FEDERAL COURT OF AUSTRALIA

Chappell v Griffin Coal Mining Company Pty Ltd [2016] FCA 1248

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| File number: |  |
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| Judge: | **MCKERRACHER J** |
|  |  |
| Date of judgment: | 21 October 2016 |
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| Catchwords: | **EVIDENCE** – industrial law – interlocutory application for injunction to restrain use of video recording – where video recording secretly obtained by company security guard – where company seeks to use the recording in connection with disciplinary and possible termination action – where applicant’s characterisation of conversation changed at the hearing – whether private conversation – identification of parties to conversation  |
|  |  |
| Legislation: | *Fair Work Act 2009* (Cth) ss 340(1), 343*Surveillance Devices Act 1998* (WA) ss 3, 5(1)(a), 6(1)(a), 9(1)  |
|  |  |
| Cases cited: | *Alliance Craton Explorer Pty Ltd v Quasar Resources Ltd* [2010] SASC 266*Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57*Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148*Georgiou Building Pty Ltd v Perrinepod Pty Ltd* [2012] WASC 72*Kelly v R* (2004) 218 CLR 216*Re Surveillance Devices Act 1998; Ex Parte TCN Channel Nine Pty Ltd* [1999] WASC 246*Tidy Tea Ltd v Unilever Australia Ltd* (1995) 32 IPR 405  |
|  |  |
| Date of hearing: | 17 October 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Counsel for the Applicants: | Ms KA Vernon |
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| Solicitor for the Applicants: | Turner Freeman Lawyers |
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| Counsel for the Respondent: | Mr AJ Power |
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| Solicitor for the Respondent: | King & Wood Mallesons |

ORDERS

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|  | WAD 453 of 2016 |
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| BETWEEN: | WAYNE CHAPPELLFirst ApplicantAUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS' UNION (AMWU)Second Applicant |
| AND: | GRIFFIN COAL MINING COMPANY PTY LTDRespondent |

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| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 21 OCTOBER 2016 |

THE COURT ORDERS THAT:

1. Subject to the deletion of the words ‘or otherwise’ in (b) and (c), the undertaking of 4 October 2016 continue until further order of the Court.
2. If the undertaking is withdrawn, an injunction be granted in similar terms until further order of the Court.
3. Liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCKERRACHER J:

# INTRODUCTION

1. In the midst of an ongoing substantial industrial dispute, the first applicant (**Mr Chappell**) was secretly videoed making particularly adverse and colourful comments about **the** respondent **Company**. Mr Chappell seeks urgent relief to restrain usage of a **recording** of the secret video for any purpose. The purpose foreshadowed by the Company was to use the content of the recording against him in connection with disciplinary and possible termination action.
2. The question arising in this interlocutory application is whether there is an arguable case that the recording was taken in breach of the ***Surveillance Devices Act*** *1998* (WA). This Court has jurisdiction because the second basis of the interlocutory relief is that the threat to use the recording accompanied by the action foreshadowed upon usage of the recording is arguably ‘adverse action’ pursuant to s 340(1) of the ***Fair Work******Act*** *2009* (Cth), alternatively, coercion contrary to s 343 of the *Fair Work Act*.
3. It has been unnecessary to consider the contentions under the *Fair Work Act* as I am satisfied for the reasons which follow that it is *arguable* that the obtaining and subsequent use of the recording contravened the terms of the *Surveillance Devices Act*. The balance of convenience and the interests of justice firmly favour the conservative course of preserving the status quo. This is best achieved by injunctive relief or an undertaking to the Court being given by the Company not to use the recording.

# STATUTORY FRAMEWORK

1. The relevant provisions of the *Surveillance Devices Act* are as follows:

**5. Regulation of use, installation and maintenance of listening devices**

(1) Subject to subsections (2) and (3), a person shall not install, use, or maintain, or cause to be installed, used, or maintained, a listening device -

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

(b) to record a private conversation to which that person is a party.

Penalty:

(a) for an individual: $5 000 or imprisonment for 12 months, or both;

(b) for a body corporate: $50 000.

(2) Subsection (1) does not apply to -

(a) the installation, use, or maintenance of a listening device in accordance with a listening device warrant issued under Part 4;

(b) the installation, use, or maintenance of a listening device in accordance with an emergency authorisation issued under Part 4;

(c) the installation, use, or maintenance of a listening device in accordance with a law of the Commonwealth;

(d) the use of a listening device in accordance with Part 5; or

(e) the use of a listening device resulting in the unintentional hearing of a private conversation.

