

New South Wales Council for Civil Liberties

Workplace Surveillance

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Introduction

Twenty-first century industrial relations has been marked by a new age in workplace surveillance. Driven by technology and innovation, workplace surveillance is becoming increasingly sophisticated and accessible¹. In the last five years, for example, technological change has seen the emergence of new surveillance possibilities such as Global Position Monitoring² to determine the exact location of employees, devices that monitor key strokes taken per minute or time spent away from the computer³, which are used to determine worker productivity, and devices that enable a third party to watch an employees screen as he or she works⁴. In fact Australia spends more money per capita on workplace surveillance equipment than most other industrialised nations⁵.

These developments do not come without uncertainty. While advances in surveillance technologies are generally welcomed by employers, there is a growing sense of unease amongst academics⁶, employees and interest groups⁷ as to the ethical boundaries that such technologies may cross. There is a concern that new technologies will leave employees open to abuse and discrimination and further, that workplace surveillance represents a threat to worker privacy and dignity.

In the context of balancing the interests of employers with employees, the role of law is to ensure that any workplace surveillance is conducted within an appropriate social and ethical framework. It has been argued⁸ however that instead of achieving a balance, the law has created a legal framework that embraces workplace surveillance whilst disregarding the interest of employees.

This paper will examine the validity of this concern. Firstly, it will discuss how surveillance is used in the workplace and the potential benefits and problems created by it. The paper will then consider current and proposed laws relating to workplace surveillance in order to determine the impact they have on surveillance activities. It will firstly examine the common law, and then current and proposed legislation. In doing so, the paper will conclude that to a large extent criticism of workplace surveillance law is justified. While employers need to be able to supervise staff, regulation of workplace surveillance in its current and proposed form fails to protect the worker against potential abuses including the invasion of privacy and dignity. With this in mind, the paper will advocate significant legal reform in the area of workplace surveillance.

¹ Afaras, A “Workplace Privacy – Can employers spy on their employees at work?” Deacons Workplace Relations update, June 2004 p1.

² In October 2004 for example, Xerox Australia announced plans to install GPS technology in their photocopier technician’s laptop computers to track and monitor productivity.

³ Law Reform Commission, “Surveillance: An Interim Report” Report No. 98 (2001) part 2 p256.

⁴ Ibid.

⁵ Dixon, T “Workplace Video Surveillance and Controls sought” Austral Surveillance Australia Pty Ltd, 2004.

⁶ Examples include Walker 1999, Sempill 2001, Nye 2002 and Kirby J in his address to the *New South Wales Council for Civil Liberties* 2004.

⁷ Examples include the *New South Wales Council for Civil Liberties*, *New South Wales Privacy Commission* and the *Australian Privacy Foundation*.

⁸ Johnston A & Cheng M, “Electronic Workplace Surveillance, Part 1: Concerns for Employees and Challenges for Privacy Advocates” (2003) 9 (9) *Privacy Law and Policy Reporter*.

Part One – Do we need surveillance in the workplace?

1.1 Arguments for surveillance

Four main arguments have been raised in defence of the conduct of workplace surveillance.

The first is that employers have an absolute right to protect themselves and their property from security risks created by employment⁹. Surveillance tools such as cameras, proximity cards and access codes are therefore justified on the basis that they minimise the risk of theft, protect the premises from threats to property such as sabotage, arson and vandalism and reduce the risk of extortion by employees¹⁰. It is claimed that company procedures, management supervision and the presence of security staff, is not enough to resolve these security threats¹¹.

Secondly, employers justify workplace surveillance as a way of reducing exposure to liability risks¹². Significant legal obligations fall upon all employers. For example, an employer may be vicariously liable for employee misconduct such as defamation, computer hacking, violation of securities laws, workplace harassment and discrimination¹³. Surveillance technology such as e-mail and internet interception, telecommunications monitoring and access to files stored or deleted on an employees hard drive are therefore used to head off the possibility of litigation¹⁴. In *Williams v Centrelink*¹⁵ for example, the *Australian Industrial Relations Commission* upheld the dismissal of an employee who was found to be sending pornographic e-mails to a female staff member. Centrelink argued that without the surveillance, the conduct would not have been discovered and they may have been held vicariously liable for sexual harassment of the employee. An employer is also responsible under Occupational Health and Safety regulations for the physical well-being of an employee¹⁶. Surveillance tools such as cameras have been justified by employers on the basis that they have a positive obligation to ensure their workplace is safe¹⁷.

The third argument proposed by employer groups is that surveillance provides a means of increasing productivity in the workplace through quality control and performance evaluation¹⁸. An employer may conduct surveillance through cameras or Global Position Monitoring systems to determine when an employee leaves his or her desk, where they go and for how long. In addition, devices that actually record the

⁹ Op cit 1.

