oil Corporation Ltd* [1995] Ch 152 at 171.

154 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 390. See also Maitland, *Equity: also the Forms of Action at Common Law* (1910) at 256-257.

155 Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (1836), vol 2, §862 at 155.

156 See *Doulton Potteries Ltd v Bronotte* [1971] 1 NSWLR 591 at 596. Compare *Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd* [1965] NSWR 581 at 587-589.

157 Holdsworth, *A History of English Law*, 3rd ed (1945), vol 5 at 324, citing *Young v Burrell* (1576) Cary 54 at 54-55 [21 ER 29 at 29].

158 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 326 [68].

159 Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill*, 5th ed (1847) at 138-139; *North v Great Northern Railway Co* (1860) 2 Giff 64 at 68 [66 ER 28 at 30]. See also *Dougan v Ley* (1946) 71 CLR 142 at 153.

160 *Stewart v Metro North Hospital and Health Service* (2025) 282 CLR 655 at 670 [25]; *Austral v Northern Territory* (2026) 100 ALJR 912 at 937 [110]; 430 ALR 324 at 353-354.

committed".[161] An injunction that aims to rectify the wrongful conduct or the consequences of a wrong has been described as "restorative"[162] or as a "restorative mandatory injunction".[163]

92 In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*,[164] five members of this Court recognised that a restorative mandatory injunction can be awarded despite the violation of a plaintiff's rights, the injury, being complete. Their Honours recognised that "for over a century it has been established that 'there is no rule which prevents the court from granting a mandatory injunction where the injury sought to be restrained has been completed before the commencement of the action'".[165] The injunction could be awarded if "the damage caused by tortious conduct is ongoing and is 'extreme, or at all events very serious'".[166] The criterion of seriousness would be met and an injunction would issue where the injury is not "capable of being fully and abundantly compensated by a pecuniary sum", such that "restoring things to their former condition is the only remedy which will meet the requirements of the case".[167]

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161 *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 ("*Smethurst*") at 249 [177], quoting Seton, *Forms of Judgments and Orders in the High Court of Justice and Court of Appeal*, 7th ed (1912), vol 1 at 518.

162 *Law Debenture Trust Corporation v Ural Caspian Oil Corporation Ltd* [1995] Ch 152 at 170.

163 Lerch, *Final Injunctions in Tort Law* (2025) at 145; see also at 146. See also Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 462.

164 (1998) 195 CLR 1.

165 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [33], quoting Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 50. See also Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 49.

166 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [33], quoting *Durell v Pritchard* (1865) LR 1 Ch App 244 at 250.

167 Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 49. See also *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [33].

93 In many cases, the focus of a restorative mandatory injunction will be upon undoing the wrongful conduct itself where damages are an inadequate response.[168] It is said to be "of great importance to see if the [d]efendant knew he was doing wrong" so that the injunction would prevent "the [d]efendant doing a wrongful act, and thinking that he could pay damages for it".[169]

94 In other cases, the restorative mandatory injunction may be concerned with rectifying the consequential effects of the wrongful conduct. Again, before making an order that interferes with the liberty of the defendant, it is necessary that other remedies, such as compensatory and exemplary damages, are inadequate sufficiently to rectify the consequences of the wrongdoing, including any need to deter the wrongdoer or others from similar wrongdoing.[170] Instances of where an injunction may be necessary "in order to do justice to the plaintiff and as a warning to others" include cases where "the defendant has acted in a high-handed manner".[171] That concept of acting in a high-handed manner was applied by Bridge J in *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd*[172] to consequential effects of wrongful conduct. In that case, his Lordship said that one matter that "cries out for the exercise of the court's power" is where the defendant is "clearly motivated" by an attitude that it "can get away with [wrongdoing] subject only to a liability to pay damages".

95 More recently, this principle was applied in relation to the consequences of wrongful conduct in *Ansco Arena Ltd v Law*,[173] where an injunction was granted to require the defendants to remove from the internet videos of their trespasses onto the roof of the O2 Arena in London. The "primary purpose" of the trespass

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168 See, eg, *Council of the Shire of Hornsby v Danglade* (1928) 29 SR (NSW) 118 at 124, referring to *Attorney-General v Parish* [1913] 2 Ch 444.

169 *Smith v Smith* (1875) 20 LR Eq 500 at 505. See also *Redland Bricks Ltd v Morris* [1970] AC 652 at 666.

170 *Austral v Northern Territory* (2026) 100 ALJR 912 at 938 [113]; 430 ALR 324 at 355.

171 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 193, approved in *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 855 [121]. See also *Crestfort Ltd v Tesco Stores Ltd* [2005] L&TR 20 at 435-436 [70].

172 [1974] QB 142 at 157. See also *Crestfort Ltd v Tesco Stores Ltd* [2005] L&TR 20 at 435-436 [70].

173 [2019] EWHC 835 (QB).

was to make videos to be posted on the internet for profit to the trespassers.[174] But since the propensity of the videos was to encourage others to commit similar trespasses on the plaintiffs' property, "unravelling the effects of the original trespass require[d] restraint on the posting of the videos".[175]

96 All members of this Court in *Smethurst v Commissioner of the Australian Federal Police*[176] also recognised the availability of a restorative mandatory injunction to rectify the consequential effects of wrongful conduct in an appropriate case. In *Smethurst*, the injunction refused by a majority of this Court was sought for delivery up and destruction of private material held by the Australian Federal Police. The private material was information obtained from the appellant journalist's mobile phone, which had been seized as a result of a trespass due to an invalid search warrant.

97 In the majority, the joint judgment of Kiefel CJ, Bell and Keane JJ accepted that if the trespass is complete, so that there is no ongoing infringement of the plaintiff's rights, a court will only grant an injunction if "the damage which has occurred is serious or the trespass is continuing in its effects".[177] The joint judgment in *Smethurst* refused the injunction, consistently with the principle that an injunction will not issue if the act will cause no real damage,[178] because their Honours considered that the consequences to Ms Smethurst were not legally recognised damage: the taking of the information for use in the investigation of an offence, and the prospect of being investigated for an offence, were not damage.[179]

98 The other member of the majority in *Smethurst*, Nettle J, accepted that "restorative injunctive relief" could be awarded in some circumstances where damages would be inadequate.[180] Nettle J held that on the facts of the case, damages were adequate having regard to the "nature, gravity and contumacy of the trespass". His Honour emphasised, however, that if the matter "had involved a

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174 *Ansco Arena Ltd v Law* [2019] EWHC 835 (QB) at [13].

175 *Ansco Arena Ltd v Law* [2019] EWHC 835 (QB) at [16].

176 (2020) 272 CLR 177.

177 *Smethurst* (2020) 272 CLR 177 at 212 [68], citing Kerr, *A Treatise on the Law and Practice of Injunctions*, 6th ed (1927) at 94-95.

178 Maitland, *Equity: also the Forms of Action at Common Law* (1910) at 262.

179 (2020) 272 CLR 177 at 213 [72]-[73].

180 (2020) 272 CLR 177 at 243 [157]-[158].

deliberate flouting of the law ... the public interest may have provided good reason to regard the official retention and use of the information as raising an equity for restorative injunction".[181]

99 Each of the members of the minority specifically recognised the availability of an injunction and would have awarded a restorative mandatory injunction on the facts of the case. In his Honour's reasoning concerning the common law, Gageler J held that a restorative mandatory injunction should issue because "money alone cannot restore [Ms Smethurst] to the position she would have been in had the trespasses not been committed".[182] Gordon J held that a restorative mandatory injunction should issue since damages were not an adequate remedy, explaining that "equity would seek to restore the position of Ms Smethurst to that prior to the trespass, which extends to a consideration of the consequences of the trespass".[183] And Edelman J held that a restorative mandatory injunction should issue, consistently with its central rationale, because "the interference with the liberty of the defendant ... is justified by the extent of the inadequacy of damages to ameliorate the consequences of the wrongdoing".[184]

Remedies against Farm Transparency

100 The central basis for Farm Transparency's opposition to a restorative mandatory injunction was that the injunction would not fall within the narrow conception of an order made to enforce a right or protect a right from infringement. For the reasons explained above, whether or not they were historically described as "injunctions", there are instances of orders made in equity that do not fall within that narrow conception. The restorative mandatory injunction is one such instance.

101 Farm Transparency also submitted that an injunction should not issue to restrain it from publishing the images contained in the footage because the awards of general damages and exemplary damages were adequate. In other words, and taking into account the intrusion into the liberty of a defendant caused by a restorative mandatory injunction, were the awards of general damages and exemplary damages adequate to reverse or prevent the consequences of the trespasses?

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181 *Smethurst* (2020) 272 CLR 177 at 243 [158].

182 *Smethurst* (2020) 272 CLR 177 at 230 [122].

183 *Smethurst* (2020) 272 CLR 177 at 257 [197].

184 *Smethurst* (2020) 272 CLR 177 at 276 [252].

102 The awards of general damages and exemplary damages were concerned with the acts of trespass by Farm Transparency. As Jackman J observed,[185] the quantum of exemplary damages was determined by reference to the primary judge's findings that Farm Transparency intended to commit similar trespasses in the future and that there was "not the slightest possibility" that Farm Transparency would face criminal sanction under the legislation to which reference had been made in submissions.[186] The exemplary damages were not increased by the primary judge due to the lack of an injunction or a constructive trust.[187] The awards of damages, therefore, were unconcerned with the consequences that would follow from publication of the images obtained by Farm Transparency.

103 Although Game Meats was unable to prove that loss would necessarily result from the public exposure arising from publication of the images, the need to prevent publication arose from the need to deter Farm Transparency from its objective of publishing the images "to effect precisely that measure of public exposure".[188] An injunction requiring Farm Transparency permanently to delete or otherwise destroy the images (including copies) in its possession or control obtained from its trespasses (and to provide an affidavit attesting to that deletion or destruction), and to do so forthwith, is a necessary response, in the words of Bridge J,[189] to the circumstances where Farm Transparency is "clearly motivated" by an attitude that it "can get away with [wrongdoing] subject only to a liability to pay damages".

104 Farm Transparency submitted that an injunction that required it to delete or destroy the images that it obtained from its trespasses would prevent it from informing itself or the Department of the legality of the conduct of Game Meats. But Farm Transparency has already made a complaint to the Department about the conduct of Game Meats and provided the Department with access to the film. The Department was not, and is not, required by any order to delete any copy of

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185 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 285 [48].

186 *Summary Offences Act 1966* (Vic), s 9.

187 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 286 [49].

188 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 294 [166].

189 Above at [94].

the film in its possession or control. And the injunction requiring Farm Transparency to delete or destroy the images that it obtained from its trespasses does not prevent Farm Transparency from making any further submission to the Department.

105 The other injunction which Game Meats sought in its amended notice of contention was an injunction permanently to restrain Farm Transparency from publishing the images obtained from the trespasses. That injunction is not necessary. Other than to preserve the rights of Game Meats for the period between the making of this Court's orders for deletion or destruction and compliance with those orders, there is no need for further restraint because there is no suggestion that Farm Transparency will not honour orders for deletion forthwith of all images obtained from its trespasses that it possesses, controls, or might come to possess or control. Farm Transparency has consistently given, and honoured, undertakings during this litigation. And if the concern of Game Meats in seeking the permanent injunction against use is that, after deletion or destruction of the images in its possession or control, Farm Transparency might re-obtain copies of the images from third parties to whom the images had been provided, then that concern is addressed by the obligation to delete or destroy images (and copies of the images) obtained from the trespasses extending to any of the same images which Farm Transparency later comes to possess or control.

106 The final order which Game Meats sought to uphold in its amended notice of contention was the order requiring Farm Transparency to file with the Full Court an affidavit attesting to the identity of any third parties to whom Farm Transparency provided the images obtained from the trespasses and the date and time and means by which the images were provided. Such an order is not necessary for Game Meats to obtain relief as against Farm Transparency. Put in different terms, such an order would be appropriate only if Game Meats could have a potential action against identified third parties. And the only potential action which Game Meats foreshadowed was for infringement of copyright. As Game Meats repeatedly submitted in this case, "the prize in this litigation is the control of the images". Whether such an order is appropriate, in addition to the other orders discussed above, depends upon the availability of a constructive trust of the copyright in the images held by Farm Transparency.