(3) Subsection (1)(b) does not apply to the installation, use, or maintenance of a listening device by or on behalf of a person who is a party to a private conversation if -

(a) that installation, use or maintenance is carried out in the course of that person’s duty as a law enforcement officer;

(b) that installation, use or maintenance is carried out by that person as instructed or authorised by a law enforcement officer in the course of an investigation into a suspected criminal offence;

(c) each principal party to the private conversation consents expressly or impliedly to that installation, use, or maintenance; or

(d) a principal party to the private conversation consents expressly or impliedly to that installation, use, or maintenance and the installation, use, or maintenance is reasonably necessary for the protection of the lawful interests of that principal party.

**6.** **Regulation of use, installation and maintenance of optical surveillance devices**

(1) Subject to subsections (2) and (3), a person shall not install, use, or maintain, or cause to be installed, used, or maintained, an optical surveillance device -

(a) to record visually or observe a private activity to which that person is not a party; or

(b) to record visually a private activity to which that person is a party.

Penalty:

(a) for an individual: $5 000 or imprisonment for 12 months, or both;

(b) for a body corporate: $50 000.

(2) Subsection (1) does not apply to —

(a) the installation, use, or maintenance of an optical surveillance device in accordance with a warrant issued under Part 4;

(b) the installation, use, or maintenance of an optical surveillance device in accordance with an emergency authorisation issued under Part 4;

(c) the installation, use, or maintenance of an optical surveillance device in accordance with a law of the Commonwealth;

(d) the use of an optical surveillance device in accordance with Part 5; or

(e) the use of an optical surveillance device resulting in the unintentional recording or observation of a private activity.

(3) Subsection (1)(b) does not apply to the installation, use, or maintenance of an optical surveillance device by or on behalf of a person who is a party to a private activity if -

(a) each principal party to the private activity consents expressly or impliedly to that installation, use, or maintenance; or

(b) a principal party to the private activity consents expressly or impliedly to that installation, use, or maintenance and the installation, use, or maintenance is -

(i) carried out in the course of that person’s duty as a law enforcement officer;

(ii) carried out by that person as instructed or authorised by a law enforcement officer in the course of an investigation into a suspected criminal offence; or

(iii) reasonably necessary for the protection of the lawful interests of that principal party.

 …

**9. Prohibition of publication or communication of private conversations or activities**

(1) Subject to subsection (2), a person shall not knowingly publish or communicate a private conversation, or a report or record of a private conversation, or a record of a private activity that has come to the person’s knowledge as a direct or indirect result of the use of a listening device or an optical surveillance device.

Penalty:

(a) for an individual: $5 000 or imprisonment for 12 months, or both;

(b) for a body corporate: $50 000.

(2) Subsection (1) does not apply -

(a) where the publication or communication is made -

(i) to a party to the private conversation or the private activity;

(ii) with the express or implied consent of each principal party to the private conversation or private activity;

(iii) to any person or persons authorised for the purpose by the Commissioner of Police, the Corruption and Crime Commission or the Chair of the Board of the Australian Crime Commission;

(iiia) to a designated Commission or to any person or persons authorised for the purpose by a designated Commission;

(iv) by a law enforcement officer to the Director of Public Prosecutions of the State or of the Commonwealth or an authorised representative of the Director of Public Prosecutions of the State or of the Commonwealth;

(v) in the course of the duty of the person making the publication or communication;

(vi) for the protection of the lawful interests of the person making the publication or communication;

(vii) in the case of the use of a listening device or an optical surveillance device in the circumstances referred to in section 5(3)(d) or 6(3)(b)(iii), as the case requires, in the course of reasonable action taken to protect the lawful interests of the principal party to the conversation or activity who consented to the use of the device;

(viii) in accordance with Part 5; or

(ix) in the course of any legal proceedings;

 …

(3) Subsection (2) only provides a defence if the publication or communication -

(a) is not more than is reasonably necessary —

(i) in the public interest;

(ii) in the performance of a duty of the person making the publication or communication; or

(iii) for the protection of the lawful interests of the person making the publication or communication;

(b) is made to a person who has, or is believed on reasonable grounds by the person making the publication or communication to have, such an interest in the private conversation or activity as to make the publication or communication reasonable under the circumstances in which it is made;

(c) is made by a person who used the listening device to record, monitor or listen to that conversation or an optical surveillance device to record or observe that private activity in accordance with a warrant or an emergency authorisation issued under Part 4; or

(d) is made by an authorised person employed in connection with the security of the Commonwealth under an Act of the Commonwealth relating to the security of the Commonwealth.

