



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

B E T W E E N:

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

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CHRISTOPHER JAMES DELFORCE
Second Plaintiff

AND

STATE OF NEW SOUTH WALES
Defendant

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SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia ("WA") intervenes pursuant to section 78A of the *Judiciary Act 1903* (Cth), in support of the defendant.

PART III: ARGUMENT

Introduction

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3. Part 2 of the *Surveillance Devices Act 2007* (NSW) ("**SD Act**") regulates the installation, use and maintenance of various surveillance devices. In effect, sections 7 and 8 prevent a person from conducting surveillance by audio or visual means. Section 7 applies to audio surveillance of private conversations. Section 8 prohibits visual surveillance from a device which is installed on a premises, vehicle

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or object without the consent of the person who has lawful possession or control of the property.

4. As well, the SD Act contains sections 11 and 12 which prevent the possession, or the communication or publication of information obtained by unauthorised surveillance by audio or visual means which has been carried out in contravention of sections 7, 8 or 9. By contrast, sections 11 and 12 are not engaged by a prior contravention of section 10.
5. The plaintiffs claim that there should be declarations that sections 11 and 12 are invalid, or alternatively that they are invalid in so far as they operate to prohibit political communication. This is upon the basis that the NSW Parliament has no legislative power to burden the implied freedom of political communication guaranteed by the Commonwealth *Constitution*. However, there is no similar claim that sections 7 and 8 are invalid in so far as they prohibit the installation, use or maintenance of a listening device or optical surveillance device for the purpose of obtaining records of a private conversation or the carrying on of an activity for political communication.
6. In other words, the plaintiffs accept that listening and optical surveillance devices cannot legitimately be installed, used or maintained where this would involve a trespass to property, but claim that surveillance records produced from installing, using or maintaining such devices in breach of the SD Act can be published or communicated for political purposes.
7. The test applied to assessing whether legislation contravenes the implied freedom of political communication was stated by the plurality in *McCloy v New South Wales* ("**McCloy test**"),¹ and modified in *Brown v Tasmania* ("**Brown**").² The test was divided into three questions:
 - (a) does the law effectively burden the implied freedom either in its terms, operation or effect?

¹ *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2] (French CJ, Kiefel, Bell and Keane JJ).

² [2017] HCA 43; (2017) 261 CLR 328 at 363-364 [104] (Kiefel CJ, Bell and Keane JJ). See also *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328 at 375-376 [155]-[156] (Gageler J), 416 [277] (Nettle J), 478 [481] (Edelman J); *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171 at 186 [5] (Kiefel CJ, Bell and Keane JJ).

- (b) if "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the constitutionally prescribed system of representative and responsible government?
- (c) if "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? This stage depends upon "proportionality testing", although the process of proportionality testing is not fully accepted.³ If employed, the process of structured proportionality requires the law to be *suitable, necessary and adequately balanced* to achieve its purposes.

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8. WA submits that:

- (a) Issue 1 – the constitutional validity of sections 11 and 12 should be considered, but should only be considered, in the context of section 8, as the agreed facts are confined to the operation of optical surveillance devices;
- (b) Issue 2 – the *Constitution* does not impliedly prevent a State or Commonwealth Parliament from legislating to prohibit the communication or publication of material by a person who knows that it has been unlawfully obtained. In terms of the first question in the *McCloy* test,⁴ legislation cannot burden the freedom where the communication it prohibits has been obtained by independently unlawful means. There is no freedom to communicate or publish material which a person knows has been unlawfully obtained;
- (c) Issue 3 – if WA's submissions on issue 2 are not accepted, the application of the *McCloy* test means that sections 11 and 12 are within the legislative power of the NSW Parliament. The *McCloy* test should be applied as follows:
- (i) A law which protects the privacy of a person from unlawful audio and visual surveillance, and prevents the communication or publication of

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³ See, for example, *LibertyWorks Inc v Commonwealth* [2021] HCA 18; (2021) 95 ALJR 490 at 512 [93] (Gageler J), 521 [134] (Gordon J); *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171 at 225 [161]-[162] (Gageler J), 294 [354], 304-310 [389]-[404] (Gordon J); *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328 at 389-391 [200]-[206] (Gageler J), 464-468 [427]-[438] (Gordon J).

⁴ *McCloy v New South Wales* [2015] HCA 34; (2015) 257 CLR 178 at 194-5 [2] (French CJ, Kiefel, Bell and Keane JJ).

such material by a person who knows that it has been unlawfully obtained, burdens political communications.