A constructive trust of Farm Transparency's copyright

The nature of a constructive trust of copyright

107 A copyright in relation to images in a cinematograph film (such as the footage obtained and processed by Farm Transparency in this case) is, relevantly, described by the *Copyright Act 1968* (Cth) as the exclusive right to make a copy of the film, to cause the film to be seen in public, and to communicate the film to

the public.[190] Putting to one side particular statutory or resulting trusts, a trust that is imposed upon a right in the absence of any express or implied declaration of trust is generally described as a "constructive" trust.[191] Hence, the holder of copyright subject to such a trust is usually described as a "constructive trustee".[192]

Institutional constructive trusts and remedial constructive trusts

108 There are ambiguities about the concepts of "constructive trusts" and "constructive trustees". One ambiguity[193] arises because the expression "constructive trust" is used in circumstances where the trust might be described as "institutional" (arising "immediately upon the acquisition of the [right]") as well as where it might be described as "remedial" (arising as a remedy "when recognised by a court").[194] The two types of constructive trust might overlap if, for example, a remedial constructive trust were recognised by the court with retrospective application from the date of the relevant events, rather than merely from the date of judgment.[195]

109 Nevertheless, there are important differences between the two types of constructive trust. An institutional constructive trust is recognised by a court as a pre-existing right which arose when the relevant events occurred and despite any subsequent events. A remedial constructive trust is the creation of the court only, and is imposed "as a remedy" only if there are no "other means available to quell the controversy".[196] Put another way, where the constructive trust is a remedy for wrongdoing, it is imposed to rectify wrongful conduct or its consequences only if

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190 *Copyright Act 1968* (Cth), s 86.

191 Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 228-229 [13-01]; Hudson, McFarlane and Mitchell, *Hayton, McFarlane and Mitchell on Equity and Trusts*, 15th ed (2022) at 707.

192 *Lenah Game Meats* (2001) 208 CLR 199 at 246 [102].

193 See also *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 [4].

194 *Evans v European Bank Ltd* (2004) 61 NSWLR 75 at 100 [113]. See also *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714-715; *Angove's Pty Ltd v Bailey* [2016] 1 WLR 3179 at 3191-3192 [27]; [2017] 1 All ER 773 at 787-788.

195 Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 240 [13-11]; *Muschinski v Dodds* (1985) 160 CLR 583 at 615.

196 *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585 [42].

there are no "other orders capable of doing full justice"[197] or "if some other remedy is not suitable".[198] Hence, the remedial constructive trust can be imposed at the date of judgment in a manner "akin to orders for conveyance",[199] without "an immediate right to positive equitable relief as understood in the same sense that a right to recover damages may be seen as consequent upon a breach of contract".[200] In such cases, the "equitable right to a conveyance is the cause of the trust, not its product".[201]

110 The remedial constructive trust is therefore only recognised by the court in its equitable discretion at the date of judgment, based on all the circumstances that exist at that date. Although the equitable discretion is not at large, and is to be exercised by reference to the "legitimate processes of legal reasoning" and rules of equity,[202] there is almost no limit to the circumstances upon which the parties can rely and which can be considered at the date of judgment. A remedial constructive trust therefore might not be imposed by the court if any circumstances at the date of judgment make it unsuitable as a remedy to resolve the dispute. For instance, the trust might not be imposed if, prior to the hearing, third parties have acquired rights in relation to the subject matter of the proposed trust or if the defendant is insolvent.[203]

111 But the recognition of the remedial constructive trust in Australian law has not supplanted or replaced the existence of the institutional constructive trust. As a matter of principle, facts could occur which, independently of any later court order, immediately impose upon a person the duty to hold rights on constructive

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197 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45 [128].

198 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 172 [200].

199 *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 [5].

200 *Giumelli v Giumelli* (1999) 196 CLR 101 at 113 [9].

201 Swadling, "The Fiction of the Constructive Trust" (2011) 64 *Current Legal Problems* 399 at 414.

202 *Muschinski v Dodds* (1985) 160 CLR 583 at 615. See also *Pakenham Upper Fruit Co Ltd v Crosby* (1924) 35 CLR 386 at 400-401; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 590 [148].

203 *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585 [42]; *Giumelli v Giumelli* (1999) 196 CLR 101 at 113-114 [10].

trust for another. The court order that recognises this pre-existing constructive trust does so in the same way that court orders for specific performance or injunctions generally give effect to pre-existing rights to contractual performance[204] or other pre-existing rights.[205]

112 The institutional constructive trust is also recognised in Australian law as a matter of authority. A fiduciary who benefits by receiving rights from their fiduciary position has not been treated as subject to obligations in relation to that benefit only once the court makes orders.[206] The "inflexible rule"[207] imposing a constructive trust over fiduciary benefits[208] has not been replaced by a flexible rule dependent upon whether a personal remedy of disgorgement of profits is an adequate remedy. When a constructive trust is recognised over proceeds from the sale to a third party of land which is the subject of a completed contract, that

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204 *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 504; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 574-575 [128]; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 285-286 [13]; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 639 [195].

205 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 394 [28], 395-396 [31]; *Lenah Game Meats* (2001) 208 CLR 199 at 231-232 [60], 241 [91], 312 [285]; *Smethurst* (2020) 272 CLR 177 at 206 [48], 214 [77], 241-242 [155], 271 [240], 274-275 [248].

206 *Wicks v Bennett* (1921) 30 CLR 80 at 98; *Furs Ltd v Tomkies* (1936) 54 CLR 583 at 592; *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342 at 350. See also Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 241 [13-11].

207 *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408-409, citing *Parker v McKenna* (1874) LR 10 Ch App 96 at 124. See also *Breen v Williams* (1996) 186 CLR 71 at 108; *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 93 [69].

208 Compare *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 560, explaining *Keech v Sandford* (1726) Sel Cas t King 61 [25 ER 223]. See also Getzler, "Rumford Market and the Genesis of Fiduciary Obligations", in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (2006) 577 at 586; Smith, *The Law of Loyalty* (2023) at 194-195.

constructive trust[209] has not been treated as depending on the discretion of the court but rather on the "availability of specific performance" to the purchaser under the completed contract.[210] Nor have the "automatic" resulting trusts that arise by operation of law at the time of the happening of an event[211] (and are therefore a species of institutional constructive trust[212]) been abolished.[213] And legislation has been enacted upon the assumption of the prior existence of institutional constructive trusts,[214] including legislation which assumes that the distribution of rights on bankruptcy or insolvency is subject to a pre-existing institutional constructive trust.[215]

113 It is not clear whether the constructive trust declared by the Full Court over the copyright was intended to be an institutional constructive trust rather than a remedial constructive trust. It is therefore necessary to consider whether a constructive trust of Farm Transparency's copyright arose on an institutional as well as a remedial basis.

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209 *PSAL Pty Ltd v Raja* [2016] WASC 295 at [89]-[91], discussing *Lake v Bayliss* [1974] 1 WLR 1073; [1974] 2 All ER 1114. See also Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 234-235 [13-07].

210 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 332-333 [53].

211 *Bosanac v Federal Commissioner of Taxation* (2022) 275 CLR 37 at 70-71 [93]-[94].

212 *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321 at 336 [93]-[94]. See also *In re Llanover Settled Estates* [1926] Ch 626 at 637, citing Underhill, *The Law Relating to Private Trusts & Trustees*, 8th ed (1926) at 147; Chambers, *Resulting Trusts* (1997) at 4.

213 cf Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 94-102.

214 See, eg, *Conveyancing Act 1919* (NSW), s 23C(2); *Property Law Act 1958* (Vic), s 53(2); *Law of Property Act 1936* (SA), s 29(2); *Property Law Act 2023* (Qld), s 10(1)(c); *Property Law Act 1969* (WA), s 34(2); *Conveyancing and Law of Property Act 1884* (Tas), s 60(2); *Law of Property Act 2000* (NT), s 10(2); *Civil Law (Property) Act 2006* (ACT), s 201(4)(a).

215 *Bankruptcy Act 1966* (Cth), s 116(2)(a). See *Parsons v McBain* (2001) 109 FCR 120 at 126 [16]; *Clout (Trustee) v Markwell* (2001) 1 ABC (NS) 177 at 184-185 [20]; *Parianos v Melluish (Trustee)* (2003) 1 ABC (NS) 333 at 343 [59]-[63]; *Shepard (Trustee) v Behman* [2019] FCA 1801 at [97]-[98].

No institutional constructive trust of Farm Transparency's copyright

114 A central part of the reasoning upon which Jackman J supported the existence of a constructive trust of the copyright relied upon analogies with three categories of cases where constructive trusts have been imposed: (i) property obtained by theft or fraud; (ii) money paid by mistake where the payee was, or became, aware of the mistake; and (iii) property acquired contrary to a firm arrangement or agreement that one party should buy property for the advantage of both where the agreement induced the other party not to bid against the buyer. The characterisation of the constructive trust declared by the Full Court as institutional might be suggested by one case relied upon by Jackman J in relation to a constructive trust arising from theft or fraud, a category of constructive trust which has been treated in this Court as arising at the time of the theft[216] and which Jackman J considered to have "strong similarities" with the present case,[217] where it was said that "the trust rests on the existence of property rights and in that sense is not purely remedial. The court declares that a trust exists and existed".[218]

115 Perhaps for the reason that the constructive trust was seen as institutional, there was no exploration in the Full Court of the effect of the constructive trust on third parties or of whether there were more appropriate means than a constructive trust to quell the controversy and do justice between the parties. But to the extent that any of the three categories of constructive trust to which Jackman J referred are capable of being understood as imposing a constructive trust on an institutional basis, great care should be taken before extending those categories. Each category has been the subject of much debate as to its conceptual foundation or scope of operation.[219] There is debate about any rationale upon which the trust is imposed

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216 See, eg, *Black v S Freedman & Co* (1910) 12 CLR 105 at 110-111 and *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426 at 432-433, 441. See also Tarrant, *Legal and Equitable Property Rights* (2019) at 127-133.

217 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 278 [18].

218 *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 at 266 [155]. See also *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429 at 437 [42]. But compare *Sze Tu v Lowe* (2014) 89 NSWLR 317 at 347-348 [156]-[158] and *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296 at 360 [256], 405 [511].

219 Millett, "Restitution and Constructive Trusts" (1998) 114 *Law Quarterly Review* 399 at 412-413; Barkehall Thomas, "Thieves as trustees: The enduring legacy of *Black v S Freedman & Co Ltd*" (2009) 3 *Journal of Equity* 52; Yip, "The *Pallant v*

in some of these cases.[220] There is also debate about whether some of these instances are properly described as resulting trusts rather than constructive trusts,[221] or as both,[222] or as mere devices to obtain a transfer of legal rights with the absence of any positive trust duties.[223] None of these debates was addressed in argument before the Full Court or before this Court.

116 To the extent that a constructive trust is imposed by law immediately upon the acquisition of a right and independently of the remedial discretion of the court at the date of judgment, the extension of such an institutional constructive trust to the present circumstances would be a large and unwarranted step. Even putting to one side the controversy surrounding each of the three categories of constructive trust as an institutional trust, none is a close analogy with the circumstances of the present case. Unlike instances of theft, fraud, and mistake, the copyright that Farm Transparency has in the images was not a right transferred from another. And unlike particular instances where one party obtains rights contrary to a firm arrangement or agreement, no arrangement or agreement exists where copyright arises as a result of a trespass.

117 More fundamentally, there is no principled reason for the law immediately to impose an institutional constructive trust in every case of copyright obtained as

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Morgan equity reconsidered" (2013) 33 *Legal Studies* 549; Porter, "Questioning the Mistaken Payment Constructive Trust" (2023) 97 *Australian Law Journal* 58. Compare *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 at 740 [36]-[37] and Tarrant, "Thieves as trustees: In defence of the theft principle" (2009) 3 *Journal of Equity* 170.

