Submission No 1

INQUIRY INTO LANDOWNER PROTECTION FROM UNAUTHORISED FILMING OR SURVEILLANCE

Organisation: Australian Privacy Foundation

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The Hon Robert Borsak MLC
NSW Legislative Council Select Committee On Landowner Protection From Unauthorised Filming Or Surveillance
Parliament House
Macquarie Street
Sydney NSW 2000

RE: Landowner Protection from Unauthorised Filming or Surveillance

This submission by the Australian Privacy Foundation responds to the Select Committee's invitation to provide input regarding landowner protection from unauthorised filming or surveillance.

The submission first provides contextual information and then addresses specific matters in the Select Committee's Terms of Reference.

Basis

The Australian Privacy Foundation is the nation's pre-eminent civil society body concerned with privacy. It has no political alignment. Its membership is across Australia; its board includes legal, information technology, health and other experts. It has a thirty-year history of providing cogent policy analysis and fostering law reform at the Commonwealth and state/territory levels. It has made numerous contributions to inquiries by the NSW state Parliament and Law Reform Commission, with for example a submission and testimony to the 2016 inquiry into surveillance technologies.

Information about the Foundation and access to its submissions, media releases and policy documents is available at www.privacy.org.au.

Approach

The Select Committee's Terms of Reference authorise its inquiring into and reporting "on the extent of protection for landowners from unauthorised filming or surveillance", with specific matters (discussed below) to be addressed in the report.

The Foundation is sympathetic to the real concerns raised by landowners, but considers that that unauthorised surveillance (with or without digital technologies) is most appropriately addressed on a holistic basis rather than through remedies that are specific to one part of the community, such as the agribusiness sector's landowners. That assessment is practical. It is consistent with a succession of reports by the Australian Law Reform Commission, other law reform commissions, parliamentary inquiries and judgments in Australian courts.

The concerns expressed by landowners about the inappropriate disregard of their privacy and disruption to their lives are concerns that have been voiced by many Australians in domestic, health, commercial, educational and other environments. There are substantive concerns regarding disregard of privacy and inappropriate access to non-public facilities, including trespass that does not result in destruction or damage of equipment, fences and buildings. They are evident in NSW litigation such as *Windridge Farm v Grassi*.

Those concerns are best addressed through –

- the development of a coherent body of law that is not technology or sector specific and that operates at the Commonwealth and state/territory levels
- the establishment of effective remedies for disregard of privacy, in particular a statutory cause of action (aka the Privacy Tort) that provides compensation for injury attributable to that disregard, irrespective of whether injury was caused by government, business, an individual or political activist
- the appropriate provisioning and direction of privacy watchdogs, which must have the legal authority, resources and commitment to actively address privacy concerns.

The Foundation considers that such law reform will meet the needs of NSW landowners, in particular small and large-scale livestock enterprises, and will not inappropriately inhibit media activity, law enforcement and the constitutionally implied freedom of political communication. Reform will not impose an onerous burden on taxpayers.

It will, we believe, be welcomed by most Australians on the basis that privacy is important to all people, irrespective of whether they are landowners or agriculturalists. We note and endorse the recent statement by Minister Dominello that privacy is "sacrosanct", "beyond politics" and an "absolutely enshrined right of the citizen". Law reform will give effect to what the Minister wrongly calls an "absolutely enshrined" right. The problem is that this right is **not** enshrined in NSW law, so Australian landowners, and everyone else, have no direct way to take action to protect themselves from serious intrusions into their privacy.

The following paragraphs address specific matters in the Select Committee's Terms of Reference.

(a) the nature of protection for landholders from unauthorised filming or surveillance, including but not limited to installation, use and maintenance of optical surveillance devices without consent under the *Surveillance Devices Act 2007* (NSW)

In responding to this matter the Foundation provides four broad comments.

The first is that it is important to recognise that inappropriate surveillance (including the use of handheld surveillance devices such as video cameras and mobile phones, tools such as bodycams, and software such as web bugs that engage in unauthorised transmission of an agriculturalist's closed circuit television feed) is in practice not effectively addressed through a single NSW statute or common law. The Foundation encourages the Select Committee to recognise that effective protection involves both Commonwealth and NSW statute and common law, for example dealing with illegal use of surveillance devices, computer crime, confidentiality, trespass, the media and aviation.

In achieving better protection for people engaged in primary production, in other areas of business or recreation, and in domestic settings it is important to look beyond the *Surveillance Devices Act 2007* (NSW). It is also important for NSW to encourage the development of a coherent regulatory framework across Australia, so that for example abuses of privacy are not fostered by inconsistent law and inconsistent enforcement on a jurisdiction by jurisdiction basis.

