HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

CHRISTOPHER JAMES DELFORCE
Second Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: PUBLICATION OF SUBMISSIONS

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

Part II: INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant.

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: SUBMISSIONS

4. The plaintiffs impugn the validity of ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW) (**SD Act**) on the basis that they impermissibly infringe the implied freedom of political communication.[1]

5. The constitutional validity of the impugned provisions is to be determined by reference to the three-stage test most recently endorsed by a majority of this Court in *LibertyWorks Inc v Commonwealth*.[2]

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1 Plaintiffs' Submissions (**PS)** [65], [79], [86].
2 (2021) 95 ALJR 490.

6. In summary, South Australia submits:

6.1 The assessment of the extent of the burden imposed by the impugned provisions requires consideration of the conduct that is already rendered unlawful by ss 7 and 8 of the SD Act and the broader legal context within which the SD Act operates. The assessment directs attention to the what the impugned provisions do over and above the existing legal framework. It is only the "incremental burden" effected by the impugned provisions that needs to be justified.

6.2 The impugned provisions pursue the legitimate purpose of protecting against intrusions into privacy and into property rights. Identified at the appropriate level of generality, the purposes of the SD Act have remained constant.

6.3 The laws enacted in other jurisdictions are not obvious and compelling alternatives in the sense that they achieve the *same* purposes as the SD Act to the *same* extent. The laws enacted in those jurisdictions reflect the policy choices of their respective Parliaments. Those choices have not narrowed the rational policy choices available to the Parliament of New South Wales.

6.4 The incremental burden effected by the impugned provisions cannot be said to be so grossly disproportionate or manifestly excessive by reference to the importance of the purpose sought to be achieved as to manifest irrationality.

The first stage: Only the incremental burden need be justified

7. The first stage requires an assessment of the legal effect and practical operation of the impugned law to determine whether it imposes an effective burden on an ability to engage in, or the content of, political communication.

8. The parties agree that the impugned provisions burden the implied freedom of political communication.[3] Section 11 restricts the publication and communication of material that is derived from the use of surveillance devices in contravention of ss 7 or 8.[4] To the extent that the possession of material obtained contrary to ss 7 or 8 is necessary for communication, s 12 may, concurrently with s 11, restrict the ability of a person to communicate, or receive communication of, that material. Together, the impugned provisions impose a restriction on conduct that, though not always constituting

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3 PS [46]; DS [59]-[60] (although noting that the defendant's statement that "[a]ny burden imposed by s 12 is indirect" may suggest the defendant does not accept that s 12 imposes an effective burden).

4 Although the use of a tracking device contrary to s 9 would also engage ss 11 and 12, as the Plaintiffs do not separately address this provision, consistent with the defendant's approach (DS [7]), South Australia will not address it in these submissions.

political communication, may include instances of communicative behavior that might ultimately bear on electoral choice.

9. While the extent of the burden imposed is not relevant at this stage of the enquiry,[5] a proper understanding of the extent of the burden is relevant to the application of structured proportionality analysis.[6]

10. The plaintiffs' submission that "an absolute prohibition is always a significant burden" should not be accepted.[7] The extent of the burden effected by any prohibition is ultimately a question of "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".[8] It is to be approached "by reference to what [persons] could do were it not for the statute".[9] Accordingly, it is only the "incremental burden" effected by the impugned provisions that needs to be justified.[10]

11. The impugned provisions only restrict political communication where a private conversation or record of the carrying on of an activity has come to the person's knowledge or possession as a result of the use of a listening device or optical surveillance device in contravention of ss 7 or 8. The assessment of the extent of the burden imposed by the impugned provisions requires consideration of the conduct that is already rendered unlawful by ss 7 and 8, the validity of which is not impugned by the plaintiffs. It also requires consideration of the broader legal context within which the SD Act operates, which includes the common law of trespass and nuisance and other pre-existing offences which protect against intrusions into privacy and property rights.[11] The assessment of the extent of the burden effected by the impugned provisions is directed to what those provisions do over and above the existing legal framework.