However:

- (ii) such a law is compatible with the maintenance of the constitutionally prescribed system of representative government, and does not impinge adversely upon the functioning of that system of government; and
- (iii) sections 11 and 12 are reasonably appropriate and adapted to advance the legitimate object of protecting the privacy of a person from unlawful audio and visual surveillance:

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- They are *suitable* because there is a rational connection between such laws, and the purpose of preventing unlawful surveillance. These laws prevent the product of unlawful surveillance being utilised;

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- They are *necessary*, because there is no obvious and compelling alternative which is reasonably practicable to achieve the purpose of protecting the privacy of a person from unlawful audio and visual surveillance and which inevitably involves burdening the freedom of political communication to a lesser degree (as opposed to burdening it in a different way, which may not be less significant);

- They are *adequate in balance*, as they serve an important purpose to prevent unlawful conduct, by re-enforcing private rights to prevent trespass. Even though the prohibition against communication, publication or possession of information which has been unlawfully obtained is absolute, this corresponds with the absolute prohibition against engaging in a trespass to install, use or maintain an audio or optical surveillance device.

Issue 1: Scope of Question to be determined by this Court

9. In an Amended Special Case, the parties have agreed to refer questions concerning
30 the constitutionality of sections 11 and 12 of the SD Act to this Court: SCB 36.

While the validity of sections 7 to 9 are not in dispute, these provisions are relevant in so far as they might engage sections 11 and 12.

10. At times the plaintiffs' submissions are confined to challenging the validity of sections 11 and 12 as engaged by sections 7 and 8: PS [13], [17], [29]. However, at other times their submissions expand to challenging the validity of sections 11 and 12 as engaged by sections 7, 8, 9 and 10: PS [32], [46], [56], [60]. The plaintiffs justify this broader challenge by expressing that "this case is not about the plaintiffs *per se*. It is about the law that is challenged ... the case is about the publishers whose freedom to publish is curtailed": PS [39].
- 10 11. The prudential approach of this Court dictates that "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties".⁵ Underlying this approach is the recognition that performance of this Court's adjudicative function "proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy".⁶
12. This approach has recently informed⁷ a cautious and restrained approach to answering questions agreed by the parties in a special case. In *Mineralogy v Western Australia*, the Court emphasised that this cautious approach means that parties have no entitlement to expect an answer to a question of law that they have agreed upon in stating a special case unless there exists a state of facts which makes it necessary to decide the question.⁸
- 20 13. The scope of the plaintiffs' challenge is confined by the factual basis they have agreed to through this Court's special case procedure. The special case only provides a sufficient factual basis to support a challenge to sections 11 and 12 as

⁵ *Zhang v Commissioner of Police* [2021] HCA 16; (2021) 95 ALJR 432 at 437 [21] (the Court), quoting *Knight v Victoria* [2017] HCA 29; (2017) 261 CLR 306 at 324 [32] (the Court); *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ for the Court).

⁶ *Mineralogy v Western Australia* [2021] HCA 30; (2021) 95 ALJR 832 at 846 [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171 at 217 [137] (Gageler J).

⁷ *Zhang v Commissioner of Police* [2021] HCA 16; (2021) 95 ALJR 432 at 437 [21] (the Court); *LibertyWorks Inc v Commonwealth* [2021] HCA 18; (2021) 95 ALJR 490 at 510-511 [86]-[90] (Kiefel CJ, Keane and Gleeson JJ).

⁸ [2021] HCA 30; (2021) 95 ALJR 832 at 846-847 [56]-[60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 852-854 [100]-[107] (Edelman J).

engaged by section 8. It is uncontroversial that there is evidence before the Court that sections 11 and 12 have restrained, and will continue to restrain, the plaintiffs from publishing or communicating audio-visual footage relating to the treatment of animals in farms and which are obtained through trespass. See, for example, SCB 101-102 [10]-[17], 103 [24], 177 [9]-[10], 190 [138], 191 [149]. This is also consistent with how the case has been put in the Amended Special Case: SCB 28 [5(e)(i)], 30 [14], [18], 35 [42].

