HIGH COURT OF AUSTRALIA

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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

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PARTS I, II AND III — CERTIFICATION AND INTERVENTION

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

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Defendant.

PART IV — ARGUMENT

A INTRODUCTION

3. Sections 11 and 12 of the *Surveillance Devices Act 2007* (NSW) (**the Act**) prohibit, in broad terms, the publication and possession of material obtained as the result of the use of a surveillance device in contravention of ss 7 to 10 of the Act. The Plaintiffs challenge the validity of ss 11 and 12 in all of their operations as contrary to the implied freedom of political communication.

4. The Commonwealth submits that the Court ought to consider the validity of ss 11 and 12 only in so far as those sections operate by reference to a contravention of s 8. The facts and documents in the Amended Special Case (**ASC**) are insufficient to enable the Court to be satisfied that there exists a state of facts which makes it necessary to decide the validity of ss 11 and 12 any more broadly.

5. The effective burden imposed by ss 11 and 12 on political communication must be assessed having regard to the burden already placed upon political communication by existing general law restrictions on publication. In circumstances where those existing restrictions are not challenged, it is only the *additional* burden imposed by ss 11 and 12 that requires justification. Those provisions, in their operation with s 8, are proportionate

to their legitimate objective of protecting the privacy of individuals from being unjustifiably impinged by the unlawful use of surveillance devices. The existence of variations on the impugned prohibitions in other States and Territories does not lead to a different conclusion. Those other statutory regimes, when properly analysed, underscore the fact that there may be a number of proportionate means by which a legislature can seek to achieve the same legitimate purpose. Sections 11 and 12, in their operation with s 8, are therefore valid.

B THE APPLICATION OF SECTIONS 11 AND 12 TO THE PLAINTIFFS

6. It is not in dispute that the Plaintiffs have standing to challenge the validity of ss 11 and 12 of the Act (**PS [38]**; **DS [4]**). However, the question of standing is distinct from the question of whether, as a matter of practice, the Court should determine the validity of those provisions in the abstract. The existence of standing does not mean that the Plaintiffs are permitted to "roam at large" over those provisions.[1] They remain confined to advancing those grounds of challenge which bear on the validity of those provisions in their application to the Plaintiffs.[2]

7. The offences in ss 11 and 12 are predicated on a prior contravention of a provision of Pt 2 of the Act. In that sense, the offences in ss 11 and 12 operate distributively by reference to other provisions of Pt 2. That distributive operation of ss 11 and 12 has significance for the issues to be determined by the Court.

8. Questions 1 and 3 of the ASC concern the validity of ss 11 and 12 of the Act in all of their operations.[3] However, the facts and documents in the ASC are insufficient to enable the Court to be satisfied that "there exists a state of facts which makes it necessary" to decide Questions 1 and 3, at least in the broad terms in which they are framed, "in order to do justice in the given case and to determine the rights of the parties".[4]

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1 *Knight v Victoria* (2017) 261 CLR 306 (***Knight***) at [33] (the Court); *Brown v Tasmania* (2017) 261 CLR 328 (***Brown***) at [170] (Gageler J); *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 (***Mineralogy***) at [59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), [99] (Edelman J).

2 *Knight* (2017) 261 CLR 306 at [33] (the Court).

3 Those questions reflect the primary relief sought by the Plaintiffs, namely that both sections are wholly invalid: Statement of Claim at [27(a)] (SCB 14).

4 *Mineralogy* (2021) 95 ALJR 832 at [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ). See also *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432 at [21] (the Court); *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490 (***LibertyWorks***) at [90] (Kiefel CJ, Keane and Gleeson JJ).

9. The relevant facts stated in the ASC are:

9.1 The First Plaintiff has engaged in activity that purportedly contravenes ss 11 and 12 of the Act.[5]

9.2 In the future, the First Plaintiff may engage in activity that is a purported contravention of ss 11 and 12 of the Act.[6]

9.3 The Second Plaintiff, who is also a director of the First Plaintiff,[7] has engaged in activity that purportedly contravenes ss 8, 11 and 12 of the Act.[8]

9.4 In the future, the Second Plaintiff intends to engage in activity that is a purported contravention of ss 11 and 12 of the Act.[9]

10 10. The facts summarised above do not identify, with precision, the "activity" engaged in by the Plaintiffs in the past (or which they intend to engage in in the future) that has amounted (or will amount) to a purported contravention of ss 11 or 12. Nor do they identify, with precision, the activity of any person that has amounted (or will amount) to a contravention of Pt 2 that is capable of providing the foundation for an offence against ss 11 or 12.[10]

11. In theory, it might be possible for the Court to overcome that difficulty by drawing such inferences of fact or law as might have been drawn from the facts stated and the documents identified in the ASC had they been proved at trial.[11] Numerous documents are annexed to the ASC, which the parties rely upon "for their full meaning and effect".[12] Most relevantly, the documents include an affidavit from Ms Kiss, a director of the First 20 Plaintiff,[13] and an affidavit from the Second Plaintiff. However, the Plaintiffs have not identified any inferences that they contend the Court should draw from that documentary material. Rather, their written submissions proceed on the basis that they are entitled to challenge ss 11 and 12 in all of their operations, merely because New South Wales has

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5 ASC [10] (SCB 30).

6 ASC [11] (SCB 30).

7 ASC [6(c)] (SCB 30).

8 ASC [14] (SCB 30). Relatedly, the Second Plaintiff was previously charged under ss 8(1)(a) and 11 of the Act. Those charges were dismissed on the basis that the Attorney-General had not given permission to institute the proceedings, under s 56 of the Act: ASC [18] (SCB 30).

9 ASC [15] (SCB 30).

30 10 Cf *Mineralogy* (2021) 95 ALJR 832 at [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

11 *High Court Rules 2004* (Cth) r 27.08.5.

