

# Workplace Surveillance Act 2005

As at 20 May 2014

## Long Title

An Act to regulate surveillance of employees at work; and for other purposes.

## Part 1 ñ Preliminary

### 1 Name of Act

This Act is the *Workplace Surveillance Act 2005*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Definitions

In this Act:

**"at work"** --see section 5.

**"camera"** includes an electronic device capable of monitoring or recording visual images of activities on premises or in any other place.

**"covert surveillance"** means surveillance of an employee while at work for an employer carried out or caused to be carried out by the employer and not carried out in compliance with the requirements of Part 2.

**"covert surveillance authority"** means an authority issued under Part 4.

**"employee"** has the same meaning as in the *Industrial Relations Act 1996* and includes:

- (a) a bailee of a public vehicle or a carrier under Chapter 6 (Public vehicles and carriers) of the *Industrial Relations Act 1996*, and
- (b) a person performing voluntary work (that is, a person performing work without remuneration, reward or obligation).

**"employer"** has the same meaning as in the *Industrial Relations Act 1996* and includes:

- (a) in the case of an employee who is a bailee of a public vehicle or a carrier under Chapter 6 of the *Industrial Relations Act 1996* --the bailor of the public vehicle or the principal contractor under that Chapter, and
- (b) a person for whom an employee performs voluntary work, and
- (c) another person for whom an employee performs work pursuant to any contract or other arrangement between that other person and the employee's employer (such as a labour hire contract). Paragraph (c) can result in an employee having 2 employers for the purposes of this Act--the employee's actual employer and another person for whom the employee is doing work under (for example) a labour hire contract between that other person and that employer.

**"employer's representative"** means a person authorised by an employer to act on behalf of the employer for the purposes of this Act.

**"exercise"** a function includes perform a duty.

**"function"** includes a power, authority or duty.

**"law enforcement agency"** means any of the following:

- (a) the NSW Police Force,
- (b) a police force or police service of another State or a Territory,
- (c) the Australian Federal Police,
- (d) the Police Integrity Commission,
- (e) the Independent Commission Against Corruption,
- (f) the New South Wales Crime Commission,
- (g) the Australian Crime Commission,
- (h) the Department of Corrective Services,
- (i) the Department of Juvenile Justice,
- (j) any other authority or person responsible for the enforcement of the criminal laws of the Commonwealth or of the State,
- (k) a person or body prescribed for the purposes of this definition by the regulations.

**"related corporation"**, in relation to an employer that is a corporation, means a corporation that is, with respect to the employer, a related body corporate within the meaning of the *Corporations Act 2001* of the Commonwealth.

**"surveillance"** of an employee means surveillance of an employee by any of the following means:

- (a) **"camera surveillance"**, which is surveillance by means of a camera that monitors or records visual images of activities on premises or in any other place,
- (b) **"computer surveillance"**, which is surveillance by means of software or other equipment that monitors or records the information input or output, or other use, of a computer (including, but not limited to, the sending and receipt of emails and the accessing of Internet websites),
- (c) **"tracking surveillance"**, which is surveillance by means of an electronic device the primary purpose of which is to monitor or record geographical location or movement (such as a Global Positioning System tracking device).

This Act does not apply to surveillance by means of a listening device. See section 4 (3) of the *Surveillance Devices Act 2007*. Camera surveillance that is regulated by this Act will also be regulated by the *Surveillance Devices Act 2007* if the camera is used to record a private conversation.

**"surveillance information"** means information obtained, recorded, monitored or observed as a consequence of surveillance of an employee.

**"surveillance record"** means a record or report of surveillance information.

**"surveillance supervisor"**, in relation to a covert surveillance authority, means a person named in the authority as a person who is to be responsible for the oversight of the conduct of the covert surveillance authorised by the authority.

**"unlawful activity"** means an act or omission that constitutes an offence against a law of this State or the Commonwealth.

**"work"** means work as an employee.

See section 5 for the meaning of "at work".

**"workplace"** means premises, or any other place, where employees work, or any part of such premises or place.

#### **4 Extended meaning of "employer" when corporations related**

If an employer is a corporation that has one or more related corporations, this Act operates in relation to employees of any such related corporation as if they were also employees of the employer, with the result that a reference in this Act to an employer's employees includes employees of a related corporation of the employer.

#### **5 Meaning of "at work"**

(1) For the purposes of this Act, an employee is **"at work"** for an employer when the employee is:

- (a) at a workplace of the employer (or a related corporation of the employer) whether or not the employee is actually performing work at the time, or
- (b) at any other place while performing work for the employer (or a related corporation of the employer).

(2) An employee who is a bailee of a public vehicle or a carrier under Chapter 6 of the *Industrial Relations Act 1996* is considered to be performing work for the employer while engaged under the contract of bailment or carriage concerned.

