HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S83/2021

BETWEEN:

FARM TRANSPARENCY INTERNATIONAL LTD
ACN 641 242 579
First Plaintiff

CHRISTOPHER JAMES DELFORCE
Second Plaintiff

AND

STATE OF NEW SOUTH WALES
Defendant

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland ('Queensland') intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

Filed on behalf of the Attorney-General for the State of Queensland

3 December 2021

PART IV: Submissions

SUMMARY OF ARGUMENT

4. Queensland makes the following submissions:

(a) Sections 11 and 12 of the *Surveillance Devices Act 2007* (NSW) ('SD Act') overlap with a number of other offences and causes of action. Any burden imposed by ss 11 and 12 on the implied freedom of political communication consists only of the impediments to the free flow of political communication which are *additional* to the burden imposed by those overlapping offences and causes of action.

(b) Once the purpose of the burden on the implied freedom imposed by ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW) ('SD Act') is identified at the appropriate level of generality, concepts of 'dynamic' purpose do not assist the plaintiffs. The relevant legislative purpose was and remains protection of privacy.

(c) Necessity-testing by reference to how other States and Territories have decided to address a mischief should be approached with caution. Unless States and Territories are left a domain of selections, necessity-testing has the potential to undermine one of the core tenets of federalism, requiring uniform national solutions, rather than local solutions to local problems.

(d) When it comes to the adequacy of the balance struck between free political communication and privacy, our constitutional system places great weight on the value of privacy.

STATEMENT OF ARGUMENT

Burden – The relevant burden is 'incremental'

5. It may be accepted that ss 11 and 12 of the SD Act burden the implied freedom.[1] However, it is important to identify the nature and extent of the burden at the outset.

[1] Defendant's submissions, 15 [59]-[60]. See also *ABC v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199, 281-2 [195]-[198], 286-7 [217]-[218] (Kirby J).

Doing so 'serves to focus and to calibrate' the justification inquiry, however one undertakes that inquiry.[2]

6. When identifying the extent of the burden, it is relevant that ss 11 and 12 of the SD Act are engaged by a prior contravention of ss 7, 8 or 9, which the plaintiffs do not challenge. It is also relevant that the conduct proscribed by ss 11 and 12 (as engaged by ss 7 to 9) overlaps with conduct proscribed by the wider legal framework. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, Gummow and Hayne JJ pointed out that a possible emergent tort of invasion of privacy would overlap with a number of existing causes of action:[3]

> Injurious falsehood, defamation (particularly in those jurisdictions where, by statute, truth of itself is not a complete defence), confidential information and trade secrets (in particular, as extended to information respecting the personal affairs and private life of the plaintiff, and the activities of eavesdroppers and the like), passing-off (as extended to include false representations of sponsorship or endorsement), the tort of conspiracy, the intentional infliction of harm to the individual based in *Wilkinson v Downton* and what may be a developing tort of harassment, and the action on the case for nuisance constituted by watching or besetting the plaintiff 's premises, come to mind.

7. To that list, Kirby J added 'the law of negligence, trespass, passing off, copyright, the specific contracts, duty of confidence and equitable remedies'.[4] Gleeson CJ also recognised there would be overlap with legislation in various States 'which prohibit or regulate secret surveillance, and deal with the consequences of breaches, including the use that may be made by third parties of the products of such surveillance'.[5]

8. The point is not that ss 11 and 12 of the SD Act would overlap with a tort of invasion of privacy were this Court to recognise such a tort at some point in the future[6] (though they

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2 *Tajjour v New South Wales* (2014) 254 CLR 508, 579 [147] (Gageler J). See also *Brown v Tasmania* (2017) 261 CLR 328, 367 [118] (Kiefel CJ, Bell and Keane JJ), 378-9 [165] (Gageler J), 398-9 [237] (Nettle J), 460 [411] (Gordon J); *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 507 [63] (Kiefel CJ, Keane and Gleeson JJ).

