



FreeTV
Australia

44 Avenue Road
Mosman NSW
Australia 2088

T : 61 2 8968 7100
F : 61 2 9969 3520
W : freetvaust.com.au

Workplace Surveillance Bill - Exposure Draft
Legislation and Policy Division
NSW Attorney General's Department
GPO Box 6
SYDNEY NSW 2001

E-mail: david_mitchell@agd.nsw.gov.au

4 August, 2004

Free TV Submission to the Attorney General's Department on the *Workplace Surveillance Bill* 2004

1. Introduction

Free TV Limited (**Free TV**) represents all 48 free-to-air commercial television licensees in Australia.

This letter sets out Free TV's submission with respect to the exposure draft of the *Workplace Surveillance Bill 2004 (Draft Bill)*.

2. Executive Summary

Free TV has no difficulty with the prohibition of inappropriate workplace surveillance and supports this aspect of the Draft Bill.

However, Free TV considers that the Draft Bill goes too far and is likely to seriously adversely affect the public's access through the media to information about matters of public importance.

Free TV submits that substantial amendments should be made to the Bill to avoid this effect.

The Draft Bill would have this effect for the following reasons:

- (a) the Draft Bill would prevent the media from obtaining and reporting important business information because it:
 - (i) prohibits employers from accessing information which is not private, such as accessing legitimate business records held on computers owned by employers, in ways which do not constitute "surveillance" in the ordinary sense. If employers cannot access this information, then they cannot provide it to the media; and

- (ii) prohibits employers from disclosing such information to the media; and
- (b) it creates a disproportionate risk for media organisations and journalists of committing an offence each time they obtain information from an employer. In this context, it is important to remember that a large proportion of stories dealing with serious matters of public concern relate to employers of some description in the government or private sector.

It has long been recognised as a matter of public policy that the media's role in informing the public about what occurs in courts, government organisations and corporations is of fundamental importance. This provides protection against corruption and, perhaps more importantly, protects against public suspicions of corruption. Hence the principle that "sunlight is the best disinfectant" underpins corporate disclosure rules, open justice principles limit court suppression powers and Freedom of Information Acts have been enacted at the Commonwealth and State and Territory levels.

Because the Draft Bill burdens freedom of speech and its prohibitions are excessive, it may well be constitutionally invalid (in whole or in part) if enacted in its current form. The basis of such invalidity would be the constitutional freedom of speech in relation to government and political matters and also, potentially, its inconsistency with open justice principles.

To make the Draft Bill consistent with these fundamental public policy requirements, the following changes are required:

- (a) clause 28, which prohibits use and disclosure of covert surveillance records, should be removed or substantially redrafted (see heading 4.3 below);
- (b) the surveillance offence in clause 8 of the Draft Bill should be made much narrower (by narrowing the definition of "surveillance" and by including a public interest exception). In its