220 *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429 at 437 [42] and *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 715, re-explaining *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105. Compare Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 470 [14-010].

221 *Evans v European Bank Ltd* (2004) 61 NSWLR 75 at 100 [112]. See also *Bosanac v Federal Commissioner of Taxation* (2022) 275 CLR 37 at 70-71 [94]. See also Chambers, *Resulting Trusts* (1997) at 129. Compare Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72.

222 See *In re Llanover Settled Estates* [1926] Ch 626 at 637, citing Underhill, *The Law Relating to Private Trusts & Trustees*, 8th ed (1926) at 147.

223 Bant and Bryan, "Specific restitution without trusts" (2012) 6 *Journal of Equity* 181 at 184-185.

a result of even a wilful trespass. Any description of the conduct of a wilful trespasser as "unconscionable" is not a principled reason for a constructive trust. There is "no place in the law of this country for the notion of 'a constructive trust of a new model' which, '[b]y whatever name it is described, ... is ... imposed by law whenever justice and good conscience' ... 'require it'".[224] As has been said in a different context, such descriptions of "unconscionability" do not permit "a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate".[225] The label "unconscionable" is no more than a characterisation of a legal result rather than the identification of a process of reasoning.[226] As explained below, the only principled reason for the law to impose a constructive trust on copyright obtained as a result of a trespass is that other remedies are inadequate to rectify the consequences of the trespass.

No remedial constructive trust should be imposed on Farm Transparency's copyright

118 It may be that, to the extent any trust should be recognised in the three categories described by the Full Court, such a trust, whether described as constructive or resulting or both, and whether or not institutional, could be alternatively characterised (as it is in other contexts[227]) as a remedial trust.[228] The trust would then be imposed as a remedy by the court only where there are no other appropriate means to quell the controversy and do justice between the parties. In an appropriate case, such a remedial constructive trust might be imposed on

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224 *Muschinski v Dodds* (1985) 160 CLR 583 at 615, quoting *Hussey v Palmer* [1972] 1 WLR 1286 at 1289-1290; [1972] 3 All ER 744 at 747 and citing *Eves v Eves* [1975] 1 WLR 1338 at 1341-1342; [1975] 3 All ER 768 at 771-772.

225 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256.

226 See *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 409 [34]; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 73 [43]; *Thorne v Kennedy* (2017) 263 CLR 85 at 105-106 [45]; *Kramer v Stone* (2024) 281 CLR 484 at 503 [41].

227 *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296 at 422 [582].

228 See *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 29-30 [68]-[69], 45 [128]; *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296 at 360 [255]. See also *Kerr v Baranow* [2011] 1 SCR 269 at 300-301 [52].

copyright obtained as a result of a trespass. This view is supported by the obiter dicta of Gummow and Hayne JJ in *Lenah Game Meats*.

119 In *Lenah Game Meats*, the issue was whether an interlocutory injunction should issue to restrain the Australian Broadcasting Corporation from actions including publishing video footage obtained by trespassers of possums being stunned and having their throats cut. The interlocutory injunction was refused but, in obiter dicta, Gummow and Hayne JJ (with whom Gaudron J and Callinan J agreed on this point[229]) considered the possibility of the court imposing a constructive trust on the copyright obtained by the trespassers. Their Honours did so by reference to the decision in *Lincoln Hunt Australia Pty Ltd v Willesee*.[230] In that case, although the interlocutory injunction was refused, Young J accepted that there was a prima facie case that the defendant trespassers should be restrained from publishing video footage that they took, where there was some evidence that publication would harm the goodwill of the plaintiff's business.[231]

120 Although questions concerning intellectual property rights had not been explored in *Lincoln Hunt* or (as their Honours recognised) in the case before them, Gummow and Hayne JJ tentatively suggested that in a case where a film was made in circumstances involving the "invasion of the legal or equitable rights of the plaintiff", it "may then be inequitable and against good conscience for the maker to assert ownership of the copyright against the plaintiff and to broadcast the film".[232] The suggestion by their Honours was made in the context of assessing "the ability of equity to provide remedies in situations previously not covered by precedent" and "a new possibility of restraining the publication of materials obtained by trespassers".[233]

121 The constructive trust was suggested by Gummow and Hayne JJ in *Lenah Game Meats* as a vehicle to achieve two remedial consequences: (i) the legal assignment of the copyright, from which discovery could be sought of the identity

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229 *Lenah Game Meats* (2001) 208 CLR 199 at 231 [58], 320 [309].

230 (1986) 4 NSWLR 457.

231 *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 464.

232 *Lenah Game Meats* (2001) 208 CLR 199 at 246-247 [102]-[103].

233 Hudson, "Consumer Protection, Trespass and Injunctions" (1988) 104 *Law Quarterly Review* 18 at 18, 21, quoted in part in *Lenah Game Meats* (2001) 208 CLR 199 at 246 [100].

of any third party in possession of the film,[234] with the potential for a court to restrain publication by that third party; and (ii) in the meantime a power to restrain publication to a third party, or by any third party known to be in possession of the film.[235] In short, since "[t]he essence of copyright in an unpublished work is that it enables the owner to prevent others from publishing that work",[236] the constructive trust was a vehicle from which the plaintiff could obtain a means (legal rights) to enable the plaintiff to restrain publication of the film by any person.

122 The treatment by their Honours of a constructive trust over copyright as only a possible remedial response was no doubt because it was recognised that there will be instances where such a response would not be appropriate. Most obviously, the imposition of a constructive trust to obtain the remedial restraints above would not be appropriate if "the consequence would be to prevent the disclosure of criminality which in all the circumstances it would be in the public interest to reveal".[237] The same would be true of potential criminality. In this case, for three reasons, justice is best served by the more limited remedy of the injunction against Farm Transparency requiring deletion of the images.

123 First, it is not appropriate to impose a constructive trust as a remedial vehicle to obtain ancillary orders such as those made by the Full Court requiring an affidavit attesting to the identity of all persons to whom Farm Transparency provided copies of the images and the date and time and means by which such images were provided. That information could have, and should have, been sought as part of discovery[238] or interrogatories,[239] as interlocutory orders before trial,[240] or in the course of cross-examination of witnesses at trial.

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234 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133; *British Steel Corporation v Granada Television Ltd* [1981] AC 1096.

235 (2001) 208 CLR 199 at 246-247 [102]-[103].

236 *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 58.

237 *A v Hayden* (1984) 156 CLR 532 at 545.

238 *Federal Court Rules 2011* (Cth), rr 20.13, 20.23.

239 *Federal Court Rules*, r 21.01.

240 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 at 175; *Rugby Football Union v Consolidated Information Services Ltd* [2012] 1 WLR 3333 at 3338 [14]-[15]; [2013] 1 All ER 928 at 934; *Computershare Ltd v Perpetual*

124 Secondly, as the amici curiae in this case, the Human Rights Law Centre and the Alliance for Journalists' Freedom, correctly submitted, a constructive trust could significantly impinge upon the freedoms and interests of third parties. None of those third parties were before the courts below, or this Court. As a vehicle to obtain the restraint of third parties from publication of the images, the constructive trust might directly affect the interests of Channel Seven and officers of the Department who are in possession of a copy of the film. In *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*,[241] this Court referred to the received influence in Judicature systems of the Chancery concern "that all persons materially interested in the subject matter of a suit generally ought to be made parties so as to settle the controversy by binding those interested to the final decree".

125 If third parties such as Channel Seven or any officers of the Department had been joined to the proceeding at trial, then they might have pointed to strong reasons that the order of a restorative mandatory injunction against Farm Transparency would be a sufficient remedy to do justice in the case, rather than the more extreme remedy of a constructive trust. In particular, although the primary judge held that it was not "clear" that the events portrayed in the film disclosed illegal conduct, this is not a case where it can be said that there is no possible public interest in the publication of the film.[242]

126 Thirdly, and in any event, any decision to impose a constructive trust on copyright as a remedial vehicle to restrain publication by a defendant and third parties would need to consider complex issues concerning the intersection between general law remedies and statute law,[243] and the "symbiotic relationship" between the two.[244] There was very limited consideration in this case of the *Privacy Act*, which now contains, in Sch 2, a statutory tort in relation to serious invasions of

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Registrars Ltd (2000) 1 VR 626 at 632-634 [16]-[19]. See *Breen v Williams* (1996) 186 CLR 71 at 120.

241 (2010) 241 CLR 1 at 48 [139].

242 Compare, for instance, *Giller v Procopets* (2008) 24 VR 1.

243 See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 60-63 [19]-[28]; *Tame v New South Wales* (2002) 211 CLR 317 at 394 [224]; *Bird v DP (a pseudonym)* (2024) 283 CLR 45 at 84 [71].

244 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 532 [31]; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 183 [17].

privacy,[245] with exemptions including for journalists,[246] requirements to consider the public interest when considering whether to grant any injunction,[247] and express provision for non-monetary relief including a power to grant an injunction.[248] The absence of any argument on this issue further reinforces the appropriateness of the more limited order of a restorative mandatory injunction against Farm Transparency, an order which is not inconsistent with Sch 2 to the *Privacy Act*.

Conclusion

127 In the result of this appeal, Game Meats has been successful in its claim that Farm Transparency should delete or destroy the images that it obtained as a consequence of its trespasses. Farm Transparency has been successful in its claim that no constructive trust should be declared over its copyright in the images. On these important issues, each party has had a measure of success in this Court. It is appropriate that each party should bear its own costs in the appeal to this Court.

128 The costs that should have been awarded at trial and in the Full Court are a different matter. The costs of the proceeding at first instance and in the Full Court were the subject of a separate judgment of the Full Court on 25 September 2025.[249] Those costs were also affected by an offer of compromise made by Game Meats. Farm Transparency sought an order that the costs of the proceeding at first instance and in the Full Court be remitted to the Federal Court. No submissions were made in this Court about the Full Court's judgment or the offer of compromise. It is appropriate that the issues of costs at first instance and in the Full Court be remitted to the Full Court to be dealt with consistently with these reasons.

129 Orders should be made as follows:

1. Appeal allowed in part.

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245 *Privacy Act*, Sch 2, cl 7.

246 *Privacy Act*, Sch 2, cl 15.

247 *Privacy Act*, Sch 2, cl 9(2).

248 *Privacy Act*, Sch 2, cl 12.

249 *The Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd (Costs)* [2025] FCAFC 134.

2. The declaration and orders 2 and 4-8 of the orders of the Full Court of the Federal Court of Australia made on 13 August 2025 be set aside and, in their place, it be ordered that:

   (a) the appeal be allowed in part; and

   (b) order 5 of the orders of the Federal Court dated 19 December 2024 be set aside and in lieu thereof order that:

      (i) the respondent forthwith permanently delete or destroy (as applicable): (A) all images (and copies of images) of the applicant's business undertaking presently in its possession or control, obtained or captured from the cameras placed in the premises at 319 Hughes Lane, Eurobin, Victoria, 3739 ("the Premises") by the persons who entered the Premises on behalf of the respondent between 9 January 2024 and 13 April 2024; and (B) all copies of such images that come within the respondent's possession or control in future;

      (ii) within 14 days of each compliance with order 2(b)(i), the respondent file with the Court an affidavit attesting to the permanent deletion or destruction of all images (and copies of images) of the applicant's business undertaking in the respondent's possession or control, obtained or captured from the cameras placed in the Premises by the persons who entered the Premises on behalf of the respondent between 9 January 2024 and 13 April 2024; and

      (iii) pending the respondent's compliance with orders 2(b)(i) and 2(b)(ii) on each occasion, the respondent be restrained from publishing or communicating to any person any images (and copies of images) of the applicant's business undertaking in the respondent's possession or control, obtained or captured from the cameras placed in the Premises by the persons who entered the Premises on behalf of the respondent between 9 January 2024 and 13 April 2024.

3. The orders of the Full Court made on 25 September 2025 be set aside and the matter be remitted to the Full Court for assessment of costs of the proceedings at trial and in the Full Court.

JAGOT J.