12 ASC [1] (SCB 28).

13 Kiss Affidavit at [1] (SCB 99).

conceded the Plaintiffs have standing (**PS [38]**). They point also to *Croome v Tasmania*[14] to contend that their intention regarding future activities is sufficient to demonstrate they have a "sufficient interest" in the relief sought (**PS [38]**). But *Croome* serves only to highlight the imprecision of the facts stated in the ASC. There, each of the plaintiffs alleged that they "had sexual relations (including sexual intercourse) with each other, and intends to continue to have, sexual relations (including sexual intercourse) with male persons".[15] The plaintiffs in that case thus pleaded, with appropriate precision, that they intended to engage in specific conduct, being conduct that was capable of constituting the impugned criminal offences.[16] In contrast, the facts stated in the ASC are framed only by reference to an intention to engage in unspecified "activity", which is not linked to any stated facts relating to an underlying contravention of Pt 2.

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12. In the circumstances, the Court ought to adopt a "cautious and restrained approach to answering questions agreed by the parties in a special case".[17] On that approach, the Court ought to consider the validity of ss 11 and 12 only in so far as those sections operate by reference to a contravention of s 8 (see **DS [5]**). It is open to the Court to take that approach in this case. There are no "unusual features", "good reasons" or other considerations that favour a "broader adjudication" in the circumstances of this case.[18]

13. The stated fact set out at paragraph 9.3 above appears to provide a sufficient basis for the Court to proceed in that way, at least when read together with the matters set out at **DS [6]**. That fact at least expressly refers to a purported contravention of s 8 by the Second Plaintiff in combination with purported contraventions of ss 11 and 12 (although it is not at all clear that the purported contravention of s 8 is related to, as opposed to completely independent of, the purported contraventions of ss 11 and 12). In contrast, none of the stated facts in the ASC suggest that a contravention of any other provision of Pt 2 is relevant to the application of ss 11 and 12 to the Plaintiffs (see **DS [6]-[8]**).

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[14] (1997) 191 CLR 119 (***Croome***) at 125 (Brennan CJ, Dawson and Toohey JJ).

[15] *Croome* (1997) 191 CLR 119 at 123. Contrary to what is suggested by **PS [38]**, three judges in *Croome* considered that Tasmania's concession of the plaintiffs' standing was properly made by reference to the plaintiffs' past conduct, "not by reason of their intention to engage in conduct of the kind pleaded": at 127 (Brennan CJ, Dawson and Toohey JJ).

[16] See *Croome* (1997) 191 CLR 119 at 129 (Gaudron, McHugh and Gummow JJ). Cf *Kuczborski v Queensland* (2014) 254 CLR 51 at [151] (Crennan, Kiefel, Gageler and Keane JJ).

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[17] *Mineralogy* (2021) 95 ALJR 832 at [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[18] See *Clubb v Edwards* (2019) 267 CLR 171 (***Clubb***) at [36]-[40] (Kiefel CJ, Bell and Keane JJ); *Private R v Cowen* (2020) 94 ALJR 849 at [107] (Gageler J), [158]-[159] (Edelman J); *Mineralogy* (2021) 95 ALJR 832 at [101]-[104] (Edelman J).

C THE ELEMENTS OF SECTIONS 11 AND 12

14. Before assessing the constitutional validity of a law, it is necessary to identify its proper construction.[19] Statutory offence provisions are to be construed in accordance with ordinary rules of statutory construction.[20] "The starting point for ascertainment of the meaning of a statutory provision is, of course, the text of the provision considered in light of its context and purpose".[21]

15. The statutory context includes the general principles of criminal responsibility,[22] including the principle that a fault element is essential in every statutory offence unless it has been excluded on a proper construction of the statute.[23] In particular, there is a presumption that the accused must be shown to have done the physical act of the offence voluntarily and with the intention of doing an act of the kind proscribed.[24] There is also a presumption that, where an external element of an offence is a circumstance attendant on the doing of the physical act, a fault element is to be implied as to the existence of that circumstance.[25] The ordinary presumption (at common law)[26] is that the accused must have known the circumstance which makes the doing of the act an offence.[27]

C.1 Section 11

16. The external elements of the s 11(1) offence are, relevantly:

16.1 the act of publishing or communicating to another person a record or report of the carrying on of an activity; and

16.2 the attendant circumstance that the matter published or communicated came to the accused's knowledge as a direct or indirect result of the use of an optical surveillance device in contravention of s 8.

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[19] See, eg, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [11] (Gummow, Hayne, Heydon and Kiefel JJ).

[20] *Aubrey v The Queen* (2017) 260 CLR 305 at [39] (Kiefel CJ, Keane, Nettle and Edelman JJ).

[21] *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at [20] (Kiefel CJ, Bell and Nettle JJ). See also at [41] (Gageler J); *R v A2* (2019) 269 CLR 507 at [33], [37] (Kiefel CJ and Keane J), [124] (Bell and Gageler JJ), [163] (Edelman J).

[22] See *CTM v The Queen* (2008) 236 CLR 440 at [5] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

[23] *He Kaw Teh v The Queen* (1985) 157 CLR 523 (***He Kaw Teh***) at 528-529 (Gibbs CJ; Mason J agreeing), 565-568, 582 (Brennan J), 590-591 (Dawson J).

[24] *He Kaw Teh* (1985) 157 CLR 523 at 582 (Brennan J).

[25] *He Kaw Teh* (1985) 157 CLR 523 at 570-571 (Brennan J).

[26] Under the *Criminal Code* (Cth) s 5.6(2), the default fault element for a circumstance is recklessness.

[27] *He Kaw Teh* (1985) 157 CLR 523 at 570-571, 582 (Brennan J).

17. Section 11(1) does not expressly specify any fault elements for either of those external elements.[28] Nevertheless, applying the general principles of criminal responsibility summarised in paragraph 15 above:

17.1 the act of publishing or communicating must be accompanied by an intention to do that act;[29] and

17.2 the attendant circumstance that the matter published or communicated came to the accused's knowledge as a direct or indirect result of the use of an optical surveillance device in contravention of s 8 likewise has a fault element (leaving aside for the moment the question what that element is).

18. The Plaintiffs deny that s 11(1) has *any* fault element (**PS [26]-[27]**). However, because the Plaintiffs do not squarely acknowledge that s 11(1) has two distinct external elements (cf **PS [20]**), it is unclear whether they mean to deny that a fault element attaches to the act of publishing or communication. The Plaintiffs instead focus on whether a fault element attaches to the attendant circumstance. Two points can be made with respect to the Plaintiffs' submissions on that issue.