3 *ABC v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199, 255 [123] (Gummow and Hayne JJ) (references omitted).

4 *ABC v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199, 277 [186] n 364 (Kirby J).

5 *ABC v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199, 228 [47] (Gleeson CJ).

6 Left open in *ABC v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199, 225-7 [38]-[43] (Gleeson CJ), 248-58 [106]-[132] (Gummow and Hayne JJ), 277-9 [185]-[191] (Kirby J).

would overlap); the point is that ss 11 and 12 overlap with many of the existing offences and causes of action identified by this Court in *Lenah Game Meats*.

9. The relevance of this to identifying the extent of the burden is that:[7]

> the impact of any given law on political communication … lies in the incremental effect of that law on the real-world ability of a person or persons to make or to receive communications which are capable of bearing on electoral choice. Therein lies its relevant burden.

10. The plaintiffs in this case do not challenge the validity of ss 7 to 9 of the SD Act, nor do they challenge any of the offences or causes of action under the general law which overlap with ss 11 and 12 of the SD Act. Accordingly, the burden that requires justification is not the burden imposed by ss 11 and 12, considered in the abstract; rather, 'it is any incremental burden that needs justification.'[8]

Legitimate aim – the relevant purpose was and remains protection of privacy

11. The plaintiffs submit there is 'a "dynamic" component to legislative purpose'.[9] Even if that proposition were to be accepted,[10] it would not assist the plaintiffs. A number of principles relevant to identifying the purpose should be pointed out.

12. First, because legislative purpose is identified objectively,[11] any shift in legislative purpose could not be discerned from the subjective intention behind a government response to a parliamentary committee's consideration of whether the SD Act should be amended.

13. Second, the relevant purpose is the purpose *of the burden* on the implied freedom, not the purpose of the Act as a whole. The purpose of the Act as a whole 'will almost always be relevant to identifying the objects and purposes of a particular provision.' But 'the high-level, abstract purposes of the whole Act' are not 'the exhaustive statement of

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7 *Brown v Tasmania* (2017) 261 CLR 328, 386 [188] (Gageler J) (underlining added).
8 *Brown v Tasmania* (2017) 261 CLR 328, 456 [397] (Gordon J).
9 Plaintiffs' submissions, 10 [51].
10 Cf Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 286ff.
11 *Zheng v Cai* (2009) 239 CLR 446, 455-6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595, 656 [169] (Edelman J) Compare *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 460-1 [74]-[77] (Gageler J).

the purposes of a single provision' of the Act. Indeed, the general purpose of the Act as a whole 'might not touch upon, or might barely touch upon, some provisions'.[12]

14. For that reason, the plaintiffs' identification of the SD Act's overall purpose of regulating the use of surveillance devices by law enforcement agencies (reflecting s 2D(a) and (b) of the SD Act)[13] is not to the present point (putting to one side the plaintiffs' attempt to downplay s 2D(c)).

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15. Third, the purpose of a law is not what it does.[14] Otherwise, every law that burdens the implied freedom would have the impermissible purpose of burdening the implied freedom. Accordingly, contrary to the plaintiffs' submissions,[15] even if ss 11 and 12 of the SD Act have the 'effect' of limiting communication about agricultural practices (as a so-called 'ag-gag' law), that does not mean that limiting communication is their purpose.

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16. Fourth, the relevant purpose must be identified at the appropriate level of generality, lying between the meaning of the words and the impetus for the law;[16] that is, the 'mischief'.[17] The Canadian Supreme Court has explained why this is important:[18]

> The appropriate level of generality for the articulation of the law's purpose is also critically important. If the purpose is articulated in too general terms, it will provide no meaningful check on the means employed to achieve it: almost any challenged provision will likely be rationally connected to a very broadly stated purpose (see, eg, *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331, at para 77). On the other hand, if the identified purpose is articulated in too specific terms, then the distinction between ends and means may be lost and the statement of purpose will effectively foreclose any separate inquiry into the connection between them. The appropriate level of generality, therefore, resides

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12 *Unions NSW v New South Wales* (2019) 264 CLR 595, 657 [172] (Edelman J). See also *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 537 [204] (Edelman J).