The appeal

130 The Game Meats Company of Australia Pty Ltd ("GMC") occupied land at Eurobin, Victoria, from which it operated an abattoir for the slaughtering and processing of feral goats for the meat export market ("the premises"). Subject to the statutory regimes applicable to the operation of the abattoir and otherwise, the common law protected GMC's right of possession of the premises from unauthorised interference, including by way of entry onto the premises without GMC's permission to do so. In recognising the right against unauthorised interference with possession,[250] the law conventionally operates through the tort of trespass: (i) by grant of (often, but not exclusively, interlocutory) injunction, to protect that right from threatened infringement; (ii) by an award of nominal damages against the tortfeasor, to vindicate that right if it has been infringed even if the trespass has caused the plaintiff no loss or harm; (iii) by an award of general damages against the tortfeasor, to compensate the plaintiff "in a sum which, so far as money can do, will put [the plaintiff] in the same position as he or she would have been in if ... the tort had not been committed";[251] and (iv) if appropriate, by an award of exemplary damages against the tortfeasor, to punish and deter the tortfeasor.[252]

131 This appeal concerns additional remedies.

132 The first class of additional remedy that GMC sought in respect of admitted acts of trespass onto the premises by employees or agents of Farm Transparency International Ltd ("FTI") was final injunctive relief. In effect, GMC sought both a negative injunction permanently restraining FTI from publishing any of the films FTI obtained at the premises by reason of FTI's acts of trespass (other than to the Commonwealth Department of Agriculture, Fisheries and Forestry, referred to as "DAFF") and a positive injunction requiring FTI to delete or destroy the films and all copies of the films in its possession or control.

133 The primary judge in the Federal Court of Australia (Snaden J) refused to grant this final injunctive relief.[253] The Full Court of the Federal Court of Australia

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250 *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 226-227; *New South Wales v Ibbett* (2006) 229 CLR 638 at 646-647 [29]-[31].

251 *Haines v Bendall* (1991) 172 CLR 60 at 63.

252 *Austral v Northern Territory* (2026) 100 ALJR 912 at 919 [11]; 430 ALR 324 at 329.

253 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261.

(Burley, Jackman and Horan JJ) granted this final injunctive relief but did so only on the basis that it was satisfied that the second class of additional relief (discussed below), relating to FTI's copyright, should be granted. That is, the Full Court did not grant GMC final injunctive relief based on harm GMC claimed that it was likely to suffer in the future by FTI acting on its express intention to further copy and publish the films (in whole or part).[254]

134 The second class of additional remedy that GMC sought was a declaration that FTI's copyright in the films obtained or created (as applicable) by its acts of trespass was held on constructive trust for GMC as beneficial owner thereof, such beneficial ownership to be perfected by an order requiring FTI to assign copyright in the films to GMC. The primary judge refused to grant this second class of additional remedy. The Full Court granted this second class of additional remedy, making a declaration and order in these terms:[255]

> "1 [FTI] holds the copyright in the images (and copies thereof) obtained or captured by [FTI] between 9 January 2024 and 13 April 2024 at [GMC's] business undertaking conducted at 319 Hughes Lane, Eurobin, Victoria, 3739 (the **Premises**) (including the 14-minute Footage as defined in the reasons for judgment) on trust for [GMC].
>
> ...
>
> 6 Within 7 days, [FTI] execute an assignment in writing to [GMC] of the copyright in the images (and copies thereof) which [FTI] obtained or captured between 9 January 2024 and 13 April 2024 at the Premises, and in the event of any default, the Registrar be directed to execute such a transfer on behalf of [FTI] under r 1.37 of the *Federal Court Rules 2011* (Cth)."

135 For the following reasons, the Full Court erred in: (i) declaring GMC's beneficial ownership of the films and requiring FTI to assign copyright in the films to GMC; and (ii) on that basis, granting final injunctive relief to GMC.

136 First, the declaration and order in respect of FTI's copyright in the films exceeded the "minimum relief necessary to 'do justice' between the parties" as required by legal (specifically, equitable) principle.[256]

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254 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 274 [1], 284 [43]-[44], see also at 287 [55].

255 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 288-289 [59].

256 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 416.

137 Second, a mandatory injunction requiring FTI to delete or destroy the films and all copies of the films in (and which came into) its possession or control would involve substantially less intrusion into the potential rights and interests of known third parties, who had not been joined to the proceedings, than the declaration and order in respect of FTI's copyright in the films. It was therefore necessary for the Full Court to consider the appropriateness and adequacy of the grant of a final injunction to this effect before deciding to grant relief attaching to FTI's copyright in the films: a "constructive trust ought not to be imposed if there are other orders capable of doing full justice".[257] In deciding to impose a constructive trust over FTI's copyright before considering final injunctive relief, the Full Court inverted the necessary process of legal reasoning. The necessary process was to determine if damages were an adequate remedy and, if they were not, to consider the minimum relief necessary to do justice between the parties. This the Full Court did not do. In so considering, moreover, the Full Court was also required to have regard to the impacts of any such minimum relief necessary to do justice between the parties on: (i) the rights and interests of third parties; (ii) the operation of relevant statutory regimes; and (iii) the public interest.[258] This the Full Court also did not do.

138 Third, and relatedly, it was necessary to recognise that the practical purpose of GMC seeking and obtaining the declaration and order in respect of FTI's copyright in the films was for GMC to be able to prevent any third party possessing a copy of any of the images from the films from exploiting copyright in the films by making a copy of or causing those parts of the films to be seen or heard in public, or communicating those parts of the films to the public.[259] The declaration and order in respect of FTI's copyright, accordingly, was a vehicle for GMC to commence fresh litigation against third parties, at least some of whom were known to GMC and therefore could have been (but were not) joined to the proceedings to enable them to be heard in respect of the making of the declaration and the order. In these circumstances, not only have known third parties been denied an opportunity to be heard about the making of the declaration and order in respect of FTI's copyright when the interests of those third parties were likely to be affected by their making, but also (if the Full Court's declaration and order in respect of

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257 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45-46 [128]-[129], referring to *Giumelli v Giumelli* (1999) 196 CLR 101 at 113-114 [10], 125 [49]-[50].

258 See, by analogy, the range of characterisations of the circumstances and of potentially relevant considerations in *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 206 [48], 213 [73], 221-223 [99]-[104], 228 [117]-[118], 229-235 [120]-[140], 243-245 [158]-[162], 250-252 [179]-[181], 255 [191]-[192], 280 [262], 282 [265]-[267], 284-288 [272]-[279].

259 *Copyright Act 1968* (Cth), ss 13 and 86.

FTI's copyright stand) the litigation would be fragmented, the Federal Court having been prevented from ensuring that a multiplicity of proceedings is avoided, as required by s 22 of the *Federal Court of Australia Act 1976* (Cth).

139 Fourth, in making the declaration and order in respect of FTI's copyright, the Full Court granted GMC relief which had been contemplated as potentially available by this Court in circumstances such as those of the present case,[260] but which had never been granted in this (or, as far as can be ascertained, any other) common law jurisdiction. It was for this reason that the primary judge, rightly, considered that "the court should proceed with caution to recognise such circumstances for the first time".[261] As will be explained, such caution was both required by legal principle[262] and particularly necessary in the circumstances of this case.

140 One example of the circumstances of this case requiring caution is that the evidence exposed that there were statutory and related public interest factors which had to be considered before making the declaration and order in respect of FTI's copyright. For example, in addition to DAFF, Senator Murray Watt in his capacity as Minister for Agriculture, Fisheries and Forestry was one of the other known third parties in possession of the films (in part). Another was a television network, Channel Seven. If GMC obtained the assignment of copyright in the films from FTI, GMC might be able to revoke the implied licence that FTI would be taken to have granted to those third parties to exploit copyright in the film given to them (such revocation being a right that FTI itself may have retained).[263] The effect of such revocation on the third parties and their statutory or other duties or responsibilities was relevant but unknown.

141 Another example of the circumstances of this case requiring caution is that in considering the declaration and order in respect of FTI's copyright it was necessary to recognise that, whether expressed or suppressed, value judgments about the welfare of animals (or, at least, feral goats) in meat production were involved. This matters because analogy is a central tool in legal reasoning and precedent is a core legal principle. Different circumstances involving the welfare and protection of other animals or vulnerable people may have exposed the factors

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260 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 245-247 [100]-[103].

261 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 297 [181].

262 See, by analogy, *Isenberg v East India House Estate Co Ltd* (1863) 3 De G J & S 263 at 271-272 [46 ER 637 at 641].

263 *Copyright Act*, ss 15 and 196(4).

required to be considered, but those factors nevertheless were relevant in the present case.

142 This does not mean that the law may condone a trespass. A trespass is a civil wrong for which the common law provides a remedy in damages whether the plaintiff sustains harm or not. It does mean, however, that a plaintiff seeking an additional legal remedy for a tort founded on equitable principle must both establish the inadequacy of damages and confront equity's insistence on the court considering all of the circumstances relevant to "its determination upon the real justice of the case".[264]

Facts

143 GMC's abattoir operated pursuant to statutory licence under State legislation (the *Meat Industry Act 1993* (Vic)). That licence was issued by PrimeSafe (a Victorian authority). GMC also held approval to export meat under Commonwealth legislation (the *Export Control Act 2020* (Cth)). DAFF is the federal department responsible for regulating the abattoir's export operations under that legislation.[265]

144 These statutory regimes did not feature prominently in the arguments in the appeal. The primary judge recorded that it was common ground that the abattoir had to operate in accordance with "Australian Standard AS 4696:2007 [sic] Hygienic Production and Transportation of Meat and Meat Products for Human Consumption".[266] In fact, the applicable Australian Standard appears to have been Australian Standard AS 4696:2023 Hygienic Production and Transportation of Meat and Meat Products for Human Consumption, which came into force on 1 July 2023 ("the Australian Standard").[267] Clause 7 of the Australian Standard deals with "Animal welfare". Provisions of cl 7 require that premises and equipment be used in a way and maintained in a condition that "minimises the risk of injury, pain and suffering to animals and causes them the least practicable disturbance";[268] and that animals be handled "in a way that minimises the risk of injury, pain and suffering

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264 *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 119, quoting *The Juliana* (1822) 2 Dods 504 at 521 [165 ER 1560 at 1567].

265 *Export Control Act*, s 12(1), definition of "Secretary".

266 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 269 [42].

267 See *Export Control Act*, s 432 (Secretary's rule-making power), s 29(1) (rules may prohibit export unless conditions prescribed by the rules are complied with), Ch 2, Pt 1, Div 4 (offences and civil penalty provisions).

268 Australian Standard, cl 7.1.

and causes the least practicable disturbance to them and to other animals at the premises".[269] Other provisions of cl 7 require that "[a]nimals are slaughtered in a way that prevents unnecessary injury, pain and suffering to them and causes them the least practicable disturbance";[270] "[b]efore sticking[271] commences, animals are stunned[272] in a way that ensures the animals are unconscious and insensible to pain before sticking occurs and do not regain consciousness or sensibility before dying";[273] and "[b]efore stunning commences, animals are restrained in a way that ensures stunning is effective".[274]

145 The primary judge recorded that because the abattoir was "export-registered" under the Commonwealth legislation, it was required to have an "on-plant veterinarian" engaged by DAFF present to supervise the slaughtering of the goats. The role of the on-plant veterinarian was to ensure the fitness of goats for slaughter and that the animal welfare requirements of the Australian Standard were satisfied.[275] As the primary judge explained:[276]

> "Each day, before commencement of production, the on-plant veterinarian completes an ante-mortem inspection and assessment of the livestock at hand. Throughout production (approximately every 20 minutes), the on-plant veterinarian completes an inspection and assessment of the livestock 'from the stunning and sticking all the way up to when ... the carcasses are being put into cold storage'. Each week, the on-plant veterinarian conducts a meeting to address, amongst other things, issues concerning animal welfare. Those meetings are typically attended by GMC's general manager, production manager, quality assurance manager and occupational health and safety officer. Biannually, auditors employed by the Department

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269 Australian Standard, cl 7.2.