19. *First*, the Plaintiffs do not acknowledge that the starting presumption is that a fault element will attach to an external element that is an attendant circumstance (**PS [26]**). The Plaintiffs must identify a legislative intention to displace that presumption (see **DS [47]**). They have not even attempted that task.

20. *Second*, "knowledge" is the default fault element for an attendant circumstance. Here, as indicated by New South Wales, the relevant fault element may be "knowledge" or "recklessness" (see **DS [48]**). Which of those fault elements is ultimately to be implied will depend on "which is more consonant with the fulfilment of the purpose of the statute",[30] as ascertained through the ordinary process of statutory construction.[31] New South Wales also raise the possibility that the process may indicate that no fault element attaches to the attendant circumstance, but that the accused can advance the existence of an honest and reasonable belief that the attendant circumstance is such that the doing of

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[28] The reference to the published matter "com[ing] to the person's knowledge" (as opposed, for example, to "coming into the person's possession") appears to be cast so as to capture both physical records and intangible information. As such, it does not specify a fault element.

[29] *He Kaw Teh* (1985) 157 CLR 523 at 582 (Brennan J).

[30] *He Kaw Teh* (1985) 157 CLR 523 at 582 (Brennan J).

[31] *He Kaw Teh* (1985) 157 CLR 523 at 582 (Brennan J).

the act is innocent.[32] However that question is resolved (which it is really for New South Wales to address), it is plain enough that the extreme position advanced by the Plaintiffs in an attempt to maximise the burden imposed by s 11 should not be accepted.

C.2 Section 12

21. The external element of the s 12(1) offence is, relevantly, possessing a record of the carrying on of an activity. The concept of possession imports a requirement that the accused know that the record is within the accused's custody or control.[33] Section 12(1) expressly provides that the fault element for the offence is knowledge that the record had been obtained, directly or indirectly, by the use of an optical surveillance device in contravention of Pt 2.[34] So much appears to be accepted by the Plaintiffs (**PS [33]**).

D VALIDITY OF SECTIONS 11 AND 12

22. The implied freedom of political communication is a qualified limitation on legislative power to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors".[35] It extends only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the Constitution.[36]

23. Whether a particular legislative restriction or limitation infringes the implied freedom is to be answered by: *first*, determining whether the restriction or limitation places an "effective burden" upon political communication; and *second*, determining whether that burden is "justified".[37] The question of "justification" involves both an identification of the purpose of the law, and an assessment of whether the law is "proportionate" (or "reasonably appropriate and adapted") to achieve that purpose.[38] A law will be proportionate if it is "suitable", "necessary" and "adequate in its balance".[39]

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[32] *He Kaw Teh* (1985) 157 CLR 523 at 533 (Gibbs CJ; Mason J agreeing), 562-563 (Wilson J), 582 (Brennan J), 591-592 (Dawson J).

[33] *He Kaw Teh* (1985) 157 CLR 523 at 537-539 (Gibbs CJ), 589 (Brennan J), 599 (Dawson J).

[34] The Commonwealth takes no position on whether the knowledge required is knowledge of the underlying facts that would make the use of the optical surveillance device a contravention of the Act, or whether it is knowledge that a contravention of the Act has occurred. As to the latter possibility see *Hill v Donohoe* (1911) 13 CLR 224 at 227 (Griffith CJ; Barton and O'Connor JJ agreeing), which Parliament reversed by enacting s 233B(1A) of the *Customs Act 1901* (Cth).

[35] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 560 (the Court).

[36] *Comcare v Banerji* (2019) 267 CLR 373 (***Banerji***) at [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

[37] See *Lange* (1997) 189 CLR 520 at 567-568 (the Court); *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at [5], [69] (French CJ, Kiefel, Bell and Keane JJ), [130]-[131] (Gageler J).

[38] *Lange* (1997) 189 CLR 520 at 562 (the Court); *LibertyWorks* (2021) 95 ALJR 490 at [45]-[46] (Kiefel CJ, Keane and Gleeson JJ), [93] (Gageler J).

[39] See, eg, *Clubb* (2019) 267 CLR 171 at [5]-[6] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks* (2021) 95 ALJR

D.1 Effective burden

24. The question of whether and to what extent a law imposes an "effective burden" on political communication is a critical first step in the analysis. The answer to that question does not depend upon a "quantitative" analysis about whether the law imposes a "big" or a "little" burden.[40] It is a "qualitative" question to be answered by reference to the legal and practical operation of the law.[41] The question is to be answered "yes" if the "effect of the law is to prohibit, or put some limitation on, the making or the content of political communications".[42] In that event, "the supervisory role of the courts is engaged to consider the justification for that restriction".[43] That is why the *extent* of the burden is "not relevant to the threshold question as to whether justification is required".[44]

25. Nevertheless, the *extent* of the burden must be examined because the burden step in the analysis is "more than a box to be ticked".[45] A slight burden will be more readily justified than a substantial one.[46] Indeed, the extent of the burden will often — as it does in this case — "assume some importance when considering what has to be justified and the questions to be addressed in that process".[47]

26. The question of whether a law imposes an effective burden on the freedom requires consideration of whether and how the impugned law affects political communication generally, rather than how the law applies to political communication in which a plaintiff wishes to engage.[48] That focus reflects the nature of the freedom. As McHugh J

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490 at [46] (Kiefel CJ, Keane and Gleeson JJ), [93] (Gageler J), [134] (Gordon J), [200] (Edelman J), [247] (Steward J).

40 *Monis v The Queen* (2013) 249 CLR 92 (***Monis***) at [172]-[173] (Hayne J).

41 *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at [200] (Keane J); *Brown* (2017) 261 CLR 328 at [84], [118] (Kiefel CJ, Bell and Keane JJ), [180] (Gageler J), [237] (Nettle J), [316], [326] (Gordon J), [484]-[488] (Edelman J); *Clubb* (2019) 267 CLR 171 at [163] (Gageler J), [358] (Gordon J).

42 *Monis* (2013) 249 CLR 92 at [108] (Hayne J); *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions No 1***) at [119] (Keane J).

43 *McCloy* (2015) 257 CLR 178 at [127] (Gageler J). See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50 (Brennan J).

