

Surveillance and Privacy issues concerning dashboard cameras fitted to customer vehicles and remain activated while the vehicle is in service/repair

The inaugural meeting of the Victorian Automobile Dealers Association (VADA) Parts and Service Managers Group (PSG) discussed issues relating to consumer and dealer facing issues relating to dashboard cameras and other recording devices that remain activated when a consumer car is being serviced, repaired or driven by relevant dealership staff. The PSG has requested VACC revisit advice provided to members in 2015 for VACC for dissemination amongst its VADA service department members. The bulletin below usurps that original 2015 advice.

The members of the VADA PSG thank Daniel Hodges, Gabriella Marton, Rob Martin and the Team from the VACC IR Department for the provision and painstaking research in the development of this bulletin.

Why the bulletin has been devised?

This Bulletin has been devised for members of the Victorian Automobile Dealers Association (VADA) in response to ongoing consumer issues relating to dashboard cameras and other recording devices ('Dash Cams') that remain activated in consumers' vehicles when they are left for service and/or repair work with VADA members' businesses.

VADA members are encouraged to check the repair instructions and recommend standard procedures of their franchisor or manufacturer of the product they are selling regarding the de-activation of Dash Cams or to seek further legal advice specific to their particular circumstances before implementing any new policy within the dealership or dealership workshop.

Although the information provided in this bulletin does not intend to be comprehensive legal advice it is necessary to refer to relevant legislation.

Dash Cam as an inadvertent workplace surveillance device

Dash Cams and other forms of recording devices onboard of a vehicle traditionally used to record the driving route of a vehicle. They are typically installed in non-commercial motor vehicles to record road transport 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 and drivers' habits in company vehicles.

A Dash Cam commences recording automatically as soon as the car engine starts and stops recording when the engine of the vehicle is turned off. However, in some models Dash Cams are also connected to motion sensors to provide ongoing protection. 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 leave the Dash Cams installed in their vehicle in activated mode, which may result in optical and audio recording of what happens inside or in the vicinity of the vehicle inside and outside of VADA members' businesses. This create a concern for businesses as Dash Cams with respect to what is being recorded while a customer's car is being worked on by employees or contractors of a VADA member and when they are taken for test drives because an activated Dash Cam might become a workplace surveillance device.

Workplace surveillance

Workplace Surveillance means surveillance conducted by employers on their employees regardless of whether an employer intend it for that purpose or not. In Australia, there is no general right to privacy and what can be recorded at the workplace is regulated by a complex net of Federal and state laws.

Prohibitions

The *Surveillance Devices Act 1999* (Vic) (SD Act) has broader scope then the workplace alone at and prohibits the use of cameras, listening and tracking devices generally.

Specifically, sections 6 and 7 of the SD Act provide that a person (or body corporate) must not:

- “*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; or
- “*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.*”

Further, section 11 of 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.”*

However, the SD Act also provides a number of exclusions to these prohibitions, including in the following (non-exhaustive) circumstances:

- where *each* party present has consented (express or implied);
- 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.

Section 3 of the SD Act defines **private activity** and **private conversation** 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, Part 2A of the SD Act only provides employees protection against surveillance by their *employer* in private areas such as the toilet, washroom or change room.

Penalties

Breach of the SD Act can result in significant penalties. In the case of a natural person penalties include imprisonment (2 years maximum) or a fine of up to \$44,380.80, or both. For body corporates, the penalty may be up to \$221,904.00.

Privacy

There is no tort or right to privacy in Australia. The Australian Privacy Principles (**APPs**) contained in section 6 of the *Privacy Act 1988* (Cth) protect **personal information** capable of identifying an individual. The APPs regulate collection, use and disclosure of personal information by 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.

Importantly therefore, the APPs *do not apply* to individuals acting in their own capacity. This means that the APPs do not protect individuals against privacy infringements by other individuals, including in relation to the use of Dash Cams.

Recommendations

Whilst limited, the SD Act does provide some protections 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;
- that the SD Act governs the use of Dash Cams, with breaches by individuals subject to up to 2 years imprisonment and/or fines of up to \$44,380.

It is important to note however, that 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.

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.

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