14. The plaintiffs' rights and liabilities are not, and will not be, affected by sections 11 and 12 as engaged by section 7 or 9. In line with this Court's prudential approach, "justice does not require" these further questions to be resolved.⁹ Sections 7 to 9 each operate "on substantially different premises".¹⁰ Section 7 is concerned only with "private conversations". Section 9 prohibits installing, using or maintaining a tracking device to ascertain a person's geographical location without consent. What is unlawful in respect of each prohibition is different. Consequently, each of sections 7 and 9 involve different considerations from the trespass necessary for breach of section 8. The unlawfulness for the purposes of section 8 is based upon entry into premises or a vehicle, or interfering with an object, to install use or maintain an optical surveillance device.
15. For this reason "the burden on political communication, and its justification, is different depending on which of sections 7-9 engage sections 11 or 12".¹¹ It would be inappropriate for this Court to be drawn into an analysis that is substantially different without a sufficient factual basis to guide the adjudication.
16. A further issue is whether sections 11 or 12 may be declared invalid at all, without being considered in the context of any actual political communication. This relates to what has been labelled the "threshold question" by this Court.¹²

⁹ *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171 at 192 [35] (Kiefel CJ, Bell and Keane JJ). See also *Mineralogy v Western Australia* [2021] HCA 30; (2021) 95 ALJR 832 at 847 [59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 852 [99] (Edelman J).

¹⁰ DS [8].

¹¹ DS [8].

¹² *Tajjour v New South Wales* [2014] HCA 35; (2014) 254 CLR 508 at 589 [176] (Gageler J); *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171 at 190-194 [25]-[40] (Kiefel CJ, Bell and Keane JJ), 220 [145]-[146] (Gageler J), 241-253 [216]-[242] (Nettle J), 287 [330] (Gordon J), 312-313 [412]-[414] (Edelman J). See generally Thomas Wood, "The 'Threshold Question' in *Clubb v Edwards*: Political Communication, Severance and Practice" (2020) 31 *Public Law Review* 155.

17. The Court should determine the validity of sections 11 and 12 as engaged by section 8. The parties have agreed that the plaintiffs likely will, in the future, engage in conduct that contravenes sections 11 and 12 as engaged by section 8: SCB 30 [11], [15].¹³ The validity of these provisions arising in the future is "obvious".¹⁴

Issue 2: Applying the first question of the *McCloy* test, is there a freedom to communicate or publish material which a person knows has been unlawfully obtained?

18. There is a constitutional imperative that there should be representative federal government.¹⁵ A minimum requirement for the existence of representative federal government is that there should be a government constituted by an elected bicameral legislature,¹⁶ where the election of candidates to that legislature must be a result of popular choice.¹⁷ This primarily follows from the requirements of sections 7 and 24 of the *Constitution*, which provide for the Senate and the House of Representatives to be constituted by candidates "directly chosen by the people".¹⁸

19. A particular aspect of the imperative of representative government is that voters should be free to communicate on political matters. In *Lange v Australian Broadcasting Corporation*,¹⁹ the High Court acknowledged that it was the antecedent imperative of representative government which was the basis for the implied freedom to communicate on political matters. A unanimous Court said

¹³ See *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328 at 343 [17] (Kiefel CJ, Bell and Keane JJ); *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51 at 101 [152]-[153] (Crennan, Kiefel, Gageler and Keane JJ).

¹⁴ *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171 at 193 [38] (Kiefel CJ, Bell and Keane JJ).

¹⁵ *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1 at 30 [76] (Kiefel J). See also *Attorney-General for South Australia v Adelaide City Corporation* [2013] HCA 3; (2013) 249 CLR 1 at 73-74 [166], 90 [221] (Crennan and Kiefel JJ); *Monis v The Queen* [2013] HCA 4; (2013) 249 CLR 92 at 193 [277]-[278], 194 [281], 213-214 [346] (Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* [2015] HCA 34; (2015) 257 CLR 178 at 218 [84]-[85] (French CJ, Kiefel, Bell and Keane JJ), 225 [108] (Gageler J); *Re Gallagher* [2018] HCA 17; (2018) 263 CLR 460 at 476 [43] (Gageler J), 481 [57] (Edelman J); *Comcare v Banerji* [2019] HCA 23; (2019) 267 CLR 373 at 437 [149] (Gordon J).

¹⁶ *Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462 at 476 [15] (Gleeson CJ, Gummow and Hayne JJ).