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5 *McCloy v New South Wales* (2015) 257 CLR 178, 218 [83] (French CJ, Kiefel, Bell and Keane JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, 578 [145] (Gageler J).

6 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 507 [63] (Kiefel CJ, Keane and Gleeson JJ).

7 PS [46].

8 *Brown v Tasmania* (2017) 261 CLR 328, 386 [188] (Gageler J) (emphasis added), 460 [411], 462 [420] (Gordon J); *Comcare v Banerji* (2019) 267 CLR 373, 420 [89] (Gageler J).

9 *Brown v Tasmania* (2017) 261 CLR 328, 365 [109] (Kiefel CJ, Bell and Keane JJ), 383 [181] (Gageler J), 408-409 [259] (Nettle J), 428 [304] (Gordon J), 502-503 [557] (Edelman J). See also *Levy v Victoria* (1997) 189 CLR 579, 625-626 (McHugh J), cited in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 223-224 [107]-[108] (McHugh J), 246 [184] (Gummow and Hayne JJ), 303-304 [354] (Heydon J).

10 *Brown v Tasmania* (2017) 261 CLR 328, 456 [397] (Gordon J).

11 In this regard, it may be noted that s 8 of the SD Act would appear not to burden political communication given that all of the conduct that it proscribes is unlawful under the general law (see for example, the offence of unlawful entry on inclosed lands pursuant to s 4 of the *Inclosed Lands Protection Act 1901* (NSW)).

The second stage: The privacy and property purposes are legitimate

12. Central to the analysis required by the second stage is the identification of the purpose or purposes of the impugned law. It is to be discerned from the text, context, and, if relevant, legislative history.[12] It is critical that the identification of the purpose be at the level of generality that is relevant to the constitutional task, namely at the level of identifying the mischief to which the law is directed.[13]

13. The purposes of Part 2 are most clearly discerned from the sections which contain the primary prohibitions, being relevantly ss 7 and 8.[14] Section 7 prohibits the installation, use and maintenance of a listening device to overhear, monitor or listen to a private conversation, which will not include a conversation in circumstances where the parties to it ought reasonably expect that it might be overheard by another.[15] Section 8 prohibits the installation, use and maintenance of an optical surveillance device to record visually or observe the carrying on of an activity, where it involves a trespass onto or unlawful interference with a premises, vehicle or other object without the express or implied consent of the owner, occupier or person with lawful possession. Both provisions contain exceptions which, consistent with the broader provisions of the SD Act, provide for the installation and use of surveillance devices by law enforcement agencies in specified circumstances.[16]

14. These provisions can thereby be seen to be directed towards protecting against two kinds of intrusions: intrusions into privacy and intrusions into property rights. They are directed towards the installation, use and maintenance of surveillance devices because that conduct is seen as the potential source of those intrusions. In allowing for limited intrusions by law enforcement agencies, the provisions are also directed towards ensuring the proper functioning of those agencies, consistent with the broader provisions of the SD Act. These privacy, property and law enforcement purposes,

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12 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 532 [183] (Gordon J); *Brown v Tasmania* (2017) 261 CLR 328, 362 [96] (Kiefel CJ, Bell and Keane JJ), 432 [321] (Gordon J); *McCloy v New South Wales* (2015) 257 CLR 178, 212-213 [67] (French CJ, Kiefel, Bell and Keane JJ), 232 [132] (Gageler J), 284 [320] (Gordon J); *Unions NSW v New South Wales* (2013) 252 CLR 530, 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

13 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 532 [183] (Gordon J), 537 [204] (Edelman J); *Brown v Tasmania* (2017) 261 CLR 328, 391 [208] (Gageler J), 432 [321] (Gordon J); *Unions NSW v New South Wales (Unions No 2)* (2019) 264 CLR 595, 657 [171] (Edelman J).

14 *Brown v Tasmania* (2017) 261 CLR 328, 362 [99] (Kiefel CJ, Bell and Keane JJ).

