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

DEFENDANT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: STATEMENT OF ISSUES

2. In an Amended Special Case, the parties have stated questions of law to be decided in this matter (SCB 36). Those questions concern the constitutionality of ss 11 and 12 of the Surveillance Devices Act 2007 (NSW) ("SD Act"). Critically, no challenge is made to ss 7-9 (see further DS [56]). Section 10 does not engage ss 11 or 12, because those provisions do not apply to 'data surveillance devices.'

3. The prudential approach of this Court to a Special Case is to decide only the issues properly raised on the state of facts before it and which are necessary to determine a legal right or liability in controversy: see eg Mineralogy Pty Ltd v Western Australia (2021) 95 ALJR 832 at [57]-[60] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ; [99] per Edelman J; Libertyworks Inc v Commonwealth (2021) 95 ALJR 490 ("Libertyworks") at [90] per Kiefel CJ, Keane and Gleeson JJ.

4. The plaintiffs are therefore quite wrong to submit that "this case is not about the plaintiffs *per se*": cf PS [39]. The matter is about the plaintiffs, insofar as it is their rights and liabilities that are said to be affected, not about the unidentified "publishers whose freedom to publish" is said to be curtailed. Those publishers have not come to this Court seeking constitutional relief; the plaintiffs have. The plaintiffs should not be permitted to use their standing as a vehicle to escape the confines of the Amended Special Case, to which they have agreed.

5. At various points in their submissions, the plaintiffs attempt to frame the issues arising in this case as either being about ss 11 and 12 as engaged by ss 7-10 (see eg PS [32], [56], [60], [89]) or as engaged by s 7 in addition to s 8 (see eg PS [10], [13], [17], [29]). However, it is clear that the plaintiffs' real complaint is only about ss 11 and 12 as engaged by s 8, and the Amended Special Case reflects this: see SCB 29 [5(e)(i)], 30 [14], [18], 35 [42].

6. The facts establish that ss 11 and 12 are said by the plaintiffs to have had the effect of preventing them, and of continuing to prevent them, from publishing, or having published, photographs and audio-visual footage pertaining to agricultural practices and in particular the treatment of animals in farms and which are obtained through trespass: eg Affidavit of Dorottya Kiss at SCB 101 [14]-[15], SCB 104 [27]; Affidavit of Christopher James Delforce at SCB 177 [9]-[10], and the examples annexed at SCB 196-235. Although the plaintiffs raise s 7 in unparticularised terms, there is no evidence before this Court that ss 11 and 12 have restrained or will restrain the publication or possession by the plaintiffs of private conversations which have been deliberately recorded in violation of s 7 of the SD Act.

7. Section 9 is not discretely addressed by the plaintiffs at all (and so is not separately addressed in these submissions).

8. Sections 11 and 12 are engaged by a prior contravention of ss 7-9, each of which operates on substantially different premises: DS [44]-[46]. This means that the burden on political communication, and its justification, is different depending on which of ss 7-9 engage ss 11 or 12. Because the plaintiffs' rights or liabilities are not affected by ss 11 or 12 as engaged by either ss 7 or 9, "justice does not require" either "question to be resolved": Clubb v Edwards (2019) 267 CLR 171 ("Clubb") at [35] per Kiefel CJ, Bell and Keane JJ; Lambert v Weichelt (1954) 28 ALJ 282 at 283 per Dixon CJ.

Part III: NOTICE UNDER SECTION 78B

9. The plaintiffs have given sufficient notice under s 78B of the Judiciary Act.

Part IV: MATERIAL FACTS

10. NSW relies upon the facts set out in the Amended Special Case. The following facts are particularly relevant to the justification of ss 11 and 12.

11. *First*, the plaintiffs have published, and intend to publish and to encourage others to publish, material in apparent contravention of ss 11 and 12 of the SD Act: SCB 30 [10]-[15], 104 [27], 193 [159]. That necessarily means the material was obtained in contravention of ss 7-9. But for ss 11 and 12, material obtained by the second plaintiff in contravention of s 8 would have been published: SCB 177 [10], 191 [149].

12. *Second*, from 2014 to 2019 there has been a 27 per cent increase in the number of recorded incidents of trespass on farms and rural properties in NSW (SCB 696, 814). Amendments have been made to the Inclosed Lands Protection Act 1901 (NSW) to try and deter farm trespass (SCB Annexures 13-18). In 2015 the NSW Government produced a Farm Trespass Policy determining that the existing prohibitions in the SD Act were sufficient to address the impact of farm trespass (SCB 646).

13. *Third*, two separate parliamentary inquiries have been conducted into farm trespass by 'animal rights activists', such as the plaintiffs, who are committed to the abolition of animal use industries (SCB 29 [5(e)(ii), (iv)], 31 [19], 764) and who make use of 'direct action tactics' to that end (SCB 768). The Victorian inquiry identified one such tactic as 'covert action,' which involves "filming the conditions of animals while trespassing", as well as "trespassing to install unauthorised surveillance devices to capture conditions over a period of time" (SCB 770-771).

