



Crime and Corruption Commission

QUEENSLAND

# Covert evidence gathering: opportunities and limitations

National Investigations Symposium

9 November 2016

Presented by:

**Amanda Bridgeman**

Senior Lawyer, Corruption Legal Services

# Outline

**Recent employment case involving covert recording**

**General principles**

**Impacts of capturing evidence illegally**

**Laws that prohibit/regulate these types of evidence**

**Other relevant factors to be considered**

**Conclusion**

# Recent employment case involving covert video recording

## Chappell v Griffin Coal Mining [2016] FCA 1248

### FACTS

- Chappell was a boilermaker & union representative at Griffin Coal Mine.
- He attended a meeting with council representatives outside the front gate of the mine site to discuss a planned protest the next day. After the meeting, 2 of the 3 council reps left, with 1 remaining to talk with Chappell.
- The remaining council officer was an old friend of Chappell's. As the men were talking, 2 security guards employed by the mine approached. The guards were patrolling the front gate as part of their duties & in anticipation of the next day's industrial action.
- One of the guards covertly recorded the conversation between Chappell and his friend on a camera fixed to the middle of his chest. Chappell was recorded making disparaging, offensive and racially abusive comments about the company's owners and management.
- Some weeks later, Chappell was directed to attend an inquiry into allegations of misconduct arising from the recording.
- Chappell applied to the Federal Court for an injunction preventing the company from using the video recording

# Continued....

## Chappell v Griffin Coal Mining [2016] FCA 1248 DECISION

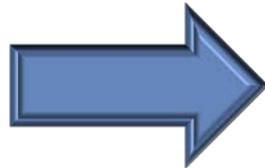
### **Federal court ruled:**

- The covert video recording was made in breach of Western Australia's *Surveillance Devices Act 1998*. As the video recording captured both sound and visual images, the Court considered whether or not the video recording breached the provisions prohibiting the recording of private conversations and activities.
- An interim injunction was granted to Chappell which restrained the mining company from using the recording for any purpose including disciplinary proceedings against Chappell

# General principles

Whatever is not prohibited or forbidden is permitted

Prohibitions  
identified from  
legislation & law  
of torts

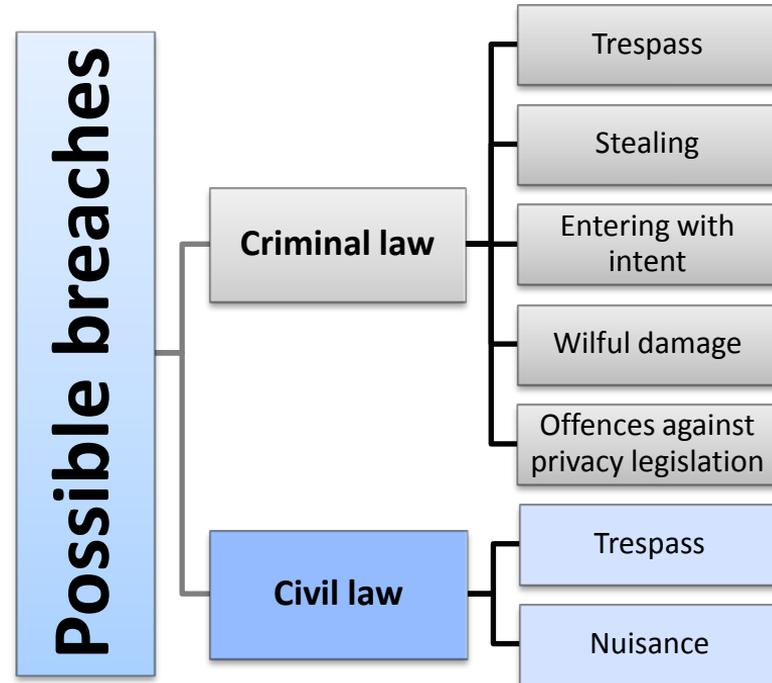


**BUT**

note the discretion to  
exclude evidence even  
where it has been  
gathered lawfully e.g.  
due to unfairness

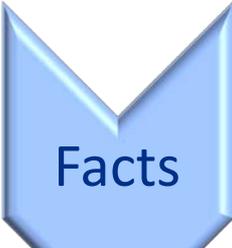
# General principles

Covert evidence gathering will be unlawful if it involves a breach of the law



# Impacts of capturing evidence illegally

## QLD case - *R v Versac* [2013] QSC 46



Facts

- Police suspected drug activities were occurring at a storage shed
- Police hired an adjacent storage shed and installed a camera and recording equipment to capture activities outside the suspect's storage shed
- Police did not apply for a surveillance device warrant under Qld's *Police Powers and Responsibilities Act 2000 (Qld)*

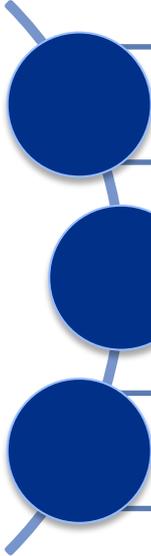


Decision

- Police violated terms of the storage shed rental agreement
- Breaching the agreement meant they were unlawfully on private property and were **trespassers**
- Recordings from the camera was captured unlawfully
- Evidence captured from the surveillance camera was excluded

# Telecommunications information

## *Telecommunications (Interception and Access) Act 1979 (Cth)*



Telecommunications interception

Telecommunications data (CCRS)

Stored communications

# Stored communications

## Includes:-

- Emails
- Text messages (SMS)
- Photos or audio files sent by text messages (MMS)
- Voicemail