¹⁰ Ham, M “Putting Crime out of Business- A guide for employers” Talk presented by Melissa Ham of Federal Police at the Small Business Show Melbourne, 2003.

¹¹ Long, D “Documenting Employee Discipline” Council on Education in Management, Discipline and Termination Law, *Thomson Law*, 1999.

¹² Op cit 1.

¹³ Bromberg, T “Investigating Employee Misconduct in the age of Privacy Law” *Journal of Workplace Trends*, March 2004, USA.

¹⁴ Op cit 1.

¹⁵ AITC, 15 January 2004

¹⁶ Howard, S “Email and Surveillance in the Workplace” Henry Davis York, Sydney 2004.

¹⁷ Ibid

¹⁸ Op Cit 1.

keystrokes of individuals, the number of phone calls an operator may take or the speed in which they type may be used to determine worker efficiency¹⁹.

Finally, some surveillance is used merely to control costs in the workplace²⁰. When employees download irrelevant material off the internet, calls friends or steal merchandise or stationary, they add to their employer's costs. Many argue that workplace surveillance is an effective tool for eliminating these unnecessary expenses²¹.

While employee monitoring may be appropriate for legitimate business reasons such as security, liability, productivity and efficiency, these arguments fail to address the potential dangers associated with the use of surveillance in the workplace.

1.2 Arguments against surveillance

To begin with, workplace surveillance data has the potential to be abused by employers²². Most employees for example, will commit some kind of infraction of computer, internet or telecommunications policies in their working life²³. If this data is used incorrectly it can serve as a catalyst for discrimination, unfair dismissal and other abuses. In evidence to the New South Wales Privacy Committee for example, private investigators confirmed that they were being hired by employers to place individual workers under surveillance so as to gather evidence in order to fire them²⁴. This practice of using surveillance data to dismiss unwanted employees can be confirmed by a number of Australian cases. In *Australian Municipal Administrative Clerical & Services Union v Ansett Australia Ltd*²⁵ an employee was unfairly dismissed for using Ansett's email facilities to distribute a union bulletin in a time of industrial dispute. In *Wilmont v Bankwest*²⁶, the court found that Bankwest's decision to dismiss an employee who had distributed a "dirty joke" was discriminatory because another employee had merely been demoted for downloading, storing and transmitting soft porn by email. Further, in *Marsden v HREOC & Coffs Harbour & District Ex-Servicemen & Women's Memorial Club Ltd*²⁷ the court found the decision to expel Marsden from membership of the club for a positive drug test result whilst on methadone treatment for opioid dependency was unjustified. These cases highlight the potential for surveillance technologies to be abused in the workplace as a means of discriminating against employees.

Even where surveillance data is not misused however, it still may have adverse effects on the employment relationship. Surveillance which results in increased pressure on employees to meet performance levels also results in increased stress, lower morale

¹⁹ Ibid.

²⁰ Ibid at 2.

²¹ Weckert, J "Trust, Corruption and Surveillance in the Electronic Workplace" *Information Age*, Cambridge University Press, 2002.

²² NSW Young Lawyers "Submissions on Workplace Surveillance Bill 2004", *Employment and Industrial Law Committee*, April 2004.

²³ Walker, R "Video and Audio Surveillance in the Workplace" *Employment Law Bulletin*, September 1999.

²⁴ Dixon, T "Invisible Eyes: Report on Video Surveillance in the Workplace" The Privacy Committee of New South Wales, Report No. 67, August 1995.

²⁵ (2000) 175 ALR 173

²⁶ WA IRC 13 June 2001

²⁷ (2001) EOC 93 – 126; [2000] FCA 1619.

and even resentment²⁸. Further, using surveillance to monitor employees may also damage mutual trust between employees and management creating suspicion and tension in the workplace²⁹. The consequence of such distrust will adversely affect the employment relationship. It will lead to increased industrial dispute, greater discontent and ultimately a less effective workforce, undermining the very reason surveillance was put there in the first place³⁰.

By far the greatest concern for the New South Wales Council for Civil Liberties however, is that workplace surveillance is ultimately an invasion of worker privacy and dignity. Privacy has been described as “the right to personal space or autonomy”³¹ or the “right to be left alone”³². For many Australians who are subjected to workplace surveillance however, this “right” simply does not exist³³. In extreme examples, covert surveillance has been used in change rooms, toilets, showers, locker rooms and employee recreation rooms where employees expect a heightened level of privacy³⁴. It is not only embarrassing for staff to be subjected to video surveillance in these areas, but also potentially abusive.