¹⁷ *Rowe v Electoral Commissioner* [2010] HCA 46; (2010) 243 CLR 1 at 48 [122] (Gummow and Bell JJ), 117 [368], 120-121 [384] (Crennan J); *Murphy v Electoral Commissioner* [2016] HCA 36; (2016) 261 CLR 28 at 105 [239] (Nettle J).

¹⁸ *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 56 (Stephen J); *Rowe v Electoral Commissioner* [2010] HCA 46; (2010) 243 CLR 1 at 48 [122] (Gummow and Bell JJ), 117 [368] (Crennan J), 126 [404] (Kiefel J).

¹⁹ (1997) 189 CLR 520.

that: "Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively".²⁰ The reference to representative and responsible government was added to the *McCloy* test in *Brown*²¹ and *Clubb v Edwards* ("*Clubb*").²²

20. The implied freedom operates as a constraint on legislative power.²³ A freedom to communicate on political matters prevents a legislature from imposing a statutory burden upon an ability to speak out. It does not create any private law right enforceable by an individual.²⁴
21. There is no challenge to the constitutional validity of section 8 of the SD Act. That is appropriate, because it does not involve any act of political communication. It prohibits the installation, use or maintenance of optical surveillance devices involving trespass upon a premises or vehicle, or interference with a vehicle or another object, without consent. That is, it prohibits trespass to land or goods for the particular purpose of installing, using or maintaining an optical surveillance device. The offence it creates corresponds with the private rights of the owner of land or goods to exclusive possession. Neither section 8, nor the implied freedom,

²⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559 (the Court). See also, for example, *Unions NSW v New South Wales (No 2)* [2019] HCA 1; (2019) 264 CLR 595 at 607 [14] (Kiefel CJ, Bell and Keane JJ), 657-658 [173] (Edelman J).

²¹ [2017] HCA 43; (2017) 261 CLR 328 at 363-364 [104] (Kiefel CJ, Bell and Keane JJ).

²² [2019] HCA 11; (2019) 267 CLR 171 at 186 [5] (Kiefel CJ, Bell and Keane JJ).

²³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 (the Court); *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 at 554 [92] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Unions NSW v New South Wales* [2013] HCA 58; (2013) 252 CLR 530 at 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* [2014] HCA 35; (2014) 254 CLR 508 at 558 [59] (Hayne J), 577 [140] (Gageler J); *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328 at 359 [88] (Kiefel CJ, Bell and Keane JJ), 407 [258] (Nettle J), 430 [313] (Gordon J); *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171 at [356] (Gordon J).

²⁴ See, for example, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561, 567 (the Court); *Unions NSW v New South Wales* [2013] HCA 58; (2013) 252 CLR 530 at 551 [30], 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* [2015] HCA 34; (2015) 257 CLR 178 at 202-203 [30] (French CJ, Kiefel, Bell and Keane JJ), 228-229 [119]-[120] (Gageler J), 258 [219] (Nettle J), 280 [303] (Gordon J); *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328 at 430 [313] (Gordon J); *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171 at 295 [356] (Gordon J).

grants to the plaintiffs (or any person) a right to enter upon the property of another, or to commit a trespass to the goods of another, without consent.²⁵

22. Sections 11 and 12 are not free-standing prohibitions against communication, publication or possession of a record of a private conversation or of the carrying on of an activity. They are prohibitions which apply only if there has been independent unlawful conduct, ie, a trespass upon the private rights of the owner of land or goods, to obtain a relevant record.
23. There is no specific private right which the owner of land or goods has to control a record of a private conversation or of the carrying on of an activity obtained by trespass.²⁶ However, that is not the relevant issue here. The true question is whether the constitutional imperative that there should be a representative federal government impliedly protects all communications on political matters, even where the communications are of records obtained by an unlawful trespass. The effect of such a constitutional implication would be tantamount to implicitly approving the unlawful trespass, by reason of permitting dissemination of the product of an unlawful trespass if it relates to governmental or political matters.
24. There is a constitutional assumption that there will be a rule of law.²⁷ No constitutional implication of an implied freedom of political communication should be made which undermines or is in conflict with the rule of law.
25. There is no case where any constitutional implication has protected the product of unlawful activity which interferes with the private rights of an individual, or implicitly approved such activity. Indeed, the rule of law is a fundamental aspect of the *Constitution*, and underpins the constitutional separation of powers.

