

The background of the entire page is a blue-toned image of a person surfing. A large magnifying glass is superimposed over the image, focusing on the surfer. The surfer is wearing a wetsuit and is in a crouched position on the surfboard. The magnifying glass has a thin orange border. The background also features faint, white, wavy lines that resemble topographical or oceanographic contours.

Surfveillance: Swellnet's SurfCam at Winki Pop

**Report Prepared for the
Surfrider Foundation Surf Coast Branch**

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SURFRIDER
FOUNDATION
SURF COAST



Australian Privacy
Foundation

Acronyms

ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
BBSRR	Bells Beach Surfing Recreational Reserve
DEECA	Department of Energy, Environment and Climate Action
GDPR	General Data Protection Regulation
GORCAPA	Great Ocean Road Coast and Parks Authority
MACP	Marine and Coastal Policy
OAIC	Office of the Australian Information Commission
SANE	Surfers Appreciating Natural Environment
VCAT	Victorian Civil and Administrative Tribunal



1. Introduction and Rationale

There are a range of SurfCams operating around the world with diverse capabilities and hosted by different providers. SurfCams provide surfers with the ability to remotely view surfing conditions and decide whether, when, and where to go surfing. They have the potential to create impacts across social, environmental, economic, and human rights domains.

This report is focused on the Winki Pop SurfCam owned and operated by Swellnet PTY LTD, fixed to a private residence on the cliffs overlooking the Bells Beach Surfing Recreational Reserve (BBSRR) on the Surf Coast of Victoria. This analysis shows where legal and regulatory reform could occur to regulate the surveillance of public land for private commercial gain. We outline recommendations and proposals for removal of the camera, regulatory reform, and future research.



2. Surfing, Technology, and SurfCams

The commercialisation of surfing and the development of the surf industry have occurred alongside, and have been accelerated by, technology in various ways. This dual trajectory of commercialisation and technological influence has had vast impacts for the environment at surf locations internationally and for surfing culture generally¹. There are four dimensions that characterise surfing in the technological era: (1) the physical (i.e., surfboards and wetsuits), (2) climatology (to forecast waves), (3) information communication technologies (ICTs) (i.e., digital cameras, social media, and the Internet), and (4) artificial surfing (i.e., wave parks).²

SurfCams are one aspect of technology in surfing and have their origins in 1985 with a Californian named Sean Collins who used weather forecasts to operate a telephone service that surfers could call (and pay-per-call) for forecasts and advice about the best places to go surfing.³ In the early 1990s, the telephone service was shaped by technology and became a website — Surfline⁴ — which continues to operate today, and provides access to live footage of over 500 SurfCams globally. As the largest provider of SurfCams, Surfline provides an illustration of how the industry is rapidly evolving without apparent constraints, and of how further technology can be applied to the operation of SurfCams. For example, surfers are able to share their surfing sessions via the Surfline Sessions app that uses GPS information from surfers' smart watches (compatible with Apple, Rip Curl or Garmin Watches) that sends the recordings from the Surfline SurfCams to their iPhones and social media accounts.⁵

The impacts of technology on surfing and surfing culture are varied, and severely understudied. These issues are not only related to surfing as the use of cameras to remotely examine conditions exists in other fields including snow sports.⁶ There is limited empirical research that canvasses the views of the stakeholders impacted by such technological 'developments': surfers. Research conducted by Leon Mach and colleagues (2020) that involved a survey of over 3,000 surfers found that two thirds (60%) reported looking at surf forecasts on the internet multiple times a day. The results indicated that most surfers either agreed or strongly agreed that SurfCams and surf forecasting websites influence if they go surfing each day (68% agreement) and that surf forecasting websites influence where they go surfing (68% agreement).⁷ Considering these findings, it is interesting that 'only around a half of the surfers polled said that surf cameras and surf forecasts contributed to their enjoyment of surfing' (as cited in Mach, 2017). Mach questions 'so if not to facilitate greater levels of enjoyment, why use this technology?'⁸

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- 1 Mach, Leon (2017). "Surfing in the technological era." In Gregory Borne & Jess Ponting (Eds.) *Sustainable Surfing* (pp. 41–71). Taylor & Francis.
 - 2 Mach, Leon (2017). "Surfing in the technological era." In Gregory Borne & Jess Ponting (Eds.) *Sustainable Surfing* (pp. 41–71). Taylor & Francis.
 - 3 Mach, Leon (2017). "Surfing in the technological era." In Gregory Borne & Jess Ponting (Eds.) *Sustainable Surfing* (pp. 41–71). Taylor & Francis.
 - 4 Surfline (2023a). Surfline homepage. Retrieved from: <https://www.surfline.com>
 - 5 Surfline (2023b) Surf, relive, share: Capture your rides on video with Surfline Sessions. Retrieved from: <https://www.surfline.com/lp/sessions>
 - 6 For example see 'SnowCams' that provide live footage of snowfall and mountain conditions: Falls Creek (2023). The whole mountain at a glance: Snow Cams. Retrieved from: <https://www.fallscreek.com.au/snow-cams/>
 - 7 Mach, L., Ponting, J., Brown, J., & Savage, J. (2020). Riding waves of intra-seasonal demand in surf tourism: Analysing the nexus of seasonality and 21st century surf forecasting technology. *Annals of Leisure Research*, 23(2), 184-202.
 - 8 Mach, Leon (2017). "Surfing in the technological era." In Gregory Borne & Jess Ponting (Eds.) *Sustainable Surfing* (pp. 41–71). Taylor & Francis. (p. 58).



Despite the limited research in this area there are reports of SurfCams being vandalised, which indicates that some are displeased with them. Destruction of cameras can occur to prevent outsiders from accessing knowledge about surfing conditions, which is related to various forms of surf localism, a recognised element of surf culture that can contribute to tensions between locals and tourists and ultimately surf aggression.⁹ There are many reported examples of SurfCams being vandalised, removed, and/or stolen including in East Hampton (NY, USA)¹⁰, Palos Verdes (California, USA)¹¹, and Ahipara (Shipwreck Bay) in Northland (NZ).¹²

Technically, SurfCams are not CCTV systems because they are not operating on closed circuit infrastructure. Rather, SurfCams constantly stream live content, which means open access streaming for a subscription is more accurately described as broadcasting. This is important because surveillance laws tend to focus on CCTV surveillance systems, while other agencies, such as the Australian Communications and Media Authority (ACMA), focus on broadcasting.

9 Mach, Leon (2017). "Surfing in the technological era." In Gregory Borne & Jess Ponting (Eds.) *Sustainable Surfing* (pp. 41–71). Taylor & Francis. (p. 47); Kilgannon, Corey (2008). Cameras show if surf is good, but surfers are getting in way. *The New York Times*. Retrieved from: <https://www.nytimes.com/2008/01/27/nyregion/27surf.html>; Beaumont, E. and Brown, D. (2016) "It's not something I'm proud of but it's ... just how I feel: Local surfer perspectives of localism. *Leisure Studies*, 35(3), 278-295; Rode, Martin (2022). The institutional foundations of surf break governance in Atlantic Europe. *Public Choice*, 190, 175-204.

10 Kilgannon, Corey (2008). Cameras show if surf is good, but surfers are getting in way. *The New York Times*. Retrieved from: <https://www.nytimes.com/2008/01/27/nyregion/27surf.html>

11 Weiss, Kenneth (2002). Angry residents sink police chief's surfcam. *Los Angeles Times*. Retrieved from: <https://www.latimes.com/archives/la-xpm-2002-jun-07-me-surf7-story.html>

12 Northland Age, *New Zealand Herald* (2016). Backlash shuts down live surf cam. Retrieved from: <https://www.nzherald.co.nz/northland-age/news/backlash-shuts-down-live-surf-cam/NSU5VOYQG7WSE4MCUUPASMEUE/>; Boyer, Sam (2016). Northland surf thugs' intimidation and vandalism to hog waves. *Stuff*. Retrieved from: <https://www.stuff.co.nz/auckland/local-news/northland/78431230/northland-surf-thugs-intimidation-and-vandalism-campaign-to-hog-waves>

3. Winki Pop and the Bells Beach Surfing Recreational Reserve (BBSRR)

The Winki Pop SurfCam is located adjacent to the iconic and world-famous Bells Beach Surfing Recreational Reserve (BBSRR) on the Surf Coast of Victoria in Australia. The BBSRR is located just outside Jan Juc and 4 kilometres south-west of Torquay. Surfing features prominently in the local area, with Torquay branded by the Surf Coast Shire as the capital of Australian surfing and is home to major surf brands such as Rip Curl and Quiksilver, with the former founded in 1969 by Doug Warbrick and Brian Singer and recently sold to Kathmandu for \$350 million AUD.¹³ Since 1962 the Rip Curl Pro has been held at Bells Beach in April each year (notwithstanding recent exceptions due to COVID-19). This event is ‘the longest running event in competitive surfing, and the Rip Curl Pro Bells Beach is an iconic stop on the World Surfing League Championship Tour.’¹⁴

a. Managing the BBSRR

There are overlapping, and shifting, jurisdictional responsibilities for the BBSRR (see Figure 1 below). This section provides a brief overview of the BBSRR, land managers and coastal policy and planning. It provides important context in understanding who is responsible for managing SurfCams on the Surf Coast.