#### **6 Act to bind Crown**

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

#### **7 Notes**

Notes included in this Act do not form part of this Act.

#### **8 Relationship with WHS Act**

A requirement imposed by or under the *Work Health and Safety Act 2011* does not limit or otherwise affect the operation of this Act.

## **Part 2 ñ Notification of workplace surveillance of employees**

Surveillance of an employee that does not comply with this Part is covert surveillance (see the definition of **"covert surveillance"**). Covert surveillance of an employee is an offence unless the surveillance is authorised by a covert surveillance authority (see Part 4).

#### **9 Application of Part**

This Part applies to the surveillance of an employee carried out or caused to be carried out by the employee's employer while the employee is at work for the employer.

#### **10 Notice of surveillance required**

(1) Surveillance of an employee must not commence without prior notice in writing to the employee. Subsection (6) provides for an exception to the notice requirement.

(2) The notice must be given at least 14 days before the surveillance commences. An employee may agree to a lesser period of notice.

(3) If surveillance of employees at work for an employer has already commenced when an employee is first employed, or is due to commence less than 14 days after an employee is first employed, the notice to that employee must be given before the employee starts work.

(4) The notice must indicate:

- (a) the kind of surveillance to be carried out (camera, computer or tracking), and
- (b) how the surveillance will be carried out, and

- (c) when the surveillance will start, and
  - (d) whether the surveillance will be continuous or intermittent, and
  - (e) whether the surveillance will be for a specified limited period or ongoing.
- (5) Notice by email constitutes notice in writing for the purposes of this section.
- (6) Notice to an employee is not required under this section in the case of camera surveillance at a workplace of the employer that is not a usual workplace of the employee.

### **11 Additional requirements for camera surveillance**

Camera surveillance of an employee must not be carried out unless:

- (a) cameras used for the surveillance (or camera casings or other equipment that would generally indicate the presence of a camera) are clearly visible in the place where the surveillance is taking place, and
- (b) signs notifying people that they may be under surveillance in that place are clearly visible at each entrance to that place.

### **12 Additional requirements for computer surveillance**

Computer surveillance of an employee must not be carried out unless:

- (a) the surveillance is carried out in accordance with a policy of the employer on computer surveillance of employees at work, and
- (b) the employee has been notified in advance of that policy in such a way that it is reasonable to assume that the employee is aware of and understands the policy.

### **13 Additional requirements for tracking surveillance**

Tracking surveillance of an employee that involves the tracking of a vehicle or other thing must not be carried out unless there is a notice clearly visible on the vehicle or other thing indicating that the vehicle or thing is the subject of tracking surveillance.

### **14 Exemption for certain surveillance by agreement**

Surveillance of an employee is taken to comply with the requirements of this Part if the employee (or a body representing a substantial number of employees at the workplace) has agreed to the carrying out of surveillance at the premises or place where the surveillance is taking place for a purpose other than surveillance of employees and the surveillance is carried out in accordance with that agreement.

## **Part 3 ñ Prohibited surveillance**

### **15 Surveillance of change rooms and bathrooms prohibited**

An employer must not carry out, or cause to be carried out, any surveillance of an employee of the employer in any change room, toilet facility or shower or other bathing facility at a workplace.

Maximum penalty: 50 penalty units.

### **16 Prohibition on surveillance using work surveillance device while employee not at work**

- (1) An employer must not carry out, or cause to be carried out, surveillance of an employee of the employer using a work surveillance device when the employee is not at work for the employer unless the surveillance is computer surveillance of the use by the employee of equipment or resources provided by or at the expense of the employer.

Maximum penalty: 50 penalty units.

- (2) A "**work surveillance device**" is a device used for surveillance of the employee when at work for the employer.

- (3) This section does not apply to the carrying out, or causing to be carried out, of

surveillance by an employer that is a law enforcement agency.

### **17 Restrictions on blocking emails or Internet access**

(1) An employer must not prevent, or cause to be prevented, delivery of an email sent to or by, or access to an Internet website by, an employee of the employer unless:

(a) the employer is acting in accordance with a policy on email and Internet access that has been notified in advance to the employee in such a way that it is reasonable to assume that the employee is aware of and understands the policy, and

(b) in addition, in the case of the preventing of delivery of an email, the employee is given notice (a "**prevented delivery notice**") as soon as practicable by the employer, by email or otherwise, that delivery of the email has been prevented, unless this section provides that a prevented delivery notice is not required.

Maximum penalty: 50 penalty units.