²⁵ *Levy v State of Victoria* (1997) 189 CLR 579 at 622, 625-626 (McHugh J); *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101; (2005) 62 NSWLR 512 at 532 [96] (Spigelman CJ, Mason P and Beazley JA agreeing); *Mulholland v Australian Electoral Commission* [2004] HCA 41; (2004) 220 CLR 181 at 223-224 [107]-[109] (McHugh J), 245 [180]-[182] (Gummow and Hayne JJ), 298 [337] (Heydon J).

²⁶ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199

²⁷ *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307 at 342 [61] (Gummow and Crennan JJ); *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 42-43 [61] (French CJ). See also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J); *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at 352-353 [30] (Gleeson CJ and Heydon J).

26. The closest case is **Brown**.²⁸ In that case, the Court considered whether a law allowing forest protesters to be moved on imposed a burden upon political communication by the protesters. The Court considered whether the law only applied to protesters who were trespassers, and had no right or ability to remain where they were and to engage in political communications.
27. The majority of the Court held that the law did impose an unconstitutional burden on political communications. Kiefel CJ, Bell and Keane JJ considered that the law applied even to protesters who might not be trespassers and who were not prohibited from being present at a particular place of protest.²⁹ Gageler and Nettle JJ each adopted similar positions.³⁰ On the other hand, Gordon and Edelman JJ separately construed the relevant laws as only (substantially) applying to conduct which was already unlawful,³¹ and hence any burden upon political communication was minimal or non-existent as it could not take place in any event.³² That is, the law permitting the protesters to be moved on did not impose any burden upon political communications as the protesters could not lawfully engage in political communications in any event. Had the majority adopted a similar construction of the relevant laws as Gordon and Edelman JJ, it appears that a similar conclusion would have followed.³³
28. This case supports the view that the existence of a burden upon political communications may fall to be considered in the context of pre-existing private rights. To that extent it supports the argument set out above about the SD Act, which depends upon pre-existing private rights to prevent trespass to land or goods.
29. However, **Brown** was concerned about whether a law placed *any* burden upon political communications, because of the pre-existing private rights. The argument above concerns *how far* the implication about the implied freedom extends, and whether it applies to protect communications which disclose the product of

²⁸ [2017] HCA 43; (2017) 261 CLR 328.

²⁹ **Brown v Tasmania** [2017] HCA 43; (2017) 261 CLR 328 at 365 [109].

³⁰ **Brown v Tasmania** [2017] HCA 43; (2017) 261 CLR 328 at 386 [189] (Gageler J), 410-411 [263]-[264] (Nettle J).

³¹ **Brown v Tasmania** [2017] HCA 43; (2017) 261 CLR 328 at 443 [357] (Gordon J), 484-485 [500], 507 [567] (Edelman J).

³² **Brown v Tasmania** [2017] HCA 43; (2017) 261 CLR 328 at 464 [426] (Gordon J), 507 [567] (Edelman J).

³³ **Brown v Tasmania** [2017] HCA 43; (2017) 261 CLR 328 at 365 [109] (Kiefel CJ, Bell and Keane JJ), 384 [186] (Gageler J), 408-409 [259] (Nettle J).

unlawful activity. It is submitted that to extend the implication that far will implicitly lend approval to the unlawful activity, and place the implication in conflict with another constitutional assumption about the rule of law. The implied freedom of political communication should only extend to protect communications and publications which are not the product of unlawful conduct or an interference with pre-existing private rights.

30. If accepted, what that means is that a State or Commonwealth Parliament may legislate to control the product of unlawful activity, without reference to the implied freedom of political communication. In other words, there is no constitutional freedom which protects against legislation prohibiting the communication or publication of records which are obtained from unlawful activity.
31. Although not specifically raising the issue of a constitutional freedom of political communication, the point which has just been developed is consistent with the recent decision in *Kadir v The Queen*.³⁴
32. This Court held that surveillance footage of animal cruelty which had been obtained by trespass was not admissible at a criminal trial. The particular decision concerned the proper exercise of the discretion to exclude evidence which had been obtained unlawfully. However, the result emphasises that even the importance of evidence being available for the proper trial of an accused does not justify disclosure or publication of surveillance records which have been obtained by trespass, and recognises the "public interest in not giving curial approval, or encouragement, to illegally or improperly obtain[ed] evidence generally".³⁵
33. The plaintiffs complain that a person with footage of serious criminality would not be permitted to give that footage to the police.³⁶ However, that is consistent with *Kadir*, where footage of serious criminality was not admissible evidence because it was the product of surveillance footage filmed as a result of a trespass.