14. *Fourth*, both inquiries found that unlawful surveillance and publication through covert action impacts the privacy and security of farmers and causes them personal distress (SCB 772, SCB 975). They also found that footage published by activists can misrepresent farm practices. The Victorian inquiry found that some published footage conflates "standard practices with illegal animal cruelty", which "is dishonest and misleading to consumers and unfairly risks the industry's reputation and economic viability" (SCB 831). The NSW inquiry considered a case study in which apparently misleading footage was provided to a media outlet and also published on the internet

(SCB 976). Both inquiries also considered the damage caused by farm trespass to farm property, biosecurity, and the economy of farming (SCB 788-796, 971-975).

15. *Fifth,* the Victorian inquiry heard that there was considerable confusion about whether and when farming activities constituted 'a private activity' for the purposes of the Surveillance Devices Act 1999 (Vic) (SCB 772).

Part V: ARGUMENT

16. The implied freedom of political communication is "but one element, though an essential element, in the constitution of … 'a society organized under and controlled by law'": Australian Capital Television v Commonwealth (1992) 177 CLR 106 at 142 per Mason CJ. In this way, the implied freedom forms part of "the concept of freedom in a civilized society, in contrast with unbridled licence in a lawless state which itself involves the necessity for laws of the kind which accommodate one [person's] activities to those of another": Samuels v Readers' Digest Association Pty Ltd (1969) 120 CLR 1 at 15 per Barwick CJ.

17. The implied freedom is a structural implication operating in a constitutional context in which the States are "separately organized" and "independent entities": State Banking Case (1947) 74 CLR 31 at 82 per Dixon J. The constitution of each gives effect to an adaptation of representative and responsible government subject to the ultimate control not of its peers, but of its people: McGinty v Western Australia (1996) 186 CLR 140 at 273, 285 per Gummow J; see also Egan v Willis (1998) 195 CLR 424 at [42] per Gaudron, Gummow and Hayne JJ, [140]-[141] per Kirby J.

18. The SD Act is an exercise of the legislative power of the Parliament of NSW, and strikes a balance of freedoms. The balance is struck between privacy, on the one hand, and the dissemination of information, on the other. The balance struck by NSW is different to the balance struck by other States and Territories – it recognises and creates different and relatively specific interests in privacy in ss 7-9 and confers upon them narrow but relatively strict protections. The plaintiffs seek to present this difference as itself sufficient to establish a contravention of the implied freedom. But the implied freedom does not involve a simple exercise in *comparison*; it is an exercise in *justification*. What is to be justified is ss 11 and 12 of the SD Act, which are narrowly tailored to limit damage to the specific interests in privacy recognised, created and protected by ss 7-9 of the SD Act.

The SD Act

19. As stated in its long title, the SD Act was enacted to replace the Listening Devices Act 1984 (NSW) ("the LD Act"). The Second Reading Speech for the Surveillance Devices Bill ("SD Second Reading Speech") notes that the SD Act was intended to "expand the application of the [LD Act] so that it applies to three other categories of surveillance devices, including data surveillance devices, optical surveillance devices and tracking devices" (SCB 604).

20. The SD Act also implements the model provisions proposed by the Joint Working Group of the Standing Committee of Attorneys-General and Australasian Police Ministers' Council on National Investigation Powers ("JWG") (SD Second Reading Speech, SCB 604). The JWG's task was simply "to facilitate the mutual recognition of warrants, rather than … overhaul of surveillance legislation in each jurisdiction." (SCB 316). The model provisions do "not affect any other law of the enacting jurisdiction in relation to the use of surveillance devices" (SCB 322). The mutual recognition of warrants is provided for in Pt 4 of the SD Act. Otherwise, the SD Act generally follows the structure of the LD Act.

21. The historical iterations of a statute, and the extrinsic background, can provide insight into its meaning and the purposes it is intended to achieve: compare Palgo Holdings Pty Ltd v Gowans (2005) 221 CLR 249 at [16]-[21] (the Court); McEvoy v Incat Tasmania Pty Ltd (2003) 130 FCR 503 at [8]-[16] per Finkelstein J. It is not necessary to resort to 'dynamic interpretation' to ascertain that the SD Act, like its predecessor, is generally concerned with privacy (cf PS [51]).

22. The Second Reading Speech for the Listening Devices Bill ("LD Second Reading Speech") proposed to "establish safeguards against the unjustified invasion of privacy that can be occasioned by the use of electronic surveillance" and in so doing sought "to protect one of the most important aspects of individual freedom … the right of people to enjoy their private lives free from interference by the State or *by others*" (emphasis added) (SCB 598). Recognised was that "the physical limits that once guarded individual and group privacy have been broken down by technology," which "is capable of being used to achieve intrusions upon privacy that are not justified by the fundamental concepts of a free society" (SCB 599).

Section 2A

23. These objectives are broadly restated in s 2A of the SD Act:

> (a) to provide law enforcement agencies with a comprehensive framework for the use of surveillance devices in criminal investigations, and
>
> (b) to enable law enforcement agencies to covertly gather evidence for the purposes of criminal prosecutions, and
>
> (c) to ensure that the privacy of individuals is not unnecessarily impinged upon by providing strict requirements around the installation, use and maintenance of surveillance devices.

24. To understand exactly what it is s 2A contemplates, it is necessary to consider what it means to speak of "the privacy of individuals" in this context.

