A covert recording of a conversation occurring in the workplace could be an evidentiary trump card, in a contest of otherwise differing recollections and inconclusive evidence. However, admissibility of such evidence is subject to s 138 of the Evidence Act 1995 (Cth). Section 138 operates to exclude evidence that is improperly or illegally obtained, unless in its discretion the court considers that the illegality is outweighed by the desirability of admitting it.

Accordingly, if in workplace litigation your client seeks to use such a recording, or such a recording is sought to be used against your client, attention must be had to whether its creation involved any breach of legislation. If there has been a breach, then the evidence could be excluded upon successful objection.

Even if the recording is successfully admitted as evidence there may be other risks. First, the potential benefit of a recording as evidence should be weighed against the risk that a recording may tend to discredit your client — because of deception innate to a covert recording. Secondly, depending on what might transpire in the recorded conversation, it might turn out to evidence misconduct on the part of your client. Thirdly, the making of a covert recording in the workplace (whether by the employer or the employee) might be conduct held to be in breach of the implied term of mutual trust and confidence in the contract of employment. If you are consulted by a client who is in the midst of an ongoing workplace dispute, you may be asked whether creating evidence through a covert recording would be a good idea. The answer is most often going to be “no”, because of risks including, that your client may commit a criminal offence, the discretionary exclusion of evidence, and that the evidence may harm your client’s case.

Another reason why creating a covert recording may be unwise is that it would bring into existence a “document”, within the meaning of that expression in most rules of court (whether Commonwealth, State or Territory). Once a document relating to litigated events exists, then the document will normally be discoverable in the litigation. This means that if it is in your client’s custody or control, then it must be listed and made available to the other side — regardless of whether its contents help or harm your client’s case. If the recording has turned out to be unhelpful, and your client has destroyed it, rules of discovery may still require your client to list the document as having once existed, and to state — by affidavit — when your client parted with it and what became of it.

### Which legislation applies?

Acts with closest potential application in the ACT are:

1. the Telecommunications (Interception and Access) Act 1979 (Cth) *(the Interception and Access Act)*; and
2. the Listening Devices Act 1992 (ACT) *(the Listening Devices Act)*.

The first step is assessing which of these Acts apply. This requires attention to the facts of how the recording was made.

### The Interception and Access Act

The Interception and Access Act governs interceptions of communications “passing over a telecommunications system”. The courts have interpreted the section as being limited to recordings:

1. by a third party, without the knowledge of one of the parties to the communication (either the caller or the recipient); and
2. made by interception of the communication as it passes through the system such as would be achieved where a listening or recording device:
   a. is part of the telephone or physically connected to the telephone line or system (e.g. a telephone bug or a headset attached by wire);²
   b. records and converts electrical impulses travelling along telephone wires into sound;³ or
   c. intercepts a mobile phone conversation using a radio scanner.⁴

In summary, the Interception and Access Act will apply in the relatively narrow circumstances of connecting into a telecommunications system — electronically, physically or by radio.

### The Listening Devices Act

State and Territory laws govern recordings of private conversations not subject to relevant Commonwealth legislation such as the Interception and Access Act. In the ACT, the use of a listening device, such as using a smart-phone or hand held tape recorder, to make a covert recording (either in person or by telephone) is covered by the Listening Devices Act.

Section 4 of the Listening Devices Act, to which the Criminal Code applies carrying with it a maximum penalty of 50 penalty units, prohibits use of a listening device⁵ with the intention of:

- listening to or recording a private conversation to which the person is not a party; or
- recording a private conversation to which the person is a party.

The main exception to the prohibition is where each principal party to the conversation consents to use of the listening device.⁶ Other exceptions are considered below.
There may be differing results on the issue of whether a company is a party to a conversation. In Miller, it was held that a company was not a party to a conversation merely because its employee was. That decision was distinguished in Scanruby in which the company was held to have been a party to the conversation in circumstances in which the employee who caused the conversation to be video-taped was a principal officer of Scanruby and the obvious person through whom Scanruby was to act.

### Exceptions to the prohibition against use of listening devices

The onus of establishing an exception is a civil one and rests on the party seeking to establish it. Exceptions to the prohibition (additional to the main exception of the unintentional hearing of a private conversation) are provided under s 4(3) of the Listening Devices Act, but are difficult in their expression.

4(3) [the prohibition] does not apply to the use of a listening device by, or on behalf of, a party to a private conversation if — …

b) a principal party to the conversation consents to the use of the device and considers to use of the device and considers on reasonable grounds that it is necessary for protection of their lawful interests — whether the user of the device is that principal party, or where the user is someone else “party” to the conversation.