40 13 Plaintiffs' submissions, 10 [48]-[49].

14 *McCloy v New South Wales* (2015) 257 CLR 178, 205 [40] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 362 [100] (Kiefel CJ, Bell and Keane JJ), 392 [209] (Gageler J), 432-3 [322] (Gordon J); *Unions NSW v New South Wales* (2019) 264 CLR 595, 656-7 [170] (Edelman J).

15 Plaintiffs' submissions, 11 [56]-[57], [59].

16 *Unions NSW v New South Wales* (2019) 264 CLR 595, 657 [171] (Edelman J). See, eg, *Brown v Tasmania* (2017) 261 CLR 328, 363 [101] (Kiefel CJ, Bell and Keane JJ).

17 *McCloy v New South Wales* (2015) 257 CLR 178, 232 [132] (Gageler J); *Brown v Tasmania* (2017) 261 CLR 328, 363 [101] (Kiefel CJ, Bell and Keane JJ), 392 [208] (Gageler J), 432 [321] (Gordon J); *Unions NSW v New South Wales* (2019) 264 CLR 595, 657 [171] (Edelman J).

18 *R v Moriarity* [2015] 3 SCR 485, 498-9 [28] (Cromwell J, for the Court).

between the statement of an "animating social value" — which is too general — and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context — which risks being too specific: *Carter*, at para 76. An unduly broad statement of purpose will almost always lead to a finding that the provision is not overbroad, while an unduly narrow statement of purpose will almost always lead to a finding of overbreadth.

17. The mischief towards which s 11 and 12 of the SD Act was and remains directed – identified at a level of generality between their words and their impetus – is the protection of privacy (or more specifically, 'to limit the damage to an interest in privacy caused by publication of material obtained in contravention of ss 7-9').[19] As the plaintiffs concede, protection of privacy is a legitimate aim.[20] Moreover, for reasons developed below, it is a weighty legitimate aim.

Necessity – federalism requires a wide domain of selections

18. The plaintiffs seek to establish that ss 11 and 12 of the SDA are not necessary to achieve their purpose of protecting privacy by reference to interstate legislation.

19. '[A] law is not ordinarily to be regarded as lacking in necessity unless there is an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom'.[21] That is, to qualify as a true alternative for the purposes of necessity testing, the alternative must be:

    (a) obvious and compelling;[22]

    (b) equally practicable and available; '[t]hat is, … as effective in achieving the legislative purpose';[23] and,

    (c) impose a significantly lesser burden on the implied freedom.

20. These qualifications of a true alternative ensure that the polity retains a 'domain of selections'[24] and the latitude to implement its policy choices.[25]

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19 Defendant's submissions 15 [61].
20 Plaintiffs' submission, 11 [53].
21 *Comcare v Banerji* (2019) 267 CLR 373, 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).
22 *Tajjour v New South Wales* (2014) 254 CLR 508, 550 [36] (French CJ); *McCloy v New South Wales* (2015) 257 CLR 178, 211 [58] (French CJ, Kiefel, Bell and Keane JJ).
23 *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [114] (Crennan, Kiefel and Bell JJ).
24 *McCloy v New South Wales* (2015) 257 CLR 178, 217 [82] (French CJ, Kiefel, Bell and Keane JJ).
25 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 536 [202] (Edelman J).