Employees are spending more time at work than ever before³⁵. In the last five years there has been a 98% increase in average number of working hours by Australians³⁶. In this context, employees should be allowed to privately interact with the outside world³⁷. Where an employee works late for example, or works though their lunch hour, they may not be able to complete their daily tasks such as banking, shopping or personal researching unless they can use work resources after hours to fulfil their needs. As long as employees are not wasting their employer’s time, they should be free to access Internet banking, on-line shopping and other E-mail and Internet resources without the fear of employer “cyber snooping”³⁸.

As such, there is a need for law to ensure that workplace surveillance does not result in discrimination, abuse or an invasion of privacy. Part two of this paper will examine to what extent the law protects the worker against these dangers.

²⁸ Nebeker D M & Tatum, B C “The Effects of Computer Monitoring, Standards and Rewards on Work Performance, Job Satisfaction and Stress” (1993) 23 (7) *Journal of Applied Social Psychology* 508 at 508.

²⁹ Op cit 24.

³⁰ Op cit 2.

³¹ Op cit 8 at 161.

³² Ibid

³³ Sewell G and Barker J, “Neither Good, Nor Bad, but Dangerous: Surveillance as an Ethical Paradox” (2001) 3 *Ethics and Information Technology* 183 at 187.

³⁴ Op cit 8 at 161

³⁵ Coyle, A “Email and Internet Surveillance – Do Employees have a Right to Privacy?” (2002) 6(3) *Internet Law Bulletin* 31 at 31.

³⁶ NSW Department of the Premier and Cabinet 2004 *Study on National Working Hours*.

³⁷ Op cit 35.

³⁸ OP cit 8 at 163.

Part Two – Common law: is it enough to protect employee privacy?

In New South Wales, common law acts to both legitimise and limit the use of surveillance in the workplace³⁹. It does this through the express and implied terms of an employment contract, through property laws, the general duty of care and through unfair dismissal laws.

2.1 *The Contract of Employment*

2.1.1 Express terms of the contract of employment

As a general rule, express terms agreed to in an employment contract represent valid and acceptable conditions of employment⁴⁰. As such, where an employer incorporates into the contract of employment, a term allowing for workplace surveillance, surveillance *prima facie*, will be legal⁴¹. This is because terms in a contract are presumed to have been freely agreed upon by equal parties⁴². Because they are freely agreed to, parties have a right to ensure that the contract is carried out according to the agreed terms. Surveillance therefore, where it is an express term of a contract, is legitimised⁴³.

There are some exceptions to this general rule. To begin with, s106 of the *Workplace Relations Act 1996* (Cth) allows the *Industrial Relations Commission* to alter or remove a term of any employment contract, despite it being “agreed” to by both parties⁴⁴. This will occur if the court believes the term to be unfair⁴⁵. It is in recognition of the fact that the general presumption about contracts being fairly agreed to by equal parties is not always correct in the context of employment agreements⁴⁶. In most employment situations an inequality of bargaining power exists between employer and employee⁴⁷. This inequality makes negotiations one sided and unfair. Unless the market place is short of labour, or an employee has a special skill that gives them a competitive advantage in the market, they will have little choice but to accept the conditions of work imposed upon them⁴⁸. For example, a prospective employee may be strongly apposed to the idea of their personal computer at work being monitored. According to conventional contract theory, there is nothing to prevent that employee from negotiating a clause in their contract to prevent such

³⁹ Sempill, J “Under the Lens: Electronic Workplace Surveillance” (2001) 14 *Australian Journal of Labour Law* 111 at 111.

⁴⁰ Stewart, A “The Legal Framework for Individual Employment Agreements in Australia, in S Deery and R Mitchell (Eds), *Individualisation and Union Exclusion in Employment Relations: An International Study*, Federation Press, Sydney, 1999, p 18.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Op cit* 39 at 118.

⁴⁴ S106 *Workplace Relations Act 1996* (Cth)

⁴⁵ It is important to note however that s106 is only available if the employee has a total remuneration less than \$100,000.

⁴⁶ Catanzariti, J “Section 106: Unfair Contracts”, *Industrial Relations Society of New South Wales*, Twilight Seminar Series, 11 August 2004.

⁴⁷ *Op cit* 39 at 118.

⁴⁸ Glasbeck, H “Voluntarism, Liberalism, and Grievance Arbitration: Holy Grail, Romance, and Real Life” in England, G (ed) *Essays in Labour Relations Law*, CCH, Ontario, 1986, p63.

conduct. In real life however, the employers interests are likely to prevail because the employee has little in which they can bargain with⁴⁹.

