

Civil Liberties and CCTV Camera Surveillance. Landmark Court Decision in Australia

Government seeks to Change Law to Resume Surveillance

By [Charles Farrier](#)

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Last week (2nd May), in the midst of Privacy Awareness Week [1], an Australian campaigner, Adam Bonner won a landmark decision against CCTV cameras in New South Wales [2].

The decision did not rule that the cameras in the town of Nowra should be switched off, but instead ordered the local council to stop breaching the Information Protection Principles of the Privacy and Personal Information Protection Act. Remedies were suggested by the Privacy Commissioner but suffice to say Shoalhaven council has switched the cameras off whilst deciding its next move.

The decision of the Administrative Decisions Tribunal New South Wales ordered that:

1. The Council is to refrain from any conduct or action in contravention of an information protection principle or a privacy code of practice;
2. The Council is to render a written apology to the Applicant for the breaches, and advise him of the steps to be taken by the Council to remove the possibility of similar breaches in the future.

[SF v Shoalhaven City Council [2013] NSWADT 94, Orders]

The court victory is evidence once again that CCTV is a local issue which can be defeated when local people take action. In this case a single campaigner took on his local council, and won.

The Road to Victory

Back in late 2009, Mr Bonner saw an article in a local newspaper detailing Shoalhaven City Council's plans to install 18 CCTV cameras in the Nowra Central Business District (CBD). Mr Bonner felt uneasy, he didn't think it was right for CCTV cameras to watch and record him and others when they visited Nowra city centre to go about their lawful business. But he didn't just wait for someone else to do something, he took action himself to defend his and other residents' freedoms.

Over and above his instinctive reaction to the cameras, Mr Bonner found the many studies that show CCTV is not an effective crime fighting tool [3]. He asked the local council to conduct an internal review of conduct under the Privacy and Personal Information Act 1998 (PPIP Act) and he called on other residents to contact Shoalhaven council pointing out to

them the many flaws of the CCTV scheme – he wrote:

There is also something very unsavoury about a society that puts more value on seeking retribution and revenge from the 4-5 per cent who offend, than on protecting the privacy and civil liberties of the 95-96 per cent who do not.

Unfortunately the council refused to conduct the review that Mr Bonner requested because they said the cameras were not yet operational – a claim that was later shown to be incorrect. The council did eventually conduct an internal review but, not satisfied with the outcome, Mr Bonner lodged an application with the Administrative Decisions Tribunal. After almost 9 months Council barristers told the Tribunal that the footage on which the case was based had been inadvertently deleted – and the case was dismissed. However Mr Bonner did not give up – he simply started the whole procedure all over again.

In 2011 Mr Bonner visited Nowra shopping centre on two separate occasions and obtained images of himself through the Government Information (Public Access) Act 2009 (although the release of actual video footage was refused). Mr Bonner then once again asked for an internal review. The council this time claimed that the threshold for collection of personal information was not met and so dismissed Mr Bonner's request. Once again Mr Bonner lodged an application with the Administrative Decisions Tribunal and the matter was at last heard over three days between May and August 2012.

Mr Bonner prepared his own written brief and represented himself in court – cross examining council staff, senior police and bringing in expert evidence from Dr Peter Kovesi and Professor Paul Wilson.

The tribunal decision published last week explicitly praises Mr Bonner's conduct throughout the case, it states: "No criticism can be levelled at the Applicant in regard to the time taken in concluding the matter. He has been pursuing his rights under the PPIP Act since the Council commenced testing the system". This is in sharp contrast to the criticism levelled at Mr Bonner by politicians, as we shall see below.

The Tribunal Decision

Mr Bonner argued that the Nowra cameras breached eight separate sections of the PPIP Act. The tribunal agreed with Mr Bonner with regards to three sections, namely section 10 relating to signage, section 11a relating to the relevance of personal information for the stated purpose and section 12c relating to security safeguards in place with regards to accessing images.

On section 10 the judge ruled:

The Council must take such steps as are reasonable in the circumstances to ensure that the Applicant was made aware of the information provided for by section 10. The fact that an individual might take steps to inform themselves of the details does not relieve the Council of the need to comply with section 10. In my view, the signage that is in place and other action taken by the Council has not been sufficient to ensure that individuals are "made aware of the implications for their privacy of the collection process, and of any protections that apply prior to or at the time of collection".