³⁴ [2020] HCA 1; (2020) 267 CLR 109.

³⁵ *Kadir v The Queen* [2020] HCA 1; (2020) 267 CLR 109 at 125 [13] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

³⁶ PS [78].

Issue 3: The validity of sections 11 and 12 of the SD Act applying the *McCloy* test

QUESTION 1: IDENTIFICATION OF A BURDEN ON THE IMPLIED FREEDOM

34. If the submissions on Issue 2 above are not accepted, WA accepts the defendant's concession that sections 11 and 12 of the SD Act "may operate to prevent the publication of material pertaining to discussion of political matters".³⁷

QUESTION 2: PURPOSE OF THE LAW IS LEGITIMATE

35. WA respectfully adopts the submissions made by the defendant as to what it identifies as the purpose of sections 11 and 12 of the SD Act, being, in summary, to:³⁸

- 10 (a) recognise and protect specific interests in privacy through sections 7 to 9 of the SD Act;
- (b) deter contraventions of sections 7 to 9 of the SD Act; and
- (c) limit the damage to an interest in privacy caused by publication of material obtained in contravention of sections 7 to 9 of the SD Act.

36. WA also adopts the defendant's submissions that such purposes are legitimate in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.³⁹

QUESTION 3: LAW IS REASONABLY APPROPRIATE, ADAPTED OR PROPORTIONATE

20 37. Subject to certain observations about the *Surveillance Devices Act 1998* (WA) ("WA SD Act"), and the adequacy of balance of the SD Act, WA also adopts the defendant's submissions that sections 11 and 12 are reasonably appropriate and adapted to achieve the purposes of the law.⁴⁰

38. The questions of *necessity* and whether a law is *adequately balanced* arise in the application of this third *McCloy* test, ie, whether there is no obvious and compelling alternative and reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and whether a necessary law adequately

³⁷ DS [59].

³⁸ DS [61].

³⁹ DS [61]-[62], see also [29], [38]-[39], [81].

⁴⁰ DS [63]-[84].

balances a competing legislative purpose against the constitutional purpose of freedom of political communication.

39. As was observed in *Clubb*:⁴¹

The question whether a law is "adequate in its balance" is not concerned with whether the law strikes some ideal balance between competing considerations. It is no part of the judicial function to determine "where, in effect, the balance should lie".⁴² Rather, the question is whether the law imposes a burden on the implied freedom which is "manifestly excessive by comparison to the demands of legitimate purpose"⁴³.

10 40. There is a range within which it is for parliament, and not the Court, to decide what is necessary to achieve a legitimate purpose. It is only "when and if parliament's selection lies beyond the range of what could reasonably be regarded as necessary that the law will be adjudged as unnecessary".⁴⁴

The significance of alternative legislative models to the necessity question

41. The plaintiffs apparently assert that the mere existence of alternative legislative models regulating surveillance devices establishes that the SD Act is not reasonably necessary or adequately balanced.⁴⁵ That submission should be rejected.

20 42. The plaintiffs are wrong to submit, in effect, that differences between the SD Act and comparable legislation from other states and territories have the consequence that the SD Act is invalid. In *Clubb*, the legislative models for exclusion zones were valid, but there were differences between each scheme.⁴⁶ The question is whether the SD Act (or, indeed, any impugned law) is reasonably appropriate and adapted to advance a legitimate purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative government.

43. Broadly, the WA SD Act takes a different approach to the SD Act. It generally prohibits the use of listening devices and optical surveillance devices (collectively,

⁴¹ *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171 at 200 [69] (Kiefel CJ, Bell and Keane JJ).

⁴² *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328 at 422-423 [290] (Nettle J).

⁴³ *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328 at 422-423 [290] (Nettle J). See also *McCloy v New South Wales* [2015] HCA 34; (2015) 257 CLR 178 at 219-220 219-220 [89]-[92] (French CJ, Kiefel, Bell and Keane JJ).

⁴⁴ *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171 at 264-265 [266] (Nettle J).

⁴⁵ PS [65]-[71], [84].

⁴⁶ *Clubb v Edwards* [2019] HCA 11; (2019) 267 CLR 171 at 212, 215 [116]-[117], [128] (Kiefel CJ, Bell and Keane JJ).

"surveillance devices"⁴⁷) to record any "private conversation"⁴⁸ or "private activity",⁴⁹ respectively, save for in particular circumstances.

