FARM TRANSPARENCY INTERNATIONAL LTD V NEW SOUTH WALES

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I CONTEXT

Farm Transparency International ('FTI', the 'first plaintiff') is a group which seeks to change modern agricultural practices and improve animal welfare standards. In furtherance of this mission, one of its directors (the 'second plaintiff') trespassed onto a private farm in New South Wales and installed an optical surveillance device. This device recorded content relating to the farming and slaughtering of animals. FTI subsequently published that content, and has previously published other content, which was obtained in contravention of the *Surveillance Devices Act 2007* (NSW) ('Act').

Three sections of the Act are relevant, sections 8, 11, and 12. Section 8 prohibits the installation, use, or maintenance of an optical surveillance device which involves trespass or interference with another's property, without consent. There are a number of exceptions but they are predominantly concerned with situations involving law enforcement or in accordance with Commonwealth legislation. Relevantly, section 11 prohibits the publication or communication of any content which stems from an optical surveillance device which is in contravention of section 8. There are several exceptions, centring on investigations or consent. Section 12 prohibits the knowing possession of a record made by an optical surveillance device which contravenes section 8.

FTI challenged parts of the Act and their application to FTI's content regarding recordings of farming methods and cruelty to animals. This forms the basis of *Farm Transparency International v NSW* ('*FTI*').[1] FTI claimed that section 11 and 12 impermissibly burdened the implied freedom of political communication ('IFPC'). The State of New South Wales (the 'defendant') argued that the Act placed reasonable and

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[1] *Farm Transparency International Ltd v New South Wales* [2022] HCA 23 ('*FTI Case*').

proportional limits on political communication, in line with the legislation's explicit purpose of ensuring 'the privacy of individuals is not unnecessarily impinged upon by providing strict requirements around the installation, use and maintenance of surveillance devices'.[2]

The High Court heard the challenge in February, 2022 before handing down its decision in August of the same year. In a 4-3 split, the High Court determined the Act did not impermissibly limit the IFPC.

II THE HIGH COURT'S JUDGEMENT

The High Court majority was composed of three judgements: Kiefel CJ and Keane J, Edelman J, and Steward J. The dissent also saw three judgements from Gordon J, Gageler J, and Gleeson J.

A Kiefel CJ and Keane J

The joint judgement begins by carefully stressing the High Court takes a '"cautious and restrained" approach to answering questions concerning the constitutional validity of provisions'.[3] This point is emphasised by most of the other judgements.[4] In construing the Act, both sections are found to require a mental element be made out.[5]

The joint judgement then moves into considering how the IFPC is burdened by section 11 and 12. Given the importance of information and communication on political matters to the constitutionally prescribed system of government, any legislation which restricts the flow of such information must be justified.[6] Discussions about animal welfare and related political matters were found to be valid subjects which the IFPC can protect against infringement. The reasoning then moved to determining if the sections placed a burden on the IFPC that was proportionate to

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[2] *Surveillance Devices Act 2007* (NSW) ('NSW Act'), s 2A(c).

[3] *FTI Case* (n 1) [20] citing *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 846 [56].

[4] *FTI Case* (n 1) [60] (Gageler J), [111] – [120] (Gordon J), [193] – [198], [208] – [218] (Edelman J), [272] (Gleeson J).

[5] Ibid [24] – [25].

[6] *McCloy v New South Wales* (2015) 257 CLR 178, 213; Ibid [26].

achieving its purpose. For this determination, the judgement employs structured proportionality.[7]

As will be seen, structured proportionality is still not employed by the entirety of the High Court. However, it has gained considerable acceptance from its first application by Kiefel J (as her Honour then was).[8] First, the purpose of the legislation must be found to be 'legitimate'. The purpose of the statutory sections must be compatible with the constitutionally prescribed system of government for those provisions to be valid. Second, the sections must be suitable. This requires a rational connection between the means chosen and the ends pursued. Third, the sections must be necessary. This step asks if the chosen means impair the right more than necessary. Note that any alternative (even if less restrictive) cannot be less effective in carrying out the policy objectives to be considered a valid alternative.[9] Fourth and finally, sections 11 and 12 must be found to be adequate in their balance. This stage weighs the relevant measure's marginal benefit against its marginal harm, permitting the inclusion of any other factors which are relevant.

The joint judgement found that the legislation's purpose was legitimate, given it existed to protect against the interference with an owner's privacy, security, or possession of property.[10] In identifying the burden created by the Act, Kiefel CJ and Keane J stressed that the relevant burden is only the incremental burden on top of the existing background of law's effect on acts excluded by the Act.[11] In this case, that background includes the equitable obligation of confidence, the common law's defamation and trespass, as well as the limiting effect of section 8.[12]

The sections were found to be suitable, given the clear rational connection between the Act's purpose and how the sections realise it.[13]

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[7] *FTI Case* (n 1) [29].