# Sound recordings

## Prohibition/regulation of listening devices:

State/Territory	Legislation
QLD	<i>Invasion of Privacy Act 1971</i>
NSW	<i>Surveillance Devices Act 2007, Workplace Surveillance Act 2005</i>
VIC	<i>Surveillance Devices Act 1999</i>
WA	<i>Surveillance Devices Act 1998</i>
SA	<i>Listening and Surveillance Devices Act 1972</i>
NT	<i>Surveillance Devices Act 2007</i>
TAS	<i>Listening Devices Act 1991</i>

# Can I secretly record a conversation?

YES – In QLD, VIC & NT: Lawful where the person recording is a party to the private conversation

However, even though it may be lawful in these jurisdictions to record a private conversation you are party to; there are also prohibitions on publishing or communicating a private

YES – In NSW: Lawful where all principal parties consent to recording OR where a principal party consents AND:

- It is reasonably necessary to protect their lawful interests; or
- It is not made for the purpose of communicating or publishing to another

# Case study

## Daran Thompson v John Holland Group [2012] FWA 10363

### FACTS

- Thompson was a rail safety officer employed at Esperance, WA.
- After a safety incident at Esperance project, investigation conducted. No disciplinary action/warnings issued against Thompson. However, he was transferred to another project to work under supervision of Mr Andrews.
- Thompson not happy but agreed to transfer.
- On first day, Thompson met with construction manager & project manager of new site. He used his phone to record the meeting without knowledge of the managers.
- Later played parts of the call to Mr Andrews. Mr Andrews reported Thompson and after an investigation, he was dismissed from the company.
- Thompson applied to Fair Work Commission that his dismissal was unfair. He argued that after the safety incident and his transfer, he was concerned his job was in jeopardy and needed to record the meeting.

# Continued....

## Daran Thompson v John Holland Group [2012] FWA 10363 DECISION

### **Federal court ruled:**

- Secret recording was unlawful because it was made without consent of other parties to the conversation and was not reasonably necessary to protect Thompson's lawful interests.
- Not necessary for reasons including that:
  - Thompson had moved willingly to new project;
  - No disciplinary action had been taken in relation to previous incident.
- Recording was not allowed into evidence.
- Dismissal was not unfair.

# Visual recordings

No prohibition in SA and TAS

In QLD, it is unlawful to view/record a person without their consent if the person

- Would reasonably expect actions to be private
- Is in a private place
- Is engaging in a private act

In VIC, it is unlawful for a person to record a private activity to which they are not a party

- Exception: Parties should reasonably suspect activity may be observed OR
- Exception: Recording is reasonably necessary to protect lawful interests

# Covert tracking

## No Prohibition

South Australia  
Tasmania  
Queensland

**Prohibition in**  
New South Wales  
Australian Capital Territory  
Western Australia  
Northern Territory  
Victoria



## Exceptions:

- Law enforcement purposes (all)
- Lawful purposes (all except Vic)

# NSW Workplace Surveillance Act

NSW is the only state which has a legislative regime to specifically regulate overt/covert surveillance in the workplace

Regulates overt surveillance by requiring that employees are notified 14 days in advance of surveillance commencing

Prohibits covert surveillance **unless authorised** by a covert surveillance authority. Covert surveillance means forms of surveillance for which an employee has not been given notice

May only be issued for the purpose of establishing whether or not one or more employees are involved in any unlawful activity while at work for the employer

**CANNOT** be used in any change room, toilet, shower or other bathing facility or for the purpose of monitoring the employee's work performance

# Impacts of capturing evidence illegally

You

- Criminal/civil prosecution
- Disciplinary action by your employer

The organisation

- Legal action
- Damage to reputation

The investigation

- Evidence potentially inadmissible

# Exercise of discretion to exclude

## Haslam v Fazche Pty Ltd T/A Integrity New Homes [2013]

### FACTS

- Haslam applied to the Fair Work Commission on the basis that her dismissal was unfair.
- During course of proceedings, she sought permission to admit audio recordings she had made of meetings with her managers. The recordings were made without the knowledge and consent of the managers.
- Conceded that the recordings were made in breach of SA's Listening and Surveillance Devices Act however requested that they be admitted pursuant to the Commission's wide discretion to inform itself as it sees fit.
- Haslam wanted the Commission to consider the recordings because they would clarify what she claimed were false statements made by her two managers in witness statements submitted in the proceedings.

# Exercise of discretion to exclude

Haslam v Fazche Pty Ltd T/A Integrity New Homes [2013]

## DECISION

- Recordings not allowed
- Although Commission isn't bound by rules of evidence they are relevant
- Where evidence has been improperly obtained start from the position that it will not be admitted **unless** the party seeking to admit, can satisfy the tribunal that the desirability of admitting, outweighs the undesirability.
- In this case, the recordings might potentially assist, they would not be determinative of whether Haslam had been unfairly dismissed or whether the witnesses were being untruthful i.e. limited probative value

# Other relevant factors to be considered by decision-maker

## Reliability of evidence

- *Peter Mulhall v Direct Freight (Qld) Pty Ltd T/A Direct Freight Express [2016] FWC 58*

## Fairness

- *Kharb v Eastfield Pty Ltd T/A BP Duaringa [2013] FWC 6403*
- *Lambley v DP World Sydney [2012] FWA 1250*

# Conclusion

**Recent case involving covert recording**

**General principles**

**Impacts of capturing evidence illegally**

**Laws that prohibit/regulate these types of evidence**

**Other relevant factors**

**Conclusion**

**Questions?**