21. That is especially important in a federation. As the defendant points out,[26] the text and structure of the Constitution which gives rise to the implied freedom also entrenches a federal system of government. The people of the States 'agreed to unite in one indissoluble *Federal* Commonwealth'. One of the central tenets of federalism is that States are free to enact local solutions to local problems. As Heydon J put it, 'A federation is a system of government permitting diversity. It allows its component units to engage in their own legislative experiments. It leaves them free to do so untrammelled by what other units have done or desire to do.'[27] Necessity testing should not be applied so stringently that the freedom to implement local solutions to local problems becomes a mandate to adopt a single, national solution to all problems that may implicate the implied freedom. Each stage of structured proportionality is 'shaped' so as to be consistent with underlying constitutional considerations.[28]

22. Thus, in seeking to protect privacy, the State is not 'necessarily restricted to the least common denominator of actions taken elsewhere'. The necessity limb of structured proportionality does not 'require legislatures to choose the least ambitious means to protect' privacy.[29]

23. In this case, none of the interstate statutes relied upon by the plaintiffs qualify as a true alternative. In particular, an alternative which includes a public interest exception would not protect privacy to the same extent. Certainly, such an alternative strikes a different balance between free speech and privacy, but to the extent that is relevant, it is relevant at the next stage of the analysis.

24. A related point is that while the State bears the onus of justifying a burden on the implied freedom,[30] the defendant in this case is not required to counter every conceivable hypothetical alternative to ss 11 and 12 of the SD Act. To require the State to adduce evidence to deal with the 'infinite set of possibilities by which that same

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[26] Defendant's submissions, 5 [17]-[18].

[27] *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343, 369 [61] (Heydon J).

[28] *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 536 [201] (Edelman J).

[29] *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927, 999 (Dickson CJ, Lamer and Wilson JJ).

[30] *McCloy v New South Wales* (2015) 257 CLR 178, 201 [24] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 370 [131] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595, 616 [45], 618 [53] (Kiefel CJ, Bell and Keane JJ), 631 [93] (Gageler J), 640-1 [117] (Nettle J), 650 [151] (Gordon J).

legislation could have been carried out'[31] would be to set a task that is 'completely unfeasible'[32] and to create 'undesirable' consequences for litigation.[33] Professor Barak resolves these tensions by differentiating the 'burden of pleading' alternative measures from the burden to produce evidence to discount those measures as true alternatives.[34] That approach aligns with recognition in this Court that 'in some circumstances, the fact that a plaintiff is unable to identify any obvious and compelling alternative productive of a significantly lesser burden on the implied freedom may be enough to conclude that the impugned law is needed.'[35] In this case, the plaintiffs are only able to point to interstate legislation as hypothetical alternatives.[36] There are no additional 'obvious' alternatives that the defendant is required to discount as true alternatives.

Adequacy of balance – protection of privacy is a weighty proper purpose

25. A law that passes each of the previous hurdles of structured proportionality 'is regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom'.[37] That, of course, involves a value judgment.[38]

26. That value judgment requires an understanding of the value of the impugned law's legitimate aim. When determining the weight to be assigned to the proper purpose, Professor Barak has said that regard should be had to 'the entire value structure of the particular legal system.'[39] Nettle J has suggested that '[a] court may be assisted in its assessment of adequacy in balance by reference to principles of the common law.'[40] Similarly, Edelman J has said that 'it may also be relevant to consider the systemic context in which the law was enacted, including, if Parliament has legislated to protect

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31 Barak, n 10, 449.
32 *United Mizrahi Bank Ltd v Migdal Cooperative Village* [1995] IsrLR 1, 157 [85] (Shamgar P).
33 *Brown v Tasmania* (2017) 261 CLR 328, 421 [288] (Nettle J).
34 Barak, n 10, 449.
35 *Unions NSW v New South Wales* (2019) (2019) 264 CLR 595, 640 [117] (Nettle J).
36 Statement of claim, 6-7 [24]; Plaintiffs' submissions 13 [65]ff.
37 *Comcare v Banerji* (2019) 267 CLR 373, 402 [38] (Kiefel CJ, Bell, Keane and Nettle JJ). See also *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 510 [85] (Kiefel CJ, Keane and Gleeson JJ).
38 *McCloy v New South Wales* (2015) 257 CLR 178, 219 [89] (French CJ, Kiefel, Bell and Keane JJ).
39 Barak, n 10, 349.
40 *Clubb v Edwards* (2019) 267 CLR 171, 267 [272] (Nettle J).