44 *LibertyWorks* (2021) 95 ALJR 490 at [63] (Kiefel CJ, Keane and Gleeson JJ). See also *Brown* (2017) 261 CLR 328 at [127] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595 (***Unions No 2***) at [162] (Edelman J).

45 *McCloy* (2015) 257 CLR 178 at [127] (Gageler J). See also *Brown* (2017) 261 CLR 328 at [237] (Nettle J); *LibertyWorks* (2021) 95 ALJR 490 at [209]-[210] (Edelman J).

46 *Brown* (2017) 261 CLR 328 at [118] (Kiefel CJ, Bell and Keane JJ), [164] (Gageler J), [291] (Nettle J), [478] (Gordon J).

47 *LibertyWorks* (2021) 95 ALJR 490 at [63] (Kiefel CJ, Keane and Gleeson JJ), see also at [94] (Gageler J), [136] (Gordon J); *Banerji* (2019) 267 CLR 373 at [38] (Kiefel CJ, Bell, Keane and Nettle JJ), [161] (Gordon J).

48 *Unions No 1* (2013) 252 CLR 530 at [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *LibertyWorks* (2021) 95 ALJR 490 at [77] (Kiefel CJ, Keane and Gleeson JJ), [135] (Gordon J).

explained in *Levy v Victoria*, "our Constitution does not create rights of communication",[49] but rather "gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters".[50] The reference to a "right or privilege" must be understood against the background that, under our common law system, persons have the "right" to do anything that is not prohibited or regulated by statute or the general law.[51]

27. That background provides the explanation for why political communications protected by the implied freedom are *not* limited to those in which persons "have some pre-existing legally enforceable right to engage".[52] But it also provides the explanation for why "an impugned law cannot have the effect of constraining the ability of persons to engage in a form of political communication if those persons would be prohibited by some other valid law from engaging in that form of political communication in any event".[53] The implied freedom "is a freedom to communicate by lawful means, not a licence to do what is otherwise unlawful".[54]

28. It follows that if an unchallenged[55] statutory provision restricts the ability of a person to engage in a particular form of political communication, and that restriction overlaps with the restriction imposed by the impugned law, the burden on political communication that must be justified will be reduced accordingly, for all that need be justified is any burden that is *additional* to that arising from the overlapping but unchallenged provision.[56]

29. Similarly, if the capacity for people to engage in particular forms of political communication is restricted by the general law (including, for example, the law of trespass, or breach of confidence), it is only any additional burden resulting from the

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[49] (1997) 189 CLR 579 at 622. See more recently *LibertyWorks* (2021) 95 ALJR 490 at [44] (Kiefel CJ, Keane and Gleeson JJ).

[50] (1997) 189 CLR 579 at 622 (McHugh J). See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [107] (McHugh J), [184] (Gummow and Hayne JJ), [337] (Callinan J), [354] (Heydon J).

[51] *Brown* (2017) 261 CLR 328 at [186] (Gageler J), [557]-[558] (Edelman J). See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [188] (Gummow and Hayne JJ), explaining that the licensing scheme in force at the time *ACTV* was decided "restricted what otherwise was the freedom under the common law to transmit broadcasting and television programmes to the general public" and that it was that regime that was extended by the law held invalid in *ACTV*. On that analysis, the relevant burden was upon the "broadcasters' freedom to broadcast": at [190], see also at [111] (McHugh J), [354], [356] (Heydon J).

[52] *Brown* (2017) 261 CLR 328 at [186] (Gageler J).

[53] *Brown* (2017) 261 CLR 328 at [186] (Gageler J).

[54] *Brown* (2017) 261 CLR 328 at [259] (Nettle J), [557]-[558] (Edelman J).

[55] *Brown* (2017) 261 CLR 328 at [561] (Edelman J).

[56] *Brown* (2017) 261 CLR 328 at [259] (Nettle J), [304], [357], [411], [420] (Gordon J).

impugned law that need be justified.[57] Of course, the general law must conform with the Constitution and be developed consistently with it.[58] But this is not a case where the Plaintiffs contend for the development of the general law in that way.

30. Ultimately, what is relevant is the extent to which the effect of the impugned law is to prohibit, or put some limitation on, the making or the content of political communications. It is therefore "logical to approach the burden which a statute has on the freedom by reference to what [persons] could do were it not for the statute".[59] Adopting that approach, the relevant burden in any given case "lies in the incremental effect of [the impugned law] on the real-world ability of a person or persons to make or to receive" political communications.[60] It is that "incremental burden" that requires "justification".[61]

10 ***D.1.1 Section 11***

31. Section 11(1) prohibits communications made in certain circumstances. In some cases those communications may be "political" in the requisite sense. It can therefore be accepted that the provision imposes a burden on political communication. That is sufficient to answer the first question "yes".

32. What is the extent of that burden? The starting point is to recognise that an offence against s 11(1), in its operation with s 8, may only be committed if the matter published or communicated came to the accused's knowledge as a direct or indirect result of the use of an optical surveillance device in contravention of s 8 (see paragraph 16.2 above). Relevantly for present purposes, for there to be a contravention of s 8, there must have
20 been "entry onto or into the premises … without the express or implied consent of the owner or occupier of the premises" (s 8(1)(a)). Accordingly, conduct in contravention of s 8(1)(a) would generally constitute trespass to real property at common law.[62]

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[57] *Brown* (2017) 261 CLR 328 at [379]-[380], [391]-[393] (Gordon J), [556]-[563] (Edelman J); *Levy v Victoria* (1997) 189 CLR 579 at 625-626 (McHugh J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [107]-[108] (McHugh J), [184] (Gummow and Hayne JJ), [337] (Callinan J), [354] (Heydon J).

[58] *Lange* (1997) 189 CLR 520 at 565, 568 (the Court); *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at [43]-[45] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Monis* (2013) 249 CLR 92 at [103] (Hayne J); *Brown* (2017) 261 CLR 328 at [188] (Gageler J), [380], [424] (Gordon J), [563] (Edelman J).

[59] *Brown* (2017) 261 CLR 328 at [109] (Kiefel CJ, Bell and Keane JJ), see also at [181] (Gageler J), [392]
30 (Gordon J).

[60] *Brown* (2017) 261 CLR 328 at [188] (Gageler J).