[ADT Decision paragraph 158]

On section 11 the judge ruled:

In my opinion, the vast majority of the information collected under the Council's CCTV program is 'collateral information' and is not relevant to the 'crime prevention' purpose. All of the Applicant's personal information is 'collateral information' and is not relevant to the 'crime prevention' purpose. Further, there is no suggestion that Police made any use of the collected information for law enforcement purposes.

[ADT Decision paragraph 162]

The judge added:

The expert evidence suggests that CCTV does little to prevent crime. The data available for the Nowra CBD suggests supports [sic] the Applicant's argument that the Council has not demonstrated that filming people in the Nowra CBD is reasonably necessary to prevent crime. In fact, available data suggests that since the Council's CCTV program was implemented crime has increased in the Nowra CBD in the categories of assaults, break and enters and malicious damage.

[ADT Decision paragraph 164]

On section 12 the judge ruled:

I agree with the Applicant that the use of a generic password rather than an individual user name and password for each authorised user means that there is no way of checking who is and isn't using the live monitor at the Nowra Police Station. There is no way of knowing whether those who are accessing the monitor have been appropriately trained. Section 12(c) provides that the agency 'must ensure' adequate protection of the collected information.

[ADT Decision paragraph 170]

An inspiration to those of us concerned by blanket surveillance

Mr Bonner's tireless campaigning shows that we can fight back against surveillance state measures. Instead of being cowed into inaction by scaremongering media reports which paint the Big Brother State as unstoppable, he fought back. Whilst challenging the Nowra cameras under the PPIP Act Mr Bonner also regularly issued press releases, started a petition against the cameras, wrote letters to the local media and even found time to share his thoughts with campaigners around the world via the International Working Group on Video Surveillance (IWGVS) [4]. All of this whilst working as a farmer.

Mr Bonner is an inspiration to anyone who feels that the ever growing levels of blanket surveillance are just plain wrong. When you see injustice, don't believe you can't do anything about it, and don't wait for someone else to do something about it, get out there and fight it yourself - you'll be surprised how powerful you really are.

The Political Backlash

Alas politicians don't like it when people try to defend their freedoms, and already the political backlash has begun. But we should not view this backlash as a negation of Mr Bonner's victory, it is in fact a unique opportunity to see the motives of our political leaders. Under pressure from Mr Bonner's campaign they have struck back wildly without bothering

to sugar-coat their thoughts. Mr Bonner challenged the cameras under the statute that the politicians introduced – the Privacy and Personal Information Protection Act. He used their statute to defend our freedoms and this has upset them. They seem to consider it outrageous that an individual would use their Act to protect every individual’s personal information or privacy. How on earth did he get it into his head that this Act was meant to do that?

Before the tribunal had even reached its decision, in October 2012 Shoalhaven Council submitted a motion at the Local Government Association conference calling on the Local Government Minister to amend the PPIP Act so that local councils could operate CCTV cameras without having to comply with the provisions of the Act that Mr Bonner had challenged [5]. The motion was not passed by the conference but was instead referred to the Association’s Executive Committee for further advice.

Since last week’s decision local politicians as well as those in the New South Wales parliament have been falling over themselves to condemn Mr Bonner and call for that change to the PPIP Act. What the politicians are saying is that they do not need to obey the law – because they make the law.

Somewhere along the way our political system has ceased to function in the way that it should, namely to defend personal freedoms. In 1766 Sir William Blackstone published the first volume of his influential ‘Commentaries on the Laws of England’ [6], in which he defined the absolute rights of man as the free enjoyment of personal security [not to be confused with the national security now used to curtail freedoms], of personal liberty, and of private property. Blackstone wrote:

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals.

Blackstone further pointed out the dangers in any laws that restrict these absolute rights:

every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of more indifference, without any good end in view, are regulations destructive of liberty

This week the New South Wales Premier Barry O’Farrell made a speech in the Legislative Assembly spelling out the position of the politicians [7]. O’Farrell’s speech epitomises the modern political ideology that has weakened individual freedoms and so it is worth quoting at length. O’Farrell claimed the tribunal’s decision was terrible:

because it was based on a complaint from one individual. One individual was put ahead of the concerns and interests of an entire community.

In fact Mr Bonner was defending the individual freedoms of all of the people of New South Wales not just his own. Further, as a community is just a group of individuals how could it be that it has more rights or freedoms than do those individuals?

