



## Can I secretly record conversations with my employer?

**Author:** [Margaret Kaukas](#)

**Email:** [enquiry@andersons.com.au](mailto:enquiry@andersons.com.au)

**Phone:** 08 8238 6636

**Date:** Wednesday October 21, 2015

In a recent report on the ABC's "[Four Corners](#)" program, Judge Lawler, the Vice President of the Australian Fair Work Commission (who has recently been the subject of intense media scrutiny in relation to his actions in taking around nine months paid sick leave from his \$435,000.00 per year job, while assisting his partner Kathy Jackson, in various legal matters) disclosed that he had been secretly recording telephone conversations with his "boss" Judge Iain Ross, the President of the Fair Work Commission since 2012.

In some States of Australia, including South Australia, it is in fact illegal/unlawful to record a telephone conversation with another party unless that other party gives their permission to do so. In the "[Four Corners](#)" report, Judge Lawler appeared to acknowledge this but argued that he had not breached the law because he made the taped conversations in order to protect his own legal interests. Whether that argument would succeed in any prosecution, remains to be seen.

In South Australia Section 4 of the Listening and Surveillance Devices Act (SA) 1972 provides that:

*“a person must not intentionally use any listening device to overhear, record, monitor or listen to any private conversation, whether or not the person is a party to the conversation, without the consent, expressed or implied, of the parties to that conversation”.*

The maximum penalty for breaching this provision is a \$10,000.00 fine or two years' imprisonment. Section 5 of the Act provides that:

*“a person must not knowingly communicate or publish information or material derived from the use of a listening device in contravention of Section 4, except with consent of every party to the conversation”.*

Again the maximum penalty is a \$10,000.00 fine or imprisonment for two years.

Section 7 of the Act provides an exception, or defence, to Section 4, providing that, if the person making the recording is a party to the conversation and the recording is made either in the course of that person's duty, in the public interest or for the “protection of the lawful interest of that person”; then there will be no breach of Section 4.

It is the “defence” or exception contained in Section 7 (or its NSW equivalent) that Judge Lawler is relying upon to justify his actions. However, in my opinion, it is unlikely that Judge Lawler's argument would be accepted by a Court.

In a 2010 case *Thomas v Nash*, the Supreme Court of South Australia considered what constituted a “lawful interest” (as per Section 7 of the Act). The Court said that the meaning of “lawful interest” was best left to be decided on a case by case basis. However, the Court commented that the desire to gain an advantage or benefit in civil legal proceedings would NOT usually constitute a “lawful interest”.

In that case, the defendant had made an unlawful recording (on a telephone answering machine) and, with one minor exception, the Court held that the recordings could not be admitted into evidence, and that the Court would itself be committing an offence pursuant to Section 5 of the Act if it “published” the recording.

We certainly advise our clients that any attempt to secretly tape a conversation will, in most cases, be a breach of the law.

You may think that recording a conversation with your employer will assist you in any subsequent legal action. That is not the case. Unless your employer or the other party to the conversation has given permission for the conversation to be recorded, the recording will be in breach of the law and, as such, any Court or Tribunal would be highly unlikely to allow it to be submitted as evidence in any legal proceedings.

Of course, it is NOT unlawful to tape a conversation if the other party to the conversation agrees. If you are in a situation where you believe a recording should be made, you should not hesitate to ask the other party if they agree to have the conversation recorded.

For example, if your employer asks you to attend a disciplinary meeting or a meeting in which you think they will dismiss you, it is entirely appropriate to ask if they will agree to allow you to record the conversation. However, if they do not agree, you should not

do so. You should, however, ensure you have a support person with you at the meeting.

If you have any questions about your rights in this regard, please do not hesitate to contact Andersons' expert [industrial lawyers](#).

---

*Please note, this Blog is posted in Adelaide, South Australia by Andersons Solicitors. It relates to Australian Federal and South Australian legislation. Andersons Solicitors is a medium sized law firm servicing metropolitan Adelaide and regional South Australia across all areas of law for individuals and businesses.*