[61] *Brown* (2017) 261 CLR 328 at [397], [411], [419] (Gordon J).

[62] See *Coco v The Queen* (1994) 179 CLR 427 at 435-436 (Mason CJ, Brennan, Gaudron and McHugh JJ).

33. That is critical to the extent of the burden arising from s 11, because the ability of a person to publish information that is obtained as a direct or indirect result of a trespass may, at least in some circumstances, be restricted by the general law. That law is still developing. It is not necessary to chart its metes and bounds in this case. It is sufficient to observe that the following views have been expressed:

33.1 Private activities, recorded in consequence of a trespass, may have the necessary quality of "confidence" such that their publication could be restrained by reference to the law of breach of confidence.[63] If that is correct, "[t]here would be an obligation of confidence upon the persons who obtained [those records], and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained".[64]

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33.2 One line of authority seems to "decide that the jurisdiction to grant an injunction against trespass extends to granting an injunction against the products of trespass. Thus, where trespassers intrude on one's property and take films in the process, the jurisdiction extends to restraining the publication of those films, whether or not they constitute a breach of any duty of confidence".[65]

33.3 Principles of copyright law may operate to restrain publication of a record made in circumstances "involving the invasion of the legal or equitable rights of the plaintiff or a breach of the obligations of the maker to the plaintiff".[66]

34. On any of those views, there is an overlap (and perhaps considerable overlap) between

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the prohibition in s 11(1) as it applies to contraventions of s 8 and constraints imposed by the general law. That reduces the burden on political communication imposed by s 11. The extent of the "effective burden" imposed by s 11(1), in its operation with s 8, is therefore less than a literal reading of the provision suggests.

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63 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (***Lenah Game Meats***) at [39], [52]-[53] (Gleeson CJ), citing the example of *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570, see also at [104] (Gummow and Hayne JJ); *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 (***Smethurst***) at [88] (Kiefel CJ, Bell and Keane JJ).

64 *Lenah Game Meats* (2001) 208 CLR 199 at [39] (Gleeson CJ).

65 Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, 2015) at [21-110], citing *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 and *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169. See also *Smethurst* (2020) 94 ALJR 502 at [196] (Gordon J).

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66 See *Lenah Game Meats* (2001) 208 CLR 199 at [102]-[103] (Gummow and Hayne JJ). See also *Smethurst* (2020) 94 ALJR 502 at [84] (Kiefel CJ, Bell and Keane JJ).

D.1.2 Section 12

35. Section 12 in its terms does not place any constraint on communications. Rather, the Plaintiffs appear to submit that s 12 burdens political communication because possession of a relevant record is a precursor to communication of that record (**PS [35]**).

36. That being so, the burden imposed by s 12 on political communication cannot rise above the burden imposed by s 11. Further, the prohibition in s 12 is narrower than the prohibition in s 11 because s 12 applies only to the possession of a record of the carrying on of an activity; it does not extend to possession of a report of such an activity. Section 12 therefore does not impose any burden that requires justification separately from that arising from s 11.

D.2 Legitimate purpose

37. The purpose of the impugned provisions is the "mischief" to which they are directed.[67] It is discerned through ordinary processes of statutory construction, having regard to text, context and, if relevant, the historical background of the impugned provisions.[68]

38. Where legislation includes an express statement of its objects, identification of legislative purpose starts with the objects so stated.[69] Here, s 2A(c) relevantly provides that one of the objects of the Act is "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".[70] Sections 7 to 10 directly implement this object by creating prohibitions that regulate the installation, use and maintenance of listening devices, optical surveillance devices, tracking devices and data surveillance devices. Sections 11 and 12 then further that object by proscribing conduct that would otherwise magnify the impact on privacy that might result from contraventions of ss 7 to 10.

39. Part 2 of the Act had its genesis in Pt 2 of the *Listening Devices Act 1984* (NSW). In the second reading speech to the Listening Devices Bill 1984 (NSW), the Attorney-General stated that the Bill would "establish safeguards against the unjustified invasion of

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[67] *Brown* (2017) 261 CLR 328 at [101] (Kiefel CJ, Bell and Keane JJ), [208]-[209] (Gageler J), [321] (Gordon J); *Clubb* (2019) 267 CLR 171 at [257] (Nettle J); *Unions No 2* (2019) 264 CLR 595 at [171] (Edelman J); *LibertyWorks* (2021) 95 ALJR 490 at [183] (Gordon J).

[68] *Brown* (2017) 261 CLR 328 at [96] (Kiefel CJ, Bell and Keane JJ), [208] (Gageler J); *Unions No 2* (2019) 264 CLR 595 at [171] (Edelman J).

[69] *Unions No 2* (2019) 264 CLR 595 at [79] (Gageler J), [172] (Edelman J).

[70] The objects in s 2A(a) and (b) relate to other components of the Act and can be set aside for present purposes: cf **PS [48]-[49]**.

privacy" and that "[p]eople should not be expected to live in the fear that every word they speak may be transmitted or recorded and later repeated to the entire world".[71] In respect of what became s 8 of the *Listening Devices Act 1984* (NSW) – which was the predecessor to s 12 of the Act – the Attorney-General stated that it was "included to fill the significant gap that would be left in the law if it could not successfully prosecute those who have committed a serious offence and effectively destroyed all evidence of its commission, save for the possession of the very thing the crime intended to obtain".[72]

40. Part 2 of the Act replaced the offences in Pt 2 of the *Listening Devices Act 1984* (NSW) with new offences extending to a greater range of surveillance devices.[73] However, the purpose of the offences remained essentially the same. The purpose of ss 11 and 12 is thus to ensure that the privacy of individuals is not unjustifiably impinged by the unlawful use of surveillance devices. Section 11 pursues this purpose by, relevantly, prohibiting the sharing of records or reports of activities obtained from the unlawful use of surveillance devices. Section 12 pursues this purpose by facilitating the enforcement of the unchallenged provisions in Pt 2.

41. The protection of the privacy of the people of New South Wales is plainly a legitimate purpose.[74] So much is accepted by the Plaintiffs (**PS [51], [53]**).