25. The common law of Australia has not recognised a general right of privacy: Australian Broadcasting Corporation v Lenah Game Meats (2001) 208 CLR 199 ("Lenah") at [110] per Gummow and Hayne JJ. Privacy is fundamentally concerned with personal autonomy (Lenah at [125]). To be autonomous is in part to exercise control over whether and how one is exposed to public discussion and scrutiny. But the concept of privacy is otherwise protean and abstract: Lenah at [116]; Wainwright v Home Office [2004] 2 AC 406 ("Wainwright") at [15]-[19] per Lord Hoffman. Being protean, privacy moulds to particular contexts and is thereby given definition: consider the examples in Wainwright at [18]. In this way, privacy finds various expressions in what the Australian Law Reform Commission ("ALRC") described in its report Privacy (1983) as specific "interests in privacy" (SCB 273).

26. Interests in privacy are creatures of law. Such interests are recognised, created and protected only insofar as is comprehended by law. In part, these interests are collaterally protected by the common law and by equity. But judge-made law is constrained by the principles of incrementalism and faithfulness to tradition that inform its development. Parliament is not so constrained: see the discussion in Wainwright at [18]-[34], esp. [33]. Within the limits of its constitutional authority, Parliament may by enactment recognise, create and protect interests in privacy of any kind, and may shape and balance those interests against other interests as it wishes. So, as the JWG observed, "it is in statutory schemes that the protection of privacy from intrusion through surveillance as well as the regulation of the justified use of surveillance can be found" (SCB 314).

27. When s 2A(c) speaks of the "privacy of individuals", therefore, it is not speaking of an abstraction but of the specific statutory interests recognised, created and protected by the "strict requirements around the installation, use and maintenance of surveillance devices" in Pt 2: cf Pillay (t/as West Corp Mortgage Market) v Nine Network Australia Pty Ltd [2002] NSWSC 983 at [19]-[21] per Campbell J.

28. "The strict requirements" mentioned in s 2A(c) are clearly a reference to the prohibitions imposed by ss 7-10 in Pt 2 of the SD Act. It is these provisions that prohibit, in terms, the installation, use and maintenance of surveillance devices. It follows that these provisions create and confine the very interests in privacy the non-impingement of which is the object of the SD Act. The object of the SD Act is to recognise and create these interests and then protect them from impingement.

29. It is not surprising that considerable attention has been given to the regulation of the power of law enforcement to engage in surveillance. Parliament has long "sought to balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his [or her] privacy and property": George v Rockett (1990) 170 CLR 104 at 110 (the Court). What the SD Act does is put law enforcement on the same footing as any private person who invades the statutory interests created in fulfilment of s 2A(c) unless there is compliance with the regime set out in Pt 3. But that is not to diminish the antecedent creation and protection of the general privacy interests contemplated by s 2A(c).

Section 7

30. Section 7(1) provides:

> (1) A person must not knowingly install, use or cause to be used or maintain a listening device—
>
> (a) to overhear, record, monitor or listen to a private conversation to which the person is not a party, or
>
> (b) to record a private conversation to which the person is a party.
>
> Maximum penalty—500 penalty units (in the case of a corporation) or 100 penalty units or 5 years imprisonment, or both (in any other case).

31. Per s 4, a "private conversation" is defined as

> any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only—

(a) by themselves, or

(b) by themselves and by some other person who has the consent, express or implied, of all of those persons to do so,

but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it might be overheard by someone else

and a "listening device" means

any device capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation, but does not include a hearing aid or similar device used by a person with impaired hearing to overcome the impairment and permit that person to hear only sounds ordinarily audible to the human ear.

32. To adopt the ALRC's rubric (SCB 273-274), s 7(1) creates interests in the "privacy of the person", by protecting private expression unchilled by surveillance, and in "informational privacy", by identifying conditions in which information is private. These interests are not engaged in a situation where there is an "unintentional hearing of a private conversation by means of a listening device": s 7(2)(c).

33. It is lawful to use a listening device where the principal parties to the conversation consent, expressly or impliedly (s 7(3)(a)), or where a "principal party" consents to its use and where recording "is reasonably necessary for the protection of the lawful interests of that principal party" (s 7(3)(b)(i)) or "is not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to persons who are not parties to the conversation" (s 7(3)(b)(ii)). A "principal party" is "a person by or to whom words are spoken in the course of the conversation": s 4.

34. The policy of the "lawful interests" exception is to recognise the interest a principal party has in the disclosure of a private conversation: R v Le (2004) 60 NSWLR 108 ("Le") at [84] per Adams J. The concept is broad: DW v The Queen (2014) 239 A Crim R 192 at [31]-[37]. It is within a principal party's lawful interests to use a listening device to expose or resist an allegation of a crime: Thomas v Nash (2010) 107 SASR 309 at [45] per Doyle CJ, or to vindicate the credibility of an account of a private conversation for a specific purpose: Le at [84], including by a 'whistleblower'.

Section 8

35. Section 8(1) of the SD Act provides:

(1) A person must not knowingly install, use or maintain an optical surveillance device on or within premises or a vehicle or on any

> other object, to record visually or observe the carrying on of an activity if the installation, use or maintenance of the device involves—
>
> (a) entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier of the premises or vehicle, or
>
> (b) interference with the vehicle or other object without the express or implied consent of the person having lawful possession or lawful control of the vehicle or object.
>
> Maximum penalty—500 penalty units (in the case of a corporation) or 100 penalty units or 5 years imprisonment, or both (in any other case).

