

**A FLY ON THE WALL, MET WITH A SWAT:
FARM TRANSPARENCY INTERNATIONAL LTD V
NEW SOUTH WALES (2022) 403 ALR 1**

I INTRODUCTION

The legality of animal activism often involves navigating a delicate balance between upholding the right to privacy and disseminating factual information which may be of political concern. In *Farm Transparency International Ltd v New South Wales* (*Farm Transparency*)¹ the High Court, by a 4:3 majority, prioritised the right to privacy, finding that ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW) (*SD Act*) did not impermissibly burden the implied freedom of political communication. Sections 11 and 12, in their operation together with s 8, prohibit persons from possessing, communicating or publishing a record or report of an activity which has been obtained by installing a surveillance device on private property, through an act of unlawful trespass.² By upholding the validity of these provisions, the High Court has placed a serious impediment upon activist organisations in New South Wales, including the plaintiffs in this case. These activists are now prohibited from publishing or possessing footage obtained by way of trespass, regardless of the social importance or severity of the activities that this footage uncovers.³ Animal welfare groups and concerned consumers can no longer employ the powerful imagery of animal cruelty obtained in this manner to agitate for social change. The political ramifications of this decision are recognised by Gageler J, as stated in his Honour’s dissenting opinion:

The prohibitions are too blunt; their price is too high; the cost they impose on the communication and receipt of information about matters of political and governmental concern is more than could be warranted for every activity which might be shown by a visual record to have occurred on private property.⁴

Underlying the High Court’s decision in *Farm Transparency* is a weak operation of the implied freedom. The majority refused to legitimise the ‘fruits’ of unlawful

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¹ (2022) 403 ALR 1 (*Farm Transparency*).

² *Surveillance Devices Act 2007* (NSW) ss 8, 11, 12 (*SD Act*).

³ *Farm Transparency* (n 1) 20 [80]–[81] (Gageler J), 63 [265] (Edelman J).

⁴ *Ibid* 20–1 [82].

trespass despite the plaintiffs acting in aid of the public interest.⁵ This case note will explore the competing moral and legal objectives inherent in this decision — including the implications for privacy, activism and political communication in Australia. It will be concluded that the High Court’s narrow analysis of ss 11 and 12 of the *SD Act* has led to ongoing uncertainty regarding the validity of these provisions and the strength of the implied freedom.

II BACKGROUND

A Facts

Farm Transparency International Ltd (‘Farm Transparency’) is a not-for-profit organisation dedicated to advocating for animal welfare by promoting social, policy and legal changes to existing animal welfare standards.⁶ Farm Transparency achieves this through investigations, documentaries and video footage to uncover the treatment of animals in farms and abattoirs, and remove the secrecy surrounding the meat industry.⁷ Christopher James Delforce, the second plaintiff and director of Farm Transparency, was charged under the *SD Act* in 2015 for the publication of footage which depicted cruelty to pigs in pig slaughterhouses.⁸ Although the charges were eventually dismissed, Farm Transparency sought to challenge the *SD Act* — which they described as containing ag-gag laws⁹ — and prevent the passage of similar acts in future.¹⁰ However, the primary purpose of proceedings was to allow Farm Transparency to continue possessing and publicising videos of animal cruelty practices ‘without the burden’ of the *SD Act*.¹¹

⁵ Ibid 42 [178] (Gordon J).

⁶ Ibid 3 [1].

⁷ ‘About Farm Transparency Project’, *Farm Transparency Project* (Web Page) <<https://www.farmtransparency.org/about>>.

⁸ Danielle Ireland-Piper, ‘What the High Court Decision on Filming Animals in Farms and Abattoirs Really Means’, *The Conversation* (online, 25 August 2022) <<https://theconversation.com/what-the-high-court-decision-on-filming-animals-in-farms-and-abattoirs-really-means-177146>>.

⁹ Ag-gag laws are laws which hinder the activity of activists seeking to expose animal cruelty within animal agriculture: Westlaw AU, *The Laws of Australia* (online at 5 August 2023) 14 Environment and Natural Resources, ‘14.14 Animals’ [14.14.760].

¹⁰ Farm Transparency Project, ‘Animal Advocates Mount Landmark High Court Challenge to Australia’s Ag-Gag Laws’ (Media Release, 29 June 2021) <<https://www.farmtransparency.org/media/19-animal-advocates-mount-landmark-high-court-challenge-australias-ag-gag-law>> (‘Animal Advocates Mount Landmark High Court Challenge’).

