

³⁰ Ibid, per Lord Nicholls at paragraph 13, in above note 1 at [71]

³¹ Above note 1 [74]

³² Ibid [78]

³³ Ibid [85]

³⁴ *Lloyd Schuhfabrik v Klijsen* [1999] ETMR 690 in Ibid, at [85]

³⁵ Ibid [89]

³⁶ Ibid [94]

³⁷ Ibid [108]

³⁸ See above note 3.

³⁹ Above note 1, [24]

⁴⁰ Above note 3.

Is Your Employer Watching You? - Computer surveillance in the workplace

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The *Workplace Surveillance Act 2005 (NSW)* commenced on 7 October 2005 and restricts the ability of employers to monitor computer usage (among other things) by its employees. Nearly a year after the commencement of this groundbreaking legislation our experience is that many employers are still not compliant with the legislation.

Non-compliance can have significant implications. Quite apart from the criminal sanctions involved, failure to comply with the Act can prevent an employer relying on computer surveillance evidence in employee disciplinary matters and legal proceedings.

Background

In order to understand the purpose of the legislation it is necessary to understand the history surrounding surveillance in the workplace in NSW. Prior to legislative intervention by the NSW government into workplace surveillance, employers could “by and large” conduct surveillance of its employees while they were at work without fear of criminal penalties. Under common law, employers are granted proprietary interests in practically every resource used by their employees in the workplace.¹ It has been argued that in order to preserve this right, employers would be entitled to conduct surveillance over these resources to ensure their proprietary right is protected.² For example, supplied business equipment such as computers could be subject to

a search by the employer, as not only does the computer belong to the employer, but anything the employee has done as employee also belongs to the employer³ (for example, the creation of work related Word documents and programs).

Employers could also in certain circumstances utilise surveillance over their employees where the possibility of such surveillance was expressed in an employee’s contract of employment. In addition to such an express right, a general duty to obey the employer’s lawful and reasonable directions is an implied term of the contract of employment. Surveillance was seen as a way to enforce the employer’s ability to ‘command’ its employees,⁴ as there is no real difference between the various forms of human and electronic surveillance (such as video and telephone recording).

Workplace Video Surveillance Act 1998 (NSW) - the forerunner to the 2005 Act

Aside from any common law ability to conduct surveillance over employees, the *Workplace Video Surveillance Act 1998 (NSW)* was introduced to regulate how employers used video surveillance in the workplace. This type of legislation was the first of its kind in Australia and was considered a step forward in attempting to reconcile privacy concerns of employees with the needs of employers in running a business⁵ (including monitoring thefts

and stock losses via video recordings). This is important in the absence of a common law entitlement for employees to privacy.⁶

Although this Act was a significant step forward, technology continued to develop at an exponential rate, with the result that employees became increasingly concerned that private communications sent by them via email could end up being intercepted and read by their employers due to the lack of regulation over this increasingly popular mode of communication.⁷ With that in mind, the NSW government proposed that a new Act, (the *Workplace Surveillance Act 2005 (NSW)*) be implemented to ensure regulation over other forms of workplace surveillance, including computer surveillance. Not only would this new Act ensure transparency in the workplace but it would strike a fair balance between the concerns of employees regarding their privacy at work and the employer’s legitimate right to limit usage of computer networks in the workplace for personal use.⁸

Workplace Surveillance Act 2005 (NSW)

Scope of the Act

The *Workplace Surveillance Act 2005 (NSW)* (“**the Act**”) restricts the ability of employers to monitor the activities of its employees through computer surveillance including controlling the extent to which employers can block