

Episode Summary

Episode number: 103
Episode name: *The Lives of Others: When is a Conversation in a Public Place a Private Conversation?*
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What area(s) of law does this episode consider? Surveillance devices.

Why is this topic relevant? You could easily associate the idea of surveillance with government agencies secretly monitoring the conversations of foreign diplomats. That government connection is strikingly illustrated by the Australia-East Timor Spying Scandal of the early 2000s and the decades of legal maneuvering since.

But the proliferation of devices capable of such surveillance and recording - even since the early 2000s - means that surveillance is no longer solely the province of state actors. Most of us carry in our pockets a device more than capable of covertly recording audio and video; with or without consent. And the technology and capability available today to state actors like the police is exponentially more powerful.

What legislation is considered in this episode? *Surveillance Devices Act 2007* (NSW) ('Act')

What cases are considered in this episode? *Poland v Hedley* [2019] WASC 403

- Media published articles based on a recorded conversation of a meeting that was held at a restaurant. The plaintiff alleged the media breached the *Surveillance Devices Act 1988* (WA). The court held that people seated at a table in a restaurant don't ordinarily expect their conversation to be overheard, even though it might be possible for others to accurately hear the conversation. The objective circumstances of the conversation established that it was private despite occurring in public.

Kanjian Holdings No 1 Pty Ltd v Kanjian; Kanjian v Kanjian (No 3) [2021] NSWSC 839

- The parties had a conversation in the dining room of a nursing home which was recorded by one of the principal parties to the conversation. Despite the dining room being open to others, the court held that the objective circumstances were such that the parties ought not reasonably to have expected that their conversation would have been overheard by others in the room.

Toth v Director of Public Prosecutions (NSW) [2014] NSWCA 133

- Toth recorded a conversation they had with their doctor. It was argued that it was not a private conversation because it was capable of being overheard from the reception area. That was rejected by the court because, despite the potential of the conversation to be overheard, the nature of that conversation was private.

Sepulveda v R [2006] NSWCCA 379

- Sepulveda was charged with historical sexual offences. A private recording was made of a conversation between a complainant and Sepulveda. “Lawful” interests were distinguished from “legal” interests. Lawful interests are interests which are not unlawful. Lawful interests could include interests in bringing someone to justice for their criminal acts, or protecting one's reputation from being labelled as a liar.

Violi v Berrivale Orchards Limited (2000) 99 FCR 580

- *Violi* was about the admissibility of evidence in a breach of contract claim. The applicant relied on conversations recorded without the consent of one party. The judge determined that the recording of the two conversations by the applicant was not reasonably necessary for the protection of his lawful interests.

Commonwealth Director of Public Prosecutions v The Country Care Group Pty Ltd [2019] FCA 2200

- Mr Cuddihy recorded a meeting with Mr Hogan, who he did not trust. He was concerned that his words might be misconstrued and that any commitments made during the meeting could be reneged upon. The court ruled that Mr Cuddihy's recording was not reasonably necessary to protect his lawful interests, even though his interests were, in fact, lawful. He did not want to engage in blackmail or extortion against Mr Hogan but, because alternative actions could have been taken, such as ensuring the presence of other individuals at the meeting, creating a contemporaneous written record of the conversation, or obtaining Mr Hogan's consent to record the discussion, the recorded evidence was deemed inadmissible.

DW v R [2014] NSWCCA 28

- The complainant covertly recorded a conversation with the accused. The recording took place when she was a minor. The court found that the recording was justified in order to safeguard the complainant's interests due to her young age. At the time, she was unaware of the option to involve the police and have them lawfully conduct a pretext call.

Rathswohl v Court [2020] NSWSC 1490

- In this decision the NSWSC provided four crucial considerations that must be taken into account when assessing whether a particular action can be deemed reasonably necessary to protect lawful interests:
 1. Purpose of the conversation.
 2. Protection from fabrication accusations.
 3. Availability of alternative recording methods.
 4. Serious disputes and dependency on oral evidence.
- The Act governs the use of surveillance devices. Its objectives are to provide law enforcement agencies with a comprehensive framework for using surveillance devices in criminal investigations, covertly gather evidence for criminal prosecutions, and protect the privacy of individuals through strict requirements for device installation, use, and maintenance.

What are the main points?

- The definition of a “surveillance device” is divided into four parts: data surveillance devices, listening devices, optical surveillance devices, and tracking devices. Smartphones can combine multiple functions of these devices.
- The definition of a tracking device under the Act includes a device for determining the location of a person or object. It appears to cover tracking someone else's phone as an object, although there have been no prosecutions based on this.
- Various GPS trackers, including AirTags and Find My iPhone, are now widely accessible, however, using such devices without the consent of the person being tracked may violate the Act, as tracking devices are considered surveillance devices.
- Section 7 of the Act addresses illegal audio recording. The offence involves secretly recording a private conversation without the person's knowledge.
- There is an exception for recording private conversations where it is reasonably necessary to protect lawful interests.
- Recordings must not be made with the intent to communicate or publish the conversation to non-participants. Recordings made with the other party's consent is not an offence.
- A pretext call is a phone call made by a complainant in an investigation before an accused person is formally charged. The purpose is to gather evidence.
- The police may request a warrant to install a listening device in the complainant's phone. The complainant then calls the accused and discusses the incident, often leading to recorded admissions that can be used in criminal proceedings. This is a lawful tool used by the police.
- Statistically, charges that involve unlawfully recorded conversations are infrequently prosecuted.
- There is crossover between the new offence of coercive control and unlawful use of surveillance devices under the Act. It remains to be seen if these charges will be pursued separately or incorporated into one another.