

Local Government Update

Recording conversations without consent

By Alexandria Bishop

Surveillance technology has become increasingly sophisticated and affordable, altering how we record our day-to-day lives. In particular, smart phones and tablets are able to record conversations conveniently, inconspicuously and reliably, tempting people to covertly record a conversation as proof of both its existence and its contents. This temptation raises two important questions:

- 1) **Is it lawful to covertly record without consent a conversation occurring over the telephone or in person?**
- 2) **Are covert recordings of conversations admissible as evidence in Court?**

The answers to these questions lie in the interplay between telecommunications, surveillance and evidence law.

Whether it is lawful to covertly record a telephone conversation

Subject to some limited exceptions, the *Telecommunications (Interceptions and Access) Act 1979 (Cth) (TIA Act)* prohibits any person intercepting, authorising the interception of, or doing anything that will enable the interception of, a communication 'passing over' the telecommunications system. Accordingly, the TIA Act covers any conversations made over a landline or mobile phone; via a headset attached by a wire; and communications in transit over the internet.

'Passing over'

Generally, a communication '**passes over**' a communications system from the time that it is sent or transmitted by the person sending it until it becomes accessible by the intended recipient. Furthermore, a communication becomes '**accessible**' by its intended recipient if it has:

- been received by the telecommunications service provided to the intended recipient;
- is under the control of the intended recipient; or
- has been delivered to the telecommunications service provided to the intended recipient.

Therefore, the passage of a communication over the telecommunications system is complete once the communication is emitted from the telephone receiver to the recipient. Clearly, this technical interpretation of the term 'passes over' catches the traditional wire tap, where the listening and recording is effected by a direct line into the telephone system. Recordings made by an external device after the sound of a speaker's voice has left the telecommunications system, such as through an external recording device placed next to a telephone receiver, however, have been explicitly held to not constitute an 'interception' for the purposes of the TIA Act.

Covertly recording a private conversation occurring face-to-face

The general prohibition

The Surveillance Devices Act 1998 (WA) (**SD Act**) prohibits the installation, use or maintenance of a listening device to:

- (a) record, monitor or listen to a private conversation to which that person is not a party; or
- (b) record a private conversation to which that person is a party.

A **'listening device'** is any device capable of being used to record, monitor or listen to a private conversation or words spoken in a private conversation. A mobile telephone capable of making an audio recording is therefore a 'listening device' for the purposes of the SD Act. Under the SD Act a conversation is private if it is carried on in circumstances that may reasonably be taken to indicate that any of the parties to the conversation desires it to be listened to by only them. A conversation is not considered private, however, if it is carried on in any circumstances in which the parties to the conversation ought reasonably to expect that the conversation may be overheard. Whether a conversation is considered private for the purposes of the SD Act will turn on the surrounding facts and the intentions of the parties, however, the following observations can be drawn from the extensive judicial consideration of the meaning of a **'private conversation'**:

- A private conversation should have a degree of informality.
- Meetings of a commercial character and purpose are of an entirely different nature to *'private conversations.'* Notably, the parties to the conversation are representatives or agents of a corporation who have a duty to report to the corporation; the meetings have formal agendas; the parties seek to reach decisions that will affect the legal rights and duties of the parties; formal records are kept; and the meetings are of a formal nature.
- A *'private conversation'* in the sense of the legislation does not mean a 'secret' or 'confidential' conversation. Rather it is a conversation that is 'not public.'
- Private conversations should be intended to be confined to the parties to the conversation or known participants in the conversation.
- A conversation can be private even though the participants are at liberty to tell others about it later.
- The location and physical environment in which the conversation took place will be of great significance in deciding what the parties expected.

Local government officers should exercise particular caution before assuming that a conversation is public and therefore can be recorded

The various cases considering the meaning of *'private conversation'* demonstrate that local government officers should exercise particular caution before assuming that a conversation is public and therefore can be recorded (or vice versa).

Exceptions to the general prohibition to covertly recording conversations

The general prohibition to recording conversations without consent is subject to some narrow exceptions. For the purposes of this article, the exception that is most relevant to the business of local government officers is that which permits a private conversation to be covertly recorded if a *'principal party'* consents to the recording and it *'is reasonably necessary for the protection of the lawful interests of the principal party.'*

Under the SD Act, a *'principal party'* in relation to a private conversation, means a person by or to whom words are spoken in the course of the conversation. This definition of principal party means that it is not necessary for all parties to the conversation to consent to the recording.