15 As defined in SD Act, s 4.

16 See SD Act, ss 7(2), (4), 8(2) and (2A). For the broader provisions of the SD Act, see Parts 3 and 4.

discernable as a matter of ordinary statutory construction, are now largely reflected in the express objects in s 2A of the SD Act.[17]

15. Sections 11 and 12, which are engaged by a contravention of ss 7 and 8, are likewise directed towards protecting against intrusions into privacy and intrusions into property rights. They are directed towards the possession, publication and communication (together, **publication**) of material obtained unlawfully through surveillance devices because that conduct is seen as a potential further source of such intrusions. In addition, because the ability to publish material obtained through the unlawful use of surveillance devices incentivises or rewards the initial intrusion into privacy and property rights, the impugned provisions are directed towards deterring the publication of the material so that (at least where a third party is engaged) the contravenor is deprived of the benefits of their unlawful conduct and the initial intrusion is disincentivised. In that latter respect, the provisions are ancillary to the primary prohibitions: they render efficacious those prohibitions.

16. The purposes of protecting against intrusions into privacy and intrusions into property rights are legitimate, in the sense that they are not incompatible with the system of representative and responsible government. They do not "impede the functioning of that system and all that it entails".[18] The plaintiffs' broad acceptance of the legitimacy of the privacy and property purposes is consistent with authority.[19]

17. The plaintiffs submit that the SD Act operates to serve the additional illegitimate purpose of gagging communication about agricultural practices.[20] That submission fails to adequately distinguish between the purpose and effect of the impugned provisions.[21] Even if the measures may preclude those who want to communicate about agricultural practices from doing so (at least by their preferred method), this is only one aspect of the operation of the impugned provisions. Moreover, this is merely

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17 See by way of analogy *McCloy v New South Wales* (2015) 257 CLR 178, 203 [32] (French CJ, Kiefel, Bell and Keane JJ).

18 *McCloy v New South Wales* (2015) 257 CLR 178, 203 [31] (French CJ, Kiefel, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, 194 [44] (Kiefel CJ, Bell and Keane JJ).

19 PS [53], [55]. *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 509 [75] (Kiefel CJ, Keane and Gleeson JJ); *Clubb v Edwards* (2019) 267 CLR 171, 198-199 [60] (Kiefel CJ, Bell and Keane JJ), 235-236 [197] (Gageler J), 260-261 [258] (Nettle J); *Brown v Tasmania* (2017) 261 CLR 328, 385 [188] (Gageler J).

20 PS [56], [59].

21 See *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, 363-364 [100] (Kiefel CJ, Bell and Keane JJ), 432-433 [322] (Gordon J); *Clubb v Edwards* (2019) 267 CLR 171, 260 [257] (Nettle J); *Unions NSW v New South Wales (Unions No 2)* (2019) 264 CLR 595, 661 [179] (Edelman J).

an effect of the measures employed to achieve the purposes of protecting against intrusions into privacy and intrusions into property rights.

18. The plaintiffs' reliance on the purposes of the SD Act being "dynamic"[22] is misplaced. That submission reflects no more than that the practical effects of the impugned provisions have been felt by different groups, in different ways at different points in time. While this may demonstrate that the Parliament of New South Wales has legislated prophylactically[23] in response to the then inferred, and now manifest,[24] policy concerns, it does not demonstrate that the SD Act now pursues an additional illegitimate purpose. Once the purposes of the SD Act are identified at the appropriate level of generality, it is evident that those purposes have remained constant.

19. In any event, as plausible legitimate purposes of the impugned provisions have been identified, the Court should proceed to proportionality testing.[25] Even if the plaintiffs' submission are taken to cast doubt on whether the operation of the SD Act conforms to those purposes, the validity of the impugned provisions should be determined by reference to proportionality testing.