1. The term ‘private conversation’ is defined in s 3 as:

any conversation 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 only by themselves, but does not include a conversation carried on in any circumstances in which the parties to the conversation ought reasonably to expect that the conversation may be overheard

1. The term ‘private activity’ is defined in s 3 as:

any activity carried on in circumstances that may reasonably be taken to indicate that any of the parties to the activity desires it to be observed only by themselves, but does not include an activity carried on in any circumstances in which the parties to the activity ought reasonably to expect that the activity may be observed

1. The term ‘party’ is defined in s 3 as:

(a) in relation to a private conversation -

(i) a person by or to whom words are spoken in the course of the conversation; or

(ii) a person who, with the express or implied consent of any of the persons by or to whom words are spoken in the course of the conversation, records, monitors or listens to those words;

and

(b) in relation to a private activity -

(i) a person who takes part in the activity; or

(ii) a person who, with the express or implied consent of any of the persons taking part in the activity, observes or records the activity

1. The term ‘principal party’ is defined in s 3 as:

(a) in relation to a private conversation, a person by or to whom words are spoken in the course of the conversation; and

(b) in relation to a private activity, a person who takes part in the activity

# THE RELEVANT EVIDENCE

1. I do not propose canvassing all the affidavit evidence in detail. I will focus in particular on those aspects concerning the *Surveillance Devices Act*.
2. Mr Chappell, who lives in Collie, is a boilermaker. He is employed by the Company, for whom he has worked for almost 29 years. He is one of the two AMWU site based representatives and has been a member of that Union for 30 years. He has held the position as a site based representative for over 12 years.