(2) An employee is not required to be given a prevented delivery notice for an email if delivery of the email was prevented in the belief that, or by the operation of a program intended to prevent the delivery of an email on the basis that:

(a) the email was a commercial electronic message within the meaning of the *Spam Act 2003* of the Commonwealth, or

(b) the content of the email or any attachment to the email would or might have resulted in an unauthorised interference with, damage to or operation of a computer or computer network operated by the employer or of any program run by or data stored on such a computer or computer network, or

(c) the email or any attachment to the email would be regarded by reasonable persons as being, in all the circumstances, menacing, harassing or offensive.

(3) An employee is not required to be given a prevented delivery notice for an email sent by the employee if the employer was not aware (and could not reasonably be expected to be aware) of the identity of the employee who sent the email or that the email was sent by an employee.

(4) An employer's policy on email and Internet access cannot provide for preventing delivery of an email or access to a website merely because:

(a) the email was sent by or on behalf of an industrial organisation of employees or an officer of such an organisation, or

(b) the website or email contains information relating to industrial matters (within the meaning of the *Industrial Relations Act 1996*).

### **18 Restrictions on use and disclosure of surveillance records--notified surveillance**

An employer who carries out or causes to be carried out the surveillance of an employee of the employer while the employee is at work for the employer, not being covert surveillance, must ensure that any surveillance record made as a result of that surveillance is not used or disclosed unless that use or disclosure is:

(a) use or disclosure for a legitimate purpose related to the employment of employees of the employer or the legitimate business activities or functions of the employer, or

(b) disclosure to a member or officer of a law enforcement agency for use in connection with the detection, investigation or prosecution of an offence, or

(c) use or disclosure for a purpose that is directly or indirectly related to the taking of civil or criminal proceedings, or

(d) use or disclosure that is reasonably believed to be necessary to avert an imminent threat of serious violence to persons or of substantial damage to property.

Maximum penalty: 20 penalty units.

## **Part 4 ñ Covert surveillance of employees at work**

## **Division 1 ñ Restrictions on covert surveillance**

### **19 Covert surveillance prohibited without covert surveillance authority**

An employer must not carry out, or cause to be carried out, covert surveillance of an employee while the employee is at work for the employer unless the surveillance is authorised by a covert surveillance authority.

Maximum penalty: 50 penalty units.

### **20 What covert surveillance authority authorises**

- (1) A covert surveillance authority that is issued to an employer or employer's representative authorises the covert surveillance generally of any employees while at work for the employer but only for the purpose of establishing whether or not one or more particular employees are involved in any unlawful activity while at work for the employer.
- (2) The authority conferred is subject to the following conditions:
  - (a) a condition that the conduct of the covert surveillance authorised by the authority must be overseen by a surveillance supervisor for the authority,
  - (b) any other conditions imposed on the authority by or under this Act.
- (3) A covert surveillance authority does not authorise the carrying out, or causing to be carried out, of covert surveillance of any employee:
  - (a) for the purpose of monitoring the employee's work performance, or
  - (b) in any change room, toilet facility or shower or other bathing facility.

### **21 Exceptions--law enforcement, correctional centres, courts, casino**

It is not an offence under this Part:

- (a) for a member or officer of a law enforcement agency to carry out, or cause to be carried out, surveillance in the exercise of a function conferred or imposed on the member or officer by or under any other Act or law, or
- (b) for a person to carry out, or cause to be carried out, camera surveillance in a correctional centre or in any other place where a person is in lawful custody, or
- (c) for a person to carry out, or cause to be carried out, camera surveillance for the purpose of monitoring operations carried out in a casino in accordance with the *Casino Control Act 1992*, or
- (d) for a person to carry out, or cause to be carried out, camera surveillance of any legal proceedings or proceedings before a law enforcement agency in the exercise of a function conferred or imposed on the person by or under any other Act or law.

### **22 Defence--surveillance for security of the workplace**

- (1) It is a defence to a prosecution for an offence against this Part involving the covert surveillance of an employee at a workplace of an employer for the employer to prove that:
  - (a) the surveillance was carried out, or caused to be carried out, solely for the purpose of ensuring the security of the workplace or persons in it and that surveillance of any employee was extrinsic to that purpose, and
  - (b) there was a real and significant likelihood of the security of the workplace or persons in it being jeopardised if covert surveillance was not carried out, and
  - (c) the employer notified employees at the workplace (or a body representing a substantial number of the employees) in writing of the intended surveillance for that purpose before it was carried out.
- (2) Evidence of any surveillance record made as a consequence of surveillance of employees in the workplace for the purpose referred to in this section that is unrelated to the security of the workplace or persons in the workplace is not to be admitted in evidence in any disciplinary or legal proceedings against an employee unless the

desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

## **Division 2 ñ Covert surveillance authorities**

### **23 Application for covert surveillance authority**

(1) An employer or employer's representative may apply to a Magistrate for the issue to the employer of an authority authorising covert surveillance generally of employees while at work for the employer for the purpose of establishing whether one or more particular employees are involved in any unlawful activity while at work for the employer.