¹¹ *Farm Transparency* (n 1) 47 [202].

B Surveillance Devices Act 2007 (NSW)

The relevant sections of the *SD Act* in issue were ss 8(1), 11(1) and 12(1), which are set out below. Sections 11 and 12 serve to strengthen the operation of s 8 by discentivising any violations of that section.

8 Installation, use and maintenance of optical surveillance devices without consent

- (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.

11 Prohibition on communication or publication of private conversations or recordings of activities

- (1) A person must not publish, or communicate to any person, a private 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.

12 Possession of record of private conversation or activity

- (1) 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.

C Issues

In 2021, the High Court granted leave for Farm Transparency to bring a special case before the Court on an agreed question of law: the constitutional validity of ss 11 and 12 of the *SD Act* under the implied freedom. Since the foundational cases in the early 1990s, there has been a lack of consensus amongst High Court Justices regarding the tests to be applied under the implied freedom.¹² *Farm Transparency* demonstrates that we are no closer to a consensus on these issues.

¹² Murray Wesson, 'The High Court's Opaque Decision in *Farm Transparency International Ltd v State of New South Wales*' (2023) 33(4) *Public Law Review* 281, 294.

In *Lange v Australian Broadcasting Corporation*¹³ and *Brown v Tasmania*,¹⁴ the three stages of the test were developed. This requires determining whether the law: (1) places a burden on political communication; (2) is for a legitimate purpose; and (3) is reasonably appropriate and adapted to achieving that legitimate purpose.¹⁵ In *McCloy v New South Wales*,¹⁶ the majority of the High Court considered structured proportionality to be the appropriate method for determining whether a law is reasonably appropriate and adapted. This involves three further steps which assess the impugned law's: (1) suitability; (2) necessity; and (3) adequacy of balance.¹⁷ The application of these tests by each Justice in *Farm Transparency* will be outlined in Part III.

The Justices adopted differing approaches at several stages of their analysis. This included disparity regarding the appropriate scope of the High Court's adjudication over questions of constitutional validity. Each Justice agreed that by applying the 'prudential approach', the validity of ss 11 and 12 could only be assessed with respect to their operation with s 8, as the plaintiffs' conduct had not contravened any of the other sections under pt 2 of the *SD Act*.¹⁸ However, Edelman J limited his Honour's analysis of the validity of ss 11 and 12 to the specific conduct raised in the plaintiffs' special case.¹⁹ As such, his Honour did not assess the validity of ss 11 and 12 with respect to third-party publishers, such as media outlets, who are not complicit in the trespass in contravention of s 8. Chief Justice Kiefel, Keane, Gageler, Gordon and Gleeson JJ adopted a broader view and assessed the validity of ss 11 and 12 in their application to third-parties.²⁰ The limited scope of Edelman J's analysis has led to a narrow ratio and ongoing uncertainty regarding the validity of ss 11 and 12 of the *SD Act*. The consequences of this narrow ruling will be discussed further in Parts III(A) and IV(B).

III DECISION

The High Court held by a 4:3 majority that ss 11 and 12 do not impermissibly burden the implied freedom in their application to the possession, communication or publication of a record or report of lawful activity by persons who were complicit in the record or report being obtained in contravention of s 8 of the *SD Act*. This

¹³ (1997) 189 CLR 520.

¹⁴ (2017) 261 CLR 328 ('*Brown*').

¹⁵ *Farm Transparency* (n 1) 36 [153] (Gordon J).

¹⁶ (2015) 257 CLR 178 ('*McCloy*').

¹⁷ *Ibid* 217 [79] (French CJ, Kiefel, Bell and Keane JJ).

¹⁸ *Farm Transparency* (n 1) 7–8 [21] (Kiefel CJ and Keane J), 16 [60] (Gageler J), 127–8 [114]–[120] (Gordon J), 46 [198] (Edelman J), 64 [269] (Steward J), 65 [272] (Gleeson J). See also Wesson (n 12) 294–6.

¹⁹ *Farm Transparency* (n 1) 50 [213].