42. The Plaintiffs assert that ss 11 and 12 pursue two additional purposes. The *first* is the dissuasion of farm trespass (**PS [55]**). The *second* is to "gag" communication about agricultural practices, outside of the farm trespass context (**PS [56]**). These submissions incorrectly elide purpose with effect.[75] There is nothing in either ss 11 and 12, or in the Act as a whole, that focuses upon, or even refers to, farm trespass or the discussion of agricultural practices. The trespassory installation, use or maintenance of optical surveillance devices is prohibited by s 8 in terms that are wholly unrelated to the purpose of the trespass. The Plaintiffs rely upon the fact that, in 2020, a Working Group established by the New South Wales government gave consideration to the insertion of a public interest exemption for unauthorised filming or surveillance into the Act, but did not endorse that course on the grounds that it risked encouraging farm trespass

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[71] Hansard, New South Wales Legislative Assembly (17 May 1984) at 1092 (SCB 598).

[72] Hansard, New South Wales Legislative Assembly (17 May 1984) at1094 (SCB 600).

[73] Hansard, New South Wales Legislative Assembly (6 November 2007) at 3579 (SCB 605).

[74] See *Clubb* (2019) 267 CLR 171 at [60] (Kiefel CJ, Bell and Keane JJ), [258]-[259] (Nettle J).

[75] *Brown* (2017) 261 CLR 328 at [100] (Kiefel CJ, Bell and Keane JJ).

(**PS [57]-[58]**).[76] However, a recent decision *not* to make an amendment to the Act cannot be used to determine the purpose of statutory provisions that were enacted over a decade previously. The Plaintiffs point to no authority to suggest otherwise. The Plaintiffs' argument for a "dynamic identification" of the purpose of the impugned provisions (**PS [52]**) should be rejected.

43. In the face of an express statement of statutory objects, an additional object that is not only unexpressed, but also constitutionally impermissible, should not lightly be inferred.[77] That is all the more so when there is nothing in the text, context or historical background of the Act to support the existence of the alleged additional object.

D.3 Proportionate or reasonably appropriate and adapted

D.3.1 Suitability

44. There is plainly a rational connection[78] between the measures adopted by ss 11 and 12 and the purpose of ensuring that the privacy of individuals is not unjustifiably impinged by the unlawful use of surveillance devices. This appears to be accepted by the Plaintiffs (**PS [64]**).

D.3.2 Necessity

45. The necessity enquiry does not deny that it is the role of the legislature to select the means by which a legitimate statutory purpose may be achieved;[79] it is not a prescription to engage in an assessment of the relative merits of competing legislative models.[80] There is a "domain of selections" that may fulfil the legislative purpose while imposing a permissible burden on the implied freedom.[81] Consequently, a law is not ordinarily to be regarded as unnecessary unless there is an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom.[82]

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[76] Referring to ASC [37]-[39] (SCB 33).

[77] *Unions No 2* (2019) 264 CLR 595 at [79] (Gageler J).

[78] *Banerji* (2019) 267 CLR 373 at [33] (Kiefel CJ, Bell, Keane and Nettle JJ).

[79] *McCloy* (2015) 257 CLR 178 at [82] (French CJ, Kiefel, Bell and Keane JJ); *Unions No 2* (2019) 264 CLR 595 at [47] (Kiefel CJ, Bell and Keane JJ).

[80] *Brown* (2017) 261 CLR 328 at [282], [286] (Nettle J).

[81] *McCloy* (2015) 257 CLR 178 at [82] (French CJ, Kiefel, Bell and Keane JJ); *Unions No 2* (2019) 264 CLR 595 at [47] (Kiefel CJ, Bell and Keane JJ), [113] (Nettle J); *LibertyWorks* (2021) 95 ALJR 490 at [202] (Edelman J).

[82] *Banerji* (2019) 267 CLR 373 at [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

46. An alternative will not be "equally practicable" unless it is "as capable of fulfilling [the] purpose as the means employed by the impugned provision, 'quantitatively, qualitatively, and probability-wise'".[83] Further, where the burden imposed by the impugned provisions is small, logically it may be difficult or impossible for a plaintiff to establish that an alternative imposes a significantly lesser burden.

47. In support of their argument that ss 11 and 12 are unnecessary, the Plaintiffs refer to the statutory regimes regulating surveillance devices in Victoria, the Northern Territory, South Australia, Western Australia and Queensland as "equally practical and available" alternatives (**PS [66]-[70]**). These statutory regimes underscore that there may be numerous reasonable means from which the legislature can select when seeking to achieve the same legitimate purpose.[84] To say that is simply to acknowledge that the implied freedom accommodates some latitude for parliamentary choice in the implementation of public policy.[85] The latitude is demonstrated by the significantly different approaches to the regulation of the installation, use or maintenance of optical surveillance devices in the various jurisdictions. The provisions in Victoria,[86] the Northern Territory[87] and Western Australia[88] prohibit the recording (etc) of a "private activity";[89] thus, the limitation in those jurisdictions is placed on the nature of the activity recorded, rather than (as under s 8 of the Act) on the circumstances in which the recording is made. Adopting a different approach again, the South Australian prohibitions[90] do not apply to the use, in the public interest, of an optical surveillance device to record the carrying on of a private activity.[91] As the Plaintiffs do not contend that s 8 of the Act is invalid having regard to the alternative approaches adopted in other States and Territories, it is not necessary to examine those approaches.

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83 *Tajjour* (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ).

84 See *Unions No 2* (2019) 264 CLR 595 at [113] (Nettle J).

85 *LibertyWorks* (2021) 95 ALJR 490 at [202] (Edelman J).

86 *Surveillance Devices Act 1999* (Vic) s 7.

87 *Surveillance Devices Act 2007* (NT) s 12.

88 *Surveillance Devices Act 1998* (WA) s 6.

89 Defined respectively in *Surveillance Devices Act 1999* (Vic) s 3(1), *Surveillance Devices Act 2007* (NT) s 4 and *Surveillance Devices Act 1998* (WA) s 3.

90 *Surveillance Devices Act 2016* (SA) s 5.

91 *Surveillance Devices Act 2016* (SA) s 6(2)(a).