The third stage: The impugned provisions rationally pursue their purposes

20. Where a law has a burdensome effect on the implied freedom, the third stage requires that it be shown to be "a proportionate, which is to say a *rational*, response to a perceived mischief".[26] A law will satisfy the requirements of proportionality testing where it is suitable, necessary and adequate in its balance.[27]

21. The plaintiffs concede that the SD Act is suitable,[28] but take issue with the necessity and adequacy in the balance of the impugned provisions.

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22 PS [51]-[52].

23 *McCloy v New South Wales* (2015) 257 CLR 178, 262 [233] (Nettle J). See also *Spence v Queensland* (2019) 268 CLR 355, 417 [96] (Kiefel CJ, Bell, Gageler and Keane JJ), 499-500 [323] (Edelman J).

24 See the agreed facts set out in the Amended Special Case as referred to in DS [11]-[13]. See also SCB 710.

25 *Unions NSW v New South Wales (Unions No 2)* (2019) 264 CLR 595, 613 [35]-[36] (Kiefel CJ, Bell and Keane JJ). See also *Brown v Tasmania* (2017) 261 CLR 328, 393 [216] (Gageler J).

26 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 504 [46] (Kiefel CJ, Keane and Gleeson JJ) (emphasis added).

27 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 504 [46] (Kiefel CJ, Keane and Gleeson JJ), 535 [200] (Edelman J); *Comcare v Banerji* (2019) 267 CLR 373, 400 [32] (Kiefel CJ, Bell, Keane and Nettle JJ); *Clubb v Edwards* (2019) 267 CLR 171, 186 [6] (Kiefel CJ, Bell and Keane JJ), 264-265 [266] (Nettle J); *McCloy v New South Wales* (2015) 257 CLR 178, 193-195 [2] (French CJ, Kiefel, Bell and Keane JJ).

28 PS [64].

Necessity

22. This stage of proportionality testing prompts the court to assess whether the impugned law imposes a burden on the implied freedom with no countervailing benefit. Where an obvious and compelling alternative is identified, being an alternative that is equally practicable, significantly less restrictive and that would advance the purpose of the impugned law to the same extent,[29] the impugned law may be said to impose a residual burden on the implied freedom that is not rationally explicable by the promotion of its putative purpose.[30] Absent such explanation, the residual burden can only be rationally understood as the product of an illegitimate purpose *to effect that very burden*.

10 23. So understood, the question of whether a law can be said to be necessary "does not involve a free-ranging enquiry as to whether the legislature should have made different policy choices".[31] The test "allows latitude for parliamentary choice in the implementation of public policy".[32] Within the realm of rational choices there may be a "multitude of options available to the Parliament in selecting the desired means".[33]

24. Legislative approaches taken in other jurisdictions to a similar subject matter may appear to supply an instantly accessible illustration of a relevant alternative approach.[34] However, caution must be exercised before concluding that a policy choice made by one legislature has narrowed the range of rational choices available to another legislature. It may emerge that an impugned law and the proffered alternative do not
20 pursue the "same purpose"[35] or, where the laws pursue multiple purposes, do not share the same composite purpose.[36] In such circumstances, the proffered alternative law will not be an obvious and compelling alternative to the impugned law.

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29 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 509 [78] (Kiefel CJ, Keane and Gleeson JJ); *Comcare v Banerji* (2019) 267 CLR 373, 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ), 452-453 [194] (Edelman J); *Clubb v Edwards* (2019) 267 CLR 171, 269 [277] (Nettle J), 337 [479] (Edelman J).

30 *Brown v Tasmania* (2017) 261 CLR 328, 370 [130] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, 420-421 [286]-[287] (Nettle J).

31 *Brown v Tasmania* (2017) 261 CLR 328, 371 [139] (Kiefel CJ, Bell and Keane JJ).

32 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 536 [202] (Edelman J).

33 *Unions NSW v New South Wales (Unions No 2)* (2019) 264 CLR 595, 616-617 [47] (Kiefel CJ, Bell and Keane JJ).

34 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 510 [80] (Kiefel CJ, Keane and Gleeson JJ).