²⁰ *Ibid* 13 [45], 15 [56] (Kiefel CJ and Keane J), 25–6 [103]–[104] (Gageler J), 44 [185]–[190] (Gordon J), 65 [272] (Gleeson J).

bare majority reflects the inherent nuances in each judgment, summarised below, which placed varying levels of importance upon the right to privacy, the value of communicating matters of public interest, and the underlying strength of the implied freedom.

A Majority

The majority consisted of Kiefel CJ, Keane, Edelman and Steward JJ, who determined that in applying a structured proportionality approach, the provisions were reasonably necessary and adequate in their balance. All Justices of the High Court — and the plaintiffs — agreed that the relevant provisions of the *SD Act* served a legitimate purpose.²¹ In their joint judgment, Kiefel CJ and Keane J held that the purpose of ss 11 and 12 was to protect the privacy interests of individuals who had surveillance records taken of activities on their property, and to deter the publication of such materials.²² Justices Edelman,²³ Gageler,²⁴ Gordon,²⁵ Steward²⁶ and Gleeson²⁷ similarly accepted that the purpose was legitimate and aimed at protecting property rights, privacy and dignity. However, upon examining the extent of the burden, the majority held that the sections did not violate the implied freedom.

The extent to which ss 11 and 12 burdened the implied freedom required examining the incremental burden of the provisions, beyond the existing restrictions in general law and legislation. Chief Justice Kiefel and Keane J found that ss 11 and 12 did not lead to a significant incremental burden upon a person's ability to publish or possess footage obtained by trespass.²⁸ Notably, their Honours found that the law of defamation and breach of confidence may, depending on the circumstances, restrict the publication of private activities.²⁹ However, central to their Honours' reasoning was that s 8 already prohibits the recording of activities on private property accessed by trespass, resulting in up to five years imprisonment.³⁰ Thus, '[a]ll that is effectively burdened' by the operation of ss 11 and 12 is the communication of the information obtained by trespass, in the knowledge it contravenes s 8.³¹ Justice Edelman took the view that ss 8, 11 and 12 do burden the implied freedom

²¹ Ibid 9–10 [30]–[32] (Kiefel CJ and Keane J), 17–18 [66]–[68] (Gageler J), 41 [171] (Gordon J), 59 [248] (Edelman J), 64–5 [269]–[270] (Steward J), 65 [273] (Gleeson J).

²² Ibid 10 [32].

²³ Ibid 59 [248].

²⁴ Ibid 17 [66].

²⁵ Ibid 41 [171].

²⁶ Ibid 64 [269].

²⁷ Ibid 65 [273].

²⁸ Ibid 11–13 [36]–[45].

²⁹ Ibid 11–12 [39]–[40], 12 [43].

³⁰ Ibid 13 [44]–[45].

³¹ Ibid 13 [45].

by extending upon existing law, '[b]ut not far beyond'.³² His Honour deemed the provisions to extend beyond the law of confidentiality by applying to activities on private property which are not necessarily confidential and activities conducted by corporations, rather than humans.³³

The Justices then turned to an examination of proportionality, to determine if the provisions are suitable, necessary, and adequately balanced. The majority found that suitability was not an issue.³⁴ Chief Justice Kiefel and Keane J adopted a strict interpretation of necessity, requiring that any alternative measure must 'achieve the same statutory purpose' and be 'less burdensome in effect'.³⁵ This is notably more onerous than their Honours' previous interpretations, which merely require that there be no 'alternative measures [which] are obvious and their practicability compelling' and that any alternatives are 'reasonably practicable' to achieve the same purpose.³⁶ Future cases may reveal whether this strict interpretation was merely responding to the nuanced issues of *Farm Transparency*, or represents a shift in applying the necessity test. In contrast, Edelman J adopted the broader approach of an 'obvious or compelling' reasonable alternative, which 'imposes a lesser burden on the freedom of political communication'.³⁷

The plaintiffs, in presenting their argument, referred to various state legislation which purported to regulate surveillance devices whilst including a public interest exemption.³⁸ However, Kiefel CJ and Keane J rejected this argument, as the other statutory schemes did not pursue the same purpose of protecting privacy interests as part of a person's property rights, and rather, related to privacy more broadly.³⁹ This was similarly held by Edelman J, stating that 'the alternative models do little more than illustrate the existence of a range of different legislative choices available'.⁴⁰ Further, a public interest exemption was found to be inconsistent with the purpose of the *SD Act* — to deter persons from engaging in trespass for the purpose of surveillance.⁴¹ Justice Edelman, in examining the adequacy of balance, also identified that the protection of privacy and dignity of property 'is itself a protection of freedom of political communication' which 'remains a right of great importance'.⁴² Chief Justice Kiefel and Keane J did not consider the adequacy of balance in depth.