270 Australian Standard, cl 7.9.

271 Defined in cl 1.3 as "the severing of the large blood vessels to induce effective bleeding".

272 Defined in cl 1.3 as "a procedure for rendering an animal unconscious and insensible to pain".

273 Australian Standard, cl 7.10.

274 Australian Standard, cl 7.11.

275 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 269 [41].

276 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 270 [43].

conduct an audit, which also delves into GMC's compliance with applicable animal welfare standards."

146 By repeated acts of trespass in 2024, seven in total, employees or agents of FTI entered the premises at night, first to install and then to retrieve video recording equipment to film the abattoir's operations. FTI employees or agents did so in pursuit of FTI's stated object of "raising public awareness of animal cruelty ... through the promotion and facilitation of public transparency in animal-use industries, and increasing human understanding of the ethical importance of the prevention and alleviation of animal suffering".

147 From the many hours of film it obtained, FTI created a compilation film of about 14 minutes' duration. FTI sent a copy of the compilation film to DAFF and to the responsible Minister at the time (Senator Watt), under cover of an email seeking that DAFF suspend GMC's export licence on the basis that the film "demonstrates serious contravention of" the cl 7 provisions of the Australian Standard, the required outcome of which, the email stated, is "[t]he minimisation of the risk of injury, pain and suffering and the least practical disturbance to animals". Apparently concerned about DAFF's lack of swift action in response, FTI then sent a copy of the compilation film to Channel Seven, a television news network, which reported on but did not publish any part of the film. FTI also uploaded the compilation film to the internet and issued a press release and commentary about it.

148 In the interim, DAFF had notified GMC of FTI's complaint and provided GMC with a copy of the compilation film, which is how GMC became aware of the acts of trespass. GMC commenced proceedings and obtained interlocutory relief and undertakings from FTI, as a result of which FTI removed the compilation film from the internet and was prevented from further publishing any of the films except to DAFF.

149 On receipt by GMC of the copy of FTI's email and the accompanying compilation film from DAFF, GMC's directors were notified. GMC's General Manager wrote to DAFF the following day. GMC's letter said that it was "deeply concerned" about the video footage and FTI's complaints, which had "highlighted a number of serious non-compliances that need to be addressed immediately". GMC said it was "extremely disappointed and concerned with what was depicted in the footage" and would "endeavour in the immediate future to address every issue raised by [FTI]". GMC said that it had convened "an urgent meeting with management and the board to address the issues raised", focusing on three key "findings highlighted", described in these terms:[277]

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277 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 276-277 [69].

"1. **Stunning & Sticking Stations** – Review stunning equipment, process & training ensuring that zero tolerance is always adhered to. Modify & enforce restraint conveyor process and allocate an additional employee into the stunning area to control loading and spacing of goats. Ensure that proper, effective stunning techniques are used, ensure that stun/stick interval is sufficiently short to prevent the regaining of consciousness prior to death and ensure bleeding time is sufficiently long to ensure death prior to any other dressing procedures.

2. **Infant Goat Euthanasia** – Review practices surrounding the process of infant euthanasia including frequency, restraint and equipment.

3. **Goat Load-in** – Review practices surrounding the process of handling of downer animal & suspects including prompt euthanasia of downers."

150 In related communications between two of the directors and the General Manager of GMC, one director referred to the "cruel and completely unacceptable behaviour" she had viewed in the video footage as something that should never have happened. The General Manager provided the directors with an action list in respect of FTI's complaint that included the following:[278]

"**Initial Action**

…

- Production Staff Involved – Show footage and … point out the zero tolerance breaches.

- Emergency Toolbox Talk – Bring all production staff up to speed.

…

Stunning & Sticking Stations

- Remove those involved from stunning & sticking.

- Replace stunner & sticking with alternately trained personnel.

- Allocate second person at the stunner station.

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278 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 278 [73].

…

- Review all stunning & sticking procedures, amend, update include more detail if required.

- Retrain all person[nel] once procedure/s have been completed.

- Reinforcement to follow stunning / sticking training exactly as shown & signed off on.

- Cameras to be installed.

Infant Goat Euthanasia

- Safe handling & euthanasia of infant goats to be written into [standard operating procedures] & [work instructions], infants must be cradled and handled gently & humanly [sic]. When euthanasia of infant goats is required, the sticker will be ready to stick immediately after stunning, infants to be euthanised & sticked one at a time, infant goats are to be euthanised as soon as practically possible.

- Blue drums for temporary infant goat containment to be filled with hay for comfortability.

- Design & manufacture Y-Chute for euthanasia of infant goats.

- Purchase a second stunner specifically for euthanasia of infant goats.

- Camera to be installed.

Goat Load-In

- Purchase of new captive bolt [illegible] x 2

- Create [standard operating procedure] & Training for use of captive bolt.

- Any goat found to be lame or injured is to be euthanised immediately with captive bolt, once euthanasia has occurred and only then can the goat be removed from the area found.

..."

151 GMC's documented remedial actions as described above largely correspond with both the primary judge's record of observations of the compilation film and FTI's complaints to DAFF about the abattoir's operations. The intended slaughtering process, as described by the primary judge, involved each goat being

led to a restraining apparatus, the goat being made unconscious by an electric shock (stunning), the hanging of the unconscious goat from a shackle, and the cutting of the goat's carotid artery and jugular vein (sticking) resulting in the animal bleeding out and dying before meat processing.[279] On observing the compilation film, however, the primary judge referred to, for example: (i) goats that appeared not to be unconscious when their throats were cut; (ii) goats escaping the restraining apparatus before stunning;[280] (iii) goats being repeatedly subject to electric shocks in order to be made unconscious due to "plainly" malfunctioning electric tongs; and (iv) infant goats being left for periods in a large bucket and, when being stunned, "bleat[ing] in protest or distress – undoubtedly as a result of the obviously foreign nature of what is occurring".[281]

The primary judge's reasoning in respect of additional relief

152 The primary judge considered that the grant of relief attaching to FTI's copyright in the films would be "the kind of 'bold step' that trial judges should ordinarily leave for higher consideration"[282] given the lack of precedent for such orders and his Honour's lack of persuasion that "GMC can identify an equity sufficient to justify intervention of the kind for which it moves".[283]

153 The primary judge further considered that a final injunction restraining FTI from copying or publishing the films (in whole or part) was inappropriate as: (i) the acts of trespass were complete; (ii) publication of images from the films by FTI was not a continuation of any act of trespass by FTI; and (iii) it could not be found that GMC would suffer "extreme" or "very serious" future damage if FTI further published the images.[284]

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279 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 269 [40].

280 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 271 [51].

281 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 274-275 [64].

282 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 297 [181].

283 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 297 [182].

284 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 302-303 [212]-[218], referring to *Patrick Stevedores*

154 The reason that the primary judge applied a test of "extreme" or "very serious" continuing or future damage (or harm) was that his Honour considered this to be required by the statement in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* ("*Patrick Stevedores*") as follows:[285]

> "A court whose jurisdiction is invoked in a conspiracy case has power to grant an injunction to prevent the completion or effecting of the conspiracy. Where the acts contemplated by the conspirators have all occurred and the tort is complete, the remedy available to an injured plaintiff is ordinarily limited to the recovery of pecuniary damages. But for over a century it has been established that 'there is no rule which prevents the court from granting a mandatory injunction where the injury sought to be restrained has been completed before the commencement of the action'. Where the damage caused by tortious conduct is ongoing and is 'extreme, or at all events very serious', a mandatory injunction may issue compelling the wrongdoer to prevent the occurrence of further damage."

155 In his Honour's assessment, applying the test of extreme or very serious harm to the present case:[286]

> "If FTI were to publish the footage that it obtained as the fruit of its unlawful trespass, the consequences for GMC are difficult to pinpoint. I would accept, at a level of generality, that they would unlikely be positive. But the extent to which they might sound in immeasurable or extreme damage to GMC's goodwill would depend on all manner of circumstances, not the least being the manner in which GMC sought to counter any public backlash. I do not consider it possible to conclude that the damage to GMC's goodwill would be so significant as to clear the hurdle that needs to be cleared."

156 It is to be inferred that the primary judge also refused to grant a final injunction requiring FTI to delete or destroy all copies of the films in its possession or control on the same basis.

The Full Court's reasoning in respect of additional relief

157 The Full Court considered that relief should be granted attaching to FTI's copyright as: (i) the considered obiter dicta of four Justices in *Australian*

Operations No 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1 at 31 [33].

285 (1998) 195 CLR 1 at 31 [33] (footnotes omitted).

286 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 302-303 [214].

Broadcasting Corporation v Lenah Game Meats Pty Ltd ("*ABC v Lenah*")[287] supported the grant of such relief; and (ii) "reason[ing] from the established cases where a constructive trust has been imposed in broadly similar circumstances" also supported the grant of such relief.[288]

158 As noted, the Full Court reasoned that final injunctions requiring FTI to delete or destroy the films and restraining FTI from copying and publishing the films should be granted as a "natural consequence" of GMC having "beneficial ownership of the copyright in the images".[289] Having done so, it was not necessary for the Full Court to consider any other juridical basis for the grant of final injunctions.

The necessary approach to additional relief

Copyright

159 Copyright in a "cinematograph film" under the *Copyright Act 1968* (Cth) is the exclusive right to make a copy of a film, cause a film to be seen in public, and communicate a film to the public.[290] The films recorded by the video recording equipment FTI's employees or agents installed on the premises and the compilation film created by FTI's employees or agents are each subject to copyright as a "cinematograph film".[291] As the "maker" of the films, FTI owns the copyright in them.[292] FTI, as the owner of the copyright in the films, may bring an action for an infringement of the copyright.[293] Copyright in the films would be infringed "by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright",[294] if the doing of the act is not otherwise

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287 (2001) 208 CLR 199.

288 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 277-278 [16], 282 [35], 282-283 [36].

289 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 284 [43].

290 *Copyright Act*, s 86.

291 *Copyright Act*, s 86.

292 *Copyright Act*, ss 22(4) and 98.

293 *Copyright Act*, s 115(1).

294 *Copyright Act*, s 101(1).

stipulated not to infringe copyright (such as, for example, a specified class of fair dealing with the copyright).[295]

160 In creating the compilation film from the films as recorded and in emailing its complaint and the compilation film to DAFF (and to the responsible Minister and Channel Seven), FTI exploited its copyright in those films. FTI also exploited its copyright when it uploaded the compilation film to the internet. As noted, FTI must be taken to have granted to DAFF, the Minister and Channel Seven a licence to exploit copyright in the film for the purposes of considering, investigating, reporting, and otherwise acting on FTI's complaints about the operation of the abattoir on the premises.[296] As also noted, GMC did not seek to join the Commonwealth, the responsible Minister or Channel Seven as parties to the proceeding. Nor is it apparent from the evidence what action, if any, DAFF, the responsible Minister, or Channel Seven took in respect of the compilation film other than that Channel Seven broadcast a report about the abattoir without publishing any part of the compilation film.

161 The Full Court's declaration (as set out above), by the use of the word "holds", operates from the time it was made, and not from the time at which copyright in the films arose (that is, on recording in the case of the films as recorded and on creation of the compilation film). The declaration therefore reflects the Full Court's conclusion that the Court should impose as a remedy[297] a constructive trust over the copyright in the films under which FTI held the copyright for GMC as the beneficial owner. That this is so, and the Full Court was not declaring that GMC was the beneficial owner of the films from the time they were recorded or created (as applicable), is apparent from Jackman J's exposition of the observations of Gummow and Hayne JJ in *ABC v Lenah* (with which Gaudron J and Callinan J agreed).[298]

162 In *ABC v Lenah* Gummow and Hayne JJ said that:[299]

> "A cinematograph film may have been made ... in circumstances involving the invasion of the legal or equitable rights of the plaintiff or a breach of the obligations of the maker to the plaintiff. It may then be inequitable and against good conscience for the maker to assert ownership of the copyright against the plaintiff and to broadcast the film. The maker

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295 *Copyright Act*, Pt IV, Div 6.