## Events of 23 June 2016

1. On 23 June 2016, Mr Chappell was at home and at about 9.00 am he received a phone call from Mr Brett King who asked him to meet with **Shire** of Collie representatives at the front of the Ewington gate, one of the entrances to the Griffin Coal Mine, to discuss a traffic management plan for a protest that was scheduled for the following day. He arrived at about 10.30 am outside the Ewington gate and shortly after, met with three representatives from the Shire. One of the representatives was a **Ranger** of the Shire, whom Mr Chappell described as an old friend. The Ranger also used to work for the Company as a production operator. Mr Chappell has known him for more than 20 years. Mr Chappell had some discussions with other Shire representatives about where various warning signs on speed limits should be placed and what those limits should be. After this discussion, two of the Shire representatives drove off to see where they wanted to place the warning signs. Mr Chappell thought they were away for about 15 minutes. During that time, the Ranger and he spoke about what they both had been doing since they had seen each last. At about 11.00 am, the Shire representatives returned. They continued to discuss traffic management. A few minutes into this discussion Mr Chappell noticed out of the corner of his eye, he says, that two **security guards** had ‘approached where we were standing on the side of the road [stopping] approximately four metres away from the group, behind [him], and to [his] right’. One of the security guards made a comment to the group. He could not recall the security guard’s exact comment, but Mr Chappell replied with words to the effect that ‘you worry about what happens on that side of the gate, and we’ll take care of what happens on this side of the gate.’ He says he then turned his back on the security guards and continued talking to the Shire representatives about the traffic management plan. He says that after turning his back on the security guards, he did not actively pay attention to what they were doing as in his mind they were not part of the conversation he was having. (This account while consistent with all contentions advanced prior to the hearing of that application is not the way the argument for Mr Chappell is now put.) A few minutes later, two of the Shire representatives left ‘where we were standing, got into their vehicle and drove away.’ Mr Chappell continued after that to speak to the Ranger.
2. Mr Chappell’s account was that the conversation with the Ranger was a private conversation when he expressed his personal views about the ways his employer had been behaving and also recounted to the Ranger some things that had been told to him by other Company employees and staff. He says that during his conversation with the Ranger in his mind the security guards were still in the same place they were when they first approached them. He did not take active notice of where the security guards were or whether they had walked away. He said he did not at any time recall seeing the security guards wearing a camera or surveillance device. The security guards did not warn the Shire representatives or him at any time that they were recording the conversations or that they were wearing any form of surveillance device. He said he spoke with the Ranger for about 15 minutes and when the conversation concluded he went home.
3. Mr Chappell relies upon an affidavit affirmed by Mr Glenn McLaren, Senior Organiser employed by the second applicant (AMWU) in its Western Australian Branch. He explains that the Company employs about 270 blue collar employees at the Collie Coal Mining Operations (**the Mine**) in two distinct groups: production and maintenance. The Company employs 230 production employees. They operate the machinery used to mine and process the coal. They are separately represented by the Constructions, Forestry, Mining and Energy Union (**CFMEU**). Production, workers’ wages and working conditions are covered by the *Griffin Coal Mining Company (****Production****) Collective* ***Agreement*** *2012*.
4. The maintenance employees and tradespersons who maintain and effect repairs to the machinery used by the Company in its coal mining operations are members of the AMWU. There are 40 now, whereas there were 70 early last year. Mr Chappell is one of two AMWU site based representatives. The other site representative is Mr King. Mr Chappell and Mr King are both mechanical tradesmen/boilermakers. Both men are working on shift and performing mechanical repair work at the Mine.
5. Mr McLaren explains the process of negotiations for an agreement between the AMWU and the Company and a significant dispute over rostering. There were and are proceedings before the Fair Work Commission, including, amongst other things, an application for a protected action ballot order by the AMWU. That order was made on 7 December 2015. Mr Chappell gave evidence during the hearing of two other applications. There are now three applications before the Commission relating to a dispute notice raised by the AMWU over the way it is interpreting and applying the provisions of the *Black Coal Mining Industry Award 2010*. Mr Chappell and Mr King are both signatories to the dispute notice.
6. After 23 June 2016, there were meetings with the Company, which Mr Chappell was given an opportunity to view the relevant recording. There were issues raised between legal advisors and the Company as to the privacy of the conversations and communications. I discuss this below under subsequent events.
7. Mr Michael Worner was the recording security guard. On 18 June 2016, he travelled to Collie after receiving an instruction to provide security services for the Company. He spent the next eight days providing those services. On the afternoon of 22 June 2016, he met with Mr Tom Neumair, Support Services Manager of the Company, and others for a briefing. Mr Neumair explained the Company was expecting some industrial action from some of its workforce and a protest involving some of its workforce and members of the Collie community. The industrial action and the community protest were scheduled to occur on 24 June 2016. It was part of Mr Worner’s duties to patrol the Ewington gate. The entrance comes off the Coalfields Highway.
8. Prior to commencing his patrols at the Ewington gate he was instructed by Mr Neumair that the Company’s mining lease extended to approximately six feet from the marked bitumen surface on the Coalfields Highway and the boundary had been marked out by a surveyor with a pink painted line. Mr Worner was rostered to and worked the day shift on 23 June 2016, arriving at work about 5.30 am. He reported at the Ewington gate wearing blue pants and a yellow high-visibility shirt, together with a high-visibility orange jacket and lanyard with an identification card attached to it. The identification card had his name, licence number, the words ‘Security Officer’ and a photograph of his face on it. The card was about 90 mm long and 50 mm wide.
9. Mr Worner was also wearing a lapel camera, fixed to the middle of his chest, over the top of his orange jacket. The camera was affixed using a small spring-loaded arm attached to the back of it. Mr Worner says he deliberately wore the camera in that way so that it could easily be seen by other people. The camera was approximately 40 mm long, by 20 mm wide and 20 mm deep, with an 8 mm wide circular lens. It was dark brown in colour. He produced a photograph of a similar camera. When he was wearing the camera, it was not concealed from view and he considers would have been readily apparent it was a camera to anyone looking at him. There is a dispute about this. Mr Worner had used a camera, similar to the camera before so he was familiar with how it worked and should be operated. It did not have a zoom lens. He was accompanied by Mr Craig Gooch, another security guard.
10. Early in the morning of 23 June 2016, he saw Mr Chappell arrive at the entrance and park his vehicle on the inside of the pink painted line, which indicated to Mr Worner that he had parked it on the Company’s mining lease. During the morning, between four and six other people arrived at the Ewington gate where Mr Gooch and he were patrolling and began setting up tents and other equipment. It appeared to Mr Worner that they were doing so in preparation for the protest planned for the following day. He did not speak to any of those people. At about 11.00 am, he was standing with Mr Gooch, near the gate at the entrance when he saw a man, whom he later learned to be the Ranger from Collie, park his vehicle on the Coalfields Highway. He then approached the Ewington gate. Mr Worner turned on the camera at that point and went towards him to see what he was doing there. Mr Gooch remained at the gate at that point in time. As the Ranger approached the Ewington gate he noticed Mr Chappell looking in his direction and then headed towards him. Mr Worner saw Mr Chappell and the Ranger standing at the Ewington gate on the mining lease side of the pink marked line as he approached them. Mr Worner remained within about five or six metres of Mr Chappell and the Ranger at this point in time, all of them standing within the mining lease side of the pink painted line. Mr Worner remained in this position because he wanted to record what was being said between them, particularly by Mr Chappell.
11. Mr Worner saw two other men arrive and approach Mr Chappell and the Ranger. He understood from the conversation which he heard between those individuals that they were officials from the Main Roads Department and/or the Shire.
12. He heard Mr Chappell, the Ranger and these two officials discuss traffic management and safety for the next day. By this time, he had moved closer to where Mr Chappell was standing, and was standing approximately two metres away from him. Mr Chappell and he were still standing within the mining lease side of the pink painted lines. At one stage, Mr Chappell said ‘So youse 2 are what? What are youse 2 guys?’ Mr Worner said ‘Security’. Mr Chappell said ‘Both of you are you?’ Mr Worner said ‘Yes’.
13. After about 10 minutes the two officials left. Mr Chappell and the Ranger stayed about where they were and Mr Worner moved closer to them. Mr Chappell and he were still on the mining lease side of the pink painted lines.
14. After the officials had left, Mr Worner noticed Mr Chappell become much more animated. I can confirm this from my two viewings of the recording. Mr Chappell’s speech became much louder. Given his change in demeanour, Mr Worner decided he would stay where he was and allow the camera to keep recording. He said he was as close as he could politely be to Mr Chappell without being ‘in his face’. He estimated that he was no more than about two metres from him and remained at that distance from him until the Ranger left. If this was so, and I presently have no reason to doubt the distance, I also have no doubt that Mr Chappell must have been aware that Mr Worner could very clearly hear the conversation and, indeed, there were occasions which I have observed in the recording, in which Mr Chappell turned to Mr Worner and appeared to include him in the conversation that followed which was primarily with the Ranger. Mr Worner says that at no time did Mr Chappell advise him or Mr Gooch that he was having a private conversation or indicate that they should leave. He noted that Mr Chappell did the majority of the talking and that he, Mr Worner, could very clearly hear what Mr Chappell was saying and he was becoming more and more agitated and became louder and frequently swore. During this conversation, Mr Worner notes that Mr Chappell turned to him from time to time. Mr Worner kept the camera switched on and recording until Mr Chappell had finished speaking and the Ranger had left the entrance to drive his vehicle back down the Coalfields Highway. During the whole of the time from when the two officials left until after the Ranger, both Mr Chappell and he stood within the mining lease side of the pink painted lines. At the end of his shift, he downloaded the audio-visual footage from the camera and has subsequently viewed some of it which he recognises as being a record of this conversation.