The Surf Coast Shire has responsibility for the management and maintenance of the BBSRR. This authority for reserve management is delegated by the Victorian State government. The Shire has responsibility for the BBSRR up to the high tide mark. The Department of Energy, Environment and Climate Action (DEECA, Victorian State government)¹⁵ is responsible for the management of the offshore waters located at the north of the BBSRR (Figure 1 below). Following the passage of the *Great Ocean Road and Environs Protection Act 2020* (Vic) GORCAPA was to take over management of the BBSRR from the Shire, notionally from 2024 (exact date is to be confirmed).

The Victorian Government Marine and Coastal Policy (MACP) is also relevant to coastal management throughout the state. The Policy is made under the authority of the *Marine and Coastal Act 2018* (Vic) and seeks to protect the biodiversity of both public and private land ‘between the outer limit of Victorian coastal water and five kilometers inland of the high-water mark of the sea.’¹⁶ The Marine and Coastal Council is a state government authority charged with these functions, that operate in line with the seventeen United Nations sustainable development goals that seek to reconcile environmental, social and economic development to ‘protect the

13 Mitchell, Sue (2019). Kathmandu stoked with \$350m Rip Curl Buy. Financial Review. Retrieved from: <https://www.afr.com/companies/retail/kathmandu-pays-350-million-for-rip-curl-20191001-p52wg5>

14 Rip Curl (2023). Rip Curl Pro Bells Beach. Retrieved from: <https://www.ripcurl.com/au/explore/events/rip-curl-pro-bells-beach.html>

15 Following the 2022 Victorian State Government election the Department of Environment, Land, Water and Planning (DELWP) was restructured and the Department of Energy, Environment and Climate Action was created from 1 January 2023.

16 State Government Victoria (2020). Marine and Coastal Policy. Retrieved from: https://www.marineandcoasts.vic.gov.au/_data/assets/pdf_file/0027/456534/Marine-and-Coastal-Policy_Full.pdf, p. 7.

environment ... address climate change, and encourage good governance,¹⁷ while maintaining the ‘character of coastal towns’ that is potentially undermined by population growth.¹⁸ The Council reports directly to the Minister for Energy, Environment and Climate Change to provide guidance at a statewide level on development of coastal areas. Local policies, such as those specifically drafted and implemented by the Surf Coast Shire, are to incorporate guidelines provided under the authority of the Marine and Coastal Council. However, legislation and guidelines on its administration are silent on how the management of private land, or the installation of SurfCams, could be regulated specifically as a sustainability issue that protects pre-existing local cultural values for Surf Coast residents.

i. The Bells Beach Surfing Recreation Reserve (BBSRR)

The BBSRR is part of a continuous strip of coastal Crown Land protected through the *Crown Land (Reserves) Act 1978* (Vic). It is the ‘world’s first surfing recreation reserve’ and was formally recognised in 1971 under the *Land Act 1958* (Vic).¹⁹ While Bells Beach is not a National or World Surfing Reserve, the BBSRR is listed on the Victorian Heritage.²⁰ In 2011, Bells Beach was added to Australia’s National Heritage List in a combined listing with the Great Ocean Road and the Twelve Apostles.²¹

The Traditional Owners and Custodians of the land are the Wadawurrung People of the Kulin Nations who have cared for the coastline for thousands of years. The location of Bells Beach was once an Aboriginal meeting place for trade, and the reef at Bells Beach provided a food source of abalone and crayfish.²² Bells Beach has historical and cultural significance greater than surfing²³:

‘Bells Beach is Wadawurrung Country, visited by Wadawurrung People for thousands of years and a significant living and gathering place — a place of connection. It remains a special place for the Wadawurrung People and our connection to this land continues to this day.’

17 State Government Victoria (2020). Marine and Coastal Policy. Retrieved from: https://www.marineandcoasts.vic.gov.au/_data/assets/pdf_file/0027/456534/Marine-and-Coastal-Policy_Full.pdf, p. 9.

18 State Government Victoria (2020). Marine and Coastal Policy. Retrieved from: https://www.marineandcoasts.vic.gov.au/_data/assets/pdf_file/0027/456534/Marine-and-Coastal-Policy_Full.pdf, p. 12.

19 Short, Andrew and Farmer, Brad (2012). Surfing reserves — recognition for the world’s surfing breaks. Reef Journal, 2, 1–14. (p. 5).

20 See: Surfing Reserves (2023). National Surfing Reserves homepage. Retrieved from: <https://www.surfingreserves.org/> and Save the Waves Coalition (2023). World Surfing Reserves. Retrieved from: <https://www.savethewaves.org/wsr/>. Bells Beach Surfing Recreation Reserve Victorian Heritage Register (VHR) Number H2032 and Listing on the Victorian Heritage Database available here: <https://vhd.heritagecouncil.vic.gov.au/places/12711>

21 Department of Climate Change, Energy, the Environment and Water (2021). Great Ocean Road — Victoria. Retrieved from: <https://www.dcceew.gov.au/parks-heritage/heritage/places/national/great-ocean-road>

22 Santarossa, Adam (2016). A brief Indigenous history of Bells Beach. SBS National Indigenous Television. Retrieved from: <https://www.sbs.com.au/nitv/article/a-brief-indigenous-history-of-bells-beach/5kkunvd5t>

23 Surf Coast Shire (2021). Wadawurrung foreword to the Management Plan 2015–25 (p. 5). Bells Beach Surfing Recreation Reserve Coastal and Marine Management Plan 2015–25 (updated 2021). Retrieved from: <https://www.surfcoast.vic.gov.au/files/assets/public/01-about-us/council/council-meetings-and-minutes/council-agendas-amp-minutes/2015/27-october/item-3.1-appendix-1-bells-beach-surfing-recreation-reserve-coastal-management-plan-2015-25.pdf>



In late 2022, the Wadawurrung People announced that the traditional name for Bells Beach in Wadawurrung language is Djararak.²⁴

In addition to this important cultural history, the status of Bells Beach as a surfing reserve is crucial for its ongoing protection and heritage:

‘a surfing reserve is designed to formally recognise surfing sites and in doing so provide a focus for the ongoing preservation and protection of those sites for surfing, and where appropriate or possible to assist in the management/ development of the adjacent land area in a sympathetic fashion.’²⁵

Surfing reserves are ‘not a panacea for all the threats to the coast and surf, but they are a proactive step to recognise and preserve these sites before they become threatened or compromised.’²⁶ The listing on the Victorian Heritage Register states:

‘Bells Beach Surfing Recreation Reserve is a landscape that is socially significant as an international icon of Australian surfing culture. Bells Beach Surfing Recreational Reserve is socially and historically significant as the location of the world’s longest continuous running surf competition.’²⁷

This international status is important. It is also important to note that the BBSRR is regularly used by significant numbers of local and visiting recreational surfers outside of competitions such as the annual Rip Curl Pro.

²⁴ Surf Coast Shire (2023c). Bells History. Retrieved from: <https://www.surfcoast.vic.gov.au/Environment/Natural-environment/Coastal-land-and-beaches/Bells-Beach-Surfing-Recreation-Reserve/Bells-History>

²⁵ Short, Andrew and Farmer, Brad (2012). Surfing reserves — recognition for the world’s surfing breaks. Reef Journal, 2, 1–14. (p. 2).

²⁶ Short, Andrew and Farmer, Brad (2012). Surfing reserves — recognition for the world’s surfing breaks. Reef Journal, 2, 1–14. (p. 2).

²⁷ Short, Andrew and Farmer, Brad (2012). Surfing reserves — recognition for the world’s surfing breaks. Reef Journal, 2, 1–14. (p. 3).

ii. Land Managers

The Surf Coast Shire Council has responsibility for the management and maintenance of the BBSRR at present, under authority delegated from the Victorian State government. The Shire has responsibility up to the mean high water mark. Land adjacent to the east of BBSRR along the Jan Juc foreshore is managed by the Great Ocean Road Coast and Parks Authority (GORCAPA) and the Otway National Park to the west is managed by Parks Victoria.

The Bells Beach surf breaks of Rincon and The Bowl are within the Point Addis Marine National Park managed by Parks Victoria (Victorian State government). The Winki Pop break is outside of the Marine National Park and located on Crown Land and waters managed by the Victorian Department of Energy, Environment and Climate Action (DEECA). Figure 1 shows the different responsibilities for the management of land around the Bells Beach Surfing Recreational Reserve.



Figure 1. Jurisdictional responsibility for Bells Beach Surfing Recreational Reserve. Note: This is pre-transition to GORCAPA responsibility. Source: Bells Beach Management Plan (p.13).