296 *Copyright Act*, s 101(1).

297 See *Muschinski v Dodds* (1985) 160 CLR 583 at 614-616.

298 (2001) 208 CLR 199 at 246-247 [101]-[103]. See also at 231 [58], 320 [309].

299 (2001) 208 CLR 199 at 246 [102] (footnotes omitted).

> may be regarded as a constructive trustee of an item of personal (albeit intangible) property, namely the copyright conferred by s 98 of the *Copyright Act*. In such circumstances, the plaintiff may obtain a declaration as to the subsistence of the trust and a mandatory order requiring an assignment by the defendant of the legal (ie statutory) title to the intellectual property rights in question."

163 As Jackman J put it:[300]

> "In that passage, Gummow and Hayne JJ used the language of possibility, no doubt because the ultimate decision would depend upon the particular facts of the case and because no contention to this effect had been advanced in *ABC v Lenah*. However, the passage indicates that there is no objection in legal principle to the imposition of a constructive trust over the relevant copyright which was created by means of unlawful conduct if the circumstances show that it is inequitable and against good conscience for the maker of the film to assert the copyright conferred by statute."

164 As his Honour also said, referring to Gummow and Hayne JJ's caution that (in Jackman J's words) "the uses of the terms 'unconscionable' and 'unconscientious' in diverse areas may have masked rather than illuminated the underlying principles at stake":[301]

> "Consistently with that caution, and adopting the traditional judicial technique in a common law system, it is important to reason from the established cases where a constructive trust has been imposed in broadly similar circumstances; that is, cases where there is no pre-existing fiduciary obligation which the defendant has undertaken to the plaintiff, but where a constructive trust is imposed in light of the nature of the defendant's wrongdoing by which the relevant asset has been obtained. Those cases must be approached on the basis that equitable principles, like common law principles, have an inherent capacity to be adapted to different circumstances, particularly having regard to the foundations of equitable principles in notions of unconscionability."

165 It is correct that legal principle does not prevent "the imposition of a constructive trust over the relevant copyright which was created by means of

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300 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 276 [10].

301 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 277-278 [16], quoting *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 73 [43].

unlawful conduct if the circumstances show that it is inequitable and against good conscience for the maker of the film to assert the copyright conferred by statute".[302] This does not mean, however, that such relief must or should be granted in every such case. Nor does it mean that a court is justified in deciding if a constructive trust over a trespasser's copyright should be imposed before considering if some other form of remedy based on equitable principle, less apt to interfere with the interests of third parties, less likely to interfere with the statutory responsibilities of regulatory authorities, and less likely to engage public interest considerations, would be sufficient to do justice between the parties.[303]

166 The Full Court inverted the required course of legal reasoning by deciding to grant relief attached to FTI's copyright in the films first and, having decided that FTI's copyright should be the subject of a constructive trust, deciding on that basis that it was unnecessary to consider another juridical basis for final injunctive relief.[304] The problem is not the "judicial economy" the Full Court thereby adopted,[305] but the Court's immediate recourse to a remedy which raised a raft of other considerations, not able to be properly considered, and which was more than that required to do justice between the parties.

167 Moreover, the Full Court imposed the constructive trust over FTI's copyright in the films on the basis that other cases in which a constructive trust had been imposed involved "broadly similar circumstances".[306] None of the cases the Full Court identified as "broadly similar" could be said to have given rise to the same suite of factors that had to be considered before deciding if the imposition of a constructive trust over FTI's copyright in the films was necessary to do justice in this case. For example, cases involving "property which is obtained by theft or fraud, in which case equity ordinarily imposes a constructive trust on the thief or

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302 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 276 [10].

303 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45-46 [128]-[129], referring to *Giumelli v Giumelli* (1999) 196 CLR 101 at 113-114 [10], 125 [49]-[50].

304 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 284 [44], 288 [58].

305 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 288 [58].

306 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 277 [16].

fraudulent recipient"[307] are different from the present case on several bases. Nor is it apparent how the facts of the present case are like the "case of a mistaken payment once the recipient knows of the mistake".[308]

168 As the Full Court acknowledged,[309] before FTI recorded and created the films there was no property. FTI's act of recording and creating the films gave rise to the property (copyright in the films) which FTI owned in accordance with provisions of the *Copyright Act*. As the relevant species of property is created by the *Copyright Act*, cases in which additional relief attaching to copyright is sought raise issues concerning the distinction underlying that statutory regime between "the particular form of expression in which an author convey[s] ideas or information to the world"[310] (the subject of copyright) and "facts or information"[311] (not protected by copyright). As French CJ, Crennan and Kiefel JJ said in *IceTV Pty Ltd v Nine Network Australia Pty Ltd*:[312]

> "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 ... public's access to and use of facts and information. Copyright is not given to reward work distinct from the production of a particular form of expression."

169 The corollary of the law's justification for copyright is that if the provisions of the *Copyright Act* are to be called in aid in support of the grant of an equitable remedy, consideration may need to be given to the question whether the remedy is capable of stultifying the public's access to and use of facts and information in which it is at least arguable there is a genuine public interest. That "the relevant

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307 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 278 [17]-[18].

308 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 278-279 [19]-[20].

309 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 279 [21].

310 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at 471 [26], quoting *Hollinrake v Truswell* [1894] 3 Ch 420 at 424.

311 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at 472 [28].

312 (2009) 239 CLR 458 at 472 [28] (footnotes omitted).

property here is copyright over a cinematograph film, not merely information"[313] may be accepted, but does not make the question of potential stultification of the free flow of facts and information irrelevant.

170 Nor is it apparent that the cases on which the Full Court relied as broadly similar to the present case involved circumstances in which: (i) the tortious acts concerned an activity subject to statutory regimes which regulated the welfare of the animals being slaughtered and processed; (ii) as a result of the tortious acts the wronged party itself (GMC) assured the regulator (DAFF) that it would implement remedial action; (iii) the intentions of the regulatory body (DAFF) and its responsible Minister remained unknown, as did the interactions of DAFF's responsibilities with those under the State legislation; and (iv) the tortfeasor had implicitly licensed DAFF, the responsible Minister, and Channel Seven to exploit copyright in the films for their own purposes. It is not that these factors meant that no relief in respect of FTI's copyright could be granted (if in fact necessary to do justice between the parties) but that these factors had to be considered, the relevant evidential onus being on GMC as the party seeking the additional relief.

171 For these reasons, the Full Court erred in making the declaration and order in respect of FTI's copyright.

Final injunctive relief on a juridical basis other than copyright

172 That FTI's further copying and publication of the films (in whole or part) does not itself constitute the tort of trespass is obvious. But there can be no doubt that FTI's obtaining of, and capacity to copy and publish, the films was the reason for and the result of its acts of trespass. Nor could there be any doubt from the evidence that, unless restrained by its own undertaking or by court order, FTI intended (and still intends) to further copy and publish the films (at least in part).

173 In these circumstances, the question which first had to be asked was whether an award of general damages to GMC would be an adequate remedy to compensate for the harm to GMC (including likely future harm caused by FTI copying and publishing the films in whatever manner FTI saw fit).[314] That is, there was no call

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313 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 283 [36].

314 *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 at 665 [11].

for any recourse to the so-called "armoury of equitable remedies"[315] unless damages were not an adequate remedy. As Kiefel CJ, Bell and Keane JJ put it:[316]

> "The principle that a plaintiff does not obtain an injunction for actionable wrongs for which damages are the proper remedy is well established. If damages are adequate a party 'should be relegated to that remedy; only if damages are inadequate will an injunction lie'. The principle is given effect as a rule, in the nature of a negative condition, for a grant of an injunction. It is a necessary, but not sufficient, condition for a grant."

174 To be an adequate remedy, an award of damages had to be able to put GMC, as far as money could do, back in the position it would have been in if FTI's acts of trespass had not been committed.[317] In considering the adequacy of damages as a remedy for trespass, it is necessary to recognise that:[318]

> "In cases of trespass what may constitute injury is somewhat wider than in some other torts. Injury in the nature of an affront to a plaintiff's dignity or the apprehension of harm may qualify as damage for the purpose of an award of damages."

175 To the extent an award of damages could not put GMC back in the relevant position, the harm to GMC (including likely future harm by FTI further exploiting its copyright in the films), if real and not trivial, would be characterised as "irreparable", thereby founding the potential grant of equitable relief in the form of final injunctions. As Isaacs J observed in *R v Macfarlane; Ex parte O'Flanagan* ("*R v Macfarlane*"), quoting Lord Watson in *White v Mellin*:[319]

> "'[D]amages and injunction are merely two different forms of remedy against the same wrong.' If damage is irreparable in the sense that pecuniary compensation would be inadequate protection, injunction may, and in the absence of countervailing circumstances will, be granted to protect a legal right".

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315 *ABC v Lenah* (2001) 208 CLR 199 at 247 [103].

316 *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 213-214 [75] (footnotes omitted).

317 *Haines v Bendall* (1991) 172 CLR 60 at 63.

318 *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 213 [73] (footnote omitted).

319 (1923) 32 CLR 518 at 550, quoting [1895] AC 154 at 167.

176 Equally relevant is Isaacs J's reference in *R v Macfarlane*[320] to the reasoning of Lord Brougham LC in *Earl of Ripon v Hobart*,[321] in which his Lordship distinguished between a case in which the incurring of any harm was uncertain and a case in which "in the common course of things" harm is likely or inevitable. In the latter case (but not the former case) his Lordship said:[322]

> "[T]he law cannot make over-nice distinctions, and refuse the relief merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Nay, it will go further, according to the same practical and rational view, and, balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming."

177 Having regard to these considerations, it is apparent that the reference in *Patrick Stevedores* to a tort causing ongoing damage (or harm) that is "extreme, or at all events very serious" as a condition of the grant of final injunctive relief (in addition to damages) is to be understood as requiring a conclusion of likely irreparable harm resulting from the tort where: (i) "likely" means proved on evidence or likely in the ordinary course of things and upon practical views of human affairs; and (ii) "irreparable" means not compensable either at all or fully by an award of damages, and real and not trivial. So much is apparent from the fact that the reference in *Patrick Stevedores* to "extreme, or at all events very serious" damage (or harm) was based on a series of decisions culminating in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*.[323] In that case Brightman J reviewed the authorities (which also inform the statement in *Patrick Stevedores*), including *Isenberg v East India House Estate Co Ltd*,[324] in which, consistent with the approach of Isaacs J to irreparable harm discussed above, Lord Westbury said:[325]

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320 (1923) 32 CLR 518 at 551.

321 (1834) 3 Myl & K 169 at 176 [40 ER 65 at 67-68].

322 (1834) 3 Myl & K 169 at 176 [40 ER 65 at 68].

323 (1998) 195 CLR 1 at 31 [33] fn 77, referring to [1974] 1 WLR 798 at 810; [1974] 2 All ER 321 at 337.

324 (1863) 3 De G J & S 263 [46 ER 637].

325 (1863) 3 De G J & S 263 at 271-272 [46 ER 637 at 641] (emphasis added).

"Every one of this class of cases must depend upon its own peculiar circumstances.

The common law remedy for a grievance of this description is an action for damages; an action liable to be resorted to as long as the cause of damage continues. Upon that ground, and by reason also of the damage in many cases not admitting of being estimated in money, this Court has assumed jurisdiction.

The jurisdiction of this Court, so far as it partakes of the nature of a preventive remedy, that is, prohibition of further damage or an intended damage, is a jurisdiction that may be exercised without difficulty, and rests upon the clearest principles.

But there has been superadded to that the power of the Court to grant what has been denominated a mandatory injunction, that is, an order compelling a Defendant to restore things to the condition in which they were at the time when the Plaintiff's complaint was made. The exercise of that power is one that must be attended with the greatest possible caution. I think, without intending to lay down any rule, that it is confined to cases where the injury done to the Plaintiff cannot be estimated and sufficiently compensated by a pecuniary sum. Where it admits of being so estimated, and where the evil sustained by the Plaintiff may be abundantly compensated in money, there appears to me to be no necessity to superadd the exercise of that extraordinary power by this Court."