some right, the importance of the right within the legal system and the extent to which it is embedded in the fabric of the legal system within which Parliament legislates'.[41]

27. The high value placed upon privacy by our legal system can be seen in:

(a) the concern our common law has to protect privacy (while this Court has not taken the step of recognising a tort of invasion of privacy,[42] it must be accepted that 'the value of privacy protection may generally inform common law developments'[43]);

(b) the systematic protection of privacy through statutes enacted at all levels of government, such as the *Privacy Act 1988* (Cth)[44] and statutory recognition of the human right to privacy in some States;[45]

(c) the observation of Kiefel CJ, Bell and Keane JJ in *Clubb v Edwards* that privacy and dignity are closely linked, and that protection of 'the dignity of members of the sovereign people' is a weighty proper purpose[46] (indeed, as Kirby J said in *Lenah Game Meats*, the implied freedom does not prevent 'protection of other values (such as individual reputation) upheld during the entire operation of the Constitution to date'[47]).

28. This Court has recognised that the deeper values underlying privacy are human dignity and personal autonomy.[48] Moreover, the people whose privacy is protected by ss 11 and 12 of the SD Act are the people of the Commonwealth, whose political sovereignty is the basis of the implied freedom.

29. In light of that considerable weight our legal system places on privacy, dignity and autonomy, the incremental impact of ss 11 and 12 of the SD Act on the implied freedom cannot be said to be grossly disproportionate to the purpose of protecting privacy.

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41 *Clubb v Edwards* (2019) 267 CLR 171, 343-4 [496] (Edelman J).

42 *ABC v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199, 225-7 [38]-[43] (Gleeson CJ), 248-58 [106]-[132] (Gummow and Hayne JJ), 277-9 [185]-[191] (Kirby J).

43 *Australian Consolidated Press Pty Ltd v Ettingshausen* (New South Wales Court of Appeal, Kirby P, 13 October 1993) 15, quoted with approval in *ABC v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199, 248 [106] (Gummow and Hayne JJ). See also Defendant's submissions, 9-10 [38]-[39], 19 [81].

44 See *ABC v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199, 248 [106] (Gummow and Hayne JJ).

45 Eg, *Human Rights Act 2019* (Qld) s 25.

46 *Clubb v Edwards* (2019) 267 CLR 171, 195-6 [49], 209 [99] (Kiefel CJ, Bell and Keane JJ).

47 *ABC v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199, 282 [201] (Kirby J).

48 *ABC v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199, 226 [43] (Gleeson CJ), 251 [113], 125 [256] (Gummow and Hayne JJ); *Clubb v Edwards* (2019) 267 CLR 171, 195-6 [49]-[51] (Kiefel CJ, Bell and Keane JJ).

PART V: Time estimate

30. It is estimates that 10 minutes will be required for the presentation of oral argument.

Dated 3 December 2021.

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AND

STATE OF NEW SOUTH WALES
Defendant

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019,* Queensland sets out below a list of the particular constitutional provisions and statutes referred to in its submissions.

No.	Legislation	Provision(s)	Version
Commonwealth			
1.	*Privacy Act 1988*		Current (Compilation No 89) as at 4 September 2021
2.	*Judiciary Act 1903*	s 78A	Current (Compilation No 48) as at 1 September 2021
State			
3.	*Surveillance Devices Act 2007* (NSW)	ss 2D(a), 2D(b), 2D(c), 7, 8, 9, 11, 12	Current version as at 11 December 2020
4.	*Human Rights Act 2019* (Qld)	s 25	Current version as at 25 May 2020