³² Ibid 57 [242].

³³ Ibid 58 [244].

³⁴ Ibid 11 [35] (Kiefel CJ and Keane J). Note that Edelman J did not consider suitability in his Honour's judgment.

³⁵ Ibid 11 [36].

³⁶ *Brown* (n 14) 371–2 [139] (Kiefel CJ, Bell and Keane JJ).

³⁷ *Farm Transparency* (n 1) 60 [253].

³⁸ Ibid 13 [47].

³⁹ Ibid 14 [51].

⁴⁰ Ibid 62 [261].

⁴¹ Ibid 15 [53] (Kiefel CJ and Keane J).

⁴² Ibid 62–3 [263]–[264].

Therefore, whilst Kiefel CJ and Keane J adopted a broader view of the operation of ss 11 and 12 than Edelman J (with whom Steward J agreed), together the Justices held that ss 11 and 12 do not burden the implied freedom. However, the ratio only accords with Edelman J's narrow analysis regarding the validity of the *SD Act* in relation to persons complicit in trespass who possess or publish footage of legal activities.⁴³

B *Minority*

The minority, comprising of Gageler, Gordon and Gleeson JJ, agreed that the purpose of protecting privacy was legitimate,⁴⁴ but their Honours disagreed with the majority's view that the provisions were reasonably appropriate and adapted.

1 *Justices Gageler and Gleeson*

Justice Gageler (with whom Gleeson J agreed) considered ss 11 and 12 to be invalid as they place an unjustified burden on the implied freedom.⁴⁵ Justice Gageler considered ss 11 and 12 to indiscriminately target information which would clearly include 'factual information bearing on matters of political and governmental concern'.⁴⁶ Justice Gageler took particular issue with the blanket and indiscriminate nature of ss 11 and 12 as they apply to all visual communications obtained in contravention of s 8, 'regardless of the gravity of the information and of the extent to which electors, their elected representatives and executive officers may have an interest in receiving it'.⁴⁷

Justice Gageler did not apply a strict structured proportionality approach to assessing whether ss 11 and 12 are reasonably appropriate and adapted. However, his Honour did assess alternative state legislation and whether the laws were adequate in their balance. Justice Gageler analysed similar legislation in the Northern Territory, Victoria and Western Australia.⁴⁸ The legislation in these jurisdictions contains a public interest exemption for similar offences.⁴⁹ His Honour considered these state laws to protect privacy in a manner that conforms with the implied freedom.⁵⁰

⁴³ Ibid 64 [268].

⁴⁴ Ibid 18 [71] (Gageler J), 41 [171] (Gordon J), 65 [273] (Gleeson J).

⁴⁵ Ibid 18 [68]–[69], 24 [95].

⁴⁶ Ibid 20 [79].

⁴⁷ Ibid 20 [81].

⁴⁸ Ibid 23 [92]–[94].

⁴⁹ *Surveillance Devices Act 2007* (NT) s 15(2)(b)(i); *Surveillance Devices Act 1999* (Vic) s 11(2)(b)(i); *Surveillance Devices Act 1998* (WA) ss 9(2)(a)(viii), 9(3)(a)(i), 31(1).

⁵⁰ *Farm Transparency* (n 1) 23–4 [94].

Justice Gageler concluded that ss 11 and 12 were unable to be read down to only apply to persons complicit in the trespass under s 8 and rather, should have ‘no application to a visual record that is the subject-matter of a political communication’.⁵¹

2 *Justice Gordon*

Justice Gordon considered ss 11 and 12 to be valid in their application to persons complicit in trespass but invalid with respect to third-parties.⁵² Her Honour considered the plaintiffs to be ‘confined to advancing grounds of challenge which bear on the validity of the impugned provisions in their application to them’.⁵³ In doing so, Gordon J confined her Honour’s analysis to ss 11 and 12 in their operation with s 8. Her Honour made clear that the plaintiffs were not free to ‘roam at large’ over the impugned provisions.⁵⁴ However, unlike Edelman J, Gordon J did not confine her Honour’s analysis further.