Further exceptions are provided under s 4(3)(b) of the Listening Devices Act, but are difficult in their expression.

#### The exception of protecting lawful interests

If a covert recording has been made, and it was made for creating evidence in the course of a workplace dispute, the exception under the Listening Devices Act most likely to be invoked is protection of a “principal party’s lawful interests” under s 4(3)(b)(i).

Whether a recording is “reasonably necessary to protect a principal party’s lawful interest” is assessed at the time of the use of the recording device. The scope of the expression “lawful interest” is assessed having regard to the particular facts of a matter and on a case by case basis. General guidelines include:

- That the exclusion should not be read so widely as to undermine the purpose of the legislation to protect the privacy of individuals;
- That “lawful interests” are interests which are not unlawful or are “legitimate” or are “conforming to the law”, and hence have a broader meaning than “legal interests” (in the sense of a legal right, title, duty or liability);
- That regardless of whether one party is induced by the other to make an admission, a recording of that admission can be reasonably necessary to protect a lawful interest if a lawful interest exists and that party is “claiming an earlier representation by the other which is denied”.

The foregoing principles indicate competing broad and narrow approaches to s 4(3)(b)(i). But an authoritative and unambiguously narrow approach that would be applicable in the scenario of evidence-gathering for a workplace dispute, was taken by Chief Justice Doyle in Thomas v Nash. In that case, the Chief Justice stated:

“I do not consider that a person makes a recording to protect his lawful interests simply because he has a hope that in contemplated litigation the recording might be used to his advantage.”

In that case, there was no litigation contemplated at the time of the recording. But, importantly, the Chief Justice stated that his conclusion would be the same “even if there was”. Reinforcing this principle, he stated that:

“a mere desire to have a reliable record of a conversation is not enough … a desire to gain an advantage in civil proceedings would not ordinarily amount to a relevant lawful interest, although of course each case has to be considered on its facts.”

On this approach, there is a high risk of failing to prove an exception, and hence committing an offence, if a recording is made for the purpose of creating evidence to be used in current or planned workplace litigation.

#### The exception under s 4(3)(b)(ii) — no intention to publish

There is relatively little case law in which the exception in s4(3)(b)(ii) is discussed. The exception would rarely be able to be credibly raised. This is because a person who made a covert recording would probably appear disingenuous to assert — in circumstances in which he or she is seeking to rely on the recording — that at the time the recording was made they had no intention to communicate or publish it to a person who is not a party to the conversation.

#### FWC’s discretion to exclude improperly or illegally obtained evidence

Unlike the federal courts and the ACT courts, the Fair Work Commission (FWC) is not bound by the Evidence Act 1995 (Cth) (the Evidence Act). The FWC is however obliged to exercise its functions taking into account the objects of the Fair Work Act 2009 (Cth) and the “equity, good conscience and the merits of a matter.”
The approach of the FWC is that even though the Commission is freed from compliance with the technicalities of the law of evidence, it should not be unrestrained in its admission and reliance on evidence. In the recent decision of Hazlam, Commissioner Wilson:

» observed that the proper approach was to consider the provisions of the Evidence Act within the context of the Fair Work Act; and

» applied s 138 of the Evidence Act by starting from a position in which the evidence is not admissible and the onus is on the party seeking admission to satisfy the FWC otherwise.

Admissibility under s 138 of evidence improperly or illegally obtained

Under s 138 of the Evidence Act, evidence that is obtained improperly or in contravention of an Australian law, “is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained”. Matters to be taken into account include:

» the probative value of the evidence;

» the importance of the evidence in the proceeding;

» the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;

» the gravity of the impropriety or contravention…

FWC’s exercise of the discretion to admit or reject secret recordings as evidence

In its application of the principles above, the FWC in Hazlam refused to admit a secret recording made by an employee in a meeting, said by her to be evidence of her dismissal by the employer. In the context in which the employer was asserting that the employee resigned, such evidence, if indeed the employee was correct as to the substance of the tape, may have been of high probative value. Not having heard the recording, but having received submissions from the employee regarding its value, the FWC refused to admit the tape on the basis that:

» the evidence would be likely to assist but would not be determinative of whether the employee’s employment was terminated; and

» in any event, the employee would have an opportunity to put her contentions to the witnesses in cross-examination.