The second comment is policymakers, courts and parliaments have typically taken a narrow view of what is 'private'. That view is often regrettably construed in terms of 'information privacy' (written or electronic data about an identifiable individual) or in terms of images of an individual, excluding concerns regarding observation/recording of a location in which no individual is present or identifiable. (Examples are photographs of rental accommodation or an agribusiness facility.)

The third comment is that traditional restrictions on unwanted/intrusive observation have been based on barriers. It is a longstanding principle in Australian and UK law that what occurs in a public place (such as a street, square, beach or park) is not private, although there are starting to be local restrictions even in public places to protect the interests of vulnerable people, in particular children or others subject to voyeuristic photography when not fully clad on public beaches.

As a corollary, what is observable from a public place is not private. The implication is that individuals seeking freedom from observation should close the blinds, draw the curtains, turn off the lights, grow a hedge or otherwise conduct their activities – intimate or otherwise – away from the gaze of prurient neighbours and people equipped with telephoto lenses. Australian and international law does not provide systematic protection from unwanted observation from the air, including from aircraft transiting over a backyard or farm, a drone that passes over such a location but does not hover, or a satellite.

In considering calls for restrictions on aerial surveillance (including real-time transmission of images from drones observing crop production, husbandry, mining and forestry activity) the Foundation encourages the Select Committee to recognise that the primary responsibility for the regulation of drones rests with the Commonwealth, that the use of drones by both business and activists is increasing as costs decline alongside increases in functionality, and in the coming decade the use of high definition imaging from satellites will be normalised. A NSW 'ban the drone' statute will be ineffective as both disproportionate and readily subverted.

The fourth comment is that privacy – and more broadly the 'personal sphere' – is not an absolute. Law regarding surveillance of landowners and of activity in the primary industry sector (including surveillance in which no individual is identifiable) is necessarily bounded by expectations regarding lawfulness. A landowner engaging in illegal activity (which might range from unauthorised clearing of vegetation, pollution of a waterway, noncompliance with a quota regarding uptake of water from a river, or growing an illegal crop such as marijuana) should legitimately expect surveillance by the state, including by law enforcement personnel who physically enter the location rather than merely observing from a distance using a thermal camera, a drone or other surveillance device.

More contentiously, activists – including employees or agents with special access to a location – are likely to gain some traction if they engage in surveillance of primary industry activity on the basis of a compelling public benefit, otherwise known as public interest. Confidentiality for example does not provide exhaustive protection of agribusiness and remedies may be ineffective if the results of observation have been placed in the public domain, something highlighted in the High Court's *Lenah Game Meats* judgment. The Foundation respectfully suggests that the Select Committee approach with caution claims made by proponents of so-called Ag-Gag statutes that are intended to criminalise what Australian courts are, in some cases, likely to regard as legitimate disclosure of for example animal cruelty, misappropriation of resources or environmental damage. A NSW Ag-Gag or Anti-SLAPP statute is, in the view of some legal experts, likely to be constitutionally impermissible.

The Foundation notes disagreements about the effectiveness of self-regulation on the part of major media organisations and (as highlighted below) the absence of self-regulation among an emerging generation of 'citizen journalists'.

One mechanism for resolving tensions and for assisting NSW Courts by enhancing clarity is the introduction of a public interest based media shield/whistleblowing statute that provides a defence where surveillance and dissemination of images or other data has clearly breached one or more Commonwealth or state/territory statutes. That 'public interest' is one of a compelling and transcendent public good, articulated by the High Court and NSW Supreme Court over several decades, rather than merely what attracts public curiosity or is deemed 'newsworthy' – so a privacy tort would, even with this defence, still work against most sorts of malicious intrusion.

(b) the extent and appropriateness of penalties for unauthorised filming or surveillance, including but not limited to on-the-spot fines and/or relevant penalties under the *Summary Offences Act 1988* (NSW)

In prefacing its response to this matter the Foundation notes that there is disagreement within the criminological community regarding penalties as deterrents, alongside some recognition that the Privacy Tort has value as both shaping behaviour and providing victims with compensation (albeit through a civil litigation process that may disregarded by landowners on the basis of litigation costs and time).

The Foundation considers that society's disquiet about intentional disregard of privacy in domestic and other settings should be signalled through stronger penalties. Consistent with the Foundation's past submissions to Parliamentary committees and law reform commissions that stronger punitive regime should be accompanied by and not preclude a statutory cause of action regarding serious invasion of privacy. That tort has both a deterrent and compensatory value.