36. An optical surveillance device is "any device capable of being used to record visually or observe an activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment": s 4. The exceptions are generally concerned with law enforcement.

37. Section 8(1), in effect, adopts the protections afforded by exclusive possession and the law of trespass to prohibit optical surveillance conducted by an interference with rights in property. Section 8(1)(a) is engaged where there is a trespass to land (or to a vehicle), and s 8(1)(b) is engaged where there is a trespass to goods. Section 8 goes no further. A person who is given express or implied consent to enter land may engage in optical surveillance and avoid entirely the application of the SD Act.

38. In this way, s 8(1)(a) and (b) recognise, create and protect an interest in *territorial privacy*, which is "the interest in controlling entry to the 'personal place' … related historically, legally and conceptually to property", into which "no one may enter without … permission, except by lawful warrant" (ALRC, SCB 273). Section 8 therefore adopts "the policy of the law", which "is to protect the possession of property and the privacy and security of its occupier": Plenty v Dillon (1991) 171 CLR 635 at 647 per Gaudron and McHugh JJ and thus to preserve "the inviolate security" of the citizen's "personal and business affairs": Parker v Churchill (1985) 9 FCR 316 at 322 per Burchett J. This is "a fundamental common law right": Coco v The Queen (1994) 179 CLR 427 at 435 per Mason CJ, Brennan, Gaudron and McHugh JJ. "[E]very invasion of private property, be it ever so minute, is a trespass": Entick v Carrington (1765) 19 St Tr 1030 at 1066 per Lord Camden LCJ. "The principle applies alike to officers of government and to private persons": Halliday v Nevill (1984) 155 CLR 1 at 10 per Brennan J.

39. In TCN Channel Nine v Anning (2002) 54 NSWLR 333 ("Anning") at [52], Spigelman CJ explained that "the protection of privacy interests has long been recognised as a social value protected by the tort of trespass." So, as Spigelman CJ observed at [58]:

> Persons conducting business on private property are entitled to do so without others intruding for purposes unrelated to the business activities they are conducting. This includes those who wish to enter with a view to publicly exposing aspects of their business.

10

40. Whether a person has consent is a question of fact, but in the law of trespass consent to entry for a permitted purpose does not render unauthorised surveillance pursuant to that entry trespassory: Barker v The Queen (1994) 54 FCR 451 at 472G-474A per Jenkinson and O'Loughlin JJ; see generally Barker v The Queen (1983) 153 CLR 338 at 347 per Mason J, 358-360 per Brennan and Deane JJ.

Section 11

41. Section 11(1) provides:

> (1) A person must not publish, or communicate to any person, a private
> 20 conversation or a record of the carrying on of an activity, or a report of a private conversation or carrying on of an activity, that has come to the person's knowledge as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device in contravention of a provision of this Part.
>
> Maximum penalty—500 penalty units (in the case of a corporation) or 100 penalty units or 5 years imprisonment, or both (in any other case).

42. Sub-s (2) creates exceptions around consent, law enforcement, and emergency.
30 Sub-s (3) provides that knowledge obtained other than by contravention of Pt 2 may be published notwithstanding that it has also been obtained in contravention of Pt 2.

43. The SD Act explanatory note notes that s 11 is "similar" to s 6 of the LD Act (SCB 610), which was enacted to "limit the damage that may be caused by … illegal publication" (LD Act Second Reading Speech, SCB 600). Section 11 treats privacy as damaged when it is given *publicity*: Wainwright at [17]. Damage is caused when the information has only been obtained through a contravention of ss 7-9. Knowledge also obtained through other means is not protected: s 11(3). This is how s 11 deters the publication of information for which ss 7-9 are a true protection. In this way, s 11
40 also operates to disincentivise, and lessen the likelihood of, contraventions of ss 7-9; it cannot be considered in isolation from these provisions.

44. Sections 7-9 *engage* s 11(1). It is the use of a listening device, optical surveillance device or tracking device in "contravention of a provision of this Part" that taints the knowledge obtained and prohibits its publication. The scope of the prohibition imposed by s 11 therefore turns entirely on which of ss 7-9 is contravened.

45. Engaged by s 7, s 11(1) will prohibit a person from publishing or communicating a private conversation or a report of a private conversation coming to their knowledge as a direct or indirect result of the knowing installation, use or maintenance of a listening device by, *inter alia,* a non-party to the conversation without the parties' consent unless the private conversation was heard unintentionally, or by a principal party to a conversation where its recording was not reasonably necessary for the protection of lawful interests.

46. Engaged by s 8, s 11(1) will prohibit a person from publishing or communicating a record of the carrying on of an activity or carrying on of an activity, that has come to the person's knowledge as a direct or indirect result of the knowing installation, use or maintenance of an optical surveillance device by a person, who has entered into or onto a premises or vehicle without the express or implied consent of the owner or occupier of the premises or vehicle, or who has interfered with a vehicle or object without the express or implied consent of the person having lawful possession or lawful control of the vehicle or object.