Cases where reliance on recordings has backfired

Even though a recording may be highly relevant to the matters and events in dispute, a factor that can weigh against admission is the artificial scenario in which a recording is made. The nature of a secret recording inherently gives the recording party the advantage of being able to construct the conversation and manufacture their response to show them in a better light and to induce the other party to make statements that they might not have otherwise been inclined to make. Even if admitted into evidence, a recording made by your client in which they are seen to provoke a set of self-serving circumstances or statements, can adversely affect their prospects. The circumstances may lead a court to give little probative value to the recording, to doubt your client’s credibility, or at worst to establish a finding of misconduct against your client.

Cases in which a party’s reliance on a secretly recording has backfired include Kharb and GSL v PLP. In Kharb, the employee’s application for relief from unfair dismissal was rejected, for reasons including that Mr Kharb proffered an explanation for having made the secret recording that was not consistent with the chronology of events. In dismissing the application, the Commissioner made a finding that the applicant was not a credible witness in relation to his claims.

GSL v PLP involved an application for sexual harassment made by a law graduate against Mr PLP, a legal practitioner and principal of his own firm. In his defence, Mr PLP produced videos and audio records in support of his argument that his approaches were welcomed by the complainant and, therefore, did not amount to sexual harassment. In finding against Mr PLP, the complainant was awarded $100,000, and President Justice Garde relied on the recordings to establish that Mr PLP’s badgering for sexual intercourse and requests for sexual favours had been unwelcome. President Justice Garde held that:

» no employee should be subject to sexual badgering of the type evidenced in the tapes; and

» the harassment and circumstances of the covert filming and recording, satisfied the President that a reasonable person would have anticipated that Ms GLS would be offended, humiliated and intimidated by that misconduct.

Regardless of whether the use of a listening device or recording was illegal, a secret recording made in the workplace or unreasonable surveillance, may constitute a breach by the recording party of the implied term of mutual trust and confidence in the contract of employment.

In Thomas, the employee Mr Thomas recorded a number of meetings he had with his managers to discuss his leave and other entitlements. The recordings were made by Mr Thomas in the context of a workers compensation claim and a dispute with his employer, Newland Foods, regarding payroll issues and a forced demotion. Subsequently, Newland Foods terminated Mr Thomas’ employment summarily and alleged that he had intimidated and made accusations against staff and that he had falsely made workers compensation claims. Mr Thomas successfully challenged the termination, and was awarded six months’ salary — the upper limit that can be awarded under unfair dismissal applications. But Mr Thomas was not awarded reinstatement. This was because he had made the secret recordings of his workplace meetings. Despite no finding that the recordings had been made illegally, and despite Mr Thomas’ contention that the recording was reasonable to protect his lawful interests, Deputy President Sams held that reinstatement was not appropriate because in his view:

“there could hardly be an act which strikes at the heart of the employment relationship, such as to shatter any chance of re-establishing the trust and confidence necessary to maintain that relationship, than the secret recording by an employee of conversations he or she has had with management. Although there may be sound reasons why an employee (or an employer for that matter) believes it necessary to secretly tape workplace conversations, I consider such an act to be well outside the normal working environment and contrary to the well understood necessity for trust and fidelity in the relationship between employee and employer.”
Once created, a recording may be discoverable

We have seen so far that, once a party has deployed in evidence a secret recording, it might turn out to be used against them. A client thinking of making a recording might not see that as a real problem, expecting that they could withhold or destroy the recording if the conversation does not go as well as they had planned. But in most jurisdictions, the applicable rules of discovery are likely to capture the recording. An order for discovery ordinarily covers any “document” in the client’s custody or control. “Document”, under court rules, is broadly defined.

In the ACT, the Court Procedures Rules 2006 (the ACT Court Rules) adopt the definition of “document” that is found separately in two different parts of the Dictionary in the Evidence Act.45

Document is defined in the Evidence Act, dict, pt 1 as any record of information, and includes —

a) anything on which there is writing; or
b) anything on which there are figures, marks, numbers, perforations, symbols or anything else having a meaning for people qualified to interpret them; or
c) anything from which images, sounds, messages or writings can be produced or reproduced, whether with or without the aid of anything else; or
d) a drawing, map, photograph or plan. [emphasis added]

The practical effect of this broad meaning of “document” is that if a client has brought into existence a recording which they now regret (for instance because inconvenient things were said on it), and if the document relates directly or indirectly to a matter in dispute in litigation, then the client might be faced with an obligation, on discovery, to provide the recording to the other side.