178 The reasoning in *Smethurst v Commissioner of the Australian Federal Police*[326] is not to the contrary. Kiefel CJ, Bell and Keane JJ acknowledged that the concept of damage (or harm) caused by a trespass is "somewhat wider than in some other torts" given that trespass infringes the right of possession.[327] Nettle J accepted that, while injunctive relief was "generally preventive, and protective, rather than restorative",[328] that was because "an award of damages is ordinarily an adequate remedy to compensate for wrongs recognised at law and that the characteristic hardship of mandatory orders ordinarily weighs against such discretionary relief".[329] Albeit in dissent, Gageler J focused on the inadequacy of

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326 (2020) 272 CLR 177.

327 (2020) 272 CLR 177 at 213 [73].

328 (2020) 272 CLR 177 at 242 [156], quoting Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (1836), vol 2, §862 at 155.

329 (2020) 272 CLR 177 at 242 [156].

damages as determinative of the continuing irreparable damage (or harm),[330] as did Gordon J[331] and Edelman J.[332]

179 On the primary judge's findings (set out above), and notwithstanding his Honour's difficulty "pinpoint[ing]" the relevant consequences for GMC,[333] an award of damages could not be an adequate remedy for the harm to GMC that was likely to be caused by FTI further copying and publishing the films (in whole or part) in the future, as FTI intended to do if not restrained by its own undertaking or court order.

180 First, copying and publishing of the films (in whole or part) in the future was intended by FTI to have an adverse effect on both GMC's business and its statutory licence to operate. That intention reflected that, "in the common course of things" and "upon practical views of human affairs",[334] such copying and publishing of the films (in whole or part) in the future would be likely to cause harm to GMC's goodwill and to place at risk GMC's statutory licence to operate. It followed that the mere fact that the primary judge found harm to GMC's goodwill to be "difficult to pinpoint"[335] did not mean that harm (to goodwill or otherwise) was unlikely. That GMC had not proved harm to its goodwill from FTI's earlier (short-lived) copying and publication of part of the films did not alter the fact that, as the primary judge found in the context of the claim of injurious falsehood, "the obvious, known, unavoidable and desired consequence of" FTI copying and publishing the films was to harm GMC's commercial interests in a manner not readily compensable by a pecuniary remedy.[336] This was strong evidence of the likelihood of irreparable harm to GMC were FTI (if not restrained) to publish the films (in whole or part) in the future.

181 Second, it was not to the point that, by taking steps after any further copying and publication of the films by FTI, GMC might be able to act to avoid or mitigate

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330 (2020) 272 CLR 177 at 232 [130].

331 (2020) 272 CLR 177 at 257 [196].

332 (2020) 272 CLR 177 at 276 [251]-[252].

333 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 302 [214].

334 *Earl of Ripon v Hobart* (1834) 3 Myl & K 169 at 176 [40 ER 65 at 67-68].

335 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 302 [214].

336 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 288 [128], 294 [165].

the likely harm. Such likely harm to GMC's goodwill and to the continuation of GMC's statutory licence to operate was FTI's intention. To fulfil its stated object, the obvious inference was that FTI wished for GMC to cease operating the abattoir altogether, either because it would be uneconomic for GMC to continue to do so or because GMC would cease to have the necessary statutory licence to do so. In dealing with GMC's claim for injurious falsehood the primary judge recognised (rightly) that:[337]

> "It cannot seriously be doubted that, by making each of the Three Publications, FTI sought to subject GMC to a measure of publicity that could only ever have been harmful to it. Likewise, it is beyond what could sensibly be doubted to observe that the publications were made in pursuance of FTI's objective to '… end all forms of business that involve causing harm to animals'."

182 Where harm is intended and likely in the ordinary course of things, no "absolute certainty of damage" from further publication of the films in the future was required. Moreover, relief ought not to have been refused "merely because there [was] a bare possibility that the evil may be avoided",[338] that bare possibility in the present case being some action by GMC to ameliorate the likely harm to it of FTI further copying and publishing the films in the future.

183 Accordingly, FTI's intention to further publish the films in the future if not restrained from so doing entailed likely future harm to GMC resulting from FTI's acts of trespass for which damages were not an adequate remedy, and which would be real and not trivial. Such likely harm, therefore, was to be characterised as irreparable and provided a proper foundation for the grant of final injunctive relief sufficient to prevent that likely harm from occurring. If the law did not provide a sufficient remedy of this kind, GMC's right to possession of the premises free from unauthorised interference would be incapable of complete vindication and compensation for infringement. As Gaudron and McHugh JJ said in *Plenty v Dillon*:[339]

> "If the occupier of property has a right not to be unlawfully invaded, then ... the 'right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric' ... If the courts of common law do

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337 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 287 [123].

338 *Earl of Ripon v Hobart* (1834) 3 Myl & K 169 at 176 [40 ER 65 at 68].

339 (1991) 171 CLR 635 at 655, quoting Samuel, "The Right Approach?" (1980) 96 *Law Quarterly Review* 12 at 14, cited by Lord Edmund-Davies in *Morris v Beardmore* [1981] AC 446 at 461.

> not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights".

184 In the present case, four facts are relevant to any evaluation of the sufficiency of final injunctive relief and the moulding of that relief to the circumstances. First, FTI had already provided the compilation film to DAFF and the Minister responsible for DAFF before interlocutory relief was granted and FTI gave undertakings. Second, DAFF had not requested further access to the films from FTI so it may be inferred that DAFF can fulfil its statutory functions based on no more than a continuation of the implied licence FTI granted to DAFF in respect of the compilation film. Third, FTI had not considered it necessary to provide the compilation film to the regulator under the State legislation, but it could not be in real doubt that FTI's implied licence to DAFF and the Minister responsible for DAFF to exploit copyright in the compilation film for their purposes would extend to them ensuring that the regulator under the State legislation had access to the compilation film if requested to do so by that regulator. It may be inferred, therefore, that the rights and interests of DAFF, the Minister and the regulator under the State legislation are not inappropriately impacted by the grant of final injunctive relief. Fourth, Channel Seven's rights and interests in respect of the compilation film also remain unaffected by final injunctive relief.

Conclusion and orders

185 In these circumstances, the minimum remedy necessary to do justice between GMC and FTI is reflected in the orders Gordon, Edelman and Steward JJ propose.

186 BEECH-JONES J. As the circumstances of this appeal demonstrate, no narrow view should be taken as to the availability of a final injunction against a tortfeasor either to prevent further harm occasioned by or resulting from a tortious act such as a trespass or to undo harm occasioned by or resulting from a tortious act.[340]

Background

187 The full background and circumstances of this appeal are set out in the judgment of Gordon, Edelman and Steward JJ, which I respectfully adopt.[341]

188 It suffices to note that on seven occasions between 9 January 2024 and 13 April 2024, persons acting on behalf of the appellant ("Farm Transparency") trespassed on the respondent's ("Game Meats") premises at which it operates an abattoir. The trespassers installed and later removed video recording equipment which recorded operations of the abattoir. On 3 May 2024, Farm Transparency provided 14 minutes of video footage ("the footage") compiled from many hours of recordings of video images captured at the abattoir ("the images") to the Commonwealth of Australia, specifically the Department of Agriculture, Fisheries and Forestry ("the Department") and the Minister responsible for the Department. Farm Transparency also sent an email seeking the immediate suspension of Game Meats' licence to operate. According to the primary judge, the footage depicted "a number of goats in the final moments of their lives".[342] On either 13 or 14 May 2024, Farm Transparency provided the footage to a local news outlet, "Channel Seven". Channel Seven broadcast a story about the content of the footage but did not publish the footage. On 17 May 2024, Farm Transparency uploaded the footage to its website.

189 In the meantime, the Department provided Game Meats with the footage and the accompanying email from Farm Transparency. Upon receiving that material, Game Meats discovered the trespasses and promptly brought proceedings against Farm Transparency (but not the Department or Channel Seven). On 17 May 2024, Game Meats obtained an ex parte injunction restraining Farm Transparency from publishing any of the images, including the footage. Farm Transparency later gave undertakings to that effect pending a final hearing.

190 After a final hearing, the primary judge (Snaden J) dismissed most of Game Meats' causes of action but upheld its case in trespass and awarded damages, including exemplary damages. However, the primary judge declined to hold that

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340 Lerch, *Final Injunctions in Tort Law* (2025) at 2.

341 Reasons of Gordon, Edelman and Steward JJ at [72]-[89].

342 *The Game Meats Company of Australia v Farm Transparency International Ltd* (2024) 186 IPR 261 at 271 [51].

Farm Transparency held copyright in the images on constructive trust for Game Meats, there being no "equity sufficient to justify intervention" of that kind.[343] The primary judge also declined to grant permanent injunctive relief against Farm Transparency to restrain publication of the images even though the primary judge found that, if not prevented from doing so, Farm Transparency would seek to publish that material with the purpose of "visit[ing] loss upon" Game Meats.[344]

191 Game Meats appealed to the Full Court of the Federal Court. Grounds 3 and 4 of its notice of appeal concerned the primary judge's denial of injunctive relief against Farm Transparency. Grounds 5 and 6 of the notice of appeal concerned the primary judge's refusal to recognise that Farm Transparency held copyright in the images on trust for Game Meats.

192 In the Full Court, Jackman J, with whom Burley J agreed, only addressed grounds 5 and 6. His Honour concluded that it should be declared that Farm Transparency "holds the copyright in the images (and copies thereof)" obtained or captured by it between 9 January 2024 and 13 April 2024 at Game Meats' premises on trust for Game Meats.[345] In so concluding, Jackman J expressly stated that it was not necessary to address grounds 3 and 4 of Game Meats' notice of appeal, which concerned the primary judge's refusal to grant injunctive relief.[346] The other member of the Full Court (Horan J) accepted that there was "some force" to the challenge to that refusal, but his Honour declined to reach a concluded view in light of his Honour's agreement with Jackman J on grounds 5 and 6.[347]

193 The Full Court made orders in aid of the trust that it declared. In particular, the Full Court granted injunctive relief restraining Farm Transparency from publishing the images other than to the Department and requiring the permanent deletion of all images in Farm Transparency's possession. Farm Transparency was also ordered to execute an assignment in writing to Game Meats of the copyright in the images, as well as to file an affidavit attesting to the permanent deletion of the images and the identity of all persons to whom the images were provided and the means by which that occurred. The Full Court dismissed a cross-appeal by Farm Transparency on damages.

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343 (2024) 186 IPR 261 at 297 [182].

344 (2024) 186 IPR 261 at 289 [142].

345 *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 at 284 [42].

346 (2025) 312 FCR 272 at 284 [44].

347 (2025) 312 FCR 272 at 287-288 [55]-[58].

194 Farm Transparency was granted special leave to appeal to this Court from the orders of the Full Court.

Constructive trust before injunction?

195 The above explanation of the Full Court's reasons is sufficient to reveal that the Full Court erred by considering and then declaring a constructive trust without first considering and deciding whether a grant of injunctive relief against Farm Transparency was sufficient to quell the controversy between the parties.[348] This error is exemplified by Game Meats' attempt in this Court to justify the declaration of trust and the order for the assignment of copyright on the basis that such orders would facilitate actions being brought against third parties.[349] The submissions in support of that attempt correctly identified the additional potential consequence and utility of declaring or imposing a constructive trust over and above the grant of any injunction, namely its capacity to affect the position of third parties. However, those submissions also exposed the difficulty with declaring a constructive trust and the attendant forms of relief granted by the Full Court in aid of that trust. Third parties who were known to be potentially affected, namely the Department and Channel Seven, were not heard before that relief was granted. Through the order requiring the identification of persons to whom the images were provided, Game Meats also sought to discover the identities of other, unknown third parties, presumably so that numerous separate proceedings could later be commenced against them.