(2) The application for the authority must include the following:

(a) a statement of the grounds the employer or employer's representative has for suspecting that a particular employee is or employees are involved in unlawful activity, together with the names of those employees (unless it is not practicable to name them),

(b) a statement as to whether other managerial or investigative procedures have been undertaken to detect the unlawful activity and what has been their outcome,

(c) the names of the employees or (if it is not practicable to name them) a description of the group or class of employees who will regularly or ordinarily be the subject of the covert surveillance,

(d) a description of the premises, place, computer, vehicle or other thing that will regularly or ordinarily be the subject of the covert surveillance,

(e) a statement as to the kind of covert surveillance (camera, computer or tracking) that is proposed to be conducted,

(f) the dates and times during which the covert surveillance is proposed to be conducted,

(g) a statement as to whether any previous application for a covert surveillance authority has been made in respect of the proposed covert surveillance and a statement as to the results of the application and of any covert surveillance conducted under a covert surveillance authority issued as a result of the previous application,

(h) in the case of an application made by an employer's representative, verification acceptable to the Magistrate of the employer's authority for the person to act as an employer's representative for the purposes of the covert surveillance operation.

(3) The regulations may require an application for an authority to include other specified information and may require the application to be in a form prescribed by the regulations.

(4) An application for an authority must also nominate one or more persons to oversee the conduct of covert surveillance to be authorised by the authority.

(5) A Magistrate must not issue an authority unless the information given by the applicant in or in connection with the application is verified before the Magistrate on oath or affirmation or by affidavit.

(6) A Magistrate may administer an oath or affirmation or take an affidavit for the purposes of an application for an authority.

(7) The applicant must provide (either orally or in writing) such further information as the Magistrate requires concerning the grounds on which the authority is being sought.

### **24 Dealing with application**

An application for a covert surveillance authority must be dealt with in the absence of the public but is otherwise to be dealt with, subject to this Part and the regulations, in such manner as is decided by the Magistrate to whom the application is made.

### **25 Grounds for issue of covert surveillance authority**

(1) A Magistrate must not issue a covert surveillance authority unless the Magistrate is

satisfied that the application for the authority shows that reasonable grounds exist to justify its issue.

(2) When determining whether there are reasonable grounds to issue a covert surveillance authority, a Magistrate must have regard to the seriousness of the unlawful activity with which the application is concerned.

(3) When determining whether there are reasonable grounds to issue a covert surveillance authority authorising covert surveillance of a recreation room, meal room or any other area at a workplace where employees are not directly engaged in work, a Magistrate must have regard to the affected employees' heightened expectation of privacy when in such an area.

## **26 Privacy must be considered**

A Magistrate must not issue a covert surveillance authority unless the Magistrate has had regard to whether covert surveillance of the employee or employees concerned might unduly intrude on their privacy or the privacy of any other person.

## **27 Surveillance supervisor**

(1) When a Magistrate issues a covert surveillance authority, the Magistrate is to designate one or more persons to be surveillance supervisors for the authority, to oversee the conduct of surveillance operations under the authority.

(2) The Magistrate is not to designate a person as a surveillance supervisor unless satisfied that the person has qualifications or experience that suit the person to be responsible for overseeing the conduct of the surveillance operations to be authorised by the authority.

(3) If the authority is to authorise covert surveillance of a recreation room, meal room or any other area at a workplace where employees are not directly engaged in work, the Magistrate must also be satisfied that each person designated as a surveillance supervisor is competent and fit to oversee the conduct of the surveillance in such an area, and is capable of adequately accommodating in the conduct of the operation the employees' heightened expectation of privacy.

## **28 Form of covert surveillance authority**

(1) A covert surveillance authority is to be in the form prescribed by the regulations.

(2) The authority is to specify the following:

- (a) the purpose for which it authorises the carrying out of covert surveillance,
- (b) the names of the employee or employees suspected of involvement in the unlawful activity with which the authority is concerned,
- (c) the kind of covert surveillance (camera, computer or tracking) that it authorises and the equipment authorised to be used for that surveillance,
- (d) the dates on which and the times during which covert surveillance is authorised to be carried out,
- (e) where practicable, the name of any person who is likely to be the subject of the covert surveillance,
- (f) the premises, place, computer, vehicle or other thing that is to be the subject of the covert surveillance,
- (g) the name of each person who is designated as a surveillance supervisor to oversee the conduct of the covert surveillance,
- (h) the period for which the authority remains in force,
- (i) the requirements of sections 35 (Report on use of authority) and 37 (Covert surveillance records may be used or disclosed for relevant purpose only),
- (j) the conditions to which the authority is subject.