Like Gageler J, Gordon J did not adopt a strict structured proportionality approach to determining whether the provisions were reasonably appropriate and adapted. Her Honour wrote that structured proportionality is a useful tool of analysis, however, ‘[i]t is not always (and it is not in this case) necessary or appropriate to undertake all steps of that analysis’.⁵⁵ Instead, Gordon J assessed whether ss 11 and 12 were justified in the circumstances.⁵⁶ This included assessing the rationality of these laws and whether they were undue when considering their purpose and the burden on the implied freedom.⁵⁷

Justice Gordon considered the application of ss 11 and 12 to those who are complicit in trespass as ‘readily justified’.⁵⁸ Her Honour viewed these provisions as ensuring that trespassers and those complicit in trespass are unable to benefit from their unlawful conduct and are therefore disincentivised from contravening s 8.⁵⁹ As such, Gordon J considered ss 11 and 12 not to infringe the implied freedom in this narrower application.⁶⁰

However, in her Honour’s view, the application of ss 11 and 12 to third-parties required a much higher degree of justification.⁶¹ Justice Gordon stated that these provisions are ‘blunt instruments’ which would prevent ‘media outlets communicating

⁵¹ Ibid 26 [105].

⁵² Ibid 43 [184], 44 [189].

⁵³ Ibid 28 [117].

⁵⁴ Ibid 28 [116].

⁵⁵ Ibid 41 [172].

⁵⁶ Ibid.

⁵⁷ Ibid 41–4 [172]–[189].

⁵⁸ Ibid 41 [175].

⁵⁹ Ibid 42 [180].

⁶⁰ Ibid 43 [184].

⁶¹ Ibid 44 [187].

about footage that reveals unlawful conduct taking place at an abattoir or even unlawful conduct engaged in by the Government'.⁶² On this basis, her Honour took the view that ss 11 and 12 should be read down so as not to apply where the provisions place an unjustified burden on the implied freedom — including in their application to third-parties.⁶³

IV COMMENT

A Tort of Privacy

Farm Transparency has important implications for the development of privacy law in Australia. Whilst Australia is yet to recognise the tort of an invasion of privacy at common law, recent judicial commentary suggests change is on the horizon.⁶⁴ In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ('*Lenah*'),⁶⁵ the High Court left the door open for such a possibility emerging in future.⁶⁶ *Lenah* concerned secret video footage captured by unidentified trespassers, depicting possum killing at the respondent's abattoirs.⁶⁷ The respondent sought an injunction to prevent this footage from being broadcast by the Australian Broadcasting Corporation.⁶⁸ Ultimately, the High Court found the respondent was unable to identify 'a legal or equitable right which could be pursued at trial' to grant the injunction.⁶⁹ However, the Court did find that a tort for the invasion of privacy is 'ripe for consideration',⁷⁰ and subsequent scholars have similarly agreed that the common law can recognise the tort.⁷¹ Following *Lenah*, courts have demonstrated a reluctance to recognise the tort of privacy.⁷² This is inconsistent with the intention of the High Court, where '*Lenah* has been interpreted as an obstacle as opposed to a

⁶² Ibid 44 [189] (emphasis omitted).

⁶³ Ibid 44–5 [191].

⁶⁴ See Jelena Gligorijevic, 'A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*' (2021) 44(2) *University of New South Wales Law Journal* 673.

⁶⁵ (2001) 208 CLR 199 ('*Lenah*').

⁶⁶ Gilgorijevic (n 64) 674.

⁶⁷ *Lenah* (n 65) 220–1 [22]–[26].

⁶⁸ Ibid 215 [5].

⁶⁹ *Farm Transparency* (n 1) 12 [42] (Kiefel CJ and Keane J).

⁷⁰ *Lenah* (n 65) 328 [335] (Callinan J).

⁷¹ See: David Lindsay, 'Protection of Privacy under the General Law Following *ABC v Lenah Game Meats Pty Ltd*: Where to Now?' (2002) 9(6) *Privacy Law and Policy Reporter* 101; Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Discussion Paper 80, March 2014) 49–50 [3.52]–[3.60]; Des Butler, 'A Tort of Invasion of Privacy in Australia?' (2005) 29(2) *Melbourne University Law Review* 339.

⁷² Gilgorijevic (n 64) 675.

door left open'.⁷³ Therefore, *Farm Transparency* is crucial to indicate the normative demand for the protection of individual privacy and to recognise that it is cognisable for the common law to develop in this way.