35 *McCloy v New South Wales* (2015) 257 CLR 178, 195 [2], 217 [81] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 371 [139] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, 186 [6] (Kiefel CJ, Bell and Keane JJ), 265 [267] (Nettle J), 336 [476], 337 [479] (Edelman J).

36 *McCloy v New South Wales* (2015) 257 CLR 178, 203-204 [33]-[34] (French CJ, Kiefel, Bell and Keane JJ), 285 [328] (Gordon J).

25. Where the impugned law and proffered alternative do pursue the same purpose, the proffered alternative law will not be a "true alternative"[37] if it does not seek to achieve that purpose to the "same extent"[38] as the impugned law. Any proffered alternative must be "as effective"[39] or "equally effective",[40] "quantitatively, qualitatively, and probability-wise",[41] in achieving the same legislative purpose or purposes as the impugned law.

26. Pointing to legislation in Victoria, the Northern Territory, South Australia, Western Australia and Queensland, the plaintiffs assert that the impugned provisions "fail the test of necessity".[42] The plaintiffs submit that by comparison to the proffered alternative laws, the SD Act imposes a "far greater burden" on political communication by reference to the following features:[43] it does not prohibit the publication or communication of only *private* activities;[44] it does not contain a public interest exception;[45] and, it prohibits the possession of material obtained contrary to Part 2.[46]

27. The plaintiffs do not explain how the proffered alternative laws are obvious and compelling, in the sense that they achieve the *same* purposes as the SD Act to the *same* extent, such that the impugned provisions can be found to be irrational. Significantly, the different tailoring of the proffered alternative laws strongly suggests that they would not be *equally* effective at achieving the composite purpose that ss 11 and 12 of the SD Act seek to achieve.[47] The abovementioned features in the proffered alternatives indicate that the legislatures in those jurisdictions have made policy

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37 *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [114] (Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 285 [328] (Gordon J).

38 *Tajjour v New South Wales* (2014) 254 CLR 508, 563 [81], 564 [83], 565-566 [90] (Hayne J); *McCloy v New South Wales* (2015) 257 CLR 178, 293 [361] (Gordon J); *Comcare v Banerji* (2019) 267 CLR 373, 452-453 [194] (Edelman J).

39 *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [114] (Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 211 [61] (French CJ, Kiefel, Bell and Keane JJ), 286 [328] (Gordon J); *Clubb v Edwards* (2019) 267 CLR 171, 200-201 [70], 207 [92], 209 [100] (Kiefel CJ, Bell and Keane JJ); see also 337 [478] (Edelman J).

40 *McCloy v New South Wales* (2015) 257 CLR 178, 217 [81] (French CJ, Kiefel, Bell and Keane JJ). See also *Clubb v Edwards* (2019) 267 CLR 171, 330 [463] (Edelman J).

41 *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [114] (Crennan, Kiefel and Bell JJ).

42 PS [65].

43 PS [75].

44 See, e.g., *Surveillance Devices Act 1999* (Vic), s 7; *Surveillance Devices Act 2007* (NT), s 12; *Surveillance Devices Act 2016* (SA), s 5.

45 See, e.g., *Surveillance Devices Act 1999* (Vic), s 11(2)(b)(i); *Surveillance Devices Act 2007* (NT), s 15(2)(b)(i); *Surveillance Devices Act 2016* (SA), ss 6, 10-11.

46 See, e.g., *Surveillance Devices Act 1999* (Vic); *Surveillance Devices Act 2007* (NT); *Surveillance Devices Act 2016* (SA).

47 See DS [71]-[78].

choices regarding the purposes to be pursued and the differing extents to which those purposes are to be realised. The policy choices of those legislatures, while rational, have not had the consequence of narrowing the rational policy choices available to the Parliament of New South Wales.[48]

28. The choice to include a public interest exception made by the Parliaments of some other jurisdictions, including South Australia,[49] is a case in point. Such public interest exceptions necessarily lessen the extent of the burden on the implied freedom, but it cannot be said that such legislation pursues its purpose to the same extent as it would had no allowance been made for publication in the public interest.