## **29 Duration and conditions of covert surveillance authority**

(1) A covert surveillance authority, unless sooner cancelled, remains in force for the period (not exceeding 30 days or such other period as may be prescribed by the



regulations) specified in the authority.

(2) A covert surveillance authority is subject to the following conditions:

(a) except as provided by paragraph (b), a surveillance supervisor for the authority and any of his or her supervisees must not give any other person access to any surveillance record made as a consequence of the covert surveillance,

(b) a surveillance supervisor for the authority and any of his or her supervisees may supply the employer, or employer's representative, only with any portions of a surveillance record made as a consequence of the covert surveillance that are relevant to establishing the involvement of any employee in an unlawful activity while at work for the employer in accordance with the authority conferred by the authority or for identifying or detecting any other unlawful activity at a workplace of the employer or of an employee while at work for the employer,

(c) a surveillance supervisor for the authority must erase or destroy (or cause a supervisee to erase or destroy) within 3 months of the expiry of the authority all parts of surveillance records made by the surveillance supervisor or his or her supervisees as a consequence of the covert surveillance that are not required for evidentiary purposes,

(d) if, as a consequence of the carrying out of covert surveillance of an employee, the employer or employer's representative takes, or proposes to take, any detrimental action against the employee, the employer or employer's representative must, within a reasonable period after being requested to do so by the employee (or his or her Australian legal practitioner), give the employee (and his or her Australian legal practitioner, if any) access to any part of the surveillance record supplied to the employer or employer's representative that relates to the employee or the detrimental action,

(e) such other conditions as are prescribed by the regulations or specified in the authority.

(3) In this section: "**detrimental action**" means action causing, comprising or involving any of the following:

(a) discrimination, disadvantage or adverse treatment in relation to employment,

(b) dismissal from, or prejudice in, employment,

(c) a disciplinary proceeding.

"**supervisee**", in relation to a surveillance supervisor, means any person conducting covert surveillance under the oversight of the surveillance supervisor.

### **30 Contravention of condition of authority**

A person who carries out or causes the carrying out of surveillance authorised by a covert surveillance authority must not contravene or cause the contravention of any condition of the covert surveillance authority.

Maximum penalty: 50 penalty units.

### **31 Variation or cancellation of authority**

(1) A Magistrate may at any time vary or cancel a covert surveillance authority (whether issued by that Magistrate or another Magistrate).

(2) A Magistrate may vary or cancel an authority on the Magistrate's own initiative or on application made by any employee, employer or other person affected by the authority.

(3) The Magistrate may deal with an application for the variation or cancellation of an authority, subject to this Part and the regulations, in such manner as is decided by the Magistrate.

### **32 Further application for authority after refusal**

If an application by a person for a covert surveillance authority is refused by the Magistrate, a further application in respect of the same surveillance cannot be made unless the further

application provides additional relevant information.

### **33 Records relating to covert surveillance authority**

(1) A Magistrate who issues, varies or cancels a covert surveillance authority is to cause a record to be made of all relevant particulars of the issue, variation or cancellation of the authority and the grounds on which the Magistrate has relied to justify the issue, variation or cancellation.

(2) The Magistrate is to take all reasonable steps to preserve the confidentiality of information contained in such records and the privacy of any persons concerned. However, this subsection does not prevent the Magistrate from supplying any information to the Minister that is required for the purposes of a report under section 42 (Annual report).

(3) The regulations may make provision for or with respect to:

- (a) the keeping of records in connection with the issue of covert surveillance authorities, and
- (b) the inspection of any such records, and
- (c) any other matter in connection with any such records.

### **34 Defects in authority**

A covert surveillance authority is not invalidated by any defect, other than a defect that affects the substance of the authority in a material particular.

### **35 Report on use of authority**

(1) The employer or employer's representative to whom a covert surveillance authority is issued must furnish a report in compliance with this section to the Magistrate who issued the authority within 30 days after the expiry of the authority. Maximum penalty: 20 penalty units.

(2) The report is to be in writing, setting out briefly the result of the surveillance carried out and specifying the following:

- (a) if practicable, the name of any employee who was the subject of the surveillance,
- (b) the period during which the surveillance was conducted,
- (c) details of the type of surveillance device used and of the type of place where any surveillance device was installed or used,
- (d) whether any surveillance device has been removed and, if not, why not,
- (e) details of the conditions of the covert surveillance authority,
- (f) details of any surveillance record made as a consequence of the surveillance,
- (g) any action taken or proposed to be taken in light of the information obtained,
- (h) any reason why an employee who was the subject of the surveillance should not be informed of the surveillance,
- (i) details of any previous use of covert surveillance in connection with suspected unlawful activity with which the authority is concerned.

(3) The regulations may require the report to include other specified information and may require the report to be in a form prescribed by the regulations.