## Subsequent events

1. On 2 September 2016, some ten weeks after the 23 June 2016 event, Mr Chappell received a letter dated 31 August 2016 from the Company directing to him to attend an inquiry into allegations of misconduct arising from the recording. On 14 September 2016, Mr Chappell attended the meeting accompanied by Mr McCartney, as his representative. Also in attendance was Ms Zoe Weir who explained that she was a human resources consultant from the Company and a man whom he knows as ‘JP’ who is the Assistant General Manager of the Company. Mr Chappell described what took place at the meeting and that he was given an opportunity to view the footage several times and described exchanges about whether the footage was obtained legally or otherwise. He drafted responses with legal advice, indicating that the conversation between him and the Ranger was intended to be private and one between old friends. He said he was off work and not on the Company’s premises, not in work uniform and unaware that his conversation was being recorded. Despite that, he acknowledged that in expressing his private views, he used offensive language for which he apologised.
2. Ms Weir, by affidavit for the Company, broadly confirmed that account of events, confirming that in correspondence with Mr Chappell she described his comments as:
	1. disparaging and offensive comments about the Company’s owners and management;
	2. racially abusive language to describe the Company’s owners; and
	3. containing violent and profane language in relation to a contractor of the Company.
3. Ms Weir had expressed the view that the Company considered the language used was extreme and would amount to a breach of the **Code** of Ethics and Conduct and Disciplinary Conduct Action Policy, the *Mines Safety and Inspection Act 1994* (WA) and the *Racial Discrimination Act 1975* (Cth). Ms Weir however says that Mr Chappell confirmed what she put to him to the effect that he knew that the security guards were still there listening to the conversation, they were not invisible and they were witnessing the conversation.
4. The Chief Operating Officer of the Company, Mr Terence Gray provided a detailed affidavit as to the timing of the various events and, in particular, explaining the delay between the recording of the conversation and the next steps taken by the Company. It is unnecessary to consider this aspect for present purposes as it is directed to the adverse action contention.

# CONSIDERATION

1. There is no dispute as to the Court’s jurisdiction and the well settled law relating to the grant of an interlocutory injunction. The purpose of an interlocutory injunction may be to preserve the status quo pending trial as identified in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 (at [65]). The questions arising have been identified in many cases, including *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 (at 153):
	1. whether there is a serious question to be tried in the sense that if the evidence remains the same, there is a probability that at trial the party will be entitled to relief;
	2. whether the claimants will suffer irreparable harm for which damages will not be adequate compensation unless an injunction is granted; and
	3. whether the balance of convenience favours the granting of the injunction.

To these limbs a further important rider must be added, namely the interests of justice.