The Shire receives advice from the Bells Beach Committee, which is composed of an independent Chair, representatives of the Wadawurrung Traditional Owners Aboriginal Corporation, representatives of Surfing Victoria, and six community nominees selected every four years following an open and public process.²⁸ The minutes of the previous two years of meetings of the Bells Beach Committee did not mention SurfCams or the impacts of SurfCams at Bells Beach. Rather, the Committee considered matters arising from the Rip Curl Pro not being held

²⁸ Surf Coast Shire (2023b). Bells Beach Management. Retrieved from: <https://www.surfcoast.vic.gov.au/Environment/Natural-environment/Coastal-land-and-beaches/Bells-Beach-Surfing-Recreation-Reserve/Bells-Beach-Management>; the Terms of Reference (ToR) of the Bells Beach Committee are available here: Surf Coast Shire (2017). Bells Beach Committee Terms of Reference. Retrieved from: <https://www.surfcoast.vic.gov.au/files/assets/public/05-environment/natural-spaces/bells-beach-committee-terms-of-reference-september-2017.pdf>. It should be noted that the ToR for the Bells Beach Committee is to provide advice and make recommendations to the Surf Coast Shire regarding the management of the Bells Beach Reserves with regard to the Bells Beach Surfing Recreation Reserve Coastal and Marine Management Plan/s and not to make decisions or vote on issues and therefore it is not appropriate for the the Bells Beach Committee to take positions on issues.



during covid lockdowns, the construction of an observation platform at Winki Pop, transition to management by GORCAPA, and the possibility of listing Bells Beach on the National Heritage List (in addition to the Victorian Heritage Register and separate to BBSRR's current listing on the National Register in conjunction with the Great Ocean Road).²⁹

Following the passage of the Great Ocean Road and Environs Protection Act 2020 (Vic) the management of the Bells Beach Surfing Recreational Reserve is transitioning from the Surf Coast Shire to the Great Ocean Road Coast and Parks Authority (GORCAPA), as outlined above. This transition will change the responsibility for the management and protection of the BBSRR which may have implications for the Winki Pop SurfCam.

iii. Policy and Planning

The *Marine and Coastal Act* 2018 (Vic) underpins the management of coastal and marine areas in Victoria and applies to both public and private land 'between the outer limit of Victorian coastal water and five kilometers inland of the high-water mark of the sea.' It establishes a framework of policy and planning at State, regional and local level and a Marine and Coastal Council to advise Government. It sets out requirements for consent to use, develop or undertake works on marine and coastal Crown Land.

Under the *Marine and Coastal Act* 2018 (Vic), the State Government has created a Marine and Coastal Policy³⁰ and a Marine and Coastal Strategy.³¹ Both of these measures aim to create sustainable approaches for all marine and coastal environments throughout the state, by working together with traditional First Nations owners in each location. At the local level in Bells Beach, the Policy and Strategy are given effect through the Bells Beach Coastal and Marine Management Plan (the Management Plan).

²⁹ See minutes of the Bells Beach Committee: Surf Coast Shire (2023b). Bells Beach Management. Retrieved from: <https://www.surfcoast.vic.gov.au/Environment/Natural-environment/Coastal-land-and-beaches/Bells-Beach-Surfing-Recreation-Reserve/Bells-Beach-Management>

³⁰ State Government Victoria (2020). Marine and Coastal Policy. Retrieved from: https://www.marineandcoasts.vic.gov.au/_data/assets/pdf_file/0027/456534/Marine-and-Coastal-Policy_Full.pdf

³¹ State Government Victoria (2022). Marine and Coastal Strategy. Retrieved from: <https://www.marineandcoasts.vic.gov.au/marine-coastal-management/marine-and-coastal-strategy>

The Management Plan 2015–25 was updated in 2021 and aims ‘to respect and protect the natural environment, Wadawurrung heritage and surfing culture of Bells Beach’.³² This vision consists of the two guiding principles of respect and protection, and three core values to protect the natural environment, Waddawurung heritage and surfing culture. Under this vision nine key management goals are established:

- 1. Protect and enhance ecological and geophysical values;*
- 2. Protect and promote Waddawurung archaeological, social, cultural and historic values and sites;*
- 3. Recognise the Waddawurung People’s long and ongoing association with the reserve, including the interconnections between the land, sea, people and biodiversity;*
- 4. Recognise the unique surfing heritage and the importance of surfing, and continue to cater for surfing and surfing events, including the Rip Curl Pro;*
- 5. Continue to cater for activities consistent with the vision;*
- 6. Ensure risks are minimised, recognising that the reserve is a natural place and risk cannot be eliminated;*
- 7. Minimise buildings and infrastructure;*
- 8. Protect existing waterways and minimise the site impacts of stormwater runoff, and;*
- 9. Acknowledge the importance of the setting within a rural hinterland landscape.’³³*

Council consultation has confirmed that the BBSRR is considered a special place by the local, Indigenous, and surfing communities. In preparation for the update to the Management Plan to assist with protecting the area from development proposals including the construction of an elevated walkway and observation platform at Winki Pop, the Council undertook community consultation by conducting surveys and a Wadawurrung cultural heritage tour. This consultation process informed the updated management plan and confirmed that Bells Beach is an area of cultural and historical significance that must be protected. The proposed development was subject to considerable community opposition, including a public campaign. Regarding this decision, local councillor David Bell stated in the media:

³² Surf Coast Shire (2021). Bells Beach Surfing Recreation Reserve Coastal and Marine Management Plan 2015-25 (updated 2021). Retrieved from: <https://www.surfcoast.vic.gov.au/files/assets/public/01-about-us/council/council-meetings-and-minutes/council-agendas-amp-minutes/2015/27-october/item-3.1-appendix-1-bells-beach-surfing-recreation-reserve-coastal-management-plan-2015-25.pdf> (p. 8).

³³ Surf Coast Shire (2021). Bells Beach Surfing Recreation Reserve Coastal and Marine Management Plan 2015–25 (updated 2021). Retrieved from: <https://www.surfcoast.vic.gov.au/files/assets/public/01-about-us/council/council-meetings-and-minutes/council-agendas-amp-minutes/2015/27-october/item-3.1-appendix-1-bells-beach-surfing-recreation-reserve-coastal-management-plan-2015-25.pdf> (p. 17).

‘Council is aware the elevated walkway has attracted opposition from members of the community, who have raised concerns about the visual impact of such a structure... We will take on board these concerns and not proceed with a permanent structure at this time... Bells has a spiritual significance for many and as the management body for the site we are fully aware of our duty as guardians to preserve the qualities that make it such a special location.’³⁴

In addition to the decision not to proceed with the elevated walkway and observation platform at the BBSRR, the community consultation informed strategic actions outlined within the Management Plan. Of relevance are the strategic actions and desired outcomes that relate to *respecting and protecting surfing cultural values, and the strategic actions for event management issues*. In response to ‘concerns that surfers aligned with different surfing groups will be treated unequally,’ any strategic actions should involve the ‘design of community engagement strategies to include all surfers’ in order to achieve the outcome that ‘all surfers using the reserve are recognised as stakeholders when making decisions that potentially impact surfing.’³⁵

During community consultation to inform the 2015–25 Management Plan, the winning idea on the Our Say online platform by Phil Roache, was to leave Bells Beach as it is, to paraphrase: just plant trees and not build more infrastructure. The ideas that came second, third and fourth by Surfers Appreciating Natural Environment (SANE), Surfrider Foundation, and the Bells Beach Preservation Society were that the BBSRR should be preserved as a Surfing Sanctuary. There was an overwhelming message from respondents to leave Bells Beach as it is, and that has largely been reflected in subsequent iterations of the Management Plan for the BBSRR.³⁶

Further, in response to community ‘desire to see *revenue raised from activities in the reserve spent on its maintenance and protection*’ (emphasis added), the strategic action of ‘expend revenue raised through licencing, event fees and *other revenue-raising activities at Bells Beach on reserve maintenance and improvement costs*’ was developed to ensure that ‘*revenue raised through licencing, event fees and other means is re-invested into protecting the reserve’s vales.*’³⁷ These strategic actions have clear relevance to the issue of extraction of revenue by private companies that is not reinvested to protect the reserve or benefit the local community.

The BBSRR is also affected by the Surf Coast Shire Planning Scheme (the Planning Scheme) administered by the Surf Coast Shire Council. The scheme extends 600 seaward of high water mark. The Bells Beach area is recognised as a significant landscape with protection afforded through several parts of the Planning Scheme. The BBSRR is zoned Public Conservation

³⁴ The Mirage (2019). Updated plan confirms Bells Beach as an area of special significance. Retrieved from: <https://www.miragenews.com/updated-plan-confirms-bells-beach-as-an-area-of-special-significance/>

³⁵ Surf Coast Shire (2021). Bells Beach Surfing Recreation Reserve Coastal and Marine Management Plan 2015–25 (updated 2021). Retrieved from: <https://www.surfcoast.vic.gov.au/files/assets/public/01-about-us/council/council-meetings-and-minutes/council-agendas-and-minutes/2015/27-october/item-3.1-appendix-1-bells-beach-surfing-recreation-reserve-coastal-management-plan-2015-25.pdf> (p. 28).

³⁶ See: Bells Beach Surfing Recreation Reserve Community Visioning Taskforce (2014). Minutes of Meeting Monday 31 March 2014. Retrieved from: https://www.surfcoast.vic.gov.au/files/assets/public/01-about-us/council/council-meetings-and-minutes/council-agendas-and-minutes/2014/23-september/item_32_appendix_3_-_bells_beach_visioning_taskforce_minutes_meeting_no_2_31_march_2014.pdf

³⁷ Surf Coast Shire (2021). Bells Beach Surfing Recreation Reserve Coastal and Marine Management Plan 2015–25 (updated 2021). Retrieved from: <https://www.surfcoast.vic.gov.au/files/assets/public/01-about-us/council/council-meetings-and-minutes/council-agendas-and-minutes/2015/27-october/item-3.1-appendix-1-bells-beach-surfing-recreation-reserve-coastal-management-plan-2015-25.pdf> (p. 35, emphasis added).



and Resource Zone. Adjacent GORCAPA-managed land is zoned Public Park and Recreation Zone. Residential land adjacent to the northern boundary of the BBSRR is zoned Low Density Residential Zone.

b. The SurfCam at Winki Pop

There are several SurfCam operators in Australia (and internationally), including Surfline as described above. SurfCams are also operated by other businesses (e.g. Trigger Brothers surf shop³⁸) and hotels in surfing destinations.³⁹ A complete analysis of all SurfCam providers is beyond the scope of this paper, which focuses specifically on the Winki Pop SurfCam that is fixed to a private residence that overlooks the BBSRR.