[8] Cf *Rowe v Electoral Commissioner* (2010) 243 CLR 1 with *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490.

[9] *Clubb v Edwards* (2019) 267 CLR 171, 336-337.

[10] *FTI Case* (n 1) [31].

[11] Ibid [37].

[12] Ibid [38] – [45].

[13] Ibid [35].

The necessity of the sections was then considered, with any alternative means needing to be obvious, compelling, and equally as effective.[14] The alternatives considered were legislation from Victoria, Western Australia, South Australia, and the Northern Territory which similarly regulate surveillance devices ('other State Acts').[15] The other State Acts do not proscribe publishing a recording of a private activity if it is in the public interest. However, Kiefel CJ and Keane J did not find these provided an equally effective alternative. This is because the NSW Act only applies after a trespass, unlike the other State Acts which apply more broadly to any record of a private activity. Therefore, it is with the NSW Parliament's competence to craft a stricter regulation of optical surveillance devices which are installed, used, or maintained through trespassory conduct.[16]

Finally, it was considered if the sections adequately balance the restriction on political communication against protection of privacy, security, and the integrity of property. Section 8's effect of narrowing ss11, 12 application, and 'obvious' importance of protecting privacy interests led the joint judgement to conclude the burden on political communication was not disproportionate. Therefore, the sections were held to be valid.

B Edelman J

Edelman J's reasoning begins by emphasising that the facts of the case dictate what needs to be determined. The case involves only the communication or publication of content by trespassers or those complicit in the trespass, so considerations involving third-parties are irrelevant.[17] In order to consider such hypotheticals or a broader, more principled challenge raised by a case, the Full Court must find it necessary and submissions are made on that point.[18] Neither occurred in this case. This is an important distinction between His Honour's reasoning and that of the joint judgement. The latter takes a broader view of the valid operation of the sections.[19] This means His Honour's reasoning only applies where the

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[14] Ibid [46].

[15] Ibid [47].

[16] Ibid [54].

[17] Ibid [199].

[18] Ibid [208] – [213]; *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Knight v Victoria* (2017) 261 CLR 306, 324; *Private R v Cowen* (2020) 94 ALJR 849 at 886.

[19] *FTI Case* (n 1) [58].

impugned content is communicated or published by those complicit in it being obtained in breach of section 8.

Edelman J then considers the existing state of the law to determine the 'incremental burden [ss 11 and 12] impose upon the existing liberty of political communication'.[20] In particular, the equitable doctrine of breach of confidence is considered.[21] The Act is found to extend beyond 'the existing law concerning the communication or publication of confidential information. But not far beyond.'[22] This conclusion grounds Edelman J's subsequent reasoning that the Act imposes a small incremental burden and only requires a commensurately small justification.

Using the structured proportionality process, Edelman J views the sections' purpose as protecting privacy, dignity, and property rights.[23] His Honour notes the plaintiffs conceded that the sections are suitable, meaning it need only be found that they are necessary and adequate in the balance. Similar to the joint judgement, Edelman J rejects the other State Acts as alternatives given they fail to obviously 'achieve the same purposes, to at least the same extent, and to do so with a significantly lesser burden'.[24] This is largely due to their inability to curb the 'deliberate unlawful conduct of [, in this case,] a private 'activist' entity'.[25]

In considering the sections' adequacy by balancing means and ends, Edelman J rejects the idea that it is a simple exercise contrasting the right to free political communication on one hand and privacy or property rights on the other. Instead, citing *Smethurst v Commissioner of the Australian Federal Police* it must be understood there is a 'link between protection of personal property and protection of freedom of thought and political expression'.[26] This results in His Honour finding the sections do not impermissibly burden the IPFC, on the facts raised by this case.

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[20] Ibid [224].

[21] Ibid [225] – [241].

[22] Ibid [242].

[23] Ibid [247].

[24] Ibid [256].

[25] Ibid [259] citing *Kadir v The Queen* (2020) 267 CLR 109, 137.

[26] (2020) 94 ALJR 502 at 557, 637; *FTI Case* (n 1) [264].

C Steward J

Steward J agreed with the reasoning of both the joint judgement and Edelman J, although adopts the latter's answers to the case.

D Gordon J

Gordon J's reasoning commences by articulating that in cases before the High Court, generally plaintiffs and applicants are 'confined to advancing grounds of challenge which bear on the validity of the impugned provisions in their application to them'.[27] While this limits the sections that may be challenged, here ss 8, 11, and 12, Gordon J notes that it is up to the Court to determine the extent of the challenge to those sections.[28] While the pleadings narrow the challenge to the relevant sections only on the basis of the specific facts of this case, this does not man the Court cannot consider the principled impact of the sections.