The scope of what is *'is reasonably necessary for the protection of the lawful interests of the principal party'* has been considered at some length by the Courts. The phrase does not relate to *'legal interests'* in the sense of a legal right, title duty or liability; rather *'lawful interests'* are those that are not unlawful and include *'legitimate interests'* or *'interests conforming to law.'* Examples of covert recordings not relating to lawful interests include those made:

- in case the other party decided later *'not to tell the truth about what was happening'* in respect of a previously agreed oral contract;
- to gain an advantage in civil proceedings;
- out of a mere desire to have a reliable record of a conversation;
- because it was the recorder's practice to record important meetings; and
- for the purpose of, in effect, blackmailing a party to comply with alleged collateral obligations.

On the other hand, covert recordings considered to have been reasonably necessary for the protection of lawful interests of include recordings:

- relating to a litigated property dispute where such recordings made it clear that who was going to be believed as to the arrangements regarding the property;
- made during a dispute over the rescission of an agreement where the recorder had become concerned with the behaviour of the other party and was unable to have a rational discussion with him, leading the court to accept that the recordings gave a very reliable indication of the events that occurred; and
- made during commercial meetings in order to have an accurate record of a conversation relating to commercial interests.

These cases underscore the requirement that a covert recording be made for the protection of a party's lawful interest and not for their own personal advantage or convenience in order to be considered lawful. Whilst there has been substantial consideration by the Court of the *'lawful interest'* exception to the prohibition, given that each case will turn on its own facts, the legal position is still not completely clear nor predictable.

The penalty

The SD Act imposes severe penalties for a breach of the prohibition, being:

- (a) a \$5 000 fine and/or 12 month imprisonment for an individual; or
- (b) a \$50 000 fine for a body corporate.

Whether a covertly recorded telephone conversation is admissible as evidence

Criminal Cases

In criminal cases the trial judge has discretion to reject unlawfully or improperly obtained evidence, commonly known as the *Bunning v Cross* discretion. Factors relevant to determining admissibility of covertly recorded conversations may include:



- Whether the unlawful conduct resulted from a mistake or was deliberate or reckless. Where the illegality occurs as a consequence of mistake, the Court's will favour of admissibility.
- The cogency of the evidence. Cogency will play no part where the unlawful conduct is deliberate or reckless, however, where the illegality arises only from mistake, and is neither deliberate nor reckless, cogency is one of the factors to which regard should be had.
- The ease with which the law might have been complied with. A deliberate 'cutting of corners' ought not to be tolerated thus the fact that the evidence could easily have been procured without illegality had different procedures been adopted may point towards inadmissibility.
- The nature of the offence charged. The more serious the offence, the stronger the argument for admissibility.
- The scheme of any legislation the person who obtained the evidence failed to obey. If the legislation shows a deliberate attempt to restrict the powers of investigating authorities from obtaining certain evidence, that consideration will point towards rejection of evidence obtained in breach of such legislation.

Civil Cases

Though there does not appear to be any other case authority explicitly extending the *Bunnings v Cross* discretion to civil cases, the principle is said to be one of general application and has been considered in at least one without any suggestion that it might be inappropriate. The Courts have also indicated a willingness to exercise the discretion in sufficiently strong cases where evidence has been obtained by acts of torture or extortion. Furthermore, the discretion has been exercised in relation to unlawful recordings of conversations in employment law cases before the Fair Work Commission, despite the fact that the Commission is not bound by the rules of evidence in relation to the matters before it. Therefore, though there is little authority relating to the use of the discretion in civil cases, Australian Courts and other judicial bodies have indicated a willingness to exercise the discretion to exclude unlawfully obtained evidence, such as recordings of conversations that were covertly recorded.

Conclusion

The continual advancement of technology and the changing ways in which that technology is used has made it easier than ever to covertly record conversations. Whilst this offers attractive advantages to people wishing to protect themselves from future possible liabilities, the superficial attraction must be considered against the myriad of risks involved, including but not limited to, the risk of criminal liability and the discretionary exclusion of unlawfully obtained evidence. Additionally, whilst the current legislative framework in respect of telephone conversations does appear to have left a 'loophole' in relation to recording such conversations by way of a device next to a telephone receiver, this position may change as the body of case law relating to the TIA Act develops and grows. Therefore, extreme care should be taken in making any decision as to whether it is lawful or appropriate to record a conversation without consent.

For further information in regard to the above, contact Alexandria Bishop on 9383 3133 or abishop@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.