Farm Transparency emphasises that the High Court remains open to the emerging tort of privacy, and how it may develop in Australian common law. Notably, during trial proceedings, Edelman J questioned the plaintiffs' counsel about whether the right of privacy is recognised, and if so, the effect it would have on the validity of ss 11 and 12 of the *SD Act*.⁷⁴ This judicial interest is also consistent with the statement of Gageler J that there is a 'potential development of a tort of privacy in Australia'.⁷⁵ Justice Gageler goes on to state that if a tort of privacy were to emerge, it must not provide a 'protection against public scrutiny',⁷⁶ echoing the remarks of Gleeson CJ in *Lenah*.⁷⁷ Whilst the remaining justices remained silent on this issue, the high value that Kiefel CJ and Keane J placed on the protection of privacy reflects the broader concern of the common law to protect privacy. Their Honours stated that the protection of this interest is 'obvious' and 'has long been recognised as a social value'.⁷⁸ Cumulatively, this builds upon the normative strength of an emerging tort of privacy which is gaining judicial traction.

B *Implications for Ag-Gag Laws and Animal Rights Activists*

This decision also has significant implications for animal rights activists and the future of ag-gag laws in Australia. Persons who are complicit in trespass under s 8 of the *SD Act* and obtain visual records of lawful activities are unable to possess, communicate or publish such material, regardless of the degree of public interest in the subject matter. This means that animal welfare activists in New South Wales who enter premises unlawfully to obtain surveillance footage of animal agricultural practices are unable to possess or publish that footage and are therefore strongly disincentivised from engaging in that activity.

Visual imagery is of particular importance in this line of activism.⁷⁹ Footage of cruelty within animal agriculture allows Australians to be informed about the current legislative protections for animals (or lack thereof) and the level of enforcement of those legislative protections. This footage also allows consumers to be fully informed about how their food has been produced.

⁷³ Ibid 675 n 13.

⁷⁴ Transcript of Proceedings, *Farm Transparency International Ltd v New South Wales* [2022] HCATrans 5, 65.

⁷⁵ *Farm Transparency* (n 1) 22–3 [90].

⁷⁶ Ibid.

⁷⁷ *Lenah* (n 65) 224 [35].

⁷⁸ *Farm Transparency* (n 1) 15 [56].

⁷⁹ Ibid 20 [80] (Gageler J).

As has been discussed above, Edelman J narrowed his Honour's analysis to footage of lawful activities.⁸⁰ It is unclear to what extent, if any, this influenced his Honour's ultimate conclusion that ss 11 and 12 are valid. Importantly, within animal agriculture, it is well established that lawful practices involve — or under previous laws, have involved — animal cruelty of some kind.⁸¹ The fact that Edelman J confined his Honour's analysis to footage of lawful activity should have had minimal impact on whether ss 11 and 12 were justified in their burden on the implied freedom. After all, what is lawful conduct today may well be unlawful conduct tomorrow as a result of political discourse.

In our view, the minority was correct to determine that ss 11 and 12 are invalid in their application to third-parties. Unfortunately, the narrow ratio in *Farm Transparency* has left this question unanswered. This may prevent important public interest publications by third-party news organisations. For example, in 2015, exposure by television program Four Corners of unlawful live baiting in greyhound racing led to significant reform across the country.⁸² This was accompanied by widespread public discourse on this issue.⁸³ It is unclear whether ss 11 and 12 would be deemed invalid in their application to this factual scenario — where the relevant footage is of illegal conduct such as live baiting, or where the footage is being published by third-party media programs such as Four Corners.

⁸⁰ Ibid 48 [206].

⁸¹ See: *ibid*; 'Slaughter Without Stunning', *RSPCA* (Web Page) <<https://www.rspca.org.au/take-action/slaughter-without-stunning>>; Calla Wahlquist, 'Australia to Phase Out Live Sheep Export Amid Opposition from Peak Farmers Body', *The Guardian* (online, 3 March 2023) <<https://www.theguardian.com/australia-news/2023/mar/03/australia-to-phase-out-live-sheep-export-amid-opposition-from-peak-farmers-body>>.