(4) If the Magistrate who issued a covert surveillance authority has died, has ceased to be a Magistrate or is absent, the report is to be furnished to another Magistrate.

(5) The Magistrate to whom the report is furnished may make such orders as the Magistrate thinks appropriate with respect to the use or disclosure of any surveillance record made as a consequence of surveillance conducted in accordance with the authority, including either or both of the following orders:

- (a) an order that a surveillance record made as a consequence of the surveillance be delivered up to the Magistrate to be kept in the custody of the Magistrate or dealt with as the Magistrate may otherwise order,

(b) an order that a specified person or body be informed of the surveillance and given access to, or to part of, any surveillance record made as a consequence of the surveillance.

(6) A Magistrate must make an order under subsection (5) (b) in favour of a person who was the subject of surveillance unless the Magistrate is satisfied that there is good reason for not making the order.

(7) In considering whether there is good reason for not making an order under subsection (5) (b) in favour of a person, the Magistrate is to give consideration to whether the surveillance was justified and whether the surveillance was an unnecessary interference with privacy.

### **Division 3 ñ Covert surveillance records**

#### **36 Storage of surveillance records of covert surveillance**

(1) Any surveillance supervisor who oversees the conduct of covert surveillance under the authority of a covert surveillance authority must take such security safeguards as are reasonable in the circumstances to ensure that any surveillance record made as a consequence of the covert surveillance that is in the possession or under the control of the surveillance supervisor is protected against loss or unauthorised access or use. Maximum penalty: 20 penalty units.

(2) An employer or employer's representative to whom a covert surveillance authority is issued is to ensure that any portion of a surveillance record made as a consequence of covert surveillance under the authority that is in the possession or under the control of the employer or employer's representative is protected against loss or unauthorised access or use. Maximum penalty: 20 penalty units.

#### **37 Covert surveillance records may be used or disclosed for relevant purpose only**

(1) A person must not make use of or disclose to another person surveillance information or a surveillance record knowing or having reasonable cause to suspect that the information has been obtained or the record made as a result, direct or indirect, of covert surveillance of an employee while at work for an employer carried out or caused to be carried out by the employer unless that use or disclosure is for a relevant purpose as provided by this section. Maximum penalty: 20 penalty units.

(2) If the covert surveillance of an employee was authorised by a covert surveillance authority issued to an employer, only the following use or disclosure of the surveillance information or record is for a relevant purpose:

(a) use or disclosure that is authorised or required by the conditions of the covert surveillance authority or an order of a Magistrate under section 35,

(b) use or disclosure for a purpose that is directly or indirectly related to establishing whether or not an employee is involved in unlawful activity while at work for the employer in accordance with the authority conferred by the covert surveillance authority,

(c) use or disclosure for a purpose that is directly or indirectly related to taking disciplinary action or legal proceedings against an employee as a consequence of any alleged unlawful activity while at work for the employer,

(d) use or disclosure for a purpose that is directly or indirectly related to establishing security arrangements or taking other measures to prevent or minimise the opportunity for unlawful activity while at work for the employer of a kind identified by the surveillance record to occur while at work for the employer,

(e) use or disclosure that is reasonably believed to be necessary to avert an imminent threat of serious violence to persons or of substantial damage to property,

(f) disclosure to a member or officer of a law enforcement agency for use in connection with the detection, investigation or prosecution of an offence,

- (g) use by a member or officer of a law enforcement agency for any purpose in connection with the detection, investigation or prosecution of an offence,
  - (h) use or disclosure for a purpose that is directly or indirectly related to the taking of proceedings for an offence,
  - (i) use or disclosure for a purpose that is directly or indirectly related to taking any other action authorised or required by or under this Act.
- (3) If the covert surveillance of an employee was not authorised by a covert surveillance authority, the following use or disclosure of the information or record is for a relevant purpose:
- (a) disclosure to a member or officer of a law enforcement agency for use in connection with the detection, investigation or prosecution of an offence,
  - (b) use or disclosure for a purpose that is directly or indirectly related to the taking of proceedings for an offence,
  - (c) use by a member or officer of a law enforcement agency for any purpose in connection with the detection, investigation or prosecution of an offence.
- (4) Without limiting subsection (3), if the covert surveillance of an employee was not authorised by a covert surveillance authority, the following use or disclosure of the information or record is for a relevant purpose:
- (a) disclosure to a member or officer of a law enforcement agency for use in connection with disciplinary or managerial action or legal proceedings against an employee of a law enforcement agency as a consequence of any alleged misconduct (other than an unlawful activity) or unsatisfactory performance of the employee,
  - (b) use or disclosure for a purpose that is directly or indirectly related to the taking of such disciplinary or managerial action or legal proceedings,
  - (c) disclosure to a member or officer of a law enforcement agency for use in connection with the training of law enforcement members or officers.