Yet *s106*⁵⁰ is only available as a remedy if the court deems the particular term of the contract 'unfair'⁵¹. This represents an almost impossible barrier for employees wishing to avoid workplace surveillance. Although untested, the Industrial Relations Commission is unlikely to consider surveillance in the workplace unfair, unless it represents a gross violation of human dignity, such as surveillance in change rooms or toilets. This is because of two reasons. Firstly, the concept of employment law stems from the idea of a master and servant relationship⁵². As such, the law actually foster the idea of worker subservience and employer control⁵³. Surveillance is seen as a tool for ensuring discipline in the workplace and therefore a natural consequence of employment⁵⁴. Secondly, the court has a general reluctance to interfere with the managerial prerogative of employers to run the business as they see fit⁵⁵.

Equitable doctrines of unconscionability and duress have also been used to assist individuals who find themselves party to a contract that they have not freely or fairly entered into⁵⁶. Yet these doctrines have generally been unsuccessful when applied in the employment context⁵⁷. In *Amadio*⁵⁸, the court held that inequality of bargaining power was not a "special disadvantage" for the purpose of unconscionability⁵⁹. The defence was therefore unavailable despite the fact that the employee had no ability to negotiate a true bargain. Further, duress has not worked in employees favour either⁶⁰. A threat "not to hire" is not enough to prove common law duress⁶¹. Duress requires "illegitimate pressure"⁶² and the law does not regard economic compulsion as illegitimate⁶³. By contrast however, if an employer consents to workplace conditions because a group of employees threaten strike action, a court may set the contract aside⁶⁴.

As such, however undesirable, the fact remains, that where workplace surveillance is incorporated into the contract of employment, the law will recognise employee surveillance as legitimate and legal.

⁴⁹ OP cit 39 at 120.

⁵⁰ *Workplace Relations Act 1996* (Cth)

⁵¹ Op cit 46.

⁵² Op cit 39 at 120.

⁵³ Ibid.

⁵⁴ Op cit 1 at 4.

⁵⁵ *Re: Cram Ex parte N.S.W. Colliery Proprietors' Association Ltd and Others* (1987) 163 CLR 117, *Australian Federated Union of Locomotive Enginemen and State Rail Authority of New South Wales* (XPT case) [(1984) 295 CAR 188]

⁵⁶ Op cit 39 at 120.

⁵⁷ Op cit 40 at 24.

⁵⁸ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

⁵⁹ Ibid per Mason J.

⁶⁰ Op cit 40 at 24.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ *Universe Tankships Inc v International Transport Workers Federation* [1983] 1 AC 366; *Gimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152.

2.1.2 Implied terms of the contract of employment

Power to command and duty to obey:

The law will imply into all contracts a power of employers to command their workforce and a duty for employees to obey⁶⁵. It has been argued that this implied contractual term gives legal recognition for the right of employers to conduct surveillance⁶⁶.

Under this implied term, employees are required to submit to all lawful commands of their employers, though there is disagreement over the issue of whether they are required to obey only “lawful and reasonable” orders or merely lawful ones⁶⁷. What is important in the context of workplace surveillance however, is that the implied power to command and duty to obey indicates that the law treats employee subservience as an indispensable element of the employment relationship⁶⁸. Without supervision, the power to command and duty to obey cannot be maintained in the workplace⁶⁹. Employer groups therefore argue that in keeping with this implied term, surveillance is a necessary tool for enabling employers to enforce their right to supervise. It is seen as a perfectly rational response to discipline and control in the workplace⁷⁰.

The problem with this argument is that it makes little distinction between human supervision and electronic surveillance⁷¹. It is clear that the law may embrace human supervision as a necessary requirement of the power to command and duty to obey⁷². It is more problematic however to assert that this necessary extends to a right conduct workplace surveillance. Since it is possible to ensure employees obey the lawful commands of their employers through other means, it is doubtful that this implied term on its own, would legitimise workplace surveillance⁷³.

Implied duty of mutual trust and confidence:

There is some evidence to suggest that an employer is also subject to an implied contractual duty of mutual trust and confidence⁷⁴. Under this duty, if it exists⁷⁵, an employer has an obligation not to, “without reasonable and proper cause”,⁷⁶ conduct him or herself in a manner which is likely to destroy or seriously damage mutual trust and confidence between employer and the employee⁷⁷. It has been argued that this

⁶⁵ Carter, W & Harland D, *Contract Law in Australia* 3rd Ed, Butterworths, Sydney, 1996.

⁶⁶ Op cit 39 at 122.

⁶⁷ Ibid.

⁶⁸ Kahn-Freund, *Labour and the Law*, Stephens, London 1972, p 9.

⁶⁹ *Australian Telecommunications v Hart* (1982) 43 ALR 165

⁷⁰ Op cit 39 at 123.

⁷¹ Ibid.