44. By contrast, the prohibition against the installation, use and maintenance of an optical surveillance device contained in section 8 of the SD Act is limited to situations where this involves a trespass. Consequently, it would be a breach of section 6 of the WA SD Act for a person invited onto private property to take a surveillance record of a private activity (eg illegal dog-fighting) by means of a camera hidden upon that person. However, this would not be contrary to section 8 of the SD Act, as no trespass has occurred.

10 45. The terms "private conversation" and "private activity" are defined in section 3(1) of the WA SD Act as follows:

private conversation means any conversation carried on in circumstances that may reasonably be taken to indicate that any of the parties to the conversation desires it to be listened to only by themselves, but does not include a conversation carried on in any circumstances in which the parties to the conversation ought reasonably to expect that the conversation may be overheard;

20 *private activity* means any activity carried on in circumstances that may reasonably be taken to indicate that any of the parties to the activity desires it to be observed only by themselves, but does not include an activity carried on in any circumstances in which the parties to the activity ought reasonably to expect that the activity may be observed;

46. The WA SD Act makes the prohibitions on the use of surveillance devices in respect of private conversations and activities subject to a number of exceptions, including where there has been use of a surveillance device in accordance with Part 5.⁵⁰

47. Section 9 of the WA SD Act prohibits the publication or communication of a report or record of a private conversation, or a record of a private activity that has come to a person's knowledge as a direct or indirect result of the use of a surveillance

⁴⁷ *Surveillance Devices Act 1998* (WA), section 3(1) (definition of "surveillance device").

⁴⁸ *Surveillance Devices Act 1998* (WA), section 5(1).

⁴⁹ *Surveillance Devices Act 1998* (WA), section 6(1).

⁵⁰ *Surveillance Devices Act 1998* (WA), sections 5(2)(d), 6(2)(d).

device. Again, that prohibition is subject to a number of exceptions, including where publication is in accordance with Part 5 of the WA SD Act.⁵¹

48. Part 5 of the WA SD Act deals with the use of surveillance devices "in the public interest". The term "public interest" is defined to include "the interests of national security, public safety, the economic well-being of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens".⁵²
49. Significantly, section 25 provides that the exceptions in Part 5 do not apply if, in the course of installing or using a surveillance device, an act is done that is unlawful under any law or under any statute other than the WA SD Act. Such acts would include trespass,⁵³ and the Second Reading Speech for the *Surveillance Devices Bill 1997 (WA)*⁵⁴ reveals that trespass was specifically contemplated by the parliament in this context.⁵⁵
50. The WA SD Act does not establish a general right to privacy in respect of private conversations and activities. Rather, it places limitations on using covert means to access such information and on publishing information obtained by using covert means.⁵⁶ The WA SD Act does not prohibit the publication of the content of private conversations or private activities generally.⁵⁷
51. A breach of the prohibitions against both the use, installation maintenance of surveillance devices, and the publication or communication of the product of surveillance devices, constitutes a criminal offence. What this and the scheme of the WA SD Act reflects is legislative acceptance that there is a strong public interest and public policy against the use of covert surveillance devices in relation

⁵¹ *Surveillance Devices Act 1998 (WA)*, section 9(2)(a)(viii).

⁵² *Surveillance Devices Act 1998 (WA)*, section 24 (definition of "public interest").

⁵³ *Criminal Code Act Compilation Act 1913 (WA)*, section 70A(2).

⁵⁴ Western Australia, Legislative Council, *Parliamentary Debates*, Hansard, 21 October 1998, p 2404-2407.

⁵⁵ Western Australia, Legislative Council, *Parliamentary Debates*, Hansard, 21 October 1998, p 2406.

⁵⁶ *Australian Broadcasting Corporation v SAWA Pty Ltd* [2018] WASCA 29 at [27] (the Court); *Channel Seven Perth Pty Ltd v S* [2007] WASCA 122; (2007) 34 WAR 325 at 335 [29] (McLure JA, Pullin and Buss JJA agreeing).

⁵⁷ *Australian Broadcasting Corporation v SAWA Pty Ltd* [2018] WASCA 29 at [74] (the Court); *Channel Seven Perth Pty Ltd v S* [2007] WASCA 122; (2007) 34 WAR 325 at 334 [23] (McLure JA, Pullin and Buss JJA agreeing).

to private conversations and private activities, and the publication of information obtained by such use.⁵⁸

52. That public interest is expressly balanced against, and incorporates exceptions based on, the public interest, including giving effect to the implied freedom. However, like the defendant, the WA Parliament has determined that the public benefit in political communication should not be obtained through unlawful means, including trespass.