⁸² See: Caro Meldrum-Hanna, 'Greyhound Racing: Piglets, Possums and Rabbits Used as Live Bait in Secret Training Sessions, Four Corners Reveals', *ABC News* (online, 16 February 2015) <<https://www.abc.net.au/news/2015-02-16/live-baiting-expose-to-rock-greyhound-industry/6109878>>; Cath Hanrahan, 'Explained: Why NSW is Banning Greyhound Racing', *ABC News* (online, 20 July 2016) <<https://www.abc.net.au/news/2016-07-20/greyhound-racing-ban-nsw-explained/7622052>>; *Domestic Animals (Racing Greyhounds) Amendment Act 2017* (ACT); Explanatory Statement, *Domestic Animals (Racing Greyhounds) Amendment Bill 2017* (ACT) 3; *Animal Welfare (Live Baiting) Amendment Act 2015* (SA); 'Greyhound Training Amendment Bill Passes', *Stephen Mullighan MP* (Blog Post, 17 September 2015) <<https://www.stephenmullighanmp.com.au/blog/2015/9/17/greyhound-training-amendment-bill-passes>>.

⁸³ Anne Tarasov, 'Greyhound Racing Ban: Protesters March to NSW Parliament to Campaign against Decision', *ABC News* (online, 2 August 2016) <<https://www.abc.net.au/news/2016-08-02/greyhound-racing-ban-hundreds-protesters-march-to-nsw-parliament/7683492>>; Tim Barlass, 'First Greyhound Meet in Sydney Since Baiting Allegations: Trainers Bite the Bullet and Move On', *The Sydney Morning Herald* (online, 21 February 2015) <<https://www.smh.com.au/national/nsw/first-greyhound-meet-in-sydney-since-baiting-allegations--trainers-bite-the-bullet-and-move-on-20150221-13kym3.html>>.

Worryingly, *Farm Transparency* has led to significant uncertainty regarding the validity of ag-gag legislation and may lead to an increase in this type of legislation in other states. This was an important concern for Farm Transparency and a reason behind their decision to challenge this legislation.⁸⁴ In particular, this decision may lead to the removal of public interest exceptions contained in similar legislation in the Northern Territory, South Australia, Victoria and Western Australia. This would lead to further constraints on the activities of animal welfare activists.⁸⁵

Farm Transparency also has ramifications far beyond animal activism and ag-gag laws. Sections 11 and 12 of the *SD Act* prevent the possession, communication and publication of material gathered by activists regarding environmental concerns, corporate malpractice and government misconduct.⁸⁶ This could include, for example, material gathered by trespassers on coal mines, logging areas or corporate institutions. Information gathered in these contexts may clearly be in the public interest and of significant governmental and political concern. As such, the High Court's ruling in *Farm Transparency* gives rise to broader concerns regarding the strength of the implied freedom.

C Strength of the Implied Freedom

Farm Transparency has emphasised the continuing division between justices in the High Court over the normative strength of the implied freedom of political communication. This division, whilst not new, has a significant impact on judicial outcomes.⁸⁷

Justice Gageler provides a compelling interpretation of the implied freedom — a critical protection for Australia's constitutionally enshrined system of representative and responsible government.⁸⁸ His Honour states that the freedom exists to safeguard against laws that prohibit political communications that are 'unhelpful or

⁸⁴ 'Animal Advocates Mount Landmark High Court Challenge' (n 10).

⁸⁵ *Surveillance Devices Act 2007* (NT) s 15(2)(b)(i); *Surveillance Devices Act 2016* (SA) ss 9(1), 10(1); *Surveillance Devices Act 1999* (Vic) s 11(2)(b)(i); *Surveillance Devices Act 1998* (WA) ss 9(2)(a)(viii), 9(3)(a)(i), 31(1).

⁸⁶ Justice Gordon was particularly concerned that ss 11 and 12 could prevent third-party publishers from communicating about (let alone publishing) footage that reveals unlawful conduct engaged in by government: *Farm Transparency* (n 1) 44 [189]. Justice Gordon's concern is substantiated by the recent insertion of reg 6A of the *Surveillance Devices Regulation 2022* (NSW) which grants the New South Wales Independent Commission Against Corruption ('ICAC') an exemption from pt 2 of the *SD Act*, including ss 11 and 12. This amendment allows ICAC to obtain, possess, publish or communicate recordings of corrupt government activities without contravening ss 11 and 12, demonstrating that the NSW Government considers ss 11 and 12 to apply in this context.