Her Honour then considers if the relevant sections impermissibly burden the IFPC. This is undertaken through three inquiries: do the provisions burden the freedom of political communication, is the purpose of the provisions legitimate, and are the provisions reasonably appropriate and adapted to advance that purpose?

While there was no significant dispute that the sections burdened political communication, Gordon J was careful to specify the extent of that burden. Her Honour concludes that the incremental burden imposed by sections 11 and 12 is that it prohibits a publisher who has knowledge, but not necessarily involvement, that the political information was obtained through trespass from publishing or communicating it (where that information is not otherwise confidential).[29] The reasoning then continues on to specify that the extent of that burden varies, for instance, depending on if the publisher is complicit in the trespass or an innocent third-party.

Gordon J found the relevant sections to contain dual purposes: protection of privacy and dignity, and protection of property rights. Both are legitimate purposes.[30]

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[27] Ibid [117].

[28] Ibid [112].

[29] Ibid [165].

[30] Ibid [171].

Her Honour considers if the burden is justified. For those who trespass or are complicit in the trespass, Gordon J finds the burden is minimal.[31] Therefore, the justification required is also minimal and is met in this scenario, meaning the provisions are valid.[32] However, the burden imposed by the same sections' operation on innocent third-parties is more substantial. It would serve as a 'blanket prohibition' on possessing or communicating information which the third-party knew was obtained in contravention of the relevant sections. The 'degree of justification required is, therefore, high'.[33] Her Honour does not find that standard is met by the 'blunt instruments' of section 11 and 12.[34] For instance, these sections would proscribe 'media outlets communicating *about* footage that reveals unlawful conduct taking place at an abattoir or even unlawful conduct engaged in by the Government' if the content was obtained in contravention of s8.[35]

As such, Gordon J finds that in some of their applications, the relevant sections of the Act are invalid for impermissibly burdening the IFPC.[36] In line with the s31 of the *Interpretation Act 1987* (NSW), sections 11 and 12 of the Act should be read down such that they do not operate on innocent third-parties.[37]

It is important to note that this conclusion means that according to Gordon J's reasoning, the operation of the relevant sections as applied to the plaintiffs does not burden the IFPC. This is because FTI is recognised to have been complicit in the trespass of the second plaintiff.[38]

E Gageler J

Gageler J adopts the broad view of the case for judicial determination.[39] That is, the fact that the plaintiffs were complicit in the contravention of section 8 does not limit the judicial determination to that scenario. His

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[31] Ibid [175].

[32] Ibid [177] – [184].

[33] Ibid [187].

[34] Ibid [189].

[35] Ibid [189].

[36] Ibid [191].

[37] Ibid [122].

[38] Ibid [61], [199] – [203].

[39] Ibid [61].

Honour's reasoning then moves to the 'constitutional issue at the heart of the matter'.[40] The relevant sections are viewed as creating a 'blanket criminal prohibition' aimed at 'protecting the privacy of activities on private property'.[41]

Gageler J finds that the sections are invalid and impermissibly burden the IFPC. His Honour considers how a broadcaster with actual or constructive knowledge of content in breach of s8 would not be able to possess or publish it 'irrespective of the significance of the subject-matter of the recording to government and political matters'.[42] Additionally, the other State Acts are held up as illustrating the importance of 'public interest' exceptions in legislative design.[43] Gageler J goes on to address the section's validity even if they only applied to parties complicit in the breach of s8, rejecting this. It would leave the sections 'prohibit[ing] publication or possession of a visual record that has already been brought into existence' and applying 'irrespective of the nature of the activities revealed'.[44]

His Honour then turns to the *Interpretation Act 1987* (NSW) which narrows the application of any invalid provision so that it can operate legally. Gageler J adopts a substantial narrowing of the impugned sections as a solution, such that they would have 'no application to publication or possession of a visual record that is the subject-matter of a political communication'.[45]

F Gleeson J

Gleeson J agrees with Gageler J's answers to the case. Her Honour also stresses that while a challenge to the constitutional validity of a provision is limited to its effect on the plaintiff, that does not mean it must only consider the precise circumstances which give rise to that challenge.[46] As such, it is inappropriate to only consider if the IFPC is impermissibly burdened where the party was complicit in the contravention of s8.

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[40] Ibid [66].

[41] Ibid [68] – [69].

[42] Ibid [88].

[43] Ibid [92] – [94].

[44] Ibid [104].

[45] Ibid [97].

[46] Ibid [272]

III THE OVERALL DECISION

Close reading of the High Court's reasoning reveals the outcome hinged more on the definition of the challenge's scope than judicial disagreements about acceptable burdens on the IFPC. It also shows the 4-3 split on the decision suggests a closer result than it was. The justices either adopted a broad or narrow view of the questions posed by the case. The broad view is whether ss11 and 12 impermissibly burden the IFPC. The narrow view is whether those sections impermissibly burden the IFPC when the parties charged were complicit in the trespass. The broad view was solely considered by Kiefel CJ and Keane J and Gageler J (with who Gleeson J agreed). The narrow view was adopted by Edelman J (with who Steward J agreed). Gordon J considered both views before adopting the broader one.

