HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

FARM TRANSPARENCY INTERNATIONAL LTD (ACN 641 242 579) & Anor
Plaintiffs

and

STATE OF NEW SOUTH WALES
Defendant

OUTLINE OF ORAL SUBMISSIONS

Part I: Publication

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

Part II: Argument

2. The first plaintiff is entitled to challenge ss 11 and 12, in respect of their operation by reference to ss 7 and 8. SCB 104 [27] is unchallenged evidence that the first plaintiff would, in the future, publish "audio recordings", thus engaging s 11 in respect of its operation by reference to s 7. Written submissions: Def [3]-[8];Cth [6]-[13]; Reply [2].

Burden and justification

3. NSW has the onus of justifying the conceded burden as at the time of decision by the Court; *Unions* [45] Kiefel CJ, Bell and Keane JJ, [151] Edelman J. Written submissions: Plaintiffs [44]-[46]; Def [59]-[60]; Reply [8]-[10].

4. "Incremental burden" is accepted. The existing legal protections identified by the defendant and intervenors to which ss 11 and 12 is said to be incremental demonstrate that those sections operate in a sphere where there is little practical restraint on someone in the position of the plaintiffs. *Lenah Game Meats* at [100]-[101] is a paradigm that the general law largely does not practically respond to, or constrain, conduct that contravenes ss 11 or 12. The defendant has an onus of justifying a significant incremental burden. Written submissions: Def [39]-[40]; Cth [32]-[33]; Qld [6]-[8]; Reply [17]-[18].

Legitimate purpose

5. The purposes of the SD Act are set out in s 2A. These are legitimate purposes. The purpose of ss 11 and 12 is a particular extension of the purpose of protecting privacy, upon recognition of the fact that despite the prohibitions in ss 7-10, surveillance device material might nonetheless come into existence. This is a legitimate purpose.

6. Given NSW's case for justification as rooted in the protection of privacy, if the burden on political communication cannot be justified by the protection of privacy, the plaintiffs ought succeed. Def Oral Outline, [6]-[10], comes close to suggesting that disincentivisation of "farm trespass" is an additional legislative purpose (cf Plaintiffs [36], [54]-[60]; Def [12]-[15]). This is significant because of the acknowledged application of ss 11 and 12 of the SD Act to "non-private" activity. However, a prohibition on the publication or communication of "non-private" activity cannot be justified on the ground of protection of privacy.

Construction issues

7. The Court should assume, without deciding, that ss 11 and 12 require proof of a mental element. The plaintiffs accept that to preserve validity ss 11 and 12 could be construed as incorporating a mental element. Written submissions: Plaintiffs [25]-[35]; Def [47]-[50]; Cth [14]-[21]

8. The SD Act is poorly calibrated to protect interests in "privacy". Adopting Def [40], and by analogy, the exception in s 7(3)(a) appears to be engaged if consent to recording a private conversation is obtained without attention being given to publication, or even based on a promise never to publish. But howsoever consent is obtained, publication would not contravene s 11. This fails to protect privacy. Noting Def [40], a person might obtain consent to be on the occupier's property, but then *lawfully* use covert optical surveillance devices. The resultant record can then be published without contravening s 11. This fails to protect privacy. Footage obtained in contravention of s 8 will often not be of private activity (note the facts of *Lenah Game Meats*). The application of ss 11, viz s 8, to non-private activity is not rationally connected with the legislative purpose. This is overreach. Written submissions: Plaintiffs [7]-[24], [66]-[69]; Def [19]-[46], [51]-[52], [68]-[70], [73]-[76].

Necessity

11. The decisive point is that NSW has failed to discharge its onus. The onus is not discharged by pointing to the differences between the SD Act and the compelling alternatives, and claiming the compelling alternatives leave lacunae capable of

exploitation. To do so is simply the defendant engaging in an assessment of the relative merits of competing legislative models and this is not useful; *Brown* [282], [286] Nettle J. Written submissions: Plaintiffs [65]-[69], [71]-[78]; Cf Def [63]-[78]; Cth [45]-[53].

12. Here, the same identified concern has been legislated against in several jurisdictions for some time, so that if the efficacy of the legislative response in one jurisdiction was inferior to another it ought to have capable of proof. In the absence of any demonstrated lack of efficacy the necessity testing will distil to an assessment of the differential in the burden and, if it arises, any other issues of practicability.

13. Thus, evidence needs to be presented to show why the additional burden on political communications, where publication is in the public interest, under the SD Act compared with the compelling alternatives, is justified. No such evidence has been presented. Lived experience in Victoria, and other jurisdictions, where on the state of the evidence farm trespass is no more a problem but adequately regulated, is evidence to the contrary; *LibertyWorks* [80] Kiefel CJ, Keane and Gleeson JJ, *Brown* [139] Kiefel CJ, Bell and Keane JJ, [277] Nettle J: *Tajjour* [114] Crennan, Kiefel and Bell JJ. Written submissions: Plaintiffs [65]-[69], [70]-[80]; Def [80]-[84]; Reply [4]-[11].

14. The "implied freedom calculus" is not affected by whether information came into existence lawfully or unlawfully. What matters is the qualities of the information in question and the interest in the protection thereof. Thus, attention should be given to the privacy interests underlying the prohibitions in ss 7 and 8, not the bare fact that it is unlawful for such information to have come into existence. Written submissions: Plaintiffs [72]-[75]; Def [43]-[46], [52], [66] [68], [71] Reply [13]-[14]; WA [8(b)], [18]-[30].

15. The suggested relevance of the statutory concept of "private activity" in the compelling alternatives (Def Oral Outline [6]-[9]) wrongly focusses on the underlying trespass, not the burden on political communication. Doing so conflates that ss 7-9 regulate an area where the conduct is otherwise sanctioned by the general law, whereas ss 11-12 regulate an area where the general law does not.

16. Def Oral Outline [8]-[9] strays into suggesting, or perhaps implying, that the justification for ss 11 and 12, is disincentivising farm trespass. This is not a valid justification for any burden on political communication: see *Bartnicki v Vopper* (2001) 532 US 514 at 14. It is not valid to prohibit political communication simply to disincentivise some other conduct which could itself readily be prohibited directly, at least in the absence of the most compelling justification. Written submissions: Plaintiffs [60]; Def [66].

Adequacy in the balance

17. The SD Act imposes a burden on the most valuable political communication – that which is in the public interest – which the compelling alternatives do not. All that NSW presents is a bare assertion that "Without ss 11 and 12, there will be more trespass in contravention of s 8" (Def [80]; see also [66]). The highest that NSW's evidentiary case rises is at Def [12] pointing to SCB 696, 814, which suggests that there has been an increase in reports of "farm trespass" in NSW between 2014 and 2019, by 27 per cent. This goes nowhere. There is no evidence that farm trespass is a problem unique to NSW or that the intensity of the problem in NSW is higher than in other jurisdictions. Absent such evidence, the burden on political communication in the public interest is not shown to be adequate in the balance.

Severance

18. Severance is possible. That part of ss 11 and 12, viz ss 7 and 8, which would, on their ordinary terms, apply to political communication is severed from the SD Act. A declaration would thus be made that "Sections 11 and 12, in respect of their operation on ss 7 and 8, are invalid insofar as they purport to apply to political communication"; *Clubb* [145]-[149] Gageler J, [341] Gordon J, [440] Edelman J.

10 February 2022

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