



31 January 2011

Director
Policy, Legislation and Criminal Law Review
NSW Department of Justice and Attorney General
GPO Box 6
SYDNEY NSW 2001

BY EMAIL: lpd.enquiries@agd.nsw.gov.au

Dear Sir/ Madam,

REVIEW OF THE NSW WORKPLACE SURVEILLANCE ACT 2005

I refer to the above matter and thank you for the opportunity to make a submission regarding the review of the NSW Workplace Surveillance Act 2005.

Please find enclosed the submission of Unions NSW regarding the Workplace Surveillance Act 2005.

Should you require any further information please contact Emma Maiden, Senior Industrial Officer, on (02) 9881 5906 or via email at emaiden@unionsnsw.org.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Mark Lennon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mark Lennon
Secretary



Unions NSW Submission

Review of the Workplace Surveillance Act 2005

31 January 2011

Submission by:
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Introduction

1. Unions NSW welcomes the opportunity to make a submission regarding the *Workplace Surveillance Act 2005 (the Act)*.
2. Unions NSW is the peak body for trade unions and union members in NSW. It has over 64 affiliated unions and trades and labour councils representing approximately 600 000 workers across NSW.
3. Unions NSW's affiliates cover the spectrum of the workforce, from workers in the public sector and finance to footwear and construction to communications. Unions NSW is the largest member based organisation for workers in NSW.
4. Unions NSW commends the NSW Government for seeking to provide some measure of protection for workers from the intrusion of workplace surveillance through the introduction of the Act.
5. Unions NSW supports the retention of the Act, however, Unions NSW submits the Act has failed to properly protect workers in relation to workplace surveillance and should be amended.

Section 3 Definitions – “surveillance”

6. The definition of “surveillance” in section 3 of the Act restricts surveillance to three categories: camera surveillance, computer surveillance and tracking surveillance. Each of these categories is strictly defined.

7. Unions NSW submits the definition of surveillance is too limited and does not cover the range of situations where employers are surveilling their employees.

8. Since the introduction of the Act, Unions NSW is aware of numerous instances of covert surveillance of workers resulting in disciplinary action against them. For example:
 - 8.1. mobile phone records showing alleged discrepancies in relation to expected and actual work location;
 - 8.2. swipe cards showing alleged discrepancies in relation to arrival, departure and break times;
 - 8.3. electronic access keys showing alleged discrepancies in relation to work performance and time spent at work; and
 - 8.4. public transport travel cards being used to track the movement of employees based on public transport services during their shift.

9. Employers have argued that the Act does not apply to this type of surveillance because it does not fall within any of the three categories of surveillance included in the Act. Specifically, employers have argued that because mobile phones are communications devices and swipe cards and electronic access keys are security devices they are not covered by the definition of "tracking surveillance". To support their argument employers have cited the Second Reading Speech of the Act in which the then Minister Della Bosca states the amendments *"ensure that 'tracking surveillance' does not capture things like mobile phone or credit card records that may incidentally show an employee's location"*.

10. This issue is yet to be the subject of a binding decision of a Court or Tribunal.

11. Therefore, there is a particular need for the definition of "tracking surveillance" to be broadened to encompass devices that are able to

monitor location or movement, rather than this being the “primary purpose” of the device. This may help guard against devices like mobile phones being used to track location.

12. In addition, a broad definition of surveillance is needed so that the Act does not need to be amended every time technology is updated and/or new technology is created.

13. Unions NSW recommends the following amendments to the definition of surveillance in section 3 of the Act:

13.1. broaden the definition of surveillance;

13.2. in the definition of tracking surveillance replace the words “the primary purpose of which is to monitor or record” with “which monitors or records”.

Section 3 Definitions – “employee”

14. The definition of “employee” in section 3 of the Act refers to the definition of employee in the Industrial Relations Act 1996 and states that this includes a bailee of a public vehicle or carrier and a volunteer.

15. Unions NSW submits that it would be beneficial for the definition of employee from the Industrial Relations Act 1996 to be repeated in full in this section (with the retention of the two inclusions referred to above) in order to ensure the effect of the Act is immediately apparent to the reader, without having to refer to a second piece of legislation.

Section 14 Exemption for certain surveillance by agreement

16. This section allows individual employees or a body representing a substantial number of employees at the workplace to agree to the carrying

out of surveillance for a purpose other than surveillance of employees and in accordance with that agreement.

17. This section attempts to allow contracting out from the legislative provisions. There are no safeguards on the reaching of agreement at an individual level and no requirement that the "body" be a registered union or even represent a majority at the workplace. Further, there is no evidence such an exemption is warranted.

18. Unions NSW submits that this section be deleted.

Workplace Misconduct

19. With the exception of covert surveillance, section 10 of the Act requires notification of workplace surveillance of employees prior to the surveillance commencing. The philosophy seems to be that as long as the employee is aware they are being surveilled and is reminded they are being surveilled, the surveillance can go ahead anywhere but bathrooms and change rooms and can be used for any legitimate employment-related purpose.