10 29. The Parliament of New South Wales has made a different choice. That choice is consistent with the fact that the inclusion of a public interest exception may risk encouraging unlawful entry to land.[50] The test of necessity does not require the Parliament of New South Wales to accept that risk. Indeed, if the failure to adopt a public interest exception in this case were enough to render the burden on the implied freedom unnecessary, it would appear that such a failure would be fatal at this stage of proportionality testing to any law that burdens the implied freedom. The implied freedom would become a "trump over other values".[51] This is not to say that where a greater burden is imposed by a law that contains no public interest exception, that burden need not be justified. However, this justification occurs at the adequacy in the
20 balance stage.

Adequacy in the balance

30. The test of adequacy in the balance assesses whether the balance struck by the impugned law is so "grossly disproportionate"[52] or "manifestly excessive"[53] by reference to the demands of the legislative purpose that it "manifest[s] irrationality".[54] The court's task is not "to determine 'where, in effect, the balance should lie'",[55] but

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48 Cf. PS [79].

49 *Surveillance Devices Act 2016* (SA), ss 6, 10-11.

50 This risk has since expressly been acknowledged by the Working Group established in response to a recommendation by the New South Wales Select Committee on Landowner Protection from Unauthorised Filming or Surveillance discussed at SCB 710 in considering whether to recommend the inclusion of a public interest exception into the SD Act.

51 *Comcare v Banerji* (2019) 267 CLR 373, 442 [165] (Edelman J).

52 *Brown v Tasmania* (2017) 261 CLR 328, 423 [290], 425 [295] (Nettle J); *Clubb v Edwards* (2019) 267 CLR 171, 265 [266], 268 [272], 275 [292] (Nettle J).

53 *Clubb v Edwards* (2019) 267 CLR 171, 200 [69] (Kiefel CJ, Bell and Keane JJ), 266 [270], 268 [272] (Nettle J); see also 344 [497] (Edelman J).

54 *Clubb v Edwards* (2019) 267 CLR 171, 200 [66] (Kiefel CJ, Bell and Keane JJ).

55 *Clubb v Edwards* (2019) 267 CLR 171, 200 [69] (Kiefel CJ, Bell and Keane JJ).

to assess whether the benefit sought to be achieved is "manifestly outweighed by the adverse effect on the implied freedom".[56] Indeed, as "a conclusion that a provision is inadequate in the balance will often mean that Parliament is entirely precluded from achieving its legitimate policy objective … invalidation of a law at this third stage should only occur in extreme cases",[57] or "only *at the outer margins* for reasons of systemic protection".[58]

31. The plaintiffs submit that because ss 11 and 12 of the SD Act do not contain a public interest exception, the blanket prohibition they impose on publication is not adequate in the balance.[59]

10 32. No doubt there may be circumstances, as the plaintiffs go on to suggest, where the "public interest" will be served in the publication of surveillance material that has been unlawfully obtained. That observation is unremarkable. The implied freedom of political communication proceeds upon the assumption that there is a public interest in, and indeed a need for, the free flow of political communication. But so to recognise merely begs the question of whether the burden on the free flow of political communication effected by the impugned provisions manifestly outweighs the importance of protecting against intrusions into privacy and intrusions into property rights.

33. There can also be no doubt that a "public interest" exception can, as the plaintiffs
20 further suggest, allow for careful balancing of where the public interest lies in a particular case. However, the court's task is not to determine whether the legislature has struck an "ideal" balance, but whether the legislature's assessment is grossly disproportionate or manifestly excessive. The confinement of the judicial task in this manner accords with the court's supervisory function.[60]

34. That confinement is of particular significance where, as here, the impugned laws can be seen as protecting long recognised rights and interests by augmenting applicable

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56 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 510 [85] (Kiefel CJ, Keane and Gleeson JJ); see also 553 [292] (Steward J); *Comcare v Banerji* (2019) 267 CLR 373, 402 [38] (Kiefel CJ, Bell, Keane and Nettle JJ); 457 [205] (Edelman J).