### **38 Information obtained inadvertently pursuant to authority**

- (1) Information that has inadvertently or unexpectedly come to the knowledge of a person as a direct or indirect result of the carrying out of covert surveillance authorised by a covert surveillance authority is, for the purposes of any determination by a court as to admissibility of evidence in criminal proceedings before the court, not considered to have been obtained in contravention of section 19 (Covert surveillance prohibited without covert surveillance authority).
- (2) Subsection (1) does not apply if the court is of the opinion that the application on the basis of which the covert surveillance authority was granted was not made in good faith.

## **Part 5 ñ Miscellaneous**

### **39 Commonwealth laws**

This Act does not apply to anything done under the authority of a warrant or other authority under the *Telecommunications (Interception) Act 1979* of the Commonwealth or any other law of the Commonwealth.

### **40 Functions under Act of Magistrates**

The imposition of a function on a Magistrate under this Act is not a conferral of jurisdiction on the Local Court.

### **41 Application to judicial member of Industrial Relations Commission**

- (1) An applicant for a covert surveillance authority who is aggrieved by a decision of a Magistrate to refuse to issue or to vary or cancel a covert surveillance authority may make an application to a judicial member of the Industrial Relations Commission (a "**judicial member**") to issue, vary or cancel the authority.

- (2) An employee affected by a covert surveillance authority who is aggrieved by a decision of a Magistrate to refuse to vary or cancel a covert surveillance authority may make an application to a judicial member to vary or cancel the authority.
- (3) The application must be made within 30 days after the decision is given or within such further period as the judicial member allows.
- (4) Part 4 applies to or in respect of the issue, variation or cancellation of a covert surveillance authority by a judicial member to whom an application is made under this section in the same way as it applies to the issue, variation or cancellation of such an authority by a Magistrate.
- (5) An application to a Magistrate for the issue or for a variation or cancellation of an authority is taken (for the purposes only of an application under this section) to have been refused if it is not decided within the period of 30 days after the making of the application to the Magistrate.
- (6) The imposition of a function on a judicial member under this section is not a conferral of jurisdiction on the Industrial Relations Commission.

#### **42 Annual report**

- (1) The Minister must, as soon as practicable after 31 December in each year, prepare a report in respect of operations pursuant to covert surveillance authorities during the year and table the report, or cause it to be tabled, in both Houses of Parliament as soon as practicable after it is prepared.
  - (1A) If a House of Parliament is not sitting when the Minister seeks to lay the report before it, the Minister is to cause a copy of the report to be presented to the Clerk of that House of Parliament.
  - (1B) A report presented under subsection (1A):
    - (a) is, on presentation and for all purposes, taken to have been laid before the House, and
    - (b) may be printed by authority of the Clerk of the House, and
    - (c) if so printed, is taken to be a document published by or under the authority of the House, and
    - (d) is to be recorded:
      - (i) in the case of the Legislative Council--in the Minutes of the Proceedings of the Legislative Council, and
      - (ii) in the case of the Legislative Assembly--in the Votes and Proceedings of the Legislative Assembly,on the first sitting day of the House after receipt of the copy of the report by the Clerk.
- (2) A report under this section:
  - (a) must include details of the number of covert surveillance authorities sought, and the number of such authorities issued (together with a breakdown of the kinds of surveillance to which those issued authorities related), during the year to which the report relates, and
  - (b) may report on such other matters relating to covert surveillance authorities and the use of covert surveillance as the Minister considers appropriate.

#### **43 Offences by corporations**

- (1) If a corporation contravenes any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.
- (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or convicted under that provision.
- (3) Nothing in this section affects the liability imposed on a corporation for an offence

committed by the corporation under this Act or the regulations.

#### **44 Regulations**

(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) In particular, the regulations may make provision for or with respect to:

(a) the use, possession, storage and destruction of any surveillance records made in the course of covert surveillance of the activities of an employee, and

(b) applications for the issue, variation and cancellation of covert surveillance authorities and how such applications are to be dealt with.

(3) A regulation may create an offence punishable by a penalty not exceeding 5 penalty units.

#### **45 Summary procedure for offences**

(1) Proceedings for an offence under this Act or the regulations may be dealt with summarily before the Local Court.

(2) The provisions of section 197 of the *Industrial Relations Act 1996*, and of the regulations under that Act, relating to appeals from, and the stating of a case by, the Local Court to the Industrial Relations Commission in Court Session apply to proceedings before the Local Court for offences against this Act.

#### **46 Authority to prosecute**

(1) Proceedings for an offence against this Act or the regulations may be instituted only:

(a) with the written consent of the Minister, or

(b) with the written consent of an officer prescribed by the regulations, or

(c) by the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate, or

(d) by a person who was the subject of the surveillance with which the alleged offence is concerned.