This SurfCam is operated by Swellnet PTY LTD which is an Australian (Kingscliff, NSW) based company (company number: 113 699 102) founded by Ben Matson in 1998.⁴⁰ Since 2002 it has offered a website (swellnet.com) and mobile application that provides access to surf forecasts and live surf camera footage from more than 100 SurfCams located around the Australian coastline (refer to Table 1 for location of Swellnet's SurfCams by state and subscription level). In addition to surf forecasts and SurfCam footage the Swellnet website also hosts news, forums and offers extended surf forecasts for surf trips internationally. According to Matson's public LinkedIn profile:

'Swellnet owns and operates the best surfcam network in Australia, boasts Australia's only national network of daily surf reporters, and its surf forecasts are the most highly regarded in the country.'⁴¹

38 Trigger Brothers (2023). Torquay Surfcam. Retrieved from: <https://triggerbrothers.com.au/torquay-surfcam/>

39 Rocks Resort (2022). Currumbin Beach Surfcam: We welcome you to take full advantage of checking out the swell before you arrive for your stay with us at the Rocks Resort! Retrieved from: <https://www.rockresort.com.au/surf-cam/>

40 Swellnet (2023b). About Swellnet. Retrieved from: <https://www.swellnet.com/about>

41 Matson, Ben (2023). LinkedIn profile. Retrieved from: <https://au.linkedin.com/in/thermalben>

Table 1: Swellnet Cameras by Location and Subscription Status

State	Region	Free Access Cameras (n=24)	Premium Subscription Only Paid Access Cameras (n=81)
Victoria (n=16)		Torquay, 13th Beach, Portsea, Woolamai, St Kilda (n=5)	Winki Pop and Bells Beach, Fishermans Beach, Ocean Grove, Fairhaven, Lorne, Lorne Point, Wye River, Rye, Anzacs, Magiclands, Smiths Beach (n=11)
New South Wales (n=33)			
	Southern NSW (n=20)	Newcastle, Narrabeen, Manly, Bondi, Maroubra, Cronulla Beaches, Thirroul, Wollongong (n=8)	Newcastle Point, Newcastle South, Avoca Beach, Queenscliff, North Maroubra, South Maroubra, The Alley, Cronulla Point, Shark Island, Thirroul North, City Beach, Kiama (n=12)
	Northern NSW (n=13)	Byron Bay, Park Beach, Coffs Harbour (n=3)	Kingscliff North, Kingscliff, Cabarita, Cabarita Beach, The Pass, Yamba, Pippies, Macauleys, Park Beach South, Gallows (n=10)
Queensland (n=40)			
	Gold Coast (n=22)	Duranbah, Snapper Rocks, Greenmount, Narrowneck (n=4)	Tweed Bar, Superbank, Coolangatta, Spot X, Kirra Big Groyne, Kirra, North Kirra, Currumbin, Currumbin Alley, Laceys Lane, South Palm Beach, Burleigh Heads, Burleigh Heads Beach, North Burleigh, Surfers Paradise South, Surfers Paradise North, Narrowneck Reef (n=18)
	Sunshine Coast (n=17)	Coolum, Noosa Heads (n=2)	Caloundra Bar, Caloundra, Kings Beach, Alex Headland, Alex Bluff, Alex Beach, Maroochydore, Maroochy River, Coolum Bays, Point Perry, Peregrine, Marcus Beach, Sunshine South, Sunshine Beach, Sunshine North (n=15)
	Capricornia Coast (n=1)	(n=0)	Agnes Waters (n=1)
Tasmania (n=6)		(n=0)	Clifton Beach, Clifton Beach South, Bicheno, Redbill Beach, Eaglehawk Neck, Pirates Bay (n=6)
Western Australia (n=10)		Scarborough, Margaret River (n=2)	South Trigg, Contacio, Brighton, North Floreat, Mandurah Wedge, Yallingup, Margaret River Bombie, Boat Ramp (n=8)

Source: Swellnet.com

The majority of Swellnet's 105 SurfCams are located in Queensland (n= 40, 38%) and New South Wales (n= 33, 31%), with the remainder across Victoria (n= 16, 15%), Western Australia (n= 10, 10%) and Tasmania (n=6, 6%). Of the 105 SurfCams that Swellnet provides access to on its website, 24 (23%) are able to be viewed freely by those who visit the website (with advertising shown — presumably a further revenue stream). The remaining 81 SurfCams (77%) are only accessible to those who have a premium subscription (Swellnet PRO plan) (refer to Table 1). The fees for the premium subscription differ according to different payment plans (i.e., monthly, quarterly, six monthly, annually) with the annual costs ranging from \$79.95 to \$107.40. Subscription to Swellnet PRO also removes advertising from the SurfCam footage.

Available data shows that the Swellnet website received 2,070,851 monthly visits, and 3,159 downloads of its app across a 30 day period.⁴² As Swellnet is a private company it is difficult to identify public source information about its revenue and annual turnover. It is also difficult, if not impossible, to identify how many subscribers Swellnet has. As will be discussed further below, Swellnet's financial data is important to consider given exemptions under the *Privacy Act 1988* (Cth) for small businesses with an annual turnover of less than 3 million AUD.

From the fixed position of the camera on the private residence overlooking the Bells Beach Surfing Recreational Reserve, it is possible to see both the Winki Pop and Bells Beach surf breaks in frame.⁴³ During bigger swells and lower tides, waves at The Bowl break further offshore and move into the camera frame. The footage from this SurfCam is broadcast live on Swellnet's website. It is not known how Swellnet incentivises the owners of the private residence to affix the CCTV camera to their property. There could potentially be income, capital and taxation consequences of obtaining a financial benefit from hosting a SurfCam. This is a premium camera meaning that access is only available to those who subscribe to, and pay for, Swellnet's services.⁴⁴

The fact that the SurfCam is fixed to a private residence is pertinent as it enables Swellnet to circumvent prohibitions for filming for commercial purposes at the BBSRR without a permit. The camera is located on private land and broadcasts footage of public land, and this is the source of the major loophole in existing regulatory governance. The Surf Coast Shire has no current jurisdiction or power to prevent the filming and broadcast of live footage of public land from private land for private purposes or commercial gain. The Surf Coast Shire's Acting General Manager of Placemaking and Environment Matt Taylor stated publicly: 'Because the surf cam at Winki Pop is on private freehold land zoned low density residential, planning and building permits were not required for its installation and use.'⁴⁵ Residential developments are subject to the Planning Scheme and local council approval. However, the installation of CCTV or other broadcast cameras on private property does not explicitly fall within existing planning regulations for single residential dwellings.⁴⁶

42 Crunchbase (2023). Metrics on Swellnet site traffic. Retrieved from: <https://www.crunchbase.com/organization/swellnet/technology>

43 Lamacraft, Tim (2022a). Non-stop coast watch. Surf Coast Times. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/on-the-watch/>; Please note: No images have been used from the SurfCam website in this report in order to preserve the copyright of the owner.

44 Swellnet (2023c). Winki Pop Surfcam (note: premium subscription access only, otherwise paywalled). Retrieved from: <https://www.swellnet.com/surfcams/winkipop>

45 Lamacraft, Tim (2022b). Surf camera operators told to comply with law. Surf Coast Times. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/surf-camera-operators-told-to-comply-with-law/>

46 Planning permission is required on multi-dwelling strata title properties where the cameras are designed to film in common areas; Planning and Environment Act 1987 (Vic).

There have been instances where Swellnet has been ordered to remove SurfCams that were installed without appropriate permits and approvals. However, these cameras were installed on *public land* rather than on *private residences*. For example, in June 2022 GORCAPA directed Swellnet to turn off and remove a camera at Fisherman's Beach at Torquay as it was fixed on the Torquay Marine Rescue Service building. The camera was installed without GORCAPA's knowledge and consent, and in contravention of the *Marine and Coastal Act 2018* (Vic), and GORCAPA was able to formally request the camera be turned off.⁴⁷ However, despite this request, the Fisherman's Beach SurfCam remains active on the Swellnet website.⁴⁸

There has been community concern about the Swellnet SurfCam overlooking the BBSRR as documented in numerous articles in the local newspaper *The Surf Coast Times*.⁴⁹ It is not only the Swellnet Surfcam at the BBSRR that has led to community concern, with communities at a range of surf breaks opposing the installation of SurfCams. Locally, there was a SurfCam installed further down the Great Ocean Road at Wye River which resulted in an online petition for their removal at Wye River, Lorne and Winki Pop that was signed by 258 individuals.⁵⁰ This petition was started by William Butler, a resident of the town of Lorne, who stated that he started the petition due to concerns in relation to insufficient infrastructure to support the increase number of visitors along the coast as a result of the installation of Swellnet SurfCams:

*'People are happy to share waves down here, but the infrastructure simply isn't set up for all these people who will inevitably turn up as a result of the cameras,' Mr Butler argued. 'You've already got carparks like Cumberland closing because they're falling into the ocean, loads of the other car parks and spots are already at capacity.'*⁵¹

Further afield, a Swellnet proposal to install a SurfCam at the world-famous surf break at Lennox Head on the New South Wales (NSW) North Coast was met with fierce opposition from the local and broader surfing community. The issues of concern were summarised in a 2017 article in *Surfing Life* magazine by journalist Steve Shearer (who now works for Swellnet).⁵² To date, a camera at Lennox Head has not been installed.