⁷² *Wall v Westcott* (1982) 1 IR 45; *Re Transfield Pty Ltd* [1974] AR (NSW) 596.

⁷³ Op cit 39 at 123.

⁷⁴ *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144.

⁷⁵ Sempill, J in “Under the Lens: Electronic Workplace Surveillance” (2001) 14 *Australian Journal of Labour Law* 111 at 128 comments that although it is well settled in England that there is an implied duty of mutual trust and confidence, the position in Australia remains “embryonic”.

⁷⁶ Op cit 74.

⁷⁷ *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84, EAT

obligation impacts upon an employers ability to conduct workplace surveillance by limiting what activities may be carried out⁷⁸.

The obligation not to breach mutual trust and confidence is examined objectively by the courts⁷⁹. Where workplace surveillance amounts to an abuse of power⁸⁰ the implied duty of trust and confidence is clearly breached⁸¹. Placing cameras in a change room or toilet for the purpose of “spying”⁸² on female employees for example, would breach the implied duty of mutual trust and confidence.

The issue becomes less clear however when surveillance becomes less abusive. Although employees may feel that their trust and confidence has been undermined by surveillance activities, because the standard is an objective one, the court will not take their feelings into account⁸³. Instead the court will consider whether it is reasonable to conclude that trust and confidence has been breached⁸⁴. Therefore, the court is unlikely to deem surveillance that can be justified on the basis of sound commercial practice a breach of the duty⁸⁵. Examples of such surveillance include surveillance conducted for theft control, performance monitoring or interception to reduce employer exposure to liability.

Furthermore, where surveillance does offend the implied duty of mutual trust and confidence, the obligation is unlikely to provide an attractive remedy for employees⁸⁶. The *Industrial Relations Commission in Burazin*⁸⁷ suggested that the only remedy available to an aggrieved employee in these circumstances would be to apply for an injunction to restrain the behaviour or to leave the workplace. Since an injunction is a relatively expensive remedy, neither of these options would be particularly satisfying for most employees⁸⁸.

The implied duty of trust and confidence will only offer minimal assistance to employees against the most arbitrary, intrusive and abusive forms of surveillance. Even then, it may be of little practical assistance to employees. Therefore when taking into account both the express and implied terms the contract of employment provides a framework which tends to accommodate rather than fetter employer attempts to impose surveillance on the workplace.

⁷⁸ Brodie, D “The Heart of the Matter: Mutual Trust and Confidence” (1996) 25 *Industrial Law Jnl* 126.

⁷⁹ Op cit 39 at 128.

⁸⁰ Surveillance will be an abuse of power if its exercise involves arbitrariness, caprice, unreasonableness, dis-proportionality, defeat of reasonable expectations, bad faith or improper purpose. (Laws, J “Public Law and Employment Law: Abuse of Power” [1997] *Public law* 455.

⁸¹ Op cit 39 at 129.

⁸² Ibid.

⁸³ Naughton, R “The Implied Obligation of Mutual Trust and Confidence – A New Cause of Action for Employees?” (1997) 10 *AJLL* 287 at 289.

⁸⁴ Ibid

⁸⁵ Op cit 39 at 130.

⁸⁶ Ibid at 132.

⁸⁷ *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144.

⁸⁸ Op cit 39 at 132.

2.2 Property laws

Probably the clearest basis for legitimising workplace surveillance outside of express terms in the contract of employment can be found in property law⁸⁹. In the context of employment, the law grants employers proprietary interests in virtually every resource used in the workplace⁹⁰. For example, an employer is considered to be the legal owner their employee's personal computer, client files, stored data, telephone and facsimile. Proprietary interests confer in an individual control or ownership over resources or things⁹¹.

It is argued that with these proprietary interests comes a right to conduct surveillance over the tools and resources in which the employer owns⁹². This is because proprietary right give the owner supreme control over their property. Electronic messages for example, sent or received at work are not legally considered to be an employee's personal property. As such, an employer who owns the server or personal computer, on which employee's e-mail is stored, is entitled to look at or copy the electronic material⁹³.

2.3 Employer duty of care

An employer also owes a duty of care to their employees to keep them safe in the workplace⁹⁴. This includes an obligation to prevent occupational health and safety accidents and to avoid discrimination. It has been argued that this obligation positively obliges employers to take preventative measures to avoid breaching their duty of care to the employee⁹⁵. Workplace surveillance is seen as a preventative tool. The idea follows, that without workplace surveillance, an employer could be liable for their employee's misconduct⁹⁶. For example, if an employee were to send discriminatory e-mails to a fellow employee it may be possible for the aggrieved employee to argue that their employer was vicariously liable.

