

Drones – Flying within the law

By Jennifer Long

As the technology and capability of drones (otherwise known as 'Remotely Piloted Aircrafts' (RPAs)) is rapidly increasing, so is the popularity and scope of use of this technology, not just by individuals but by private businesses and public bodies. A number of law enforcement and emergency service authorities are already using RPAs for activities such as search and rescue and fire and traffic monitoring. Similarly other bodies and businesses, including local governments have been increasingly exploring the use of RPA's for weed extermination, land use infrastructure monitoring, property surveillance and mapping. The rapid advancement in the use of this technology raises a number of questions, including the question of whether it is lawful to use RPAs

to record footage for surveillance and monitoring purposes and if so in what circumstances. However, the capability of RPAs to travel over private property to record or stream images undetected is also causing concerns and leading many to question whether the current regulations and privacy laws in Australia adequately address the privacy risks and implications posed by RPAs.

1. Legal Framework

Currently in Australia, RPAs are primarily regulated from a safety perspective and there are no specific regulations which protect the privacy of individuals in connection with the use of RPAs other than those in the Privacy Act 1988 (Cth).

1.1 Civil Aviation Safety Regulations

The Civil Aviation Safety Authority (CASA), Australia's air safety regulator is the body responsible for regulating RPAs in Australia. However, CASA's role is to implement the Civil Aviation Safety Regulations 1998 and to regulate RPAs from a safety perspective. Therefore the privacy issues pertaining to the use of RPAs are beyond CASA's remit.

Generally, the safety laws for the use of RPAs will vary depending on whether the RPA is flown commercially or recreationally. When flying recreationally and not commercially, or for any form of economic gain, RPA's can be operated without certification provided that the operator complies with the CASA safety rules.

However, when flying commercially, an operator must generally hold an RPA operator's certificate. That is unless the RPA is an 'excluded aircraft', being a small RPA weighing less than 2kgs in which the operator will only need to create an aviation reference number and notify CASA at least five days prior to their first commercial flight (and then every 24 months) and operate by the standard CASA operating conditions.

The Standard RPA operating conditions limit the operation of one RPA at a time and require the operation of the RPA to be:

- a) within visual line of sight;

- b) below 120 metres (400 ft) AGL;
- c) during the day;
- d) more than 30 metres away from anyone who is not directly associated with the operation (people being filmed are not considered to be directly associated with the RPA's operation);
- e) at least 5.5km away from controlled aerodrones;
- f) not over populous areas (including beaches, parks and sporting ovals); and
- g) not over or near an area affecting public safety or where emergency operations are underway (without prior approval).

1.2 Privacy Act 1988 (Cth)

As a general principle, in Australia the filming of a person or taking of a person's photograph in a public place without their consent or knowledge is permitted as a matter of law. However, the Privacy Act may restrict the use of RPAs on private land without the consent of the subject or property owner in certain circumstances.

Whether the Privacy Act will apply to footage taken by an RPA, will depend on who takes the footage, whether the Act applies to that body or organisation¹. In particular, whilst the Privacy Act prescribes a number of principles (the National Privacy Principles contained in Schedule 1 of the Act) with respect to the collection, handling, management and use of personal information, the Act only does not apply to local governments or private operators². In addition, there is no specific WA Privacy legislation. Therefore, the Act would not apply to a Local Governments using a RPA to take footage and arguably a local government could use information legitimately derived from such a process.

However, in the event footage is obtained from a third party, care must be taken to determine whether the third party was an organisation which was bound by the Privacy Act and if so, whether that footage contained 'personal information' (for example information where someone can be identified, or reasonably identified in the video footage). If the Act did apply and the footage contained 'personal information', the organisation would need to comply with the requirements of the Privacy Act and provide a privacy collection statement to the 'identifiable'

individual (required under Australia Privacy Principle 5 in the Privacy Act).

1.3 Surveillance Devices Act 1988 (WA)

The optical recording of a person in a public place, would not generally contravene the Surveillance Devices Act. However, if a person is recorded on private property or whilst carrying out an activity where it could reasonably be taken that person desires to be observed only by themselves, this could constitute an offence under the Surveillance Devices Act³.

It is less clear whether the use of RPAs to record footage of private land for monitoring or surveillance purposes would constitute an offence under the Surveillance Devices Act. However, it is arguable that the recording of footage to show only the 'use of the land' (where an individual is not captured carrying out an activity) would not constitute a 'private activity' as contemplated by the Act.

1.4 Law of trespass

There is some uncertainty as to whether the flying of RPAs over private property without permission could amount to a trespass to land. A trespass to land is an interference with a land owner's rights, which extend to the airspace over their land to a reasonable height.

Based on case authorities, it can be reasonably concluded at least for the time being that as long as the RPAs are flown over land quickly and at a height that does not detract from the land owner's use and enjoyment of their property, that no trespass to land would occur⁴. However, there is no clear guidance on the height a RPA would need to be flown to avoid trespassing on private land.

There is also no case authority which has considered whether the deliberate surveillance or monitoring of individuals or land by RPAs flying over private land would amount to a 'detraction from the land owner's use and enjoyment of their property' to constitute a trespass. Notwithstanding that, it is arguable that such activity could result in a trespass. However, at the present time, there have been no cases in Australia where a private individual has successfully taken action against a RPA operator for a breach of privacy or a trespass of land.

2. Use of RPAs by local governments

Under current laws, a local government would be able to operate RPAs to carry out parking surveillance or other monitoring or surveillance on Local Government owned or controlled land, as long as it complies with the CASA Standard RPA operating conditions. Additionally, in the event an RPA weighs more than 2kgs, the operator of that RPA would be required to obtain the requisite licence. However, if the RPA is to be operated over populated areas, a request should be made to CASA and any additional required protocol/conditions set by CASA must be adhered to.

Whether RPAs can be used for monitoring or surveillance of private land is less clear. On the one hand the Privacy Act would not apply to local government's use of RPAs and RPAs could in some circumstances be used to capture footage of private land to confirm land uses (so long as it did not capture footage of an individual carrying out a private activity on that land). However, whether the flying of RPAs over private land to capture footage of that land could constitute a trespass of private property or remains unclear. Additionally, local government use of a RPA to enter into airspace above private property may constitute entry onto private land for the purposes of the Local Government Act 1995 and constitute a breach of that Act if the requirements for entry onto private land are not complied with. On that basis, the use of RPAs over private land would need to be considered on a case by case basis taking into consideration the nature of the proposed use and the likely impact on a landowner's use or enjoyment of their property.

In any event, the use of RPAs to carry out surveillance of private land has the potential to incite ill feelings and discontent amongst the community and the use of such technology over private land, even if legally permitted, should be exercised with caution.

If you would like to discuss any of the matters raised in this article further, please do not hesitate to contact Jennifer Long at jlong@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.