20. Unions NSW submits that this philosophy is wrong. Even with notice and a reminder, it is simply not right that every aspect of an employee's day should be subject to minute examination, with potential recourse to disciplinary action. Modern technology allows this and as long as the employer gives notice and appropriate reminders, the Act permits it. Such an approach is also inconsistent with maintaining the implied term in employment contracts of mutual trust and confidence.

21. Unions NSW submits that appropriate limitations should be placed on the use and disclosure of surveillance records. Such records should not be able to be used for the taking of disciplinary action except where the misconduct exposed is so serious and wilful as to justify summary

dismissal. This limitation could be achieved by amending section 18 of the Act as follows:

- 21.1. Amending section 18(a) to state “use or disclosure for a legitimate purpose related to the employment of employees of the employer and resulting in summary dismissal of employment or the legitimate business activities or functions of the employer not related to disciplinary action against employees of the employer”; and
- 21.2. Amending 18(c) to clarify that “civil” proceedings do not include disciplinary action short of summary dismissal.

22. These amendments would allow employers to carry out workplace surveillance in accordance with the Act in order to ensure employees are not stealing or committing such gross violations of trust that would place them outside of the employment relationship, but not the kind of Taylorist employment monitoring that has no place in the 21st century.

Devices on the person

23. In addition to the amendments proposed above, Unions NSW submits that employers should not be permitted to track the movement of employees through devices like mobile phones or GPS devices that an employee is required to carry with them or place in their car by the employer. This is because the device becomes such a part of the employee’s life that it is not possible for the employer to effectively “remind” the employee that it is also a tracking device as required by section 13 of the Act.

24. Therefore Unions NSW submits that a new section 16A be inserted in the Act as follows:

“The surveillance of an employee using a device attached to the employee, required to be carried on his or her person, or required to be placed in a vehicle used for work purposes is

prohibited. An employer cannot require an employee to carry, have attached to him or her or place in a vehicle used for work a device for the purpose or purposes which include the surveillance of that employee.”

Contraventions of the Act

25. Section 45 of the Act states proceedings for an offence under the Act may be dealt with summarily before the Local Court. Section 46 of the Act states that proceedings for an offence under the Act may be initiated by a union secretary whose members are concerned in the matter. Only sections 15, 17, 18, 19, 30, 36, 37 include penalties for contravention of the Act. The *Workplace Surveillance Regulations* provide no further guidance.

26. These provisions lack sufficient specificity regarding the bringing of proceedings for contraventions of the Act.

27. Unions NSW submits that the Act should be amended to include greater details regarding the bringing of proceedings under the Act, including:

- 27.1. conferring jurisdiction on the NSW Industrial Court;
- 27.2. the imposition of penalties for contravention of sections 10-13 of the Act; and
- 27.3. including a mechanism that allows allegations regarding contraventions of the Act (including those that arise in unfair dismissal proceedings) to be conciliated by the NSW Industrial Relations Commission or Fair Work Australia.

28. Unions NSW is only aware of a few proceedings that have been initiated for contraventions of the Act. Unions NSW submits that this is because of the restrictive definition of surveillance in the Act and the lack of an easy remedy where contravention of the Act is alleged.

29. The 2010 case of *Harris v Austar Coal Mining Pty Limited* shows the difficulty proving a contravention of the Act. In this case, taken in the Newcastle Local Court, it was alleged Austar breached section 19 of the Act by carrying out unauthorised covert employee surveillance.
30. Mr Harris alleged Austar installed a camera in an Austar office inside a lever arch folder that had been modified to accommodate it. Mr Harris contended that he and his co-workers had not been warned or notified that the camera was monitoring or recording them.
31. The case went to hearing and was unsuccessful. There was no published decision. Unions NSW understands that the Court did not accept that Mr Harris could pursue the action on behalf of a class of workers. Therefore the fact Mr Harris had no footage of himself from the camera and no evidence to substantiate he had actually visited the office (which was part of the general office accommodation) while the camera was in situ meant the claim could not be granted. The employer's request for costs was declined.
32. Unions NSW submits that the Act should be amended to rectify these difficulties by:
- 32.1. amending section 19 to delete "of an employee while the employee is at work for the employer" and insert in lieu thereof "of a workplace used by employees of the employer"; and
 - 32.2. amending section 46(d) to allow a prosecution to be brought by a person whose workplace was the subject of the surveillance with which the alleged offence is concerned.

Uncertainty of operation

33. Another proceeding under the Act was brought by the Communications, Electrical and Plumbing Union of Australia, Postal & Telecommunications

Branch (**CEPU**) against the Australian Postal Corporation (**Post**). This matter was the subject of a Federal Court application in *Australian Postal Corporation v Jim Metcher & Anor* (**Post v Metcher**) (NSD1012/2009).

34. One of the arguments raised by Post in *Post v Metcher* was that the Act did not apply to employers covered by the Commonwealth's *Fair Work Act*. This issue was not decided in this case and Unions NSW makes no concessions regarding this point.

35. However, Unions NSW submits that the State Government should seek that the Federal Government amend section 27(1A) of the *Fair Work Act* to refer to the Act so that there is no argument regarding this issue in future. To not do so shrouds the future operation of the Act in uncertainty for the majority of employees in NSW.