2.4 Unfair dismissal laws

Employees may obtain indirect relief from workplace surveillance though unfair dismissal laws. Unfair dismissal laws allow an employee to apply for relief where a dismissal was "harsh, unjust or unreasonable"⁹⁷. The courts have held that the dismissal of an employee based purely on evidence gathered through workplace surveillance will be unfair unless there is a "clear, effective and available"⁹⁸ workplace surveillance policy in place. In *Wilmont v Bankwest*⁹⁹ for example, an employee was found to have been unfairly dismissed for sending a "dirty joke". The

⁸⁹ Neave et al, *Sackville and Neave Property Law: Cases and Materials*, 6th Ed, Butterworths, Sydney, 1999.

⁹⁰ Andersen, V "Privacy and Monitoring of E-mail and Internet Usage" Henry Davis York, February 2002.

⁹¹ *Yanner v Eaton* (1999) 201 CLR 351

⁹² Schulman, A "Computer and Internet Surveillance in the Workplace" (2001) 8 (3) *Privacy law and Policy Reporter* at 53.

⁹³ Op cit 90.

⁹⁴ Op cit 1 at 6.

⁹⁵ Op cit 39 at 126..

⁹⁶ Op cit 8 at 160.

⁹⁷ Ibid at 137.

⁹⁸ Eivazi, K "Model Acceptable Use Policy for Employee use of the Internet" (2000) 7 *Privacy Law and Policy Reporter* 7.

⁹⁹ WA IRC 13 June 2001

employer policy had failed to explain clearly what was meant by ‘inappropriate’ material.

Unfair dismissal laws therefore act indirectly to regulate workplace surveillance. They do so by ensuring that appropriate policies and guidelines are in place so that employees can at least be notified if their activities are to be surveyed¹⁰⁰. Beyond this however, unfair dismissal laws will do little to assist employees¹⁰¹. As long as workplace policies are clear, surveillance material may be used in evidence against an employee. In *Harvey v Qantas Airways Limited*¹⁰², the *Australian Industrial Relations Commission* upheld the dismissal of an employee who used the e-mail system to ask a fellow colleague for drugs. Qantas had a clear workplace surveillance policy in place. The court held that because the policy was clear, Qantas should be allowed to use the e-mail as evidence of misconduct. This demonstrates that unfair dismissal laws provide little protection for employees against surveillance.

2.5 Is there a common law right to privacy?

There is no right to privacy at common law¹⁰³. In *Grosse v Purvis*¹⁰⁴ the court raised the possibility that a tort of invasion of privacy could exist at common law¹⁰⁵. This idea was quickly over-turned by the Federal Court in *Kalaba v Commonwealth of Australia*¹⁰⁶. As such, it is not possible for employees to seek remedy for workplace surveillance through any common law right of privacy.

While the common law does not expressly grant a right to employers to conduct workplace surveillance it is clear that it embodies such a right through its various laws. The vast majority of employers will derive legitimacy for their conduct by incorporating into the contract of employment an express term allowing for workplace surveillance. Where such a term is not incorporated into the contract, it is still possible for employers to derive legitimacy for workplace surveillance from the implied duty to obey and power to command, as well as property rights and the employer duty of care.

By contrast, there is very little common law that protects the employee from workplace surveillance. The implied duty of mutual trust and confidence will only act to regulate against the most abusive forms of surveillance. Furthermore, the remedies provided for employees under this duty make pursuing a matter of workplace surveillance for most employees undesirable. Unfair dismissal laws act indirectly to assist employees, but only to ensure that they are fully informed as to workplace surveillance policies. Surveillance may then be used against the employee as evidence for the purposes of dismissal. Finally, contrary to popular belief, there is simply no right to privacy at common law.

¹⁰⁰ Op cit 98.

¹⁰¹ Op cit 1 at 7.

¹⁰² AIRC 20 Jan 2003

¹⁰³ *Giller v Procopets* [2004] VSC 113 at 187-189.

¹⁰⁴ [2003] QDC 151

¹⁰⁵ Sneddon, M & Troiano, R “New Tort of Invasion of Privacy and the Internet”. (2003) 6(6) *Internet Law Bulletin* 1 at 1.

¹⁰⁶ [2004] FCA 763 (8 June 2004)

Part Three – Legislative protection

Having examined the common law it is clear that there is very little in the way of regulation that is designed to assist employees. This part of the paper will examine whether this gap is narrowed through legislation. It will focus on NSW as the relevant jurisdiction.