196 In the case of the Department, the injunction granted by the Full Court against Farm Transparency was subject to an exception permitting publication of the images *to* the Department. However, the effect of the declaration of constructive trust and the conveyance of copyright in the images to Game Meats appears to enable Game Meats to restrain any publication *by* the Department even though that may be necessary or appropriate for the Department to discharge its regulatory or other functions. The source and nature of those functions were not explored in detail before either the primary judge or the Full Court,[350] but they may have been had the Commonwealth been joined and heard on the potential for such relief to be granted. Similar considerations apply in relation to Channel Seven.

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348 *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585 [42]; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45 [128].

349 *Farm Transparency International Ltd v The Game Meats Company of Australia Pty Ltd* [2026] HCATrans 25 at 3049-3053, 3566-3575.

350 See reasons of Jagot J at [144]-[145].

Injunction

197 As noted, in this Court Game Meats sought to defend the Full Court's declaration of a constructive trust. By an amended notice of contention it also sought, in the alternative, to relevantly uphold the orders made by the Full Court granting injunctive relief against Farm Transparency restraining the publication of the images and requiring the permanent deletion of all images in its possession.[351] If granted, that relief will not bind third parties such as the Department or Channel Seven. Subject to three matters, I agree with the reasons of Gordon, Edelman and Steward JJ for concluding that, save for the order requiring an affidavit attesting to the identity of the third party recipients of the images, the substance of the injunctive orders to that effect granted by the Full Court should not be disturbed and should be extended to cover any further copies of the images that might come into Farm Transparency's possession in the future.[352]

198 First, even though the primary judge did not find that Game Meats had suffered or would suffer substantial loss or damage from the publication of the images, I agree that a grant of injunctive relief is justified by the findings of the primary judge concerning Farm Transparency's motivations and intentions as to publication of the footage and its effects.[353] However, the primary judge's findings need to be considered in a context in which: Game Meats approached the Court quickly after becoming aware of the trespasses and obtained urgent injunctive relief restraining publication by Farm Transparency which continued until final judgment, Channel Seven did not broadcast the footage and the award of damages did not address any future harm that might be suffered by Game Meats on account of publication of the images by Farm Transparency if it was unrestrained by an injunction. As Game Meats submitted to this Court, "damages here are not enough because of the timing of the injunction". The position may have been different if interim relief had not been obtained, publication ensued, and it was clear by the time of the final hearing that damages were adequate to address the harm caused by the trespasses and their consequences.

199 Second, as is the case with any possible imposition of a constructive trust in these circumstances,[354] any determination of whether to grant an injunction and

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351 Reasons of Gordon, Edelman and Steward JJ at [87].

352 Reasons of Gordon, Edelman and Steward JJ at [90]-[106].

353 Reasons of Gordon, Edelman and Steward JJ at [103]; (2024) 186 IPR 261 at 269 [37]-[38], 286-288 [122]-[128], 289 [142], 290 [144], 294 [165]-[166], 295 [168].

354 See reasons of Gageler CJ and Gleeson J at [57]-[60]; reasons of Jagot J at [169]-[170].

its terms should, in an appropriate case, involve a consideration of the various public interests that may be affected by the injunction such as the enforcement of the criminal law, the effective performance by public agencies of their regulatory or similar functions and freedom of communication on political matters such as animal welfare.[355] In this case, although Game Meats wrote to the Department acknowledging that it "was extremely disappointed and concerned with what was depicted in the footage", the primary judge declined to find that the images depicted "illegal conduct". That finding was not challenged in the Full Court and nor was there any finding that the images depicted any breach of any regulatory standard. Otherwise, as noted, the injunctive orders granted by the Full Court and upheld in this Court do not preclude publication of any of the images to or by the Department, or publication of the footage by Channel Seven. Those orders also do not preclude Farm Transparency making submissions to the Department in respect of the footage or making public commentary on what the footage depicts or Game Meats' operations generally.

200 Third, no question arises in this case about the extent of the power conferred by s 75(v) of the *Constitution* (and s 39B of the *Judiciary Act 1903* (Cth)) to grant an injunction against an officer of the Commonwealth. The remedies conferred by s 75(v) serve different purposes to injunctions and other remedies that secure and vindicate private rights as are in issue in this case. Section 75(v) "secures a basic element of the rule of law"[356] in the sense of government under law. Thus, the remedies referred to in s 75(v) have been described as "a means" of ensuring "that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them".[357] The power conferred by s 75(v) to grant an injunction is not limited to cases of established or threatened jurisdictional error.[358]

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355 See reasons of Gageler CJ and Gleeson J at [57], [60]; reasons of Jagot J at [140]-[141], [165], [169]-[170].

356 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 482 [5]. See also *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 [56]; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 171-172 [85]-[87].

357 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [104]; see *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 231 [127], 245 [164]-[165], 252 [183] ("*Smethurst*").

358 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 162 [47].

201 Equitable remedies such as injunctions have "long had a role to play in public law".[359] Even so, in the same way that the principles applicable to the availability and grant of the prerogative writs are not to be automatically transposed to the constitutional writs referred to in s 75(v),[360] principles circumscribing when injunctive relief may be available in respect of purely private rights are not to be automatically translated to the grant of injunctive relief under s 75(v). The injunction referred to in s 75(v) is as much a constitutional injunction as the writs referred to in s 75(v) are constitutional writs.[361] In an appropriate case, s 75(v) enables the grant of an injunctive-type order to prevent any unlawful or unauthorised conduct of an officer of the Commonwealth or to undo the effect of such conduct and to do so in circumstances that may not necessarily involve a potential interference with legal rights and interests and in circumstances where a similar injunction to protect or vindicate such rights might be refused.[362]

Constructive trust

202 Given that the grant of injunctive relief against Farm Transparency is capable of doing justice between the parties, it follows that it is not necessary to determine whether, if, say, a relevant third party recipient of the footage had been joined to the proceedings, the Court would have had the power or the occasion to declare a constructive trust and make orders of the kind made by the Full Court to give effect to that declaration (such as the assignment of copyright). It is also not necessary to address whether the common law of Australia recognises or reflects any distinction between a so-called institutional constructive trust and a remedial constructive trust. That said, there is an ambiguity regarding *when* the constructive trust found or imposed by the Full Court is said to have arisen and its potential impact on third parties. If the effect of the Full Court's reasons and orders was that a constructive trust arose from the time the images were created then the publication of the footage to the Department and to Channel Seven may have infringed Game Meats' beneficial ownership of whatever copyright[363] subsisted in

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359 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 [57]; *Forestry Corporation of New South Wales v South East Forest Rescue Inc* (2025) 283 CLR 488 at 496-498 [13]-[16].

360 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 140-141 [162]; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 668 [44].

361 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 92-93 [21], 133-134 [138], 142 [165].

362 *Smethurst* (2020) 272 CLR 177 at 231 [127], 233-234 [134], 245 [165].

363 cf *Sheldon and Hammond Pty Ltd v Metrokane Inc* (2004) 135 FCR 34 at 52 [50].

the images.[364] In that event, the Department and Channel Seven might have been exposed to the grant of some remedy in respect of their retention of an infringing copy of the footage,[365] even though they did not have the opportunity to be heard as to whether or not any constructive trust should operate in that way at that time.

203 Otherwise, I do not regard the judgments in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[366] and *Smethurst v Commissioner of the Australian Federal Police*[367] as establishing either ratio, or "seriously considered dicta", as contemplated by the hegemonic statements in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[368] to the effect that a constructive trust over copyright in images obtained during, or as a consequence of, a trespass can arise or be imposed upon a trespasser or a third party in the factual circumstances of any of *Lincoln Hunt Australia Pty Ltd v Willesee*,[369] *Lenah Game Meats* or this case.

204 In *Lincoln Hunt*, Young J observed that the Court has power to grant an injunction in an appropriate case to prevent publication of a film taken by a trespasser even though no breach of confidentiality is involved, but only if the circumstances are such as to make publication of the film unconscionable.[370] In *Lenah Game Meats*, Gummow and Hayne JJ noted that such a result might be supported on a basis not articulated in *Lincoln Hunt*, in that the film may have been made "in circumstances involving the invasion of the legal or equitable rights of the plaintiff" or a breach of an obligation of the filmmaker to the plaintiff, such that "[i]t *may* then be inequitable and against good conscience *for the [film]maker to assert ownership of the copyright against the plaintiff* and to broadcast the film".[371] In that circumstance, "[t]he [film]maker may be regarded as a constructive trustee" of copyright in respect of the film conferred by s 98 of the *Copyright Act 1968* (Cth)[372] and in turn that may ground a grant of interlocutory injunctive

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364 See *Copyright Act 1968* (Cth), ss 13, 86, 101(1).

365 *Copyright Act 1968* (Cth), s 116(1); *Federal Court of Australia Act 1976* (Cth), s 23; *Young v Odeon Music House Pty Ltd* (1976) 10 ALR 153 at 165.

366 (2001) 208 CLR 199 ("*Lenah Game Meats*").

367 (2020) 272 CLR 177.

368 (2007) 230 CLR 89 at 150-151 [134], 159 [158].

369 (1986) 4 NSWLR 457 ("*Lincoln Hunt*").

370 *Lincoln Hunt* (1986) 4 NSWLR 457 at 463.

371 *Lenah Game Meats* (2001) 208 CLR 199 at 246 [102] (emphasis added).

372 *Lenah Game Meats* (2001) 208 CLR 199 at 246 [102].

relief.[373] In *Lenah Game Meats*, Gaudron J agreed with their Honours[374] as did Callinan J, in dissent,[375] although his Honour found that a constructive trust arose because there was a fiduciary relationship and a relationship of confidence between the third party recipient of the film and the owner of the abattoir whose property was the subject of the trespass.[376] Gleeson CJ only accepted that such an equitable right would arise in circumstances where the information obtained by the trespasser could be regarded as confidential.[377]

205 Even though the facts of *Lenah Game Meats* concerned a third party recipient of images taken by a trespasser, in addressing the possible imposition of a constructive trust the observations of Gummow and Hayne JJ were only addressed to the circumstance, "as in *Lincoln Hunt*", where the issue before the Court was the availability of a remedy against the trespasser.[378] Thus, their Honours did not consider whether it is inequitable or against good conscience for a third party recipient of a film made by a trespasser to deny that the occupier of the land has a beneficial interest in the copyright of the images captured by the film. Properly analysed, that is what is sought to be done here because, as noted, the only suggested justification for seeking a constructive trust over copyright in the images as opposed to an injunction against the trespasser is to ground relief against a third party recipient of the images, as was sought to be done in *Lenah Game Meats*.

206 In any event, the possibility of a constructive trust being imposed in the circumstances of *Lincoln Hunt*, as raised by Gummow and Hayne JJ in *Lenah Game Meats*, was only that – a possible future development of the law. Thus, in *Smethurst*, Kiefel CJ, Bell and Keane JJ described Gummow and Hayne JJ in *Lenah Game Meats* as having considered that "a basis in principle *might*" be found in the imposition of a constructive trust over a filmmaker's rights under the *Copyright Act* where the relevant footage was taken by a trespasser.[379] Importantly, Kiefel CJ, Bell and Keane JJ only acknowledged that relief as a possibility where the "*making*" of the film "involved the invasion of the plaintiff's legal or equitable

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373 *Lenah Game Meats* (2001) 208 CLR 199 at 247 [103].

374 *Lenah Game Meats* (2001) 208 CLR 199 at 231 [58].

375 *Lenah Game Meats* (2001) 208 CLR 199 at 320 [309].

376 *Lenah Game Meats* (2001) 208 CLR 199 at 315 [297], 320 [311].

377 *Lenah Game Meats* (2001) 208 CLR 199 at 230-231 [55].

378 *Lenah Game Meats* (2001) 208 CLR 199 at 246 [102].

379 *Smethurst* (2020) 272 CLR 177 at 216 [84] (emphasis added).

rights or a breach of confidence";[380] that is, the "making" of the film was a further such invasion of rights that extended beyond the trespass. In substance that is no different to the approach of Gleeson CJ in *Lenah Game Meats*.

Relief

207 I agree with the orders proposed by Gordon, Edelman and Steward JJ.

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380 *Smethurst* (2020) 272 CLR 177 at 216 [84] (emphasis added).