In using the broad view, Kiefel CJ and Keane J remained focused on the provisions' effect on individuals who had actual knowledge that the information was obtained through trespass.[47] Conversely, Gageler J is particularly concerned with the prohibition's indiscriminatory effect regardless of the content and the fact an innocent third-party could be penalised despite only having constructive knowledge. Despite taking a broader stance on the constitutional validity of the relevant sections, the joint judgement rests on a narrow view of the challenge.

Edelman J and Gordon J both agree that on the narrow view, the sections are constitutionally valid. However, Gordon J goes on to adopt the broad view as the basis for Her Honour's answers to the case. The adoption of that broad view originates in the view that the full and principled impact of the relevant provisions should be considered. Anything less would be to ignore the true burden generated by the sections.[48]

The justice's decisions also suggest that where a restriction occurs following wrongdoing, it will be difficult to make out an impermissible burden on the IFPC. This is because the Court presumes that most citizens will obey the law, and in this case not trespass, thereby significantly narrowing the scope of the burden on the implied freedom.[49] Additionally,

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[47] Ibid [34], [45].

[48] Ibid [165] – [168], [185] – [190].

[49] See, eg, ibid [45], [262] – [264].

the punishment of wrongdoing and illegal obtained sources of information could help to improve the marketplace of ideas.[50]

IV BROADER CONSIDERATIONS

A Significance of using structured proportionality

The use of structured proportionality remains a perennial talking point in the decisions of the High Court.[51] It is interesting to note that both judgements which did not apply structured proportionality ended up in dissent. However, as noted above, the result ultimately had more to do with each judge's definition of the scope of the question before the court than the tool for assessing proportionality. Indeed, the actual analysis saw the same factors considered, regardless of the approach adopted.

Gordon J appears to endorse the structured proportionality process to answer whether the measure is 'reasonably appropriate and adapted'.[52] However, Her Honour does not actually engage in the distinct steps in the reasoning. Gageler J does not apply the process at all, continuing to apply His Honour's 'scrutiny' framework.[53] Gleeson J, though agreeing with Gageler J's reasoning, is careful to also agree with Kiefel CJ and Keane J's use of structured proportionality analysis.[54]

B Mirroring Lenah Game Meats and privacy in law

This case also has interesting links with *Australian Broadcasting Company v Lenah Game Meats* ('*Lenah*'), almost exactly twenty years later.[55] Like *Lenah*, this case involves footage of agriculture and animal husbandry. *FTI* also considers the existing legal protections for information. Unlike *Lenah*, which famously rejected any common law development for a general right

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[50] Cf ibid[79] – [81].

[51] See, eg, Adrienne Stone, 'Proportionality and its Alternatives' (2020) 48(1) *Federal Law Review* 123; Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92.

[52] *FTI Case* (n 1) [171].

[53] *Clubb v Edwards* [2019] HCA 11, [160] – [162].

[54] *FTI Case* (n 1) [271].

[55] *Australian Broadcasting Company v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ('*Lenah*').

to privacy, *FTI* surveyed the current landscape to determine what additional burden the Act imposes.

Lenah is therefore used to inform the judgements in *FTI*. For instance, Edelman J concluded that at its narrowest an equitable breach of confidence can extend to 'all private information where human dignity is concerned'.[56] Gordon J notes that 'not everything that happens on private property, and which the owner of the land would prefer to be unobserved, is private, and thus confidential'.[57] The joint judgement broadly agreed but felt little need to delve into the particular situations where confidentiality restrained use of information.[58] The differences between judgements about the operation of breaches of confidence seem mainly to lie in the circumstances and individuals to which confidentiality applies, rather than the content of the doctrine itself. The differences between the justices may be further examined should a direct question on breach of confidence arise in a future High Court case.

V CONCLUSION

Although it may appear to be a case which simply furthers the entrenchment of the High Court's various approaches and opinions on the IPFC, *FTI* is a reminder that the essential part of any application of a proportionality test is its 'scope'. Namely, the outcome of a case will greatly vary depending on whether the court is focused only on the specific circumstances of a case or takes a broader view which considers situations and hypotheticals not directly raised on the case's facts. *FTI* also highlights that under the current High Court, it may be difficult to successfully use the IFPC to challenge legislation which is predicated on any form of wrongdoing. Ultimately, *FTI* stands as a broad articulation on how the IFPC can be interpreted and applied by the High Court, but that the most important part of a challenge may be its scope.

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[56] *FTI Case* (n 1) [237].

[57] *FTI Case* (n 1) [159].

[58] *FTI Case* (n 1) [36] – [42].