47. In interpreting s 11 as an offence of absolute liability (PS [26]), the plaintiffs claim not to have deliberately adopted the "most draconian construction" of s 11 (PS [30]). But that is exactly what they have done. Section 11 does not explicitly omit a mental element. Absent express words or necessary implication, criminal provisions involve a mental element: He Kaw Teh v The Queen (1985) 157 CLR 523 at 566 per Brennan J ("He Kaw Teh"); CTM v The Queen (2008) 236 CLR 440 at [148] per Hayne J. He Kaw Teh does *not* require consideration of whether a mental element is "implied": cf PS [25]. The presumption requires consideration of whether Parliament has indicated with sufficient explicitness that a mental element is *not* implied. The presumption is that s 11 creates an offence of intent. If the question of mental element is determinative of the constitutionality of s 11, it should absent contrary indication be read in conformity with the presumption: Interpretation Act 1987 (NSW), s 31.

48. Parliament is unlikely to have intended to create, by implication, an offence of strict or absolute liability punishable by 5 years imprisonment: He Kaw Teh at 529-530 per

Gibbs CJ. Absent indispensable benefit, Parliament is presumed not to intend to wield a serious criminal sanction against some "luckless victim": Lim Chin Aik v The Queen [1963] AC 160 at 174. No such benefit exists here. If a publisher did not know that, or was not reckless as to whether, knowledge was obtained in contravention of ss 7-9, or made an honest and reasonable mistake as to that fact, then there is nothing more the publisher could reasonably have done to avoid damage to an interest in privacy.

49. The plaintiffs claim at PS [27] that reading s 11 as having a mental element would enable knowledge obtained in contravention of Pt 2 to be 'sanitised' such as to give publishers 'plausible deniability'. It is not clear what the plaintiffs mean. Presumably, they mean that something can be done to the record or report so as facilitate the publisher's honest and reasonable mistake as to its provenance. Sanitisation to such a degree would make it difficult to prove the knowledge had been obtained in contravention of ss 7-9 and so s 11 would not be engaged anyway. Nor would there be any deterrent utility in proscribing a truly unintentional publication of a record or report so sanitised.

50. The plaintiffs claim further at PS [28]-[29] that a publisher will not "usually have any information in relation to the exceptions" in ss 7(2)-(3) and 8(2)-(3) and that this also creates the potential for 'plausible deniability'. It is unclear how. If a publisher knew that a surveillance device had been used to gather information, in circumstances that appeared to contravene s 7(1) or 8(1), but did not seek to determine whether the circumstances in ss 7(2)-(3) or 8(2)-(3) existed, then such publication would at the very least be reckless. Equally, a mistaken belief formed in such circumstances would not be honest and reasonable.

Section 12

51. Section 12(1) provides that "A person must not possess a record of a private conversation or the carrying on of an activity knowing that it has been obtained, directly or indirectly, by the use of a listening device, optical surveillance device or tracking device in contravention of this Part." Section 12 "replaces and essentially restates" s 8 of the LD Act (SD Act explanatory note, SCB 611), which was intended to enable the prosecution of persons who destroy all evidence of an offence "save for the possession of the very thing the crime intended to obtain – that is to say, the private information" (LD Act Second Reading Speech, SCB 600).

52. Section 12 operates to criminalise, in effect, the knowing and wrongful exercise of exclusive possessory control of unlawfully obtained surveillance material by any entity, including a would-be publisher. In this way, s 12 forms part of the statutory context relevant to the interpretation of s 11. Together, ss 11 and 12 apply to those who intentionally facilitate intrusions of the interests in privacy created by ss 7-9 and operate to deter them in this regard.

The implied freedom of political communication

53. Implied from ss 7, 24, 64 and 128 of the Constitution of Australia is a freedom of political communication about matters of politics and government that operates not as a personal right but a restraint on legislative power: Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 ("Lange"). The constitutional question is whether an effective statutory burden on the freedom of political communication is "justified": Libertyworks at [45]. Justification is composed of two questions: the statute must (*first*) serve a legitimate purpose and (*second*) adopt means that are proportionate to the achievement of that purpose: Libertyworks at [45]-[46].

54. In answering the second question, successive majorities of this Court have endorsed the structured method of proportionality analysis expressed in McCloy v New South Wales (2015) 257 CLR 178 ("McCloy") at [2]: see Libertyworks at [48]. Structured proportionality inquires into whether a means is *suitable* (in the sense that the means is rationally connected to the purpose), *necessary* (in the sense that the means is needed to accomplish the purpose) and *adequate in its balance* (in that the means is not disproportionate in light of the purpose sought to be achieved).

55. As Edelman J emphasised in Clubb at [406]-[407], structured proportionality must be informed by "clarity and principle" so as to ensure the implied freedom "does not become an unlicensed vehicle for a court to remodel public policy by engaging in 'an assessment of the relative merits of competing legislative models'"; see Clubb at [74] per Kiefel CJ, Bell and Keane JJ, see also [207] per Gageler J, [401] per Gordon J.

56. What is to be justified is the enactment by the Parliament of NSW of ss 11 and 12 of the SD Act. The plaintiffs have not challenged ss 7-9 of the SD Act. The Amended Special Case is directed, therefore, towards the specific question of whether ss 11 and 12 are unjustified in the role they play as protections of the specific interests in privacy created by ss 7-9. The alternative models must be capable of bringing to bear some analytical insight into why ss 11 and 12 are not justified in this specific regard.