48. In essence, it appears that the Plaintiffs contend for the following alternatives to ss 11 and 12 (**PS [71]**):

48.1 In respect of s 11 — a provision with a public interest exception, as exists in Victoria[92] and the Northern Territory,[93] or that permits publication on order of a judge, as in South Australia[94] (**PS [66.5(i)], [67.2], [68.4]**).

48.2 In respect of s 12 — the removal of the prohibition altogether, since such a prohibition does not exist in Victoria (**PS [66.5(ii)]**).

49. The public interest exception in Victoria[95] and the Northern Territory[96] is a carve-out to a broader prohibition on the publication or communication of any record or report of a private conversation or private activity made as a result of the use of a surveillance device. Importantly, that prohibition applies regardless of whether the record or report was the result of a *lawful* or *unlawful* use of a surveillance device. Those prohibitions do not, as the Plaintiffs suggest (**PS [76]-[77]**), only impose a burden upon law enforcement: lawfully obtained surveillance device material under the Victorian and Northern Territory regimes includes, for example, material recorded with consent.[97] By applying to records or reports that are the result of both lawful and unlawful use of a surveillance device, the Victorian and Northern Territory prohibitions impose a burden of prima facie greater extent on political communication than s 11 of the Act. The public interest exception in the Victorian and Northern Territory legislation must be evaluated in the context of that prima facie greater burden. The exception alleviates, to some extent, that prima facie greater burden. That illustrates that the effect of the public interest exception in Victoria and the Northern Territory must be assessed in the context of the prohibitions to which they are exceptions, being prohibitions that do not purport to have distinct operations with respect to lawfully and unlawfully obtained surveillance device material (cf **PS [73]-[77]**; see **DS [71]**).

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92 *Surveillance Devices Act 1999* (Vic) s 11(2)(b)(i).

93 *Surveillance Devices Act 2007* (NT) s 15(2)(b)(i).

94 *Surveillance Devices Act 2016* (SA) ss 10-11.

95 *Surveillance Devices Act 1999* (Vic) s 11(2)(b)(i).

96 *Surveillance Devices Act 2007* (NT) s 15(2)(b)(i).

97 *Surveillance Devices Act 1999* (Vic) ss 6(1), 7(1); *Surveillance Devices Act 2007* (NT) ss 11(1)(b), 12(1)(b).

50. In South Australia, the regime prohibits the communication of material derived from the unlawful use of a surveillance device,[98] but permits a person to apply to a judge for an order authorising the communication of that material.[99] Except in accordance with such an order, a person must not knowingly communicate material derived from an optical surveillance device in circumstances where the device was used in the public interest. The provision relied upon by the Plaintiffs only applies where the use of the optical surveillance device is not unlawful because of a public interest exception. Section 8 does not include such an exception, yet the Plaintiffs do not challenge the validity of s 8 on that basis.

51. The above analysis demonstrates that the Victorian, Northern Territory and South Australian prohibitions on communication are not directly comparable with s 11. Each of the statutory regimes have different emphases in seeking to achieve the same legitimate purpose of protecting privacy while having regard to the potential burden on communications. None of these regimes are obvious or compelling alternatives to the others.

52. Turning to s 12, it is a response to a lacuna in the law identified by the legislature as undermining the effectiveness of ss 7 to 10.[100] Given this, the complete removal of s 12 cannot be said to be an "equally practicable" alternative, for in that event the lacuna would remain, and the Act would not be "quantitatively, qualitatively, and probability-wise" as capable of fulfilling its legitimate purpose.

53. The Plaintiffs' assertion that a public interest exception would result in a significantly lesser burden on the implied freedom also does not take into account the limited manner in which a public interest exception would operate. The Plaintiffs appear to assume that political communications would fulfil a "public interest" test. However, in the context of ss 11 and 12 (which, of course, are engaged by the *unlawful* use of optical surveillance devices), the notion of the "public interest" would necessitate a balancing of numerous interests including the protection of privacy and property rights, the need to uphold the law,[101] and the goals or purposes of publication. The circumstances in which the public

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98 *Surveillance Devices Act 2016* (SA) s 12.

99 *Surveillance Devices Act 2016* (SA) s 11.

100 See at paragraph 39 above.

101 Compare *Kadir v The Queen* (2020) 267 CLR 109 at [37] (the Court).

interest exception may apply, or in which a judge may make an order to permit the communication of material obtained as a result of the unlawful use of a surveillance device, would probably be very constrained.[102]

D.3.3 Adequacy in balance

54. A law is to be regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by the adverse effect on the implied freedom.[103] The hurdle imposed by this step in the structured proportionality analysis is very high.[104]

55. The Plaintiffs focus on the specific context of animal rights activism to submit that the adverse effect on the implied freedom is significant (**PS [82]-[85]**). That focus is misplaced. The "balance" to be struck is between the "effective burden" imposed by the law on the one hand, and the benefit sought to be achieved by the law on the other.

56. In this case, the effective burden is the incremental effect of the impugned provisions in the context of existing general law constraints on publication. Further, as explained at paragraph 26 above, that burden is to be assessed by reference to the effect on political communication generally, rather than by reference to specific cases — such as those involving animal rights activists. Specific cases may provide an illustration of how the law burdens the freedom, but they are no more than illustrations.[105] The Plaintiffs' submissions do not address at all how the incremental burden on political communication that may exist in cases where ss 11 or 12 happen to apply to political communication outweighs — let alone manifestly outweighs — the legitimate purpose of protecting the privacy of individuals from publication of the product of the unlawful use of surveillance devices. In those circumstances, ss 11 and 12, in their operation with s 8, are adequate in their balance (see **DS [84]**).

57. For completeness, the Plaintiffs' reliance upon *Kadir v The Queen*[106] (**PS [84]**) is misplaced. There, this Court unanimously held that the unlawfully obtained surveillance evidence in issue in that case was inadmissible.

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[102] See *Australian Broadcasting Corporation v SAWA Pty Ltd* [2018] WASCA 29.

[103] *Banerji* (2019) 267 CLR 373 at [38] (Kiefel CJ, Bell, Keane and Nettle JJ); *LibertyWorks* (2021) 95 ALJR 490 at [85] (Kiefel CJ, Keane and Gleeson JJ), [201] (Edelman J).

[104] *LibertyWorks* (2021) 95 ALJR 490 at [292] (Steward J).