If you had in the past been apprised of your client having made such a recording, and your client has sought to avoid problems by having since destroyed the recording, then you might still be in a position of requiring your client to list the recording in compliance with orders for discovery. Most jurisdictions require identification and listing of discoverable documents once held by the client, even though such documents are no longer in the client’s custody or control. Considerable, and potentially embarrassing, detail is required, for example, under the ACT Court Rules. Rule 608(1)(c) provides as follows:

608(1) A party’s list of documents must— ...

(c) for each document not in the party’s possession, state—

i) when and how it stopped being in the party’s possession; and

ii) to the best of the party’s knowledge, information and belief, who now has possession of the document or, failing that, what has become of the document.

The list must be verified by affidavit. Obvious exposure to cross-examination would arise where a client’s discovery list reveals the past existence of a recording that your client has destroyed. This predicament adds to the reasons why secretly recording a conversation to bolster evidence in a workplace dispute can be unwise.

John Wilson, Legal Director, Bradley Allen Love
The author acknowledges the assistance of Elishka Skelding, employment lawyer at Bradley Allen Love, in the preparation of this article.

Endnotes
1 Section 7(1) of the Telecommunications (Interception and Access) Act 1979 (Cth).
4 R v Edlesten (1990) 21 NSWLR 542 at 548 and 549.
5 Section 2, Dict. of the Listening Devices Act 1992 (ACT) in which “listening device” means any instrument, apparatus, equipment or device capable of being used to listen to or to record a private conversation, but does not include a hearing aid.
8 Miller v TGN Channel Nine [1988] 36 A Crim R 92 at 108 per Findlay J.
9 Scanrury Pty Ltd v Caltex Petroleum Pty Ltd and Anor [2000] NSWIRComm 89.
10 Ibid at 28 per Peterson J.
13 Ibid at section 4(2)(a).
14 Ibid at section 4(2)(b).
15 Ibid at section 4(3)(b)(i).
16 Ibid at section 4(3)(b)(ii).
17 Scanrury Pty Ltd v Caltex Petroleum Pty Ltd and Anor [2000] NSWIRComm 89 at 42-44.
18 Ibid at 45-47.
19 Thomas v Nash [2010] SASC 153 at 45-49 per Doyle CJ.
20 Voli v Berrivale Orchards (2000) 99 FCR 580 at 856 per Branson J.
21 Scanrury Pty Ltd v Caltex Petroleum Pty Ltd and Anor [2000] NSWIRComm 89 at 46.
23 Ibid at 45 per Doyle CJ.
24 Ibid at 48. See also Sepulveda v R [2006] NSWCCA 379.
25 Sections 578(b) and 591 of the Fair Work Act 2009 (Cth).
26 Carol Haslam v Fazche Pty Ltd T/A Integrity New Homes [2013] FWC 5593 at 13.
27 Carol Haslam v Fazche Pty Ltd T/A Integrity New Homes [2013] FWC 5593.
28 Ibid at 13-16 applying the FWC full bench decision in Re: Michael King Print S4213, 17 March 2000, per Ross VP, Williams SDP, Hingley C. 29 Carol Haslam v Fazche Pty Ltd T/A Integrity New Homes [2013] FWC 5593 at 18.
30 Hamburger (Employment Advocate) v Williamson [2000] FCA 1644 at 44 and 50 per Marshall J.
31 Ibid; Khurb v Eastfield Pty Ltd T/A BP Durangina [2013] FWC 6403 at 23.
32 Ibid; Khurb v Eastfield Pty Ltd T/A BP Durangina [2013] FWC6403.
33 GLS v PLP (Human Rights) [2013] VCAT 221. See also Sent v Primelife Corp Ltd [2006] VSC 445 in which the Chief Executive Officer of the defendant was unsuccessful in an application for damages for breach of contract of employment when it was held that the applicant’s listening and recording of the defendant’s employees telephone conversations constituted serious misconduct.
34 Ibid at 30-36.
35 GLS v PLP (Human Rights) [2013] VCAT 221. See also Sent v Primelife Corp Ltd [2006] VSC 445 in which the Chief Executive Officer of the defendant was unsuccessful in an application for damages for breach of contract of employment when it was held that the applicant’s listening and recording of the defendant’s employees telephone conversations constituted serious misconduct.
36 Ibid at 30-36.
37 GLS v PLP (Human Rights) [2013] VCAT 221 at 143-145.
38 Ibid at 224.
42 Ibid at 21-22.
43 Ibid at 183-184.
45 See also dict, pt 2, 8 of the Evidence Act 1995 (Cth).