The facts

57. That analysis is to be informed by the material facts in the Amended Special Case set out at DS [10]-[15]. The Amended Special Case establishes that animal rights activists, and the second plaintiff, have engaged and intend to continue to engage in serial trespass in defiance of the interest in privacy recognised, created and protected by s 8 – which provision they do not challenge. It establishes that this serial trespass is for the sole purpose of publishing or communicating – in contravention of s 11 – the information they obtain through unlawful surveillance. It establishes that this serial trespass can cause personal distress to farmers and damage to property. It establishes that the information published can compound that distress and mislead and so cause undeserved reputational harm. It establishes that but for ss 11 and 12 material obtained in contravention of s 8 would be published. It establishes that the plaintiffs are prepared to contravene ss 8 and 11 but are concerned that media organisations may not wish to contravene s 11 by publishing film footage provided to them by the plaintiffs.

58. All of these facts support the inference that, without ss 11 and 12, there will be more trespasses with the objective of facilitating publication that will harm farmers. The plaintiffs are simply wrong to say that there is an "obvious disconnect between disincentivizing farm trespass and prohibiting communication": cf PS [60].

Burden

59. To identify a burden on political communication "requires consideration as to how the section affects the freedom generally": Brown v Tasmania (2017) 261 CLR 328 ("Brown") at [90]. It can be accepted that s 11 may operate to prevent the publication of material pertaining to discussion of political matters. But it does not impose that burden *because* the material pertains to those matters; nor does s 11 discriminate as to the matters it burdens. It is agnostic on these matters. All that is prohibited, in effect, is the communication of information obtained through specified unlawful means. The same information may be communicated if obtained in non-contravention of ss 7-9: SD Act, s 11(3). Section 11 does not strike at the content of communication at all.

60. Any burden imposed by s 12 is indirect. Section 12 is intended to operate to ensure that a person who exercises exclusive possessory control over material obtained in contravention of ss 7-9 can be prosecuted, and does not directly bear on communication at all.

Legitimate purpose

61. A statute's purpose, or the mischief it addresses, is ascertained by ordinary processes of construction: Brown at [96]-[101] per Kiefel CJ, Bell and Keane JJ. The exercise undertaken at DS [23]-[51] above reveals that the legitimate purpose of the SD Act is to authorise surveillance for law enforcement purposes but otherwise to recognise and protect the specific interests in privacy created by ss 7-9. Engaged in this case are the specific interests in security and privacy arising out of the exclusive possession of private property created by s 8 (DS [37]-[40]). Sections 11 and 12 are intended to limit the damage to an interest in privacy caused by publication of material obtained in contravention of ss 7-9, and to disincentivise and therefore lessen the likelihood of contraventions of ss 7-9, thereby serving a legitimate purpose also (DS [42]).

62. It is alien to conventional statutory construction to take a law with general legitimate purposes and render it illegitimate by reference to events subsequent to the enactment of that law (cf PS [58]). No amendment was sought to respond to farm trespass (DS [12]). In arguing that the SD Act has the illegitimate purpose of being an 'ag-gag' law, the plaintiffs are in effect complaining that a general law intended to dissuade and limit the harm caused by trespass disadvantages serial trespassers.

Necessity

63. Noting that the plaintiffs have conceded (at PS [64]) that ss 11 and 12 are *suitable*, NSW turns to the question of necessity. This requires consideration of whether there are alternative, equally practicable, means of achieving the same object but which have a less restrictive effect on the freedom. The plaintiffs seem to assert that the mere existence of alternatives is fatal to the constitutionality of ss 11 and 12: PS [65]. That is to reduce an analytical exercise in *justification* to a non-analytical exercise in *comparison*, which threatens the federal structure because it compels States to adopt without parliamentary debate a different law. Regardless, necessity is a concept that has analytical content.

64. An equally practicable alternative must ordinarily achieve, "to the same degree, the legislative object": Clubb at [477] per Edelman J; or be "equally effective": Unions NSW v New South Wales (2019) 264 CLR 595 ("Unions NSW") at [41] per Kiefel CJ, Bell and Keane JJ; Tajjour v New South Wales (2014) 254 CLR 508 ("Tajjour") at [113]-[114] per Crennan, Kiefel and Bell JJ, citing Aharon Barak, Proportionality, Constitutional Rights and Their Limitations (2012) ("Barak") at 317. A means is

exposed as unnecessary "only if the [alternative] means would advance the law's purpose at the same level of intensity as those determined in the limiting law": Barak at 324. On any view of Lange, this requirement is important because it avoids the exercise becoming one of legislative judgment: McCloy at [328] per Gordon J.

65. In Brown, it was explained by Kiefel CJ, Bell and Keane JJ that an alternative can also establish that the provision challenged operates "more widely than its purpose requires": at [109], [139]-[146], see also Unions NSW at [42]; Clubb at [480] per Edelman J. This pathway of analysis is somewhat analogous to the notion of overbreadth or lack of narrow tailoring. So, a provision can capture "more speech than was necessary to accomplish its goal": Clubb at [203] per Gageler J.

66. Neither analytical pathway arises here. Sections 11 and 12 are necessary because they are the most effective means for limiting the damage caused by contraventions of ss 7-9, and are narrowly tailored to restrain only communications of material unobtainable other than by contravention of the interests in privacy ss 7-9 create.

