

BULLETIN

Victorian Automobile Dealers Association



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Surveillance and Privacy issues concerning dash cams fitted to customer vehicles

This bulletin has been devised for members of the Victorian Automobile Dealers Association (VADA) in response to ongoing consumer issue with regards to the activation and use of dashcams or other recording devices. VADA thanks the VACC IR Department for provision of this bulletin.

VADA members are encouraged to seek the views of their franchisor or own legal team before implementing any new policy within the dealership or dealership workshop.

This bulletin examines implications with respect to use of on-board vehicle cameras or dashboard cameras (Dash Cams) by customers of VACC members. For this purpose, it is relevant to examine surveillance and privacy legislation.

Background

Dash Cams are onboard surveillance devices typically used to record the driving route of a vehicle. They are typically installed in personal motor vehicles to record car accidents and may be used as evidence in insurance claims or legal proceedings. Businesses also benefit from installing Dash Cams to monitor commercial vehicles and when used in conjunction with navigation, can be utilised to monitor driving habits in company vehicles.

A Dash Cam commences recording automatically as soon as the car engine starts. When the engine is turned off, the Dash Cam automatically shuts down. Dash Cams are also available for rear recording (dual cameras) and some models come equipped with GPS and audio recording capability.

VACC members are increasingly encountering situations where customers have Dash Cams installed, which may result in recordings inside their business premises/workshop. This creates a concern for businesses with respect to what is being recorded while a customer's car is being worked on.

Surveillance

Prohibitions

The *Surveillance Devices Act 1999* (Vic) (SD Act) has broader scope than the workplace alone and prohibits installation, use and maintenance of optical and audio surveillance devices generally.

Specifically, it provides that a person (or body corporate) must not:

- “knowingly install, use or maintain an optical surveillance device to record visually or observe a **private activity** to which the person is not a party, without the express or implied consent of each party to the activity.”¹
- “knowingly install, use or maintain a listening device to overhear, record, monitor or listen to a **private conversation** to which the person is not a party, without the express or implied consent of each party to the conversation” unless permitted by law.²

Furthermore, the SD Act prohibits a person (or body corporate) from knowingly **communicating or publishing**:

“a record or report of a **private conversation or private activity** that has been made as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device”.³

The SD Act does however, provide an exclusion to the prohibition on communicating or publishing a record or report of private conversation or activity, in (non-exhaustive) circumstances:

- where *each* party present has consented (express or implied);⁴
- it is in the public interest;
- for the protection of the lawful interests of the person publishing or communicating the record or report; or
- in legal or disciplinary proceedings.⁵

The SD Act defines **private activity** and **private conversation**⁶ as follows:

- **“private activity** means an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include—
 - a. an activity carried on outside a building; or
 - b. an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else”
- **“private conversation** means a conversation carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be heard only by themselves, but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it may be overheard by someone else”.

Employment context

In the employment context, the SD Act only provides employees protection against surveillance by their *employer* in private areas such as the toilet, washroom or change room.⁷

Penalties

Breach of the SD Act can result in significant penalties. In the case of a natural person penalties include level 7 imprisonment (2 years maximum) or a level 7 fine (\$39,652.80 maximum), or both. For body corporates, the penalty may be up to \$198,264.00.

Privacy

There is no tort or right to privacy in Australia⁸. The Australian Privacy Principles (**APPs**) contained in the *Privacy Act 1988* (Cth) protect **personal information**⁹ capable of identifying an individual.¹⁰ The APPs regulate collection, use and disclosure of personal information by private sector businesses. ¹¹

The APPs *do not apply* to individuals acting in their own capacity.

Recommendations

With respect to use of Dash Cams it is therefore evident that privacy law will not protect individuals against infringements by other individuals.

However, the SD Act does provide some protection to VACC members. Where a Dash Cam records video or audio inside a business premises/workshop and persons featured inside the recordings can be said to have not *reasonably expected* to be observed or heard by other parties than themselves, this may be considered a breach of the SD Act.

Accordingly, VACC members should provide a disclaimer/statement to customers that:

- Dash Cams will/should be disabled when a motor vehicle is submitted for any type of service;
- that recordings taken inside the business' building may involve private activities or conversations;
- that the business and its employees, officers or agents, do not consent to being recording by an optical or audio surveillance device at any time inside the business premises.

This is not guaranteed to afford protection to members given that the exclusion may be enlivened where a person seeks to protect their lawful interests or requires the recording in legal proceedings (for example in insurance, employment or negligence litigation). Further, despite a recording being illegally obtained, it may nevertheless be admitted in legal proceedings as evidence where the desirability of admitting the evidence outweighs the undesirability of admitting evidence.¹²

In conclusion, the issue of recording devices, surveillance laws and privacy is complex. VACC members are encouraged to become informed on the parameters of surveillance legislation and the capabilities of Dash Cams as set out above.

VACC IR Department

1. The *Surveillance Devices Act 1999* (Vic): section 7
 2. Ibid: Section 6
 3. Ibid: Section 11
 4. In Victoria. - <http://www.alrc.gov.au/publications/13-surveillance-devices/uniform-defences-and-exceptions>
 5. Ibid: Section 11(2)
 6. Ibid: Section 3
 7. Ibid: Part 2A
 8. See more in Butler, Des "A Tort of Invasion of Privacy in Australia?" [2005] *MelbULawRw* 11; (2005) 29(2) *Melbourne University Law Review* 339: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MelbULawRw/2005/11.html?query=#fnB5>
 9. Personal information includes (but not limited to) information about a person's:
 - Race
 - Ethnicity
 - political opinions
 - membership of political associations
 - membership of professional associations and trade unions
 - religious or philosophical beliefs
 - sexual preferences
 - health and genetic information, and
 - or criminal records
- Personal also information includes a person's contact details and can also include a photograph in which that person can be identified.
10. Privacy Act 1988: Section 6
 11. The APPs apply to all private sector businesses with an annual turnover of more than \$3 million, all private health service providers nationally, a limited range of small businesses and all Australian government agencies.
 12. Evidence Act 1995 (Cth): Section 138

Michael McKenna MBA
Industry Policy Advisor

Industry Divisions

VACC

Level 7 | 464 St Kilda Road | Melbourne Vic 3004

P: 03 9829 1280 | **M:** 0418 822 939 | **F:** 03 9867 1795 | **W:** vacc.com.au