1. It is important, in my view, that the question of whether there is a serious question not be considered in isolation from the issue of the balance of convenience: *Tidy Tea Ltd v Unilever Australia Ltd* (1995) 32 IPR 405 (at 416).
2. As I have indicated above, I have focused on the *Surveillance Devices Act* issue.
3. It is an offence under the *Surveillance Devices Act* to use or cause to be used a listening device to record a private conversation to which that person is not a party (by virtue of s 5(1)(a)), or to use or cause to be used an optical surveillance device to record visually or observe a private activity in which that person is not a party (s 6(1)(a)) and/or to knowingly publish or communicate a private conversation or a report or record of a private conversation or private activity that has come to the person’s knowledge as a direct or indirect result of the use of a listening device or an optical surveillance device (by virtue of s 9(1)).
4. In *Alliance Craton Explorer Pty Ltd v Quasar Resources Ltd* [2010] SASC 266, Sulan J observed, in relation to the equivalent legislation in South Australia, which also uses the expression ‘private conversation’, that the ordinary meaning of the term conversation is “an informal interchange of thoughts by spoken word”. His Honour said (at [29]-[35]) (footnotes omitted):

29 The ordinary meaning of the term “conversation” as defined in the Macquarie Dictionary is:

1. informal interchange of thoughts by spoken words; a talk or colloquy.

2. an instance of this.

3. association or social intercourse; intimate acquaintance.

4. Archaic behaviour, or manner of living. [Middle English, from Old French, from Latin conversation frequent use, intercourse].

30 Counsel for Alliance submits that the Act does not prohibit the recording of private “communications” but only “private conversations”. Counsel contends that not all communications are conversations.

31 I agree. Although the conversation in the Act should not be given a restricted meaning, the communication should have the characteristics of a conversation which includes a degree of informality and would not normally apply to the proceedings of a committee.

32 Proceedings which take place at the Management Committee meetings are of an entirely different character to a “private conversation”. They have a commercial character and purpose. Each party to the joint venture is a body corporate which acts through representatives or agents, who have a duty to report to the corporation. The exchanges at meetings do not have the required characteristics of a conversation. Meetings have formal written agendas upon which the parties exchange positions orally and in writing, including the provision of reports. The parties seek to reach decisions that will affect the legal rights and duties of the parties to the joint venture. A formal record is kept of the meeting. There is a formality about meetings of the joint venture. Statements made and positions taken orally by those entitled to speak at the meeting cannot be said to be conversations in the ordinary meaning of that word.

33 As to the question of whether the communication is private, Alliance submits that a final determination of privacy involves reference to whether or not the communication is desired to be confined to the parties to the communication. Counsel for Alliance submits that the parties simply could not have intended the communication to be private given that each representative present has, to the knowledge of the other, a duty to report the communications to his or her principal. Counsel for Quasar submits that the content of the discussions at the meetings was and is highly confidential material, protected by a confidentiality clause in the JVA. It is contended that the term “private conversation” should not be given a narrow meaning having regard to the objects of the Act, and that it should not be construed to exclude conversations of a business or employment nature.

34 I have had regard to the remarks of Doyle CJ in *Thomas* who observed at [36]-[38]:

The definition of “private conversation” indicates that a conversation is private if the conversation, as it takes place and progresses, is 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. In the Act, “private” is used not in the sense of “secret” or “confidential”, but in the sense of “not public”. A telephone conversation with a friend is a private conversation, even though the friend is at liberty later to tell another about it. On the other hand, a telephone conversation on talkback radio is not a private conversation.

There is no reason to give a narrow meaning to the concept of “private conversation”, bearing in mind the objects of the Act. There is no need to trace the precise limits of the concept of a private conversation. I am satisfied that each of the conversations was a private conversation, in the sense that the circumstances indicated that the participants other than Mr Nash wished the actual conversation to be confined to the known participants.

35 The fact that each representative has a duty to report back to their respective principals would not alter the private nature of the verbal discussions which take place during the Management Committee meetings. As observed by Doyle CJ in *Thomas*, a conversation will be private even though the participants are at liberty to tell others about it later. It is clear that the nature of the communications which take place at the meetings are of a confidential nature and are private in the sense that they are “not public”.

1. In *Georgiou Building Pty Ltd v Perrinepod Pty Ltd* [2012] WASC 72 Allanson J considered the differences between the *Surveillance Devices Act* and the *Listening and Surveillance Devices Act 1972* (SA) (at [11]-[12]). His Honour said that the definition of private conversation in each Act is not the same. The South Australian Act, in s 3 defines private conversation to mean:

any conversation carried on in circumstances that may reasonably be taken to indicate that any party to the conversation desires it to be confined to the parties to the conversation.

1. In contrast, the *Surveillance Devices Act* defines a private conversation as:

any conversation 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 only by themselves, but does not include a conversation carried on in any circumstances in which the parties to the conversation ought reasonably to expect that the conversation may be overheard.