Other commentators spoke to issues of the normalisation of SurfCams and the potential for the ongoing expansion of surveillance along the coast, issues of overcrowding in the surf, unsustainable surf tourism, an absence of community consultation, and safety issues, especially as Winki Pop is a

47 Lamacraft, Tim (2022c). Swellnet ordered to remove Fishos' surf cam. *Surf Coast Times*. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/swellnet-ordered-to-remove-fishos-surf-cam/>

48 Swellnet (2023d). Fisherman's Beach SurfCam. (note: premium subscription access only, otherwise paywalled). Retrieved from: <https://www.swellnet.com/surfcams/fishermans-beach>

49 See for example the following articles: Lamacraft, Tim (2022a). Non-stop coast watch. *Surf Coast Times*. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/on-the-watch/>; Lamacraft, Tim (2022b). Surf camera operators told to comply with law. *Surf Coast Times*. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/surf-camera-operators-told-to-comply-with-law/>; Lamacraft, Tim (2022c). Swellnet ordered to remove Fishos' surf cam. *Surf Coast Times*. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/swellnet-ordered-to-remove-fishos-surf-cam/>; Lamacraft, Tim (2022d). Surf cameras operating without state consent. *Surf Coast Times*. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/surf-cameras-operating-without-state-consent/>; Lamacraft, Tim (2022e). Opposition grows to increasing surf surveillance. *Surf Coast Times*. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/opposition-grows-to-increasing-surf-surveillance/>

50 Change.org (2022). Remove Wye! Fairhaven, Lorne point, and Winki surfcams petition. Retrieved from: <https://www.change.org/p/remove-wye-lorne-point-fairhaven-and-winki-surfcams>

51 Lamacraft, Tim (2022e). Opposition grows to increasing surf surveillance. *Surf Coast Times*. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/opposition-grows-to-increasing-surf-surveillance/>

52 Shearer, Steve (2017). Surveillance society. *Surfing Life*. Retrieved from: <https://www.surfinglife.com.au/2017/02/24/29648/lennox-surfcams-steve-shearer/>



high-performance and powerful surf break that could draw novice surfers with skills not suited to the area's conditions.⁵³ Representatives of the Surf Coast Shire Council have also made comments regarding community concerns on the public record. For example, the Council's General Manager of Place Making and Environment, Chris Pike, stated:

*'We are aware of community concerns about a surf cam for this location as it doesn't align with the vision to respect and protect Bells Beach, particularly because it has a commercial aspect.'*⁵⁴

In addition to media commentary by various stakeholders, Swellnet's own discussion forums have been the site of critical commentary. It has been reported that Swellnet is censoring posts made to its forums as a way of 'blocking people from its online forum who leave posts questioning the company's approach to installing surf cameras.'⁵⁵ The censorship of critical commentary points to the silencing of concerns of local communities about the SurfCams.⁵⁶ This highlights the tensions between private corporate motives, the commercialisation of 'surveillance' and established surfing culture. We now turn to an examination of the various issues and concerns that relate to Swellnet's SurfCam overlooking the BBSRR.

⁵³ Lamacraft, Tim (2022e). Opposition grows to increasing surf surveillance. Surf Coast Times. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/opposition-grows-to-increasing-surf-surveillance/>

⁵⁴ Lamacraft, Tim (2022a). Non-stop coast watch. Surf Coast Times. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/on-the-watch/>

⁵⁵ Lamacraft, Tim (2022c). Swellnet ordered to remove Fishos' surf cam. Surf Coast Times. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/swellnet-ordered-to-remove-fishos-surf-cam/>

⁵⁶ Censorship of critical commentary may also distort the number and/or nature of comments on Swellnet's discussion forums.

4. Issues, Regulatory Frames and Suggested Policies

This section examines some of the issues and concerns associated with SurfCams. In doing so it also explores various regulatory frames and governance arrangements that could apply to SurfCams. Privacy law, laws relating to surveillance devices, public nuisance, and media law are explored. The main finding is that none of these areas of law directly regulate SurfCams, or at least, at present.

a. Coastal Planning

A key challenge is commercial use of the BBSRR without consent as required by the Marine and Coastal Act 2018 (Vic). While the Swellnet camera itself is located on private land, the vision broadcast by the camera, and sold by Swellnet through subscriptions, is vision of public land and the activities occurring on it. The Surf Coast Shire Council states it is unable to issue orders on private property to address concerns over the SurfCam filming people in public. The Surf Coast Council has advised that it does not have a role in managing SurfCams, unless a permit is required under the Planning Scheme, which is not the case under existing planning laws governing single dwellings.⁵⁷ Council has provided different advice on this matter on different occasions. Initial advice was that the dwelling does not require a permit in the Low Density Residential Zone and the camera is considered ancillary to the dwelling. It was not considered to be an occupation for the purposes of a home-based business under Clause 73.03 of the Planning Scheme. Subsequent advice was provided which noted that the camera may not be an ancillary use, but that the SurfCam may be considered to be a home-based business.⁵⁸

On the issue of ancillary use, the Surf Coast Shire Council Planning Scheme is clear at Clause 64.01 that “if land is used for more than one use and one is not ancillary to the other, each use must comply with this scheme.” The concept of ancillary use in Victorian planning has evolved over the years in response to a number of challenges to planning decisions that have been considered by the Victorian Civil and Administrative Tribunal (VCAT). These challenges have resulted in the concept of ancillary use being tested as proponents seek to include a range of additional uses in applications to develop land which is not clearly zoned for that use. For example, in *Great Ocean Road Adventure Park Pty Ltd v. Surf Coast SC*, 2016, VCAT decided a cafe proposed for an adventure park development could only be approved if its use was restricted to ancillary leisure and recreational use of the adventure park approved by the Surf Coast Shire Council. This finding specifies the cafe can only be used by customers who pay to gain entry to the park for leisure and recreational purposes, rather than members of the public wishing to attend the cafe only. Cases examining approved and ancillary uses for proposed land developments raise a number of pertinent issues relevant to SurfCams. However, it is not clear how a camera broadcasting vision

⁵⁷ Personal communication 29th of December 2022, Ben Hynes Coordinator of Statutory Planning at the Surf Coast Council; *Planning and Environment Act 1987* (Vic).

⁵⁸ Personal communication 19th of August 2022, Kate Sullivan Manager Planning and Compliance at the Surf Coast Council; Personal communication 10th of January 2023, Ben Hynes Coordinator of Statutory Planning at the Surf Coast Council.

of public spaces for commercial purposes fits within established understandings of ancillary use for a residential dwelling.

The SurfCam provides no obvious supporting role for the primary function of the dwelling as a residence, and there is no obvious element of dependence between the house and SurfCam. It is also not a common occurrence for a SurfCam to be located at a private residence, and there is no reasonable linkage or natural adjunct between a house and the operation of a commercial SurfCam. Apart from the dwelling providing the physical infrastructure to support the SurfCam, they are unrelated uses of land. As such, the installation of the SurfCam does not appear at all ancillary to the dwelling, and would therefore appear to require a separate planning permit.

Broader concerns in relation to the environmental impacts of surf tourism, carrying capacity, and issues of sustainability are also relevant.⁵⁹ While there have been myriad concerns reported anecdotally regarding the influence of SurfCams on crowd numbers in the surf, there is no empirical evidence that this has occurred. The Marine and Coastal Policy (MACP) has a strong focus on preventing cumulative impacts and includes many relevant issues including consultation, safety, community benefit and heritage. Noting that the BBSRR is listed on the Victorian and National heritage lists as mentioned above, the MACP aims to ‘manage intangible and tangible cultural values and heritage sites to reflect and protect their values’ and sets forth that changes of land use and visitation numbers must be assessed with regard to heritage values.⁶⁰

b. Privacy

There are issues of privacy for people whose images are captured by SurfCams, both in the water and on public beaches. Privacy concerns are especially relevant in the context of public beaches where people, including children, may be unaware that their images are not only being captured but also live broadcast to the internet, recorded, and transmitted internationally. Further, individuals captured by the SurfCams have not been notified of their presence, that the cameras are live streaming to the internet, nor have they consented to it. This extends to the broadcast, transmission, sharing and storage of the footage in which they may be personally identifiable. It should be noted that Swellnet’s privacy policy extends only to Swellnet’s subscribers (i.e., their users) and not those captured in public spaces by their cameras.⁶¹

The collection, use and disclosure of personal information in Australia is principally governed by the *Privacy Act 1988* (Cth) (henceforth Privacy Act). Most States and Territories also have privacy laws, which extend to public agencies (rather than private organisations and businesses⁶²). Within the Commonwealth *Privacy Act* personal information is defined as:

59 See for example: Ponting, Jess and O’Brien, Danny (2014). Regulating “Nirvana”: Sustainable surf tourism in a climate of increasing regulation. *Sport Management Review*, 18, 99–110.