There are three legislative instruments in NSW that impact upon workplace surveillance. The most significant of these instruments is the *Workplace Video Surveillance Act 1998* (NSW) (the *Act*). It was introduced in response to an inquiry¹⁰⁷ into workplace video surveillance¹⁰⁸. The inquiry was conducted during an industrial dispute between Franklins and the National Union of Workers when an employee was dismissed for instigating a strike and his conduct was caught on camera.¹⁰⁹

The *Act* regulates covert video surveillance. It does this by prohibiting all forms of video surveillance in change rooms, toilet, shower and other bathing facilities and by prohibiting covert video surveillance unless the employer has obtained a magistrate's warrant¹¹⁰. This is clearly a significant gain for employees in that it effectively prohibits the employer from secretly conducting workplace video surveillance.

The problem for employees however, is that the legislation does not go far enough. In defining covert video surveillance, the *Act* specifies¹¹¹ that video surveillance will only be covert if an employee has not been "notified"¹¹² of the intended surveillance. Notification may come in the form of a clearly defined workplace surveillance policy, or through written notification coupled with clearly visible signs indicating the location of cameras¹¹³. There is no requirement in the legislation that the employee must consent to the surveillance. As such, the legislation does little more than put in place what was effectively the outcome of unfair dismissal laws. As discussed above, the indirect effect of unfair dismissal laws was that employees were required to inform employees though surveillance policies of any workplace surveillance in place. The *Act* merely codifies this principle¹¹⁴. Secondly, overt video surveillance remains largely unregulated by the *Act*¹¹⁵. The New South Wales Privacy Commissioner and the *International Labour Organisation* have developed Codes of Practice for regulating Overt Surveillance in the Workplace¹¹⁶ but these guidelines

¹⁰⁷ The Working Party of Video Surveillance in the Workplace *Report to the Hon J W Shaw QC MMLC Attorney General and Minister for Industrial Relations* Sydney 1996 and NSW Law Reform Commission, *Surveillance: Issues paper* 12 Sydney 1997.

¹⁰⁸ Johnston, A & Cheng M "Electronic Workplace Surveillance, Part 2: Responses to Electronic Workplace Surveillance – Resistance and Regulation" (2003) 9(10) *Privacy Law and Policy Reporter*, 187 at 187.

¹⁰⁹ *Franklins v NUW* [1994] NSW IR Comm 77

¹¹⁰ Banks, R "The Proposed Workplace Surveillance Bill 2004", Henry Davis York 2004.

¹¹¹ *S4 Workplace Video Surveillance Act 1998* (NSW)

¹¹² *Ibid*

¹¹³ *Ibid*.

¹¹⁴ *Op cit* 39 at 137.

¹¹⁵ Walker, R "Video and Audio Surveillance in the Workplace" (1999) 5 *Employment Law Bulletin* 6 at 1.

¹¹⁶ *The New South Wales Privacy Commissioner Code of Practice for Use of Overt Surveillance in the Workplace* 1991, and the International Labor Organization Code of Practice, *The Protection of Workers Personal Data*, Geneva, 1997.

merely set out the need to have a clear and well publicised policy¹¹⁷. Furthermore, the guidelines do not have the force of law¹¹⁸. As such, employers are still free to conduct video surveillance of employees as long as they have given the required notification.

The only other form of regulated surveillance comes from The *Listening Devices Act 1984* (NSW). This act makes it an offence to use listening devices such as telephones to record or secretly listen to private conversations including those involving employees¹¹⁹. Again, there is nothing to prevent an employer listening to telephone conversations as long as the employee is informed and consented to the possibility that their phone call may be intercepted¹²⁰.

It has been argued by many commentators that the *Telecommunications (Inception) Act 1979* (Cth) may also prevent non-consensual interception of communications carried on telecommunication systems at work¹²¹. This could extend the regulation to e-mail and facsimile as well as telephone communications. This possibility was rejected however in *R v Green*¹²² and subsequently by the full supreme court of Victoria in *R v Evans*¹²³. However, there has been no high court decision on this matter.

Contrary to popular belief, the *Privacy Act 1988* (Cth) does not provide a statutory right to privacy¹²⁴. It establishes safeguards for the handling of certain personal information¹²⁵. Furthermore, it offers no protection for employees because the “employee records exemption”¹²⁶ allows employers to collect personal information concerning employees and to access employee personal records. As such, the *Privacy Act 1988* (Cth) is of no assistance.

3.1 Proposed Legislation

The *Workplace Surveillance Bill 2004* was released in draft form in June 2004. If successfully implemented, the Bill will represent a positive trend in the law in protecting employees against the abuses of workplace surveillance¹²⁷. This is because it extends the protection provided for employees in two ways. Firstly, the new Act will extend the prohibiting of covert surveillance provided under the *Workplace Video Surveillance Act 1998* to computer and tracking surveillance as well¹²⁸. Covert surveillance will not be permitted without a magistrate’s warrant and such warrant will not be given to conduct surveillance in change rooms, toilets or other bathing

¹¹⁷ Op cit 1.

