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
Respondent

REPLY

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

2. The defendant's submissions (**DS**), at [4], mischaracterises the plaintiffs' submissions, at [39], and is respectfully rhetoric. The plaintiffs are confined to the agreed special case. The plaintiffs are confined in their challenge to the operation of ss 11 and 12 in respect of s 8. NSW accepts, at DS [5], that the first plaintiff might breach ss 11 and 12 in their operation in relation to s 7 (DS [11]), and addresses the point (DS [30]-[34]). The plaintiffs accept that the distributive operation of ss 11 and 12 extends beyond ss 7 and 8, and the Court should not enter those questions. The questions are framed to enable appropriate answers, including in relation to any possible severance of ss 11 and 12 if their operation in respect of ss 7 and 8 is invalid.

3. The plaintiffs maintain that the correct construction of s 11 is that it does not have a *mens rea*. However, even if the construction urged by NSW or the Attorney General of the Commonwealth is accepted, that does not relevantly affect the proportionality testing because there is only a small difference in the burden on political communication as between the competing constructions.

4. As to DS [68], NSW does not take any benefit from the situation that the comparator Acts prohibits "private activity", whereas ss 8, 11 and 12 of the SD Act do not. The point works against NSW – the SD Act prohibits the publication of material whether or not it was private activity. It serves to highlight the overreach of the SD Act if its purpose is the protection of privacy.

5. All of the comparator Acts prohibit the publication of surveillance device material obtained through trespass. However, critical to the disposition of this case, some political communication is allowed, and that allowance has not compromised the achievement of the purposes and policy of the legislation. The fact that comparator Acts might also prohibit a wider range of communications is beside the point.

6. As to DS [69], NSW is wrong to suggest that there is any lack of clarity in the law as to what is "private activity". There may be complexity in working out whether the definition is met in particular factual situations, but that has no bearing on whether the burden on the implied freedom imposed by the SD Act is justified. With respect, the point goes nowhere.

7. As to DS [70], it is wrong to assert that the Victorian and Northern Territory Acts leave an "open-ended means for the publication of material" or create a gap capable of exploitation; the publications must be in the public interest, and if they are not, the publisher has committed a crime. Whether publication is in the public interest will necessarily take account of how the material sought to be published has been obtained, to avoid one interest trampling over another without a careful balance as to where the overall public interest lies.

8. The onus remains at all times upon the polity to justify the burden on this high constitutional value.[1] It is respectfully submitted that the justification of a burden must be shown as at the time of decision by the Court, and not simply at the time of enactment. It is possible that a validly enacted law may become invalid, depending on the evidence that is presented on any challenge to the law. That is an orthodox notion in Australian constitutional law in relation to the "purposive powers" in s 51 of the Constitution and should be accepted in relation to the implied freedom of political communication.

9. Where the same recognised mischief is the subject of legislative response in different polities and there is some years' experience in operation, comparisons are instructive. In such circumstances, the onus of justification implies a heavy persuasive burden on the polity seeking to justify a measure that imposes a greater burden on political communication than some other measure which has responded satisfactorily to the same mischief. It is not sufficient to discharge the onus to assert that the impugned measure is one within a range of legislative choices. A polity which has chosen to legislate in a way that imposes a more onerous burden on political communication in responding to the same mischief as other polities should be able to adduce evidence of the supposed inadequacy of the choice or choices made by other polities.

10. This reflects the fact that the implied freedom is not an abstract concept, but a practical safeguard to the system of government established by the Constitution.

11. DS [71], [74]-[76], it is wrong to say that the model chosen in Victoria, or the Northern Territory, would be less effective than the model chosen by the SD Act. The

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[1] *Unions NSW v New South Wales* (2019) 264 CLR 595, [151].

legislation in Victoria, the NT, and in NSW has been in place for some time. NSW has been unable to identify any facts or evidence suggesting that farm trespass, or any other privacy incursion, is a problem in Victoria or the NT beyond that in NSW. If there was some deficiency in the Victorian Act as compared with the SD Act, one would expect NSW to have identified it. The proper inference is that privacy incursions and farm trespass are as well managed in the Victorian and the NT Acts, as in the SD Act, but without the need to burden the implied freedom. That highlights the overreach of the SD Act.