⁸⁷ Wesson (n 12) 299.

⁸⁸ *Farm Transparency* (n 1) 19–26 [77]–[104].

inconvenient ... to a current majority'.⁸⁹ This analysis formed the basis of Gageler J's argument — that indiscriminate and blanket prohibitions on fundamental sources of truth limit the ability for electors to accurately discharge their duty.⁹⁰ According to Gageler J, it 'is inconceivable' that any law would intend to censor the communication or possession of visual information, irrespective of the importance of this information to electors, legislators and policy-makers.⁹¹ Articulating the freedom of political communication in this way was integral to Gageler J's argument that the freedom had been breached. Particularly, through a broad analysis of ss 11 and 12, Gageler J considered these provisions to stifle discourse on matters within the legislative powers of Parliament which bear on electoral choice.

Justice Gageler's notion that 'privacy cannot always trump political communication'⁹² is in opposition to Edelman J, who considered it wrong to view the implied freedom as a 'constitutional trump' over the right to dignity and privacy.⁹³ This reflects a fundamental point of difference between the Justices' analysis. Justice Edelman expressed a tension between the implied freedom, and citizens' enjoyment of other rights such as the right to peaceful possession.⁹⁴ In fact, the right to peaceful possession in itself was described by Edelman J as necessary to uphold the freedom of political communication whereby 'an assault on the one can be an assault on the other'.⁹⁵

Whilst the implied freedom is a well-settled area of law,⁹⁶ Steward J approaches the implied freedom from a textualist approach, with notable caution. Justice Steward operates on the 'assumption' that the implied freedom applies to state legislation, suggesting that his Honour remains sceptical about its application in this context.⁹⁷ This is demonstrated by Steward J's judgment in *LibertyWorks Inc v Commonwealth* ('*LibertyWorks*'),⁹⁸ where his Honour refers to the 'tenuous nature' of the implied freedom and states 'it is still not yet settled law'.⁹⁹ Whilst it is beyond the scope of this case note to examine Steward J's dissent in *LibertyWorks*, *Farm Transparency* tends to indicate that these are still firmly held convictions.

Finally, Kiefel CJ and Keane J's judgment raises significant concerns. Their Honours did not consider ss 11 and 12 (including in their application to third-parties) to constitute an unjustified burden on the implied freedom. As has been discussed

⁸⁹ Ibid 19 [76].

⁹⁰ Ibid 20 [80]–[81], 22–3 [90].

⁹¹ Ibid 22–3 [90].

⁹² Ibid 23 [91].

⁹³ Ibid 62 [262].

⁹⁴ Ibid 62 [263].

⁹⁵ Ibid 62 [264].

⁹⁶ *McCloy* (n 16) 200–1 [23] (French CJ, Kiefel, Bell and Keane JJ).

⁹⁷ *Farm Transparency* (n 1) 64–5 [270].

⁹⁸ (2021) 274 CLR 1.

⁹⁹ Ibid 95 [249], 111 [298].

above, ss 11 and 12 apply broadly to third-party publishing of public interest materials, including recordings of illegal conduct. In our view, these provisions place a significant and unjustified burden on the implied freedom. Therefore, Kiefel and Keane J's judgment may indicate a weakening of the implied freedom, particularly in cases involving the protection of privacy and property rights.

The vastly differing views of Kiefel CJ, Keane, Gageler, Edelman and Steward JJ indicate deepening divisions in the High Court regarding the strength of the implied freedom. In particular, the majority judgments in *Farm Transparency* appear to indicate a weakening of this fundamental constitutional protection.

V CONCLUSION

Farm Transparency has important ramifications for animal welfare activism, privacy and political communication in Australia. This decision demonstrates that there remains a lack of consensus within the High Court regarding several aspects of the implied freedom. In particular, the High Court was divided on the appropriate scope of the Court's adjudication of issues of constitutional validity. This disparity, as well as disparity regarding the application of the key tests underpinning the freedom, led to a narrow ratio and has left many important questions unanswered. In particular, the validity of ss 11 and 12 in their application to third-parties remains unclear. In our view, preventing publication by third-parties places an unjustified burden on the implied freedom. The judgments of Kiefel CJ and Keane J were of particular concern in this respect and appear to demonstrate a weakening of the implied freedom — a fundamental protection for our democratic system.