60 State Government Victoria (2020). Marine and Coastal Policy. Retrieved from: https://www.marineandcoasts.vic.gov.au/_data/assets/pdf_file/0027/456534/Marine-and-Coastal-Policy_Full.pdf

61 Swellnet’s privacy policy states: “Swellnet collects personally identifying information from our users during (1) online registration, (2) online surveys, and (3) online purchasing.” This does not extend to broadcasting live footage from SurfCams on the internet. Swellnet (2023). Privacy Policy. Retrieved from: <https://www.swellnet.com/privacy>

62 For example, in Victoria the Privacy and Data Protection Act 2014 (Vic)

‘information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in material form or not.’

Whether or not information is considered personal information is one factor that determines whether the *Privacy Act* applies. According to guidance provided by the Office of the Australian Information Commission (OAIC), the decision of what constitutes personal information is complex and should be made on a case-by-case basis and with regard to the specific circumstances.⁶³ Essentially, for information to be considered personal information and fall within the scope of the *Privacy Act* it must be about an identified individual or about an individual who is reasonably identifiable. The OAIC offers guidance that ‘an individual is ‘identified’ when, within a group of persons, he or she is ‘distinguished’ from all other members of a group.’⁶⁴ When determining whether an individual is identified or reasonably identifiable, consideration of the circumstances and specific context is required. This includes assessment of the nature and amount of information, who will hold and have access to the information, other information that is available, and the practicality of using that information to identify an individual.⁶⁵

The *Privacy Act* sets forth thirteen Australian Privacy Principles (APPs) which is principles-based law that govern standards, rights and obligations relating to the collection, use and disclosure of personal information. The APPs relate to, *inter alia*, the open and transparent management of personal information (APP1), notification of the collection of personal information (APP 5), use or disclosure of personal information (APP6), and the cross-border disclosure of personal information (APP8). Breaching an APP is an interference with the privacy of an individual which can potentially lead to enforcement action and the imposition of financial penalties. The Australian Office of the Information Commissioner (OAIC) is the responsible regulator in relation to the investigation and enforcement of breaches of the *Privacy Act*.

There are also special classes of personal information that are afforded greater protection under the Australian Privacy Principles, known as ‘sensitive information’. Sensitive information is information or an opinion (that is also personal information) about an individual’s racial or ethnic origin, political opinions, membership of a political association, religious beliefs or affiliations, philosophical beliefs, membership of a professional or trade association, membership of a trade union, sexual orientation or practices, or criminal record. It also includes health information about an individual, genetic information, biometric information that is to be used for the purposes of automated biometric verification or biometric identification, or biometric templates.

Biometric information applies to, for example, facial templates for the purposes of facial recognition, DNA, and fingerprints (i.e., first generation biometrics). We are not aware of any examples of second generation biometric identification techniques (e.g., gait analysis or surfing style or stance) being used to identify an individual and being implicated by the *Privacy Act*, but this type of information has been used in national security contexts, particularly at airports to detect and identify people with suspicious movements.⁶⁶ It is an interesting and open question

⁶³ Office of the Australian Information Commission (2017). What is personal information? Received from: <https://www.oaic.gov.au/privacy/guidance-and-advice/what-is-personal-information>

⁶⁴ Office of the Australian Information Commission (2017). What is personal information? Received from: <https://www.oaic.gov.au/privacy/guidance-and-advice/what-is-personal-information>

⁶⁵ Office of the Australian Information Commission (2017). What is personal information? Received from: <https://www.oaic.gov.au/privacy/guidance-and-advice/what-is-personal-information>

⁶⁶ Pugliese, J. (2010) *Biometrics: Bodies, Technologies, Biopolitics*. Routledge, London.

as to whether an individual's surfing style could be considered a form of biometric identification allowing for the identification of an individual surfer in 'the lineup'.

Indeed, there are surf podcasts where individuals are discussing surfing at the BBSRR and their ability to remotely watch the Winki Pop SurfCam footage and readily identify other surfers. That is, the surfers captured in the footage are personally identifiable (as well as the exact time and location of their surfing sessions — that is, temporal and geolocative data). Take the following example:

'I surf Winki, around the week that it [the SurfCam] came out, it was packed, and I got back to work. It was on my lunch break and I said I had this sick one, I had this really good wave and I did this turn... I get back to work and one of the young kids that work for us Loius Wright, Louis is like 'let's get it up and check it out' and I was like 'ah shit' and he was like 'when was it' and I was like 'start of the surf' and like scrolled through and literally from a distance you can see it, and I was looking at this and thinking fuck this camera is out of control, it is clear as day, and so I got myself gratification from that little clip and had everyone standing around at the office... and Timmy got a good tube the next one as I was flicked off... then we see Timmy's pit and I was like 'ah yeah cool'. But then I was like 'I am just not down on it [the SurfCam] pointing at Winki'... 'You can tell who is who'... 'Yeah you can'... "If you know, you can tell, and I could tell pretty quickly which one was Timmy, I could tell that Roley was out there, I saw Roley, Mick Ray'.⁶⁷

Further to the ability to personally identify individuals in the SurfCam footage as per the above, there have been fatal shark attacks captured by SurfCams with the footage of the incidents broadcast live online, and later by mainstream media outlets. In 2015, Tadashi Nakahara was killed by a shark attack near Ballina in Northern New South Wales (NSW) with the incident broadcast live around the world.⁶⁸ More recently, in 2020, Nick Slater was fatally attacked by a shark on the Gold Coast in Queensland with the incident also captured by a SurfCam.⁶⁹ These incidents raise additional concerns that relate to sensitivities associated with live broadcasting fatal incidents.

Significantly, at present, the *Privacy Act* only applies to Australian Government agencies and private organisations that have an annual turnover of more than \$3 million (AUD). This means that small businesses with an annual turnover of less than \$3 million (AUD) are exempt from compliance with the *Privacy Act 1988* (Cth) (along with other notable exemptions including activities by law enforcement and security agencies, and political parties). It is not possible to make a complaint to the Office of the Victorian Information Commission (OVIC) as its authority only extends to public sector organisations.⁷⁰

67 Discussion on the Winki Pop SurfCam on John Teague's Horses Mouth podcast Episode 74, 22 October 2022. Discussion commences at 1 hour 44 mins: <https://open.spotify.com/episode/30SYzobHinfEh1P0Up09pC?si=dacba107c6e1468d&nd=1>

68 Cheer, Louise, Carty, Sarah, Michael, Sarah & Thackray, Lucy (2015). Horrific shark attack that killed Japanese surfer in Australia was beamed LIVE around the world by 'surfcam' filming beach conditions. Daily Mail Australia. Retrieved from: <https://www.dailymail.co.uk/news/article-2946663/Fatal-shark-attack-took-life-Japanese-surfer-beamed-LIVE-world.html>

69 Roach, April (2020). Beachcam footage shows chilling moment shark fatally attacks surfer on Australia's Gold Coast. Evening Standard. Retrieved from: <https://www.standard.co.uk/news/world/shark-attack-video-australia-gold-coast-a4543291.html>

70 *Privacy and Data Protection Act 2014* (Vic)

There are reform processes currently underway. In late 2019 and in response to the Australian Competition and Consumer Commission's (ACCC) Digital Platforms Inquiry,⁷¹ the then Attorney-General announced a review of the *Privacy Act*.⁷² The review covered, *inter alia*:

‘the scope and application of the Privacy Act, whether the Privacy Act effectively protects personal information and provides a practical and proportionate framework for promoting good privacy practices, whether individuals should have direct rights of action to enforce privacy obligations under the Privacy Act, whether a statutory tort for serious invasions of privacy should be introduced into Australian law.’⁷³

The report made several recommendations to improve privacy protection including the removal of the small business exemption, broadening the definition of personal information from ‘about’ an individual to ‘relating to’ an individual, and changes to enforcement mechanisms (for example, the introduction of a cause of action for serious invasions of privacy also known as a privacy tort).⁷⁴

c. Surveillance Devices

Laws such as the *Surveillance Devices Act 1999* (Vic) regulate the use of optical devices. From a legal perspective, this legislation has limited impact in cases involving SurfCams because they are streaming activities in public spaces. Australia has no equivalent of the Canadian doctrine of a reasonable expectation of privacy in public space (we discuss surveillance in public places further below),⁷⁵ but it is also unlikely Surf Cams can be viewed as CCTV systems because they appear to be involved in broadcasting (i.e. not ‘closed circuit’ as outlined above). Rather, SurfCams stream live content constantly, which means open access streaming for a subscription is more accurately described as broadcasting. This is important because surveillance laws tend to focus on CCTV surveillance systems, while other agencies, such as the Australian Media and Communications Authority, focus on broadcasting (as we discuss further below).