12. DS [75] is wrong. A person who enters premises with a concealed intention to install, use or maintain an optical surveillance device will not usually have entered the premises with "express or implied consent". Consent to enter a premises would usually be given upon express or implied conditions, including that the entry is for a specific purpose or purposes, and that the entrant is to conduct themselves appropriately and within the scope of the purpose of entry. It is an unrealistic construction of the SD Act to be urged by NSW; for, it suggests that a putative farm trespasser would need only procure permission to enter the premise upon false pretences to evade the proscriptions of the SD Act.

13. Relevantly, the argument put forward by NSW, supported by the interveners, is in error in so far as it asserts justification for the burden on political communication on the antecedent prohibitions in the SD Act. The argument is to the effect that "the material sought to be published should not exist in the first place, and therefore a prohibition on its publication is justified". It is a misplaced attempt to adapt the "fruit of the poisoned tree" idea. The implied freedom being a systemic constitutional imperative and not an individual right or freedom, the value of information being communicated about political matters does not diminish depending on how that information came into being.

14. Indeed, it may be accepted that the material to which ss 11 and 12 apply "should not exist in the first place". However, ss 11 and 12 have no work to do for so long as that assumption is valid. Sections 11 and 12 instead assume that material which should not exist has come into existence, despite that being unlawful. The rationale for the proscriptions in ss 7-9 of the SD Act, and the rationale for the proscription in ss 11 and 12 of the SD Act, each attract different considerations; the two sets of proscription

come in tension with different principles and at different levels. That observation invalidates any first blush attraction of this argument.

15. DS [80]-[81] make uncalibrated statements about the need for legislative curtailment of political communication without engaging with the critical point that one can disincentivise invasions of privacy without burdening political communication at all.

16. DS [83] suggests that the plaintiffs' arguments somehow result in the "courts [being] recruited into the publicisation of private material invariably obtained through serious criminality". That is baseless and misconceived.

17. The submission of the interveners seeking to confine proportionality testing to the "additional burden" imposed by a law is generally accepted, but with a qualification. The Court must be careful to guard against the possibility of a polity to legislate the extinguishment of the implied freedom "slice by slice", justifying only each incremental burden as it is brought before the Court. The need for a justiciable controversy, the rules on standing, and the fact that cases proceed one at a time, might limit the scope of what the Court has before it to consider. Exercises in justification performed on a case by case must take account of the "whole picture" and the overall result on the scope of the freedom to communicate about political matters.

18. That qualification is important to bear in mind when considering the submissions of the interveners relying on overlap between ss 11 and 12 of the SD Act and remedies available under the general civil law. Although the general civil law might be capable of granting a remedy for conduct that is also proscribed by ss 11 and 12 of the SD Act, whether or not any such remedy is granted, and how any such order is framed, would always take account of the significant value in political communication. The grant of a remedy is under judicial control. The mere fact that the general civil law overlaps with a legislative measure that is to be justified does not assist in that justification. And of course, the general law must conform to the Constitution, not the other way around.

19. The plaintiffs accept that in choosing a legislative model to respond to some mischief, polities might have a range of options available to them and they are not compelled to choose an option which does not burden, or places the least burden, on political communication. However, there is no evidence or explanation by NSW (or the

interveners) about why the mischief – the protection of privacy – is any less well pursued by the Victorian or NT Acts as compared with the SD Act. On their face, and in their history, the Victorian and NT Acts pursue the same purpose as the SD Act.

20. The Attorney-General of Queensland makes a fair point about the value of privacy in our society and legal system (paragraphs 25-29). But the value of that interest is not absolute. The Victorian and NT Acts recognise that many things in the "public interest" might outweigh privacy interests. *Kadir* exemplifies how interests in privacy and the prosecution of criminal charges conflict, and may require the former to yield to the latter. *Smethurst* provides another example where any interest in privacy had to yield to law enforcement purposes. Political communication is, with respect, a public interest that ranks at least as highly as law enforcement.

21. Indeed, the values underpinning privacy are very similar to those underpinning the tort of defamation, and it is established that defamation law, and its underpinning values, must conform to the implied freedom of political communication.[2]

22. The hypotheticals advanced by the Western Australia Attorney-General in paragraphs 54-55 are, respectfully, misconceived. *First*, it is unlikely that such publication is political communication. *Second*, it would be within legislative power for the Parliament of NSW to legislate a tailored and focussed prohibition on publication of that kind. *Third*, whatever the legislative choice, it is dubious that either hypothetical publication would be acceptable. For example, neither hypothetical would seem to meet the public interest test in the Victorian and NT Acts.

Dated: 20 December 2021

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[2] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.