The significance of unlawful trespass and adequacy of balance

- 10 53. If the submissions on "Issue 2" set out above are not accepted, the SD Act adequately balances the legislative purpose of protecting the privacy of a person who has been the subject of an unlawful trespass and the constitutional purpose of ensuring representative government and freedom of communication on political and governmental matters. The balancing exercise may justifiably take into account that no unlawful trespass to obtain information should be countenanced by allowing that information to be freely published or communicated.

- 20 54. Two simple examples illustrate this. If a partner in a personal relationship is estranged from the other partner, who is a well-known political figure, and the estranged partner employs a private detective to obtain optical surveillance upon private property of the other partner covertly having an affair, the detective cannot provide the estranged partner with the surveillance records without committing an offence. Nevertheless, if section 11 is invalid to the extent of the implied freedom of political communication, the detective could provide those same records to a newspaper for publication. The estranged partner may learn of the records from the newspaper's publication. If section 11 is wholly invalid, the surveillance records may be provided to the estranged partner. However, this gives no weight in any balancing exercise about the validity of section 11 to the privacy upon private property of the partner subject to surveillance.

55. The second example is optical surveillance of technological development by a private company in its laboratory of a new, but controversial, process, such as

⁵⁸ *Australian Broadcasting Corporation v SAAWA Pty Ltd* [2018] WASCA 29 at [27] (the Court); *Channel Seven Perth Pty Ltd v S* [2007] WASCA 122; (2007) 34 WAR 325 at 334 [26] (McLure JA, Pullin and Buss JJA agreeing).

storing nuclear waste. The plaintiffs' argument about the invalidity of section 11 means that, if section 11 is subject to the implied freedom of political communication, it would be an offence for an enquiry agent employed by a competitor to provide surveillance records to the competitor, but not to a current affairs television program. The competitor may then see the surveillance records as part of the current affairs program. If section 11 is wholly invalid, the competitor may be supplied with the surveillance records. However, that substantially undermines the legislative purpose of preventing the installation, use and maintenance of an optical surveillance device upon private property, as the product of using such a device may be published.

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56. These are strange results, which justify an approach of balancing the legislative purpose of protecting the privacy of a person who has been the subject of an unlawful trespass in a way which takes priority over the constitutional purpose of freedom of political communication.

57. This may not be the only possible approach to the balancing exercise. The question of whether disclosure should be permitted to occur at all might be the subject of a public interest test to be assessed judicially. That substitutes a judicial assessment in individual cases for a general legislative judgment based upon re-enforcing private property rights against trespass. It might lead to a court saying that there should be no publication in the first example (of the affair), but there may be publication in the second example (of the industrial espionage). However, it should not be concluded that one mechanism for judging whether publication should or should not occur is necessarily better than the other. It certainly should not be said that the approach of making it an offence to publish, communicate or possess all records obtained from optical surveillance based upon a trespass to private property is a manifestly excessive response.

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PART IV: LENGTH OF ORAL ARGUMENT

58. It is estimated that the oral argument will take 15 minutes.

Dated: 8 December 2021



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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

B E T W E E N:

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

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CHRISTOPHER JAMES DELFORCE
 Second Plaintiff

AND

STATE OF NEW SOUTH WALES
 Defendant

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**ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR
 WESTERN AUSTRALIA (INTERVENING)**

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney General for Western Australia sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	Version	Provision
Constitutional Provisions			
1.	<i>Commonwealth Constitution</i>	In force version	ss 7, 24
Statutory Provisions			
<u>New South Wales</u>			
2.	<i>Surveillance Devices Act 2007 (NSW)</i>	Current (version as at 11 December 2020)	ss 4(1), 7-12
<u>Western Australian</u>			
3.	<i>Criminal Code Act Compilation Act 1913 (WA)</i>	Current (version as at 25 November 2021)	s 70A
4.	<i>Surveillance Devices Act 1998 (WA)</i>	Current (version as at 1 July 2015)	ss 3, 5, 6, 9, 24, Part 5
5.	<i>Surveillance Devices Bill 1997 (WA)</i>	No. 92 of 1997	