Much of the contention involving this SurfCam is because it is filming public activity from private land and for private gain. The SurfCam is overlooking the Bells Beach Surfing Recreation Reserve (BBSRR) where filming for commercial purposes is expressly prohibited with only rare exemptions made with a permit required ‘if the filming relates directly to specific elements of Indigenous culture or surfing culture.’⁷⁶

71 Australian Competition and Consumer Commission Digital Platforms (2023). Reports of the Digital platform services inquiry 2020–25. Retrieved from: <https://www.accc.gov.au/inquiries-and-consultations/digital-platform-services-inquiry-2020-25>

72 Attorney-General's Department (2023). Privacy Act Review Report. Retrieved from: <https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988>

73 Attorney-General's Department (2023). Privacy Act Review Report. Retrieved from: <https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988>

74 Attorney-General's Department (2023). Privacy Act Review Report. Retrieved from: <https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988>

75 See for example: Scassa, Teresa (2010). Information privacy in public space: Location data, data protection and the reasonable expectation of privacy. *Canadian Journal of Law and Technology*, 7(1&2), 193–220.

76 Surf Coast Shire (2023a). Filming and Photography. Retrieved from: <https://www.surfcoast.vic.gov.au/About-us/Permits-forms-and-applications/Filming-and-photography>

d. Nuisance

Technically, it is unlikely SurfCams can be classified as either a private or public nuisance. Private nuisance involves an unreasonable interference with a property right or some kind of damage to another's land or property. Public nuisance covers interference with more general rights shared by the public and is closely linked to criminal activity but aims to compensate for the effect of the act, rather than punish the person behind the act.⁷⁷ A person can bring a legal action for public nuisance if they have suffered a specific form of harm over and above the rest of the population. Local councils can also restrain proven public nuisances or sue to have them addressed. Public nuisances must affect a 'representative cross section' of an identifiable class of people, such as residents in a community who use a roadway that is blocked by the unlawful activity. A successful action in private nuisance can lead to damages for actual or intangible harm to those directly affected, or an injunction to desist in the activity.⁷⁸

The only references to CCTV systems in the law of private nuisance apply to cameras installed on private property that capture private activities on neighbouring properties, easements or common areas of strata residential complexes.⁷⁹ One case decided in the European Court of Justice recommended by the Czech Office for Personal Data Protection indicated that a camera installed on a private home, which recorded people walking in a public street and adjacent car park, was not deployed for purely personal or household activity. As the camera could record identified people, the private property owner was not open to the personal or household exemption within Article 2(c) of the European Union's (EU) General Data Protection Regulation (GDPR).⁸⁰ In the UK case of *Fairhurst and Woodard* (2021), a person who installed a security camera system, a ring video doorbell, a nest camera and lights on their property that captured images of a neighbour's property was ordered to comply with the data protection principles under Articles 4 (consent) and Article 5 (lawful processing) of the GDPR.⁸¹ However, Australia has no equivalent laws or regulations that cover situations where private property owners install cameras that capture images outside their property.

e. Media

Media laws set up a self-regulating structure for large-scale radio and television broadcasters, or commercial filmmakers. They do not specifically regulate streaming services. As such, while there should be some system for regulating online streaming as a legacy of media activity, we have been unable to find any clear insight into how a fixed camera filming public space from private land could be regulated. It is unclear, yet unlikely, that Swellnet have sought or obtained any authority under existing broadcast or filming laws to undertake commercial streaming. There is a weak regulatory framework governing surveillance by the media in Australia.⁸²

⁷⁷ Thomson Westlaw (2023) 'Nuisance' (section 33.7.360). *Laws of Australia*. Thomson Westlaw.

⁷⁸ Thomson Westlaw (2023) 'Nuisance' (section 33.7.370). *Laws of Australia*. Thomson Westlaw.

⁷⁹ See for example *Merezhko v. Diamandi* [2019] SADC 159; *Ras v. Community Corp No 27140 Inc* [2018] SADC 54.

⁸⁰ Hariharan, Jeevan (2022). Ringing off the hook: When do domestic security devices become unlawful. *Entertainment Law Review*, 32(2), 60–62; *Ras v. Community Corp No 27140 Inc* [2018] SADC 54.

⁸¹ *Fairhurst v. Woodard* [2021] 10 WLUK 151.

⁸² Clarke, Roger (2014). Surveillance by the Australian media, and its regulation. *Surveillance & Society*, 12(1), 89–107.

As a form of broadcasting, SurfCams should theoretically fall under the authority of the Australian Communications and Media Authority (ACMA). However, ACMA regulation tends to be focused on print, radio, and TV broadcasting rather than online streaming. ACMA provides few privacy guidelines for broadcasters, and merely provides registration of codes of practice for the broadcast industry. Most issues involving the media and privacy that are affected by broadcasting practices are subject to loose forms of self-regulation.

Rights to undertake commercial filming in Victoria are regulated by the *Filming Approval Act 2014* (Vic). This requires public agencies to adopt film friendly principles when making decisions about commercial filming on public land. This includes decisions to grant filming permits to private agencies. However, the legislation does not directly apply to private organisations, and only governs the way in which film permits on public land should be issued. It is worth reiterating that filming for commercial purposes is expressly prohibited at the Bells Beach Surfing Recreation Reserve, with only rare exemptions made and a permit may be granted ‘if the filming relates directly to specific elements of Indigenous culture or surfing culture.’⁸³

Finally, the 1937 High Court ruling in *Victoria Park Racing and Recreation Grounds Co. v Taylor* indicated that a person can erect a stand overlooking a neighbouring racetrack to broadcast horse races.⁸⁴ However, given the commercial interest in contemporary broadcasting, this case may be decided differently today.

f. Surveillance in Public Places

In 2010, the Victorian Law Reform Commission released a detailed report examining the laws relating to surveillance in public places, making a series of recommendations. While the following recommendations are not legally binding nor enforceable, they have relevance for the restriction and regulation of surveillance in public places. According to the Victorian Law Reform Commission:

1. *People are entitled to a reasonable expectation of privacy when in public places (as discussed above);*
2. *Users of surveillance devices in public places should act responsibly and consider the reasonable expectations of privacy of individuals (as discussed above);*
3. *Users of surveillance devices in public places should take reasonable steps to inform people of the use of those devices; (as discussed above)*
4. *Public place surveillance should be for a legitimate purpose related to the activities of the organisation conducting it;*
5. *Public place surveillance should be proportional to its legitimate purpose;*

⁸³ Surf Coast Shire (2023a). Filming and Photography. Retrieved from: <https://www.surfcoast.vic.gov.au/About-us/Permits-forms-and-applications/Filming-and-photography>

⁸⁴ *Victoria Park Racing and Recreation Grounds Co. v Taylor* (1937) 58 CLR 479

6. Reasonable steps should be taken to protect information gathered through public place surveillance from misuse or inappropriate disclosure.⁸⁵

While many of these principles apply to the use of surveillance by public or government agencies, they also relate to surveillance that records or stream public activity, without the knowledge and/or consent of those captured by the surveillance activity (in this case recording and live broadcasting by commercially operated SurfCams). We suggest these principles are highly relevant to consider and could address some of the legal and regulatory gaps in the regulation and governance of SurfCams outlined in this report (that is, if they were enforceable).

g. Impacts on Surfing and Surfing Culture

SurfCams represent broader social trends, where private industries extract from and reshape the uses of public waters and lands. Related criticisms have been raised in the context of smart city developments where personal data is extracted and exploited for commercial gain without reinvestment into the community, and in the absence of a social licence to do so.⁸⁶ This creates a tension between private commercial benefit, and the need to protect areas such as the BBSRR from overuse or saturation by visitors. This has implications during summer months when the population of the Surf Coast Shire exponentially expands with tourists and holiday visitors.⁸⁷ Noting the limited research, one concerning possibility is that overcrowding, especially in the water, can lead to surf aggression. Moreover, the connection between surf localism (or territoriality) and aggression has been documented in the literature.⁸⁸ Towner and Lemarie argue that:

‘With a greater number of individuals in the water, many surf breaks have become overcrowded, thus leading to management issues. At these crowded locations, some local surfers are protective and maintain ownership over a site or break through the practice of localism. Localism may produce aggressive behaviour, including verbal abuse, damage to property and violent confrontations.’⁸⁹

In addition to these concerns, there is also the potential for wider impacts on surfing and surf culture, especially considering the influence of technology.⁹⁰ The impacts of technology on surfing and surfing culture are likely to be varied, and they are severely understudied. There is also limited research that canvasses surfers views of SurfCams or the impact of SurfCams on surfing

⁸⁵ Victorian Law Reform Commission (2010) *Surveillance in Public Places, Final Report*, 18. VLRC, p. 85.

⁸⁶ Mann, M., Mitchell, P., Foth, M. & Anastasiu, I. (2020). #BlockSidewalk to Barcelona: Technological sovereignty and the social licence to operate smart cities. *Journal of the Association for Information Science and Technology*, 71(9), 1103–1115.

⁸⁷ On regional tourism adaptation (to climate change) and reducing seasonality on Victoria's Surf Coast see: Jopp, Ryan, DeLacy, Terry, Mair, Judith & Fluker, Martin (2012). Using a regional tourism adaptation framework to determine climate change adaptation options for Victoria's Surf Coast. *Asia Pacific Journal of Tourism Research*, 18(1–2), 114–164.

