



Industrial Relations

Level 23, McKell Building,
2-24 Rawson Place
Sydney NSW 2000
Tel 131 628 Fax 02 9020 4700
TTY 1800 555 677 ABN 81 913 830 179
www.industrialrelations.nsw.gov.au

NSW IR No: 11DOC0003

Director, Legislation Policy and Criminal Law Review
NSW Department of Justice and Attorney General
GPO Box 6
SYDNEY NSW 2000

Dear Sir/Madam

I am writing with respect to the Review of the *Workplace Surveillance Act 2005* (WS Act).

NSW Industrial Relations (NSWIR, formerly the Office of Industrial Relations) consulted closely with the then Attorney General's Department during the development and implementation of the WS Act.

NSW IR supported the new legislation as it became clear that as the application of new forms of surveillance technology steadily increased, the provisions of the former *Workplace Video Surveillance Act 1998* were not broad enough to protect employees from all modern forms of surveillance.

The WS Act created a new framework for regulating all contemporary forms of workplace surveillance undertaken by employers in New South Wales including computer surveillance and tracking devices.

NSW IR acknowledges that in its current form the WS Act strikes an appropriate balance between workers' expectation of privacy and the genuine concerns of employers to protect their workplaces from unlawful activity. Its ongoing operation is both desirable and necessary as without it, an employer's use of these devices would be unfettered and undermine an employee's reasonable expectation and right to privacy.

NSW IR further notes that there is no corresponding federal legislation to protect workers against covert workplace surveillance. The Workplace Privacy Factsheet authored by the federal Fair Work Ombudsman acknowledges that some states and territories have their own workplace privacy and surveillance laws. This suggests that the FWO is not of the view that the federal *Privacy Act 1988* 'covers the field'.

This position is further supported by section 27(2)(m) of the federal *Fair Work Act 2009* which provides that workplace surveillance is a 'non-excluded' industrial relations matter. In this context a prima facie case can be made to demonstrate that a state law about privacy and surveillance can apply to a national system employer.

It is NSW IR's strong view that the constitutional validity of the WS Act be clarified in the absence of it being tested in the court system. This would eliminate the possibility

for NSW based companies to avoid or fail to meet their statutory obligations due to the misguided notion that the legislation does not apply to their operations. It also canvasses moves to harmonise provisions across Australia.

A search of the available records indicates that there is yet to be a successful prosecution under the WS Act however some attempts have been made to challenge the application of the WS Act. A summary of relevant legal action follows.

Application of the laws to federal government agencies:

On 1 March 2006 NSW Police confirmed that they had dropped a reference from former NSW Attorney-General Bob Debus to prosecute Centrelink under the WS Act for blocking access to union websites and CPSU emails during an enterprise bargaining dispute after the DPP raised uncertainty about whether the WS Act applied to federal agencies.

A Centrelink spokesperson cited advice obtained from the Australian Government Solicitor that the NSW WS Act does not apply to federal government agencies. NSW IR has not seen a copy of this advice.

Application of the laws to federal system employers:

In February 2010, the Attorney General appeared in proceedings before the federal Court in which Australia Post claimed that state workplace surveillance legislation does not apply to federal system employers.

The CEPU had initiated a criminal prosecution for unlawful covert surveillance activities triggered by its use of its Cyberlock computer surveillance system - under which street side postal collection boxes are linked by computer to individual postal workers' keys. The system was ostensibly implemented to stop mail theft however it effectively allows a worker's movements to be monitored.

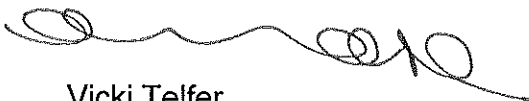
Australia Post maintained that the then *Workplace Relations Act 1996* over-rode the WS Act and further, that the Australian Postal Corporation Act also exempts it from coverage.

The case was ultimately withdrawn.

It appears then that while there have been two high profile attempts to challenge the jurisdiction of the WS Act, its coverage is yet to be conclusively tested and uncertainty prevails. This is something that needs to be addressed in some form.

Thank you for the opportunity to participate within the Review. If you have any comments or questions in relation to any of the issues raised in this submission please contact Ms Jane Cole, Principal Policy Analyst on either 9020 4505 during normal business hours or jane.cole@services.nsw.gov.au.

Yours sincerely



Vicki Telfer
Executive Director

31/1/11