[105] See *Brown* (2017) 261 CLR 328 at [90], [150] (Kiefel CJ, Bell and Keane JJ).

[106] (2020) 267 CLR 109.

E SEVERANCE (QUESTIONS 2 AND 4)

58. Questions 2 and 4 ask whether ss 11 and 12 are severable in respect of their operation upon political communication pursuant to s 31(2) of the *Interpretation Act 1987* (NSW). Those questions reflect the alternative relief sought by the Plaintiffs.[107]

59. One situation in which s 31(2) applies is where "a provision which, in relation to a limited subject matter or territory, or even class of persons, might validly have been enacted, is expressed to apply generally without the appropriate limitation, or to apply to a larger subject matter, territory or class of persons than the power allows".[108] In that situation, s 31(2) requires a provision to be construed such that the purported operations of the provision that are beyond power are unlawful. Different language is used to describe the different techniques by which this may be achieved. For example, where particular words are used that result in the provision being beyond power, those words may be "severed" (or "blue pencilled") to ensure that the provision is limited to matters within power. Or, where a generally expressed provision has some operations that are within and some that are beyond power, the provision may be "partially disapplied" such that it is construed so as not to have those operations that are beyond power.[109]

60. Importantly for present purposes, s 31(2) is capable of operating where the "appropriate limitation" that is missing from the text of an impugned provision is a "clear constitutional limitation".[110] That can occur "even if the constitutional limitation is incapable of precise definition, and even if an inquiry of fact is required to determine whether the constitutional limitation would or would not be engaged in so far as the law would apply to particular persons in particular circumstances".[111] By way of illustration, provisions equivalent to s 31(2) were applied in that way in the *Industrial Relations Act Case*[112] (by reference to the *Melbourne Corporation* principle) and in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[113] (by reference to Ch III

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[107] Statement of Claim at [27(b)] (SCB 14).

[108] *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652 (Dixon J), quoted in *Clubb* (2019) 267 CLR 171 at [141] (Gageler J), see also at [340] (Gordon J).

[109] See *Clubb* (2019) 267 CLR 171 at [415], [422]-[425], [429]-[430] (Edelman J).

[110] *Tajjour* (2014) 254 CLR 508 at [171] (Gageler J).

[111] *Tajjour* (2014) 254 CLR 508 at [171] (Gageler J) (citations omitted).

[112] *Victoria v Commonwealth* (1996) 187 CLR 416 at 503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), 574-575 (Answer to Question 4).

[113] (1996) 189 CLR 1 at 20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J). See also *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [66] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

"incompatibility"). Similarly, the decision in *Knight* (again by reference to Ch III "incompatibility") and the reasoning of three judges in *Clubb*[114] (by reference to the implied freedom) depend upon provisions such as s 31(2) being capable of applying in that way.

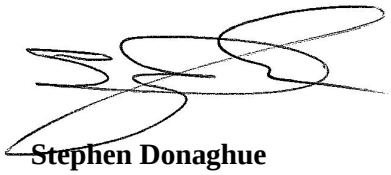
61. There is no "positive indication" in the Act that all operations of ss 11 and 12, in so far as they operate by reference to s 8, must stand or fall together.[115] That is, the Act does not manifest any "contrary intention" that displaces the ordinary operation of s 31(2). Section 31(2) therefore applies in the manner described above.

62. In light of the above, if some operations of ss 11 and 12 operate to place a burden on political communication that is not justified, those operations will be beyond power. However, while the effect of s 31(2) of the *Interpretation Act 1987* (NSW) is that ss 11 and 12 will not have those operations, they otherwise operate validly in accordance with their terms.[116] Accordingly, if it is necessary to answer Questions 2 and 4, each should be answered: "The section operates to the extent that it does not impose an unjustified burden on the freedom of political communication".

PART V — ESTIMATE OF TIME

63. It is estimated that up to 30 minutes will be required for the presentation of the Commonwealth's oral argument.

Dated: 8 December 2021



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[114] (2019) 267 CLR 171 at [148]-[149] (Gageler J), [341]-[342] (Gordon J), [440] (Edelman J).

[115] See *Cam & Sons Pty Ltd v Chief Secretary (NSW)* (1951) 84 CLR 442 at 454 (Dixon, Williams, Webb, Fullagar and Kitto JJ); *Tajjour* (2014) 254 CLR 508 at [169] (Gageler J); *Clubb* (2019) 267 CLR 171 at [148]-[149] (Gageler J), [341]-[342] (Gordon J), [440] (Edelman J).

[116] *Clubb* (2019) 267 CLR 171 at [429] (Edelman J).

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

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ANNEXURE TO THE ATTORNEY-GENERAL OF THE COMMONWEALTH'S SUBMISSIONS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Commonwealth Attorney-General sets out below a list of the particular constitutional provisions and statutes referred to in her submissions.

Commonwealth		Provision(s)	Version
1.	*Criminal Code* (Cth)	s 5.6(2)	Current (Compilation No 140, 3 September 2021 – present)
2.	*Customs Act 1901* (Cth)	s 233B(1A)	As at 30 May 1967
3.	*High Court Rules 2004* (Cth)	r 27.08.5	Current (Compilation No. 24, 21 December 2019 – present)
4.	*Judiciary Act 1903* (Cth)	s 78A	Current (Compilation No. 48, 1 September 2021– present)

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State			
5.	*Interpretation Act 1987* (NSW)	s 31	Current (20 October 2021 – present)
6.	*Listening Devices Act 1984* (NSW)	Pt 2	As assented to on 27 June 1984
7.	*Surveillance Devices Act 2007* (NSW)	ss 2, 7, 8, 9, 10, 11, 12, 56	Current (11 December 2020 – present)
8.	*Surveillance Devices Act 2007* (NT)	ss 4, 11, 12, 15	Current (30 November 2018 – present)
9.	*Surveillance Devices Act 2016* (SA)	ss 5, 6, 10, 11, 12	Current (7 October 2021 – present)
10.	*Surveillance Devices Act 1999* (Vic)	ss 3, 6, 7, 11	Current (1 December 2021 – present)
11.	*Surveillance Devices Act 1998* (WA)	ss 3, 6	Current (1 July 2015 – present)