1. In any event, Allanson J opined (at [13]), and I agree, the expression ‘private conversation’ in the context of the *Surveillance Devices Act* is not intended to impose a limitation. The function of a definition is not to enact substantive law, but to provide aid in construing the statute. As his Honour noted, McHugh J said in *Kelly v R* (2004) 218 CLR 216 (at [103]):

Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better - I think the only proper - course is to read the words of the definition into the substantive enactment and then construe the substantive enactment -in its extended or confined sense -in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.

1. Justice Allanson also observed (at [14]) that the *Surveillance Devices Act* prohibits two sorts of activity: the use of listening devices to record, monitor or listen to private conversations or words spoken in a private conversation, and the use of optical surveillance devices to record visually or observe a private activity. The two strands are intended to act together and be comprehensive. The definition of private activity has no limitation to informal activity. The evident aim of both strands is to protect privacy, whether formal or informal. For example, it would not be open for a business competitor to legally install a concealed listening device to listen in to or record a meeting intended to be private, although formal.
2. In *Re Surveillance Devices Act 1998; Ex Parte TCN* ***Channel Nine*** *Pty Ltd* [1999] WASC 246, Owen J said (at [18]-[20]):

18. … In all cases it will be necessary to look at the circumstances as a whole. Obviously, the location and physical environment in which the incident takes place will be of great significance in deciding what the parties expected and, with the degree of objectivity that the word "reasonably" imports, should have expected. In my view, persons contemplating the use of a surveillance device in these circumstances should exercise caution before concluding that because the incident takes place outside a "building" (assuming that word is meant in the colloquial sense of four walls and a roof) it is not covered by the Act.

19 The second of the issues of construction relates to the extent of the exclusion in the last three lines of the definitions of "private activity" and "private conversation" respectively. **Something is not a private conversation or private activity if the parties to it ought reasonably to expect that the conversation or activity may be overheard or observed**. It is to be noted that **the test here is largely objective. The problem arises because of the word "parties" (plural) in the exclusionary provision. The first part of the definition refers to "any of the parties"**. The test under the first part is primarily subjective, that is, the person must actually hold that desire, although the circumstances must also be such as to make the indication of desire "reasonable". **Thus, if the circumstances reasonably indicate that any one or more, but not necessarily all, of the parties desired that the incident be observed or heard only by the principal parties, that is enough to satisfy the first part of the definition**. But I do not think that the use of the word "parties" (plural) in the exclusionary provision means the definition cannot be satisfied unless all of the parties ought reasonably to have intended the incident to be restricted to themselves. **It may well be the case that one of the parties (being the one who is wearing the device) knows full well that the incident is being observed or listened to by third parties. I think the term "parties" in the exclusionary provision refers primarily to the person who comes within the phrase "any party" in the earlier part of the definition but may extend to other parties as well**. The words of the exclusionary provision reinforce **the need for objective, as well as subjective, considerations** in drawing the appropriate inferences.

20 This is an important consideration. If the circumstances are such that the exclusionary provision applies the incident would not be covered by Pt 5. Accordingly, but subject to all of the other provisions of the Act and the law generally, the material could be recorded and published without the need for an order of the Court. However, once again I think the exclusionary provision is of somewhat limited operation and careful consideration needs to be given to it.

(emphasis added)