(c) the implications with regard to self-incrimination of the request of disclosure by a person of any recordings made by that person

The Foundation considers that this matter can be addressed under the existing Australian legal framework regarding evidence and self-incrimination. We would be happy to respond to a question by the Select Committee that provides more detail.

(d) the implications of rapidly changing media environment, including social media platforms such as Facebook Live, and

Landowners (personal and corporate) exist in the same environment as other individuals and bodies that experience a disregard of privacy, confidentiality and dignity. That disregard is both a function of data capture/dissemination technologies (such as the ubiquity of the audio/video recording device known as the mobile phone) and of practice (including recurrent carelessness on the part of data custodians such as the Commonwealth Bank, indifference on the part of governments such as the official 'doxing' of a Centrelink claimant, rhetoric that 'if you have nothing to hide you have nothing to fear' and perceptions among the media that 'if it bleeds it leads').

Experience in Australia and overseas suggests that the leading media organisations, particularly those driven by an imperative to retain audience share and increase the return on capital amid a race to the bottom, have an uncertain culture of self-regulation regarding the disregard of individuals – particularly disadvantaged people. They will on occasion legitimately argue that there is a compelling public interest in investigative journalism relating to primary industry, non-commercial abuse of animals, environmental harm and so forth. Historically much of that argument has been held by Australian courts to be persuasive and for example consistent with the implied freedom of political communication that covers all Australian jurisdictions.

As mentioned above, there is less certainty about the media activity of individuals (who sometimes claim a privileged status as 'citizen journalists', emulating language in the United States) and formal/informal groupings of political activists and researchers. Those entities will inevitably adopt surveillance tools and will be increasingly adept at disregarding legal restrictions on the dissemination of content, particularly if activists perceive that providing illicit content to a conventional media organisation such as the ABC (*Lenah Game Meats*) will be less effective than a viral distribution through YouTube, Twitter, Facebook and other social media.

On that basis the Foundation offers three conclusions.

The first is that use/misuse of privacy invasive media is becoming normalised: technologies for surveillance and dissemination are increasingly low cost, robust and user friendly. Their propagation is in part a matter of emulation: users copying peers and users copying public figures. (The Prime Minister, for example, is the salient example for many university students and academics of adoption of Wickr and Snapchat.) Normalisation will affect the privacy of all Australians rather than merely or especially the Australians who are landowners or who work in primary industry.

The second is that a coherent and reasoned legal framework is required. That framework cannot be sector or technology specific. It must gain the commitment of stakeholders through an educative public awareness campaign and through proportionate enforcement by public and private sector entities. Advocates have on occasion offered simplistic remedies such as severe criminal penalties for unauthorised surveillance of animal husbandry activity (exceptionally and inappropriately characterised as terrorism) or nationalisation of social network services such as Facebook. An effective response to substantive concerns regarding inappropriate surveillance of landowners and of non-landowners alike is the establishment of a consistent national legal framework that

- is technology neutral (unlike the range of statutes across Australia that are restricted to audio or networked devices)
- acknowledges harms may not centre on physical injury (e.g. recognises that disregard of your privacy may not involve any destruction of property or financial loss)
- is sector neutral, centred on inappropriate observation and dissemination irrespective of whether that is in your home, in a public change room, in the piggery or your backyard
- is proportionate and thus for example avoids the inappropriate criminalisation that evident in law regarding sexting by minors.

The third conclusion is that very substantial work, in which the Foundation has been instrumental over three decades, regarding such a framework already exists. In particular reports by the Australian Law Reform Commission and the NSW Law Reform Commission have offered cogent recommendations for achievable law reform.

The challenge for the NSW Government and other Governments is to implement those recommendations. An ongoing failure to do so will exacerbate the concerns that will be expressed to the Select Committee.

(e) any other related matter.

Given the preceding comments the Foundation offers three recommendations. The Select Committee should call on the NSW Government–

1) to adopt a position of leadership in urging the Commonwealth to adopt recommendations by the Australian Law Reform Commission and other bodies by

establishing the privacy tort, on the basis that the tort will address many of the concerns expressed by landowners and other people over the past decade

2) through the Council of Australian Governments urge the Commonwealth to ensure that the Office of the Australian Information Commissioner is adequately resourced and engages with civil society, given the significance of that agency in dealing with privacy problems and its regrettable history of underperformance

3) to better resource and otherwise empower the NSW Privacy Commissioner as an agency with an educative and enforcement function, including improved capacity to assist people in rural and regional areas, including landowners, to understand and make use of the proposed new privacy tort and other remedies for serious and unlawful intrusion of their privacy.

Representatives of the Foundation would be pleased to discuss particular points with the Select Committee.

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