57 *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 536 [201] (Edelman J); see also 553 [293] (Steward J); *Comcare v Banerji* (2019) 267 CLR 373, 442 [165] (Edelman J); *Clubb v Edwards* (2019) 267 CLR 171, 341-342 [492] (Edelman J).

58 *Comcare v Banerji* (2019) 267 CLR 373, 442 [164] (Edelman J).

59 PS [79]-[81].

60 *Clubb v Edwards* (2019) 267 CLR 171, 199-200 [66], [69] (Kiefel CJ, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 466 [434], 467 [436] (Gordon J); *Unions NSW v New South Wales (Unions No 2)* (2019) 264 CLR 595, 651 [153] (Edelman J).

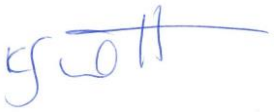
common law rules.[61] The Parliament of New South Wales has taken the view that the common law does not provide adequate protection against intrusions into privacy and intrusions into property rights, and has legislated accordingly. The "[r]ecognition that Parliament may legitimately alter the balance struck at common law" requires the court to act cautiously before declaring that a new balance struck by the Parliament is inadequate and thereby impermissible.[62]

35. Applying the correct test, it is undeniable that the purposes of protecting against intrusions into privacy and intrusions into property rights are significant.[63] So understood, the incremental burden effected by ss 11 and 12 cannot be said to be so grossly disproportionate or manifestly excessive by reference to the importance of the purpose sought to be achieved as to manifest irrationality.

Part V: TIME ESTIMATE

36. It is estimated that 10 minutes will be required for the presentation of South Australia's oral argument.

Dated 8 December 2021



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61 Section 8 of the SD Act is consistent with the common law of trespass, although it (like the *Inclosed Lands Protection Act 1901* (NSW), s 4 that predates it) imposes a criminal sanction for breach. Sections 11 and 12 then operate to prohibit the publication of material gathered as a result of trespass to land, vehicles or goods in circumstances where the common law may not prohibit publication: *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199, 230-231 [55] (Gleeson CJ), 232 [61] (Gaudron J), 248 [105], 258 [132] (Gummow and Hayne JJ). See also *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502, 524 [76]-[77] (Kiefel CJ, Bell and Keane JJ), 541 [157]-[158] (Nettle J).

62 *Clubb v Edwards* (2019) 267 CLR 171, 268 [272] (Nettle J).

63 See above fn [19] above. In relation to interests in privacy, see also *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, 344-345 [52]-[53] (Spigelman CJ); *John Fairfax Publications Pty Ltd v Doe* (1995) 57 NSWLR 81, 97 (Kirby P). In relation to proprietary rights to exclusive possession, see *Coco v The Queen* (1994) 179 CLR 427, 435 (Mason CJ, Brennan, Gaudron and McHugh JJ), 455-456 (Toohey J); *Kuru v New South Wales* (2008) 236 CLR 1, 13 [37] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Plenty v Dillon* (1991) 171 CLR 635, 647 (Gaudron and McHugh JJ).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

CHRISTOPHER JAMES DELFORCE
Second Plaintiff

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and

STATE OF NEW SOUTH WALES
Defendant

ANNEXURE TO SOUTH AUSTRALIA'S SUBMISSIONS

No.	Description	Version	Provision
1.	*Surveillance Devices Act 2007* (NSW)	In force version	ss 2A, 4, 7, 8, 9, 11, 12, Parts 3 and 4
2.	*Inclosed Lands Protection Act 1901* (NSW)	In force version	s 4
3.	*Surveillance Devices Act 1999* (Vic)	In force version	ss 7, 11(2)
4.	*Surveillance Devices Act 2007* (NT)	In force version	ss 12, 15(2)
5.	*Surveillance Devices Act 2016* (SA)	In force version	ss 5, 6, 10, 11