



HIGH COURT OF AUSTRALIA

10 August 2022

FARM TRANSPARENCY INTERNATIONAL LTD & ANOR v STATE OF NEW SOUTH
WALES
[2022] HCA 23

Today, the High Court answered questions stated in a special case concerning whether ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW) ("the SD Act") were invalid on the ground that they impermissibly burdened the freedom of political communication implied by the *Constitution* ("the implied freedom").

Part 2 of the SD Act regulates the installation, use and maintenance of surveillance devices. Section 8 relevantly prohibits the knowing installation, use and maintenance of optical surveillance devices on or within premises to record visually or to observe the carrying on of an activity if the installation, use or maintenance of the device involves trespass to the premises. Sections 11 and 12 prohibit, respectively, the communication or publication of a record or report, and the possession of a record, of the carrying on of an activity obtained as a direct or indirect result of, relevantly, the use of an optical surveillance device in contravention of s 8.

The first plaintiff, a not-for-profit charity, had agitated and advocated for political and legal changes to animal agricultural practices and animal welfare standards with the objective of ending modern farming and slaughtering practices. It had engaged in the publication of photographs, videos and audio-visual recordings of animal agricultural practices in New South Wales. The second plaintiff, a director of the first plaintiff, had obtained recordings of the farming or slaughter of animals through purported acts of trespass contrary to s 8 of the SD Act. The plaintiffs argued that ss 11 and 12 of the SD Act impermissibly burdened their ability to publish information, including video recordings, that showed animal cruelty practices. The special case was presented on the basis that the activities recorded, albeit cruel, were not established to be unlawful.

The High Court, by majority, held that ss 11 and 12 of the SD Act did not impermissibly burden the implied freedom in their application to, respectively, the communication or publication by a person of a record or report, or the possession by a person of a record, of the carrying on of a lawful activity, at least where the person was complicit in the record or report being obtained exclusively by breach of s 8 of the SD Act. It was otherwise unnecessary to determine whether ss 11 and 12 burdened the implied freedom in other applications. Assessed by reference to the restraints which the common law, equity and statute law already imposed upon the existing liberty of political communication, ss 11 and 12 imposed an incremental burden on a person's ability to publish records of lawful activities obtained surreptitiously and by conduct which amounted to trespass. The provisions had a legitimate purpose of the protection of privacy. The statutory schemes of other Australian jurisdictions were not obvious and compelling alternatives, as they did not pursue the same purpose and were broader in application. Sections 11 and 12 achieved an adequate balance between the benefit they sought to achieve and the adverse effect on the implied freedom. As ss 11 and 12 were valid in their relevant application, it was unnecessary to answer the questions stated in the special case regarding their severance or partial disapplication in that application.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*