Next O'Farrell bizarrely tried to compare defending freedoms to driving on the wrong side of the road when he said:

I do not drive on the right-hand side of the road because the law says I should drive on the left, and that law is there for good reason. It is there to protect the broader public interest. So, too, were the laws in relation to closed-circuit television cameras.

O'Farrell's crazed logic makes even less sense when we recall that the "laws in relation to closed-circuit television cameras" that he refers to are contained within the PPIP Act that the cameras have been found to breach.

O'Farrell then uses the false balance argument to weigh privacy concerns against public safety. The problem with the balance metaphor is that it suggests there is some unit of measure that allows privacy to be compared to safety, then further defies logic in suggesting that the two can be balanced despite one winning, namely public safety:

We understand that privacy considerations are important but public safety has to be paramount. Today the Attorney General advised me that the decision on Friday exposed a loophole in the State's privacy legislation, and today I can announce that that loophole will be fixed.

So O'Farrell believes that when the state does something wrong it means that the law must have a loophole. This is because O'Farrell believes that law is just statute, that as politicians create statute they create law and so whatever they do must be legal. But law cannot simply be statute, surely it is fundamentally about right and wrong.

O'Farrell then laid out how his government intends to amend the PPIP Act - by creating blanket exemptions (much like those in the UK's Data Protection Act). And these exemptions are to be introduced via a "regulation" ensuring that the order can be rushed through "on the nod" with little or no debate. Whatever one may think of the PPIP Act, it was many years in the making, was published in 1996 but did not pass until 1998. Now a major amendment will be made in little over a week:

the use of closed-circuit television cameras by councils will be given an exemption through that section of the Privacy Act that was used on Friday to strike out their use in the Shoalhaven. We are drafting urgently a regulation to provide appropriate exemptions under that privacy legislation to allow local councils, including Shoalhaven City Council, to use such cameras without breaching privacy laws. The regulation will allow councils to use closed-circuit television cameras in public places.

After bigging up surveillance cameras by trotting out a list of hackneyed and incorrect claims about their magical powers (peppered with recall of frightening events to strengthen his rhetoric), O'Farrell turned once again to why he detests the decision of the tribunal:

This was a ridiculous decision. It was a decision that concerns me because it struck me that the tribunal was trying to make policy. This Parliament is the place that will make policy. Whichever party is sitting on the Government side of this place will initiate policy. I will never stand by and allow those who sit on our tribunals or courts to dictate policy.

Leaving aside the fact that this case was about a breach of legislation not about policy, O'Farrell's bizarre schoolboy tantrum merely shows a desire of the supposedly law-making legislature to control the law-enforcing judiciary. Interestingly Blackstone had something to say about this too:

In all tyrannical governments, the supreme magistracy, or the right of both making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty.

Wider Issues and the Way Forward

Study after study has shown that CCTV cameras are not an effective crime fighting tool but most of the public is still painfully unaware of this fact. Furthermore the presence of cameras has substantial negative effects on our society by increasing fear, decreasing trust and destroying a sense of community. The debate around CCTV usually focuses on privacy alone because the regulations that facilitate it in most countries focus on the collection of personal data, but the other issues at stake ultimately constitute the curtailment of personal liberty - one of the absolute rights defined by Blackstone.

Decades after CCTV cameras were first introduced there has still been no meaningful debate that takes in all of the issues and Mr Bonner's tribunal victory is a timely reminder that such a debate is long over due.

Commenting on the likely overturning by politicians of Judicial Member S Montgomery's tribunal decision, Mr Bonner told us:

Even though this victory may be short lived I take some heart from the fact that the Member's decision is not being overturned by learned men or rational debate, but by politics and by those who wear their ignorance as a security blanket. I don't like it, but I can live with the outcome knowing that.

Well done Mr Bonner and thank you for showing us what each and every one of us can and must do to protect the individual freedoms of us all.

Notes:

[1] <http://www.privacyawarenessweek.org/>

[2] <http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=164456>

[3] A few of the studies are at http://www.no-cctv.org.uk/case_against.asp

[4] <http://www.iwgvs.org>

[5] <http://www.lgnsw.org.au/files/imce-uploads/35/2012-LGA-conference-record-of-decisions.pdf>

[6]
http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=2140&Itemid=28

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