



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

No. S83/2021

BETWEEN:

FARM TRANSPARENCY INTERNATIONAL LTD
ACN 641 242 579
First Plaintiff

CHRISTOPHER JAMES DELFORCE
Second Plaintiff

AND

STATE OF NEW SOUTH WALES
Defendant

**OUTLINE OF ORAL SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE
STATE OF QUEENSLAND (INTERVENING)**

PART I: Internet publication

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

PART II: Outline

The relevant burden is ‘incremental’

2. The burden on the implied freedom which needs to be justified is the ‘incremental’ burden: QS [9]-[10]; Reply [17]; CS [28]-[30]; SA [10]-[11].

- *Brown v Tasmania* (2017) 261 CLR 328, [188], [397] [**JBA 3.18**, pp 709, 778].

3. In this case, the incremental burden is the burden that ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW) (‘SD Act’) imposes on the implied freedom over and above:

- any burden imposed by ss 7, 8 and 9 of the SD Act – a prior contravention of which engages ss 11 and 12, and which the Plaintiffs do not challenge;

Filed on behalf of the Attorney-General for
the State of Queensland, intervening

10 February 2022

- b. any overlapping offences and causes of action which protect privacy, such as trespass, defamation, confidential information and trade secrets.
- *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [123], [186] [**JBA 2.15**, pp 364, 386].

The legitimate aim is protection of privacy

- 10 4. The relevant legislative purpose for compatibility testing is:
- a. The purpose of ss 11 and 12 of the SD Act, not the Act as a whole: QS [13]-[14]. Cf PS [48]-[49].
- *Unions NSW [No 2]* (2019) 264 CLR 595, [172] [**JBA 7.39** p 2574]; *LibertyWorks* (2021) 95 ALJR 490, [204] [**JBA 8.48**, p 2954].
- b. Not what the law does: QS [15]; CS [42]; SA [17]. Cf PS [56]-[59].
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- *Brown* (2017) 261 CLR 328, [100], [209], [322] [**JBA 3.18**, pp 684, 714, 755].
- c. Identified at the appropriate level of generality, lying between the impetus for s 11 and 12 of the SD Act (which is too broad) and the meaning of the words in ss 11 and 12 (which is too narrow): QS [16]; SA [12].
- *Unions NSW [No 2]* (2019) 264 CLR 595, [171] [**JBA 7.39**, p 2574]; *R v Moriarity* [2015] 3 SCR 485, [28] [**JBA 8.54**, p 3092].
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5. Accordingly, the mischief to which ss 11 and 12 of the SD Act is directed is not those identified by the Plaintiff (eg, an ‘ag-gag’ purpose or regulation of surveillance devices). The purpose is to limit the damage to an interest in privacy caused by publication of material obtained in contravention of ss 7, 8 or 9: QS [17]; DS [61].

Necessity and federalism

- 40 6. If necessity-testing demands that States adopt a single least restrictive option, then States will be required to adopt national uniform legislation whenever the implied freedom may be burdened. This would cut across the federal nature of the Constitution, which permits and encourages diversity: QS [21]; DS [63].

7. Necessity testing by reference to how other States have decided to address a mischief should be approached with caution. States are not restricted to the ‘least ambitious’ option adopted in other States: QS [22]; Reply [19]; CS [47]; SA [24]; WA [42].

8. In this case, interstate analogues do not qualify as true alternatives: QS [23].

Protection of privacy is a weighty legitimate aim

10 9. The aim of protecting privacy weighs heavily in the balance: QS [27]-[28]; Reply [20].

10. Relevant to the weight of a legislative aim is (QS [27]; DS [81]; SA [34]):

a. Any relevant ‘principles of the common law’; in this case, that common law developments may be informed by the value of privacy protection.

- *Clubb v Edwards* (2019) 267 CLR 171, [272] [**JBA 3.19**, p 927]; *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [106] [**JBA 2.15**, p 357].

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b. The ‘systemic context’, including statutory context; in this case that privacy has long been protected by statute at all levels of government.

- *Clubb v Edwards* (2019) 267 CLR 171, [496] [**JBA 3.19**, p 1003].

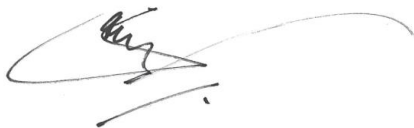
c. Constitutional values, such as ‘the dignity of members of the sovereign people’, noting in this case the close link between privacy and dignity.

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- *Clubb v Edwards* (2019) 267 CLR 171, [49], [99] [**JBA 3.19**, pp 855, 869].

11. In light of these considerations, ss 11 and 12’s protection of privacy outweighs its incremental impact on free political communication: QS [29].

Dated: 10 February 2022.



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