(2) In proceedings for an offence against this Act or the regulations, a consent to institute the proceedings, purporting to have been signed by the Minister or a prescribed officer, is evidence of that consent without proof of the signature of the Minister or prescribed officer.

#### **47 Savings and transitional provisions**

Schedule 1 has effect.

#### **48 Repeals**

The following are repealed:

*Workplace Video Surveillance Act 1998*

*Workplace Video Surveillance Regulation 1999*

#### **49 Review of Act**

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

## **Schedule 1 Savings and transitional provisions**

(Section 47)

## Part 1 ñ Preliminary

### 1 Regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

## Part 2 ñ Provisions consequent on enactment of this Act

### 2 Definition

In this Part:

"repealed Act" means the *Workplace Video Surveillance Act 1998*.

### 3 Covert surveillance authorities under repealed Act

A covert surveillance authority in force under Part 3 of the repealed Act immediately before the repeal of section 9 of that Act (or issued pursuant to clause 4 of this Schedule) is taken to be a covert surveillance authority issued under this Act.

### 4 Pending applications for covert surveillance authorities under repealed Act

An application for a covert surveillance authority pending under Part 3 of the repealed Act immediately before the repeal of section 9 of that Act is to continue to be dealt with under the repealed Act as if that Act had not been repealed.

### 5 Use of surveillance records

(1) Section 37 (Covert surveillance records may be used or disclosed for relevant purpose only) of this Act does not apply to surveillance information obtained, or a surveillance record made, in respect of surveillance that took place before the commencement of that section.

(2) Section 8 (Offence of using recording obtained by video surveillance for irrelevant purpose) of the repealed Act continues to apply despite the repeal of that section to and in respect of surveillance that took place before the repeal of that section.

### Historical notes

The following abbreviations are used in the Historical notes:

Am	amended	LW	legislation website	Sch	Schedule
Cl	clause	No	number	Schs	Schedules
ClI	clauses	p	page	Sec	section
Div	Division	pp	pages	Secs	sections
Divs	Divisions	Reg	Regulation	Subdiv	Subdivision
GG	Government	Regs	Regulations	Subdivs	

	Gazette				Subdivisions
Ins	inserted	Rep	repealed	Subst	substituted

Table of amending instruments *Workplace Surveillance Act 2005 No 47*. Second reading speech made: Legislative Assembly, 4.5.2005; Legislative Council, 21.6.2005. Assented to 23.6.2005. Date of commencement, 7.10.2005, sec 2 and GG No 116 of 16.9.2005, p 7434. This Act has been amended as follows:

2005	No 98	<i>Statute Law (Miscellaneous Provisions) Act (No 2) 2005</i> . Assented to 24.11.2005. Date of commencement of Sch 1, assent, sec 2 (2).
2006	No 58	<i>Statute Law (Miscellaneous Provisions) Act 2006</i> . Assented to 20.6.2006. Date of commencement of Sch 3.25, assent, sec 2 (2).
	No 94	<i>Police Amendment (Miscellaneous) Act 2006</i> . Assented to 22.11.2006. Date of commencement of Sch 3.37, 1.2.2007, sec 2 and GG No 22 of 1.2.2007, p 575.
2007	No 64	<i>Surveillance Devices Act 2007</i> . Assented to 23.11.2007. Date of commencement, 1.8.2008, sec 2 and GG No 92 of 25.7.2008, p 7283.
	No 94	<i>Miscellaneous Acts (Local Court) Amendment Act 2007</i> . Assented to 13.12.2007. Date of commencement of Schs 1.107 and 2, 6.7.2009, sec 2 and 2009 (314) LW 3.7.2009.
2011	No 67	<i>Work Health and Safety Legislation Amendment Act 2011</i> . Assented to 28.11.2011. Date of commencement of Sch 4, 1.1.2012, sec 2 (1).
2014	No 14	<i>Courts and Other Legislation Amendment Act 2014</i> . Assented to 20.5.2014. Date of commencement of Sch 1.5, assent, sec 2 (1).

#### Table of amendments

Sec 3	Am 2006 No 94, Sch 3.37; 2007 No 64, Sch 2.9.
Sec 8	Am 2011 No 67, Sch 4.32.
Sec 16	Am 2005 No 98, Sch 1.25 [1].
Sec 29	Am 2006 No 58, Sch 3.25.
Sec 37	Am 2005 No 98, Sch 1.25 [2] [3].
Sec 40	Am 2007 No 94, Sch 1.107.
Sec 42	Am 2014 No 14, Sch 1.5.
Sec 45	Am 2007 No 94, Sch 2.