1. The Company submits it is sufficient that the activity or conversation may be reasonably expected to be observed or overheard.
2. The position advanced for Mr Chappell in the written submissions filed prior to the first return of this application, consistent with contemporaneous communications between the Company and Mr Chappell, was that the private conversation was between Mr Chappell and the Ranger and was not carried on in any circumstance in which the parties to the conversation ought reasonably to have expected the conversation may be overheard.
3. There was an important shift in the argument for Mr Chappell at the hearing of the application for the interlocutory injunction (after counsel had viewed the recording) to the effect that the private conversation actually included Mr Worner and the other security guard.
4. Having reviewed, once again, the video footage at the parties’ request, it is certainly the case and is common ground that there are (relatively brief) occasions in which the security personnel, in particular, Mr Worner, are brought into what I provisionally describe as a conversation. While at one level, this may support the Company’s contention that in those circumstances it could not be reasonably expected that the conversation between Mr Chappell and the Ranger was to be in private, on the other, it also supports the contention now advanced for Mr Chappell. That contention, as noted above, is that all of the personnel were parties to the conversation, even if the primary participants were Mr Chappell and the Ranger. (The earlier participants in the conversation left the scene and there is nothing at all controversial in their communications.)
5. The communications concerned primarily involved Mr Chappell effectively conducting a monologue colourfully complaining of the company’s treatment of the employees. There is no doubt that the security personnel were well and truly in earshot, but the occasions on which they were expressly spoken to, not only by virtue of Mr Chappell’s direction of speaking, but also by verbal reference to them, is capable of supporting an inference that all were parties to the conversation. Ultimately, in a final hearing, the better conclusion may well be, as the Company contends, that the parties to the conversation were only Mr Chappell and the Ranger. Indeed, most certainly, that is the view that was expressed at the outset by Mr Chappell. But it is important also that the objective perspective be applied to consider the circumstances. I consider it is quite arguable that Mr Chappell was speaking to all and sundry in that group, expressing his unhappiness loudly and in no uncertain terms. Just as the security officers were virtually silent after the original exchanges, the Ranger was also a minimal contributor in his responses.
6. It is arguable, in my view, that the participants in the conversation included all four men. Those four men at relevant times were otherwise all in isolation. There was no one else in earshot. It is at least arguable that the conversation was therefore private amongst those four personnel, notwithstanding that this was not the case as originally put. Mr Chappell did not and would not be taken as intending that his remarks should go further than that group or the Ranger.
7. There is not the slightest doubt that, if the conversation was purely between Mr Chappell and the Ranger, then it could only be described as a conversation which could reasonably be expected to be both observed and overheard. The proximity and the loudness with which Mr Chappell was speaking and the fact that he was directing some comments specifically to or, at the very least, looking at the security guards (in particular, the one operating the camera), could only lead to that conclusion. Of course, if the security guards are properly regarded as being included in or participants in the ‘conversation’, which as I say was more of a monologue, then there is no question of overhearing as such because it was intended that they should hear what was said. While the initial indications were that the conversation was regarded as being a private conversation only between Mr Chappell and the Ranger, there is equally no doubt in my mind that there is a strong case that Mr Chappell was well and truly more than content for the security guards to be hearing the remarks he was making about the Company. They were loud, forceful and highly critical, as well as being particularly colourful. On one view, he was the only participant for much of the conversation, but it is difficult to distinguish in all these circumstances, at least at a *prima facie* level, between the Ranger and the security guards.
8. As to the balance of convenience, the Company will have access to an account from Mr Worner so may, if it wishes, proceed to consider Mr Chappell’s position without the recording. Or it may choose to await a final hearing, which could probably be listed without significant delay. There are several options, including, as a distinct preference, mediation. But the complexities of re-evaluating in the Fair Work Commission or this Court the impact of reliance on the recording if it is used as foreshadowed, prior to a final hearing, would be most unsatisfactory. The balance of convenience strongly favours, in my view, the conservative course of preserving the status quo. While the arguable case that all four participated in the conversation (rather than only two) may not ultimately be preferred, taking into account the strong balance of convenience together with the at least arguable case, the interests of justice require that the recording itself should not be available for use until further order. Of course, Mr Chappell’s objective is not only to restrain usage of the video material, but also to restrain or preclude that material being used in any disciplinary action taken against him. That matter does not arise at this stage, other than in the sense of being relevant to the balance of convenience, because if the Company does need to rely upon ‘evidence’ other than the recording, it will be the ‘evidence’ of the security guards who may give information to the Company without relying upon or refreshing their memory from the video recording, if the latter is tainted: see s 9 of the *Surveillance Devices Act* relating to derivative usages.
9. There is an arguable case that all four persons and only those persons were included in the conversation such that it was not a conversation which could reasonably have been expected to be overheard by any other person. In those circumstances, arguably it would be a private conversation which should not have been recorded. I do not intend at this stage to form a final view, other than to accept the arguability of the contention in support of the grant of the relief which will preserve the status quo.

# CONCLUSION

1. In my view, Mr Chappell is entitled to injunctive relief to restrain usage of the recording. This does not mean that the respondent cannot proceed with its consideration of Mr Chappell’s conduct and whether the circumstances require any action in respect of that conduct. There is an undertaking in existence in these terms: until further order of the Court the respondent (whether by its officers, delegates, agents, employees or other representatives) will not:
	1. use an audiovisual recording of a conversation between Wayne Chappell and a ranger from the Shire of Collie recorded on 23 June 2016 (**the video footage**); and
	2. conduct (or continue to conduct) or take any further steps in any disciplinary inquiry or process into the conduct of Wayne Chappell on 23 June 2016 based upon the video footage or otherwise; and
	3. terminate the employment of, or take any other disciplinary action against, Wayne Chappell in reliance on the video footage or otherwise.
2. The undertaking will continue until further order, subject to deletion of the words ‘or otherwise’ in (b) and (c) and subject to any application to vary its terms. If the undertaking is to be withdrawn, an injunction in similar terms will be granted.

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| I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 21 October 2016