The comparator Acts

67. The plaintiffs propose to demonstrate that ss 11-12 are not necessary by comparing the SD Act with the Surveillance Devices Act 1999 (Vic) ("Victorian Act"), the Surveillance Devices Act 2007 (NT) ("NT Act"), Surveillance Devices Act 2016 (SA) ("SA Act"), Surveillance Devices Act 1998 (WA) ("WA Act"), and the Invasion of Privacy Act 1971 (Qld) ("Qld Act") (together, the "comparator Acts"). Three general observations establish that these alternatives would not as effectively protect ss 7-9, nor do they expose ss 11-12 as overly broad protections.

68. *First,* unlike s 11, the comparator Acts all prohibit the publication of, relevantly, 'private activity.' When engaged by s 8, ss 11-12 only prohibit possession or publication of activity obtained through trespass. The former is an abstract quality of activity, whereas the latter is a bright line appropriately drawn around a narrow zone of privacy: cf Clubb at [201] per Gageler J. By contrast, the Victorian experience shows there is ambiguity in the line drawn around private activity (see above DS [15]).

69. *Secondly*, ss 11-12 as engaged by s 8 are of far clearer and narrower scope than the prohibitions in the comparator Acts. In NSW, once a person is given permission to cross the threshold, any activity filmed may be published. Elsewhere, any activity has the potential to be 'private activity'. The conception is "extremely broad" and "a little

loose": Pinto v Kinkela [2003] WASC 126 at [44]. Indeed, private 'activity', unlike 'conversation', is abstruse. Whenever an 'activity' is filmed, the question of its private nature will fall to be determined by highly complex principles: cf Lenah at [42]-[43].

70. *Thirdly*, the public interest exceptions are engaged only *after* there has been surveillance or publication of a 'private conversation' or 'private activity.' That reflects legislative choices made in Victoria and the NT, where the prohibitions against publication create a general interest in privacy not based on a prior contravention of the Act: see DS [74]-[76], and in WA and SA, where only surveillance lawfully obtained in the public interest may be published by judicial order: DS [72]-[73], [78]. But the whole effect of such an exception in the SD Act would be to undermine ss 7-9 by providing an open-ended means for the publication of material obtained in contravention of those provisions, regardless of whether it is political communication. This would create a "gap which is readily capable of exploitation": Tajjour at [121].

71. The plaintiffs submit at PS [72]-[75] that the relevant comparison is only of the burden each Act imposes on the publication of unlawfully obtained surveillance. This avoids engaging with the reasons why each prohibition is structured differently, and so obscures the SD Act's design. Unlike the comparator Acts, unlawfulness is the *only* way in which the SD Act burdens communication, and it does so clearly and narrowly. Their comparison also impermissibly qualifies ss 7-9. Even so compared, however, the comparator Acts would less effectively and less narrowly protect ss 7-9.

The SA Act

72. Like s 11 of the SD Act, s 12 of the SA Act prohibits without public interest exception the publication of surveillance obtained unlawfully. Unlike ss 7-9 of the SD Act, s 6 of the SA Act permits the lawful use of a surveillance device in the public interest. The plaintiffs identify s 6 as "critical": PS [68.4]. It is. Section 6 explicitly *qualifies* the interests in privacy against unlawful surveillance created by ss 4 and 5 of the SA Act (equivalent to ss 7-9 of the SD Act). Only when a surveillance device has been used *lawfully* in the public interest may an order be sought from a judge under ss 10(1) and 11 or the relevant information be given to or published by the media in the public interest under s 10(2) of the SA Act. The effect is that publication in the public interest under the SA Act will never be in consequence of unlawful surveillance.

73. The transposition of ss 10 and 11 of the SA Act into the SD Act would significantly expand the publication of unlawfully obtained material under imprimatur of law. It

would (on these facts) create an incentive to trespass to obtain that material. It would deeply compromise the consequential protection of the interests created by ss 7-9.

The Victorian and NT Acts

74. The prohibition in s 11 is narrowly tailored to protect the interests in privacy created by ss 7-9 because it is engaged only where material is only obtained in contravention of ss 7-9 (and where those sections are themselves relatively narrow). By contrast, both the Vic Act (s 11) and the NT Act (s 15) prohibit the publication, by anyone, of a record or report of *any* 'private conversation' or 'private activity' obtained directly or indirectly through surveillance, irrespective of whether it was obtained in contravention of a prohibition against surveillance. These prohibitions create a broad interest in surveillance privacy, engaged by the abstruse concept of 'private activity', to which there is an open-ended exception in the public interest.

75. Because of this, the Victorian and NT prohibitions capture publications that ss 11-12 do not. The SD Act permits unrestricted publication, by anyone, of optical surveillance taken by a whistleblower employee of what would elsewhere be called 'private activity', or of private conversations to which he or she was a principal party for the purposes of vindicating a report to the police, or to the RSPCA pursuant to the Prevention of Cruelty to Animals Act 1979 (NSW), or to a journalist.

76. If introduced into the SD Act, the model would create new, sweeping and competing private and public interests in the publication of 'private activity', wholly disconnected from and ill-adapted to the protection of the specific interests created by ss 7-9, and resulting in more violations of s 8. It is not a true practicable alternative to ss 11-12.

The QLD Act

77. The QLD Act "goes further than the SD Act in restricting publication of material derived from a listening device … but … does not regulate optical surveillance devices at all": PS [70]. On no view is it an equally practicable alternative.

