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Recording private conversations or activities - Surveillance Devices

Communication or publication of information

Listening Devices

The Surveillance Devices Act 2016 (SA) commenced operation on 18 December 2017 and regulates the recording of a *private conversation or activity*, including the use of tracking and data surveillance devices.

Under the Surveillance Devices Act 2016 (SA) it is an offence to knowingly install, use or maintain a listening device to overhear, record, monitor or listen to a **private conversation** – whether they are a party to the conversation or not [s 4].

The definition of a listening device is broad and includes any device capable of being used to listen to or record a private conversation or words spoken to or by any person in private conversation. This would include mobile phones or personal media players.

Maximum penalty: \$15 000 or 3 years imprisonment (in the case of a natural person) or \$75 000 (in the case of a body corporate).

It is not an offence to use a listening device to record a private conversation where all principal parties to the conversation provide their **consent** [s 4(2)(a)(i)].

It is also not an offence to use a listening device where the use of the device is reasonably necessary for the protection of the **lawful interests** of the person making the recording [s 4(2)(a)(ii)].

There will be no offence if there is **lawful authorisation** under the following Acts [s 4(2)(b)(i)-(v)]:

- the Surveillance Devices Act 2016 (SA) or any other Act;
- the Telecommunications (Interception and Access) Act 1979 or another law of the Commonwealth;
- for the purposes of an approved operation under the Criminal Investigation (Covert Operations) Act 2009 (SA);
- where the device is installed, used or maintained by a person who holds an investigation agent's licence under the Security and Investigation Industry Act 1995 and the device is used by the licensee in the course of their work as an investigation agent and the use is reasonably necessary for the protection of the lawful interests of a person;

- where the device is installed, used or maintained by a loss adjuster to whom the Security and Investigation Industry Act 1995 does not apply and the device is used in the course of their duties as a loss adjuster and the use is reasonably necessary for the protection of the lawful interests of a person.

A listening device can be installed and used within premises or in a vehicle if the occupier or owner consents and the installation and use is reasonably necessary for the protection of the lawful interests of the occupier or owner or some other person.

A listening device can be used to record any words spoken in connection with the execution of a surveillance device warrant or authority under the Surveillance Devices Act 2016 (SA). It may also be used by an officer for the purpose of recording any words spoken by or to the officer during the course of their duties.

Unintentional hearing of a private conversation by means of a listening device is not an offence under the Act.

Use of a listening device solely for the purposes of locating and retrieving the device is also not an offence.

Optical Surveillance Devices

It is an offence to knowingly install, use or maintain an optical surveillance device to visually record or observe private activity without the **consent** of each party to the activity. This applies even where the device is installed on premises of which the person has lawful possession or control and includes vehicles [s 5].

An optical surveillance device is defined broadly to mean a device capable of being used to observe or make a visual recording of people, places or activities and includes both still and moving pictures. Personal media players and mobile phones are included in this definition.

Maximum penalty: \$15 000 or 3 years imprisonment (in the case of a natural person) or \$75 000 (in the case of a body corporate).

There are additional offences where a person where the installation or use of the device involves entry onto or into premises or a vehicle or interference with premises, a vehicle or any other thing without **consent**.

An optical surveillance device can be installed and used within premises by a person if the installation and use is reasonably necessary for the protection of the **lawful interests** of that person.

There will be no offence if there is lawful authorisation under the following Acts [s 5(4)(a)(i)-(v)]:

- the Surveillance Devices Act 2016 (SA) or any other Act;
- under a law of the Commonwealth;
- for the purposes of an approved operation under the Criminal Investigation (Covert Operations) Act 2009 (SA);
- where the device is installed, used or maintained by a person who holds an investigation agent's licence under the Security and Investigation Industry Act 1995 (SA) and the device is used by the licensee in the course of their work as an investigation agent and the use is reasonably

necessary for the protection of the lawful interests of a person;

- where the device is installed, used or maintained by a loss adjuster to whom the Security and Investigation Industry Act 1995 (SA) does not apply and the device is used in the course of their duties as a loss adjuster and the use is reasonably necessary for the protection of the lawful interests of a person.

An optical surveillance device can be used to record any activity in connection with the execution of a surveillance device warrant or authority under the Surveillance Devices Act 2016 (SA). It may also be used by an officer for the purpose of recording any activity carried out in a public place in the course of the officer's duties.

Use of a listening device solely for the purposes of locating and retrieving the device is also not an offence.

The prohibitions against using a listening device or an optical surveillance device do not apply to the use of such devices to record private conversation or activity if the use is in the public interest [s 6].

Tracking Devices

It is an offence to knowingly install, use or maintain a tracking device to determine the geographical location of a person without their **consent**. It is also an offence to use a tracking device to determine the geographical location of a vehicle or thing without the consent of the owner [s 7].

A tracking device is any device capable of being used to determine the geographical location of a person, vehicle or thing.

Maximum penalty: \$15 000 or 3 years imprisonment (in the case of a natural person) or \$75 000 (in the case of a body corporate).

Where the installation or use of a tracking device is authorised under the Surveillance Devices Act 2016 (SA) or any other Act there is no offence. Similarly where use is authorised under a law of the Commonwealth or where used for the purposes of an approved undercover operation under the Criminal Investigation (Covert Operations) Act 2009.

It is also not an offence to use a tracking device solely for the purpose of locating and retrieving the device.

Data Surveillance Devices

A data surveillance device includes a program or device capable of being used to access, track, monitor or record the input of information into, or output of information from, a computer.

It is an offence to knowingly install, use or maintain a data surveillance device to access, track, record or monitor the input of information into, or the output of information from, a computer without the **consent** of the owner, or person with lawful control of the computer.

Maximum penalty: \$15 000 or 3 years imprisonment (in the case of a natural person) or \$75 000 (in the case of a body corporate).

It is not an offence to install, use or maintain a data surveillance device if authorised under the Surveillance Devices Act 2016 (SA) or any other Act, or a law of the Commonwealth.

Communication or publication of information

Lawful interests

It is an offence to knowingly use, communicate or publish information or material obtained from the use of a listening or optical surveillance device in circumstances where the device was used to protect the lawful interests of that person [s 9].

Maximum penalty: \$10 000 in the case of a natural person or \$50 000 in the case of a body corporate.

The following exceptions to the lawful interests provision apply:

- where the person using or communicating the information or material was a party to the conversation or activity recorded;
- where each party of the conversation or activity consents;
- where the information or material is released to an officer of an investigating agency for the purposes of a relevant investigation or proceeding;
- where the material or information is used in the course of a relevant action or proceedings;
- where a person is being subjected to violence or there is an imminent threat of violence to a person;
- where released to a media organisation;
- where released in accordance with an order of a judge under the Act;
- otherwise in the course of duty or as required by law.

There are provisions to allow a licenced investigation agent or a loss adjuster to communicate or publish material from a listening or optical surveillance device in prescribed circumstances [ss 9(2),(3)].

Public interest

It is an offence to knowingly use, communicate or publish information or material obtained from a listening or optical surveillance device in circumstances where the device was used in the public interest except in accordance with an order of a judge under the Act [s 10]

Maximum penalty: \$10 000 in the case of a natural person or \$50 000 in the case of a body corporate.

The following exceptions to the public interest provision apply:

- if used, communicated or published by a media organisation;
- where the use, communication or publication is made by a media organisation and the material or information is in the public interest.

It is possible to apply to a judge for an order authorising the use, communication or publication of information or material obtained from a listening or optical surveillance device under section 11 of the Act.

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