⁸⁸ Beaumont, E. and Brown, D. (2016) “It's not something I'm proud of but it's ... just how I feel: Local surfer perspectives of localism. *Leisure Studies*, 35(3), 278–295;

⁸⁹ Towner, Nick & Lemaire, Jeremy (2020). Localism at New Zealand surfing destinations: Durkheim and the social structure of communities. *Journal of Sport & Tourism*, 24(2), 93–110 (p.93).

⁹⁰ See generally: Mach, Leon (2017). “Surfing in the technological era.” In Gregory Borne & Jess Ponting (Eds.) *Sustainable Surfing* (pp. 41–71). Taylor & Francis.

and surfing culture, aside from that by Leon Mach and colleagues (2020) reported above. We can infer, however, that given actions to vandalise and remove SurfCams as described above, that some people are displeased with their presence at surf locations internationally.

Famous surfer and surfboard shaper, Wayne Lynch spent many years in Lorne and is now residing on the North Coast of New South Wales (NSW) near Yamba, where Swellnet also operates a SurfCam. He spoke to its specific impacts on surfing and surfing culture:

‘It’s really representative of the way everything is going... In a sense you’re destroying the area, or the feeling of being in that area... We grew up in a time that there was no telephones, the only thing that we ever got to see was a weather map on TV, or a weather map in a newspaper ... there was a whole body of knowledge you accumulated as a surfer and it was as important to learn that as it was to surf... It’s something that bothers all of us older guys, the culture of surfing is just being eroded.’⁹¹

Technological ‘progress’ has resulted in shifting the goals of modern surfing further away from being present in the moment and appreciating and protecting the environment, towards the commercial goal of accelerating ‘consumption through technological advances that facilitate more: more waves, more turns per wave, more barrels, and more time on the wave, as well as equipment (i.e. boards and wetsuits) that is ‘best’ matched to the conditions.’⁹² Neoliberal ideals (i.e., efficiency) are permeating surfing culture, have been facilitated and accelerated by technology, and this has reconfigured the goals of surfing:

‘the end goal is now more efficient surfing (knowing when and where to go), meaning, not wasting time at the beach if the surf is not running, more waves in more places, having more and better images of surfing, to share with more people and faster over the internet.’⁹³

The discussion of Swellnet’s SurfCam overlooking Winki Pop and the BBSRR on the aforementioned Horses Mouth Podcast⁹⁴ exemplifies the intrusion into the surfing experience, felt by many recreational surfers:

91 Lamacraft, Tim (2022a). Non-stop coast watch. Surf Coast Times. Retrieved from: <https://timesnewsgroup.com.au/surfcoasttimes/news/on-the-watch/>

92 Mach, Leon (2017). “Surfing in the technological era.” In Gregory Borne & Jess Ponting (Eds.) *Sustainable Surfing* (pp. 41–71). Taylor & Francis. (p. 51).

93 Mach, Leon (2017). “Surfing in the technological era.” In Gregory Borne & Jess Ponting (Eds.) *Sustainable Surfing* (pp. 41–71). Taylor & Francis. (p. 47).

94 Discussion on the Winki Pop SurfCam on John Teague’s Horses Mouth podcast Episode 74, 22 October 2022. Discussion commences at 1 hour 44 mins: <https://open.spotify.com/episode/30SYzobHinfEh1P0Up09pC?si=dacba107c6e1468d&nd=1>

'I feel like it's lost the mystique of the reserve, Fucking totally, there's an element that we're probably going to lose. Live with a bit of mystique, I feel it's going to get to the point where everyone's thinking the same, everyone's watching the cam, bang, drop, on. But we're talking about money now right, it's making money from subscribers ... But it's there, people are going to use it, does it need to be there? It hasn't been there for the last x amount of years and no-one's had an issue, I don't understand why is it needed? It's one of those things that I just don't think it's necessary and if Bells and the Surfing Reserve is as sacred and as delicate as it is, which it is, and you know we've done enviro days out there and like planted trees... I just don't think a surfing reserve requires a camera, a high deff[inition] camera, that someone's making cash out of... The purity of not having it, I just don't feel the need for it. If you're sitting there tortuously looking at it going like 'now's my gap', knowing there's probably 2,000 crew going 'now's my gap'... it's not necessary.'



5. Future Directions

This concluding section considers ways forward in relation to Swellnet's SurfCam at Winki Pop and the Bells Beach Surfing Recreational Reserve, again noting that our work is focused on one camera at one location and there are many other SurfCams across the Australian coast and also internationally. The specific local governance context is relevant as this establishes jurisdictional authority for the local land manager to make directions for the removal of a SurfCam, such as GORCAPA's direction for Swellnet's SurfCam at Fisherman's Beach in Torquay to be removed (although noting that footage from the SurfCam at Fisherman's beach is still active and available on Swellnet's website). It may be possible at other locations that (local) governments can intervene, although this depends on their (local) legal frameworks.

However, despite these possibilities, the major problem with SurfCams installed on private property but overlooking public space is they are difficult to regulate as they fall within gaps and loopholes in existing law and regulation. This is because the image-generating capacity of the cameras transcends the boundary between private and public land. The problem is magnified because SurfCams have the potential to fall outside current laws, policies and regulations, as we have demonstrated in this report. These involve coastal management law, media law, federal and state privacy laws, surveillance devices law, the tort of nuisance, and local government laws. No single area of law appropriately captures the regulatory issues and competing tensions generated by the SurfCam at Winki Pop. The way the camera transcends the boundary between private and public land is the source of the major loophole that involves various jurisdictional questions regarding 'who' is responsible for the oversight and regulation of SurfCams. Given this, we propose three ways forward: (1) regulate the camera; (2) remove the camera; and (3) conduct further research on the impacts of, and community views about, the camera.

a. Regulate

There are several ways existing law and policy could be reformed and updated to ensure the operation of the SurfCam at Winki Pop and Bells Beach is in the public interest. There could be, for example, specific laws or policies introduced that explicitly seek to protect the Bells Beach Surfing Recreation Reserve or that prohibit the filming of public land from adjacent land tenures such as private property, especially for commercial purposes. This would be consistent with the Bells Beach Management Plan (2015–25) that focuses on respecting and protecting the BBSRR and surfing and cultural values, and ensuring that revenue derived from commercial activities at the BBSRR is reinvested into its protection. Other possibilities could involve introducing amendments to planning laws that require permits for camera systems, although this could also be difficult to enforce on single dwelling lots.

The fact that individuals are clearly personally identifiable in the SurfCam footage demonstrates that the SurfCam is problematic from a privacy perspective and should potentially be subject to investigation by the Office of the Australian Information Commission (OAIC). As discussed earlier, there are ongoing reform processes in relation to the *Privacy Act 1988* (Cth) including the removal of the small business exemption, broadening the definition of personal information, and the

introduction of a cause of action for serious invasions of privacy. These reforms *may* mean that Swellnet's operation of the SurfCam at Winki Pop *may* fall within the scope of Australian privacy law in the very near future.


b. Remove

Another possibility is to remove the SurfCam entirely. This could involve the owners of the private residence taking down the SurfCam and/or community campaigns to encourage Swellnet to remove their SurfCam (like the SurfCam that was removed at Wye River). There is a well-documented history of surfers engaging in successful public sphere protest to protect surf environments and have their voices heard in relation to coastal management.⁹⁵

c. Research

There is a clear need for further research into the direct and indirect impacts of SurfCams, and particularly in the local context of Winki Ppop and Bells Beach but also elsewhere as the local context is important to consider and will shape community concerns and also given varying legal and regulatory frameworks that are jurisdictionally bound (i.e., at local, state, and federal levels). There is a need for further research with the local community, regular users of the BBSRR and stakeholder groups to better understand impacts and community views on SurfCams, including recreational surfers and the Wadawurrung People of the Kulin Nations. More research is required in relation to the SurfCam at Winki Pop, but also the thousands of SurfCams that are operated by a range of providers internationally. Such research could be conducted by GORCAPA, the Surf Coast Shire, interested organisations (such as the Surfrider Foundation) or researchers (such as ourselves).

Future research should draw from and represent the views of a broad range of stakeholders in the local community, and be used to guide and inform the development of regulation and regulatory action of the SurfCam at the BBSRR.

 95 Hales, Rob, Ware, Dan & Lazarow, Neil (2017). Surfers and public sphere protest: Protecting surfing environments. In Gregory Borne & Jess Ponting (Eds.) *Sustainable Surfing* (pp. 41–71). Taylor & Francis (pp. 125–136); Ware, Dan, Lazarow, Neil & Hales, Rob (2017). Surfing voices in coastal management: Gold Coast surf management — A case study. In Gregory Borne & Jess Ponting (Eds.) *Sustainable Surfing* (pp. 107–124). Taylor & Francis.

6. Conclusion

This paper has dealt with the issues that emerge from one SurfCam that is fixed to a private residence overlooking the Winki Pop and Bells Beach surf breaks at the BBSRR on the Surf Coast of Victoria. There are hundreds of SurfCams across the coastline of Australia, and thousands of SurfCams pointed at the waves internationally. Given the increasing prevalence of SurfCams and their potential to create impacts across social, environmental, economic and human rights domains, there is an urgent need for further research to develop an evidence base that can guide regulatory governance for SurfCams in Australia and internationally.

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8. Disclosures

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No images have been used of the SurfCam or from the SurfCam website in this report in order to preserve the copyright of the owner.

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