The WA Act

78. The plaintiffs note at PS [69.2] that s 9(2)(a)(viii) of the WA Act exempts publication or communication in accordance with judicial order made under Pt 5. Much like the SA Act, Divs 2 and 3 of Pt 5 create a basis for the lawful *use* of surveillance devices in the public interest which must be satisfied before an order can be made: WA Act, s 31(1). Further, per s 25 this regime is not available where the surveillance was

obtained in a way that was unlawful under any other law or Act. This includes trespass: Criminal Code Act Compilation Act 1913 (WA), s 70A. The WA Act is not "less restrictive" of political communication facilitated by unlawful acts.

Adequacy of balance

79. "If a law presents as suitable and necessary … it is regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom": Comcare v Banerji (2019) 267 CLR 373 at [38] per Kiefel CJ, Bell, Keane and Nettle JJ.

80. Sections 11 and 12 are instrumental parts of the scheme created by the SD Act. They recognise that almost the entirety of the harm done by a violation of ss 7-9 is to the disclosure of the information each of those sections renders private. Without ss 11 and 12, there will be more trespasses in contravention of s 8 in disregard and disdain of the interest in privacy it creates. The facts of this case reveal as hollow the proposition that the harm to privacy is sufficiently addressed by ss 7-9. Privacy means nothing if the harm caused by its violation cannot be effectively restrained.

81. Privacy is a human right and is a core aspect of our individuation in a free society. In deterring trespass and addressing its consequences for privacy, ss 11 and 12, as engaged by s 8, secure and reinforce the long-standing common law right to the privacy and security of one's property. The "principles of constitutional liberty and security carried forward from Entick v Carrington are part of our common law inheritance. We ignore them – or, worse, devalue them – at our peril": Smethurst v Commissioner of Police (Cth) (2020) 94 ALJR 502 at [126] per Gageler J. They are of particular importance in an age of mass media: Anning at [59]-[61].

82. This observation applies with equal force to ss 11 and 12, which when engaged by s 8 ensure that those who would take it upon themselves to enter a person's property without lawful warrant to engage in surveillance are unable to achieve their aim of publicisation. In a society organised under and controlled by law, the expectation is that public benefits will be achieved through lawful means. It is certainly not accepted that public benefits must be achieved through unlawful means.

83. Against this, the plaintiffs rely on Kadir v The Queen (2020) 267 CLR 109 ("Kadir"). As Kadir recognises, there is a public interest in not giving curial approval, or encouragement, to illegally or improperly obtaining evidence generally: [13]. The

surveillance evidence obtained in contravention of s 8(1) of the SD Act was "a deliberate" and "serious contravention of Australian law", and so the difficulty in lawfully obtaining the evidence weighed *against* its admission (and it was properly not admitted): [37]. Even evidence obtained by the RSPCA due to that surveillance was only admissible because there was no indication that its investigations were facilitated by a "pattern of conduct" of unlawful activity: [48]. The same cannot be said of the system proposed by the plaintiffs, in which courts would be recruited into the publicisation of private material invariably obtained through serious criminality.

84. Ultimately, the impact of ss 11 and 12 upon the implied freedom is not disproportionate to the consequential protection of the specific interests in privacy recognised, created, and protected by ss 7-9. The SD Act establishes with specificity the boundaries beyond which the public may not trespass but outside of which all are free to communicate without qualification or restraint. It identifies, within this narrow boundary, conversations and activities that are truly 'private.' Those conversations and activities may well be of public interest. Their publication may on occasion lead to reform. It is equally true that the general warrant would be an effective crime-fighting tool. The narrow interests in privacy created by ss 7-9 and defended by ss 11-12 embody a legislative recognition that truly private interests, even when of public interest, may only be revealed by consent or in accordance with law.

Severance

85. There is no basis for the proposition that ss 11 and 12 are "intended to apply to political communication" (PS [88]). They apply to restrain communication of unlawfully obtained information. Sections 11 and 12 are entirely capable of so operating even if they cannot apply to political communications.

Relief

86. The relief sought by the plaintiffs should be refused.

Part VI: TIME FOR ORAL ARGUMENT

87. NSW will require 2.5 hours for oral submissions.

Dated: 24 November 2021

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ANNEXURE

List of the particular constitutional provisions, statutes and statutory instruments referred to in the Defendant's submissions including the correct version relevant to the case

	Title	Correct version
1.	*The Constitution of Australia,* ss 7, 24, 64 and 128	In force version
2.	*Criminal Code Act Compilation Act 1913* (WA)	In force version
3.	*Inclosed Lands Protection Act 1901* (NSW)	In force version
4.	*Interpretation Act 1987* (NSW)	In force version
5.	*Invasion of Privacy Act 1971* (Qld)	In force version
6.	*Judiciary Act 1903* (Cth)	In force version
7.	*Listening Devices Act 1984* (NSW)	6 December 2005
8.	*Prevention of Cruelty to Animals Act 1979* (NSW)	In force version
9.	*Surveillance Devices Act 2007* (NSW)	In force version
10.	*Surveillance Devices Act 1999* (Vic)	In force version
11.	*Surveillance Devices Act 2007* (NT)	In force version
12.	*Surveillance Devices Act 2016* (SA)	In force version
13.	*Surveillance Devices Act 1998* (WA)	In force version