¹¹⁸ Ibid.

¹¹⁹ S5 *Listening Devices Act 1984* (NSW)

¹²⁰ S5(3) *Listening Devices Act 1984* (NSW)

¹²¹ Op cit 16.

¹²² (1996) 135 ALR 181

¹²³ (1999) 152 FLR 352

¹²⁴ Sneddon, M & Troiano, R “New Tort of Invasion of Privacy and the Internet”. (2003) 6(6) *Internet Law Bulletin* 1 at 1.

¹²⁵ Office of the Federal Privacy Commissioner, “The Privacy Act” NSW *Government Press*, 2003.

¹²⁶ Section 7B, Part 3 *Privacy Act 1988* (Cth)

¹²⁷ Newton, A “Proposed NSW Workplace Surveillance Bill Extends Employees’ Protection From Surveillance in the Workplace”, *Workplace and Employee Relations Law Update*, Mallesons Stephens Jacques Publications, 2004.

¹²⁸ Ibid.

facilities, or to monitor worker performance¹²⁹. Secondly, the Workplace Surveillance Bill 2004 will regulate e-mail and internet surveillance¹³⁰. It will prevent an employer from blocking e-mails or restricting internet access unless they are acting in accordance with an Internet and e-mail policy which has been notified to the employee (except in the case of spam or menacing or offensive emails)¹³¹. The employee must be immediately notified that the email or internet access has been blocked. Access cannot be blocked merely because the content relates to industrial action¹³².

Like the *Workplace Video Surveillance Act* 1998 however, the new legislation is lacking in that there is no requirement that an employee must consent to surveillance¹³³. Again this represents a significant shortfall in the protection of employees. Further, while the regulation of e-mail and internet blocking is welcomed, the legislation does nothing to prevent employers from intercepting telecommunications, reading employee e-mails and examining internet sites and material that the employee has accessed¹³⁴. As such, there remains a significant potential for workplace surveillance to be abused, to undermine relationships between employers and employees and to invade worker privacy and dignity. The legislation does not go far enough.

¹²⁹ Op cit 22.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Op cit 1.

¹³³ Submission on the Draft Workplace Surveillance Bill 2004, *Printing Industries Association of Australia* 1 at 4.

¹³⁴ Ibid.

Part Four – Conclusion and proposed reform

The first part of this paper examined the problems associated with workplace surveillance. While recognising the benefits surveillance could bring to employers it highlighted the potential for surveillance technologies to be abused, the negative impact surveillance could have on the employment relationship and the potential for surveillance technologies to invade worker privacy and dignity.

An examination of the law relating to workplace surveillance led to the finding that there was little real protection for employees from the negative impacts of surveillance. The contract of employment, the employer duty of care and property law effectively empowers the right of employers to conduct surveillance in the workplace. While the implied duty of mutual trust and confidence, unfair dismissal laws and legislative protection does provide some protection for employees, this protection is limited to surveillance that is either covert in nature or particularly intrusive and abusive. There is little in the way of real protection from everyday surveillance activities in the workplace. It is the opinion of the *New South Wales Council for Civil Liberties*, that given the potential for abuse and the impact on employment relationships and privacy concerns, all forms of workplace surveillance should be regulated. As such, the following reforms are proposed;

- 1) That the government introduce new legislation which will regulate overt¹³⁵ workplace surveillance as per sections 2 to 4 below.
- 2) That the new legislation requires employers to obtain consent from the employee or a representative body of the employee before they can conduct any overt workplace surveillance activity that is designed to monitor worker productivity or efficiency. Where consent is not given, the employer may obtain a magistrate's warrant to conduct overt surveillance if they have reasonable suspicion that the employee is underperforming.
- 3) That the new legislation requires employers to obtain consent from the employee or a representative body of the employee before they can conduct any workplace surveillance that monitors an employee's personal working area, such as their PC, e-mail, internet or telephone activities. Where consent is not given, the employer may obtain a magistrate's warrant to conduct overt surveillance if they have reasonable suspicion that the worker is in breach of any clearly defined workplace policy.
- 4) That the new legislation, in accordance with the proposed *Workplace Surveillance Bill 2004*, requires employees to be notified of any overt surveillance that is to be conducted for security purposes. Examples of such surveillance would be video camera surveillance in retail industry which is designed to reduce the likelihood of theft. Further, that the legislation require clear signage indicating the presence of surveillance.
- 5) Covert surveillance should only be permitted with a magistrate's warrant as in accordance with the proposed *Workplace Surveillance Bill 2004*.

¹³⁵ This will constitute all surveillance that is not covert and therefore to be regulated by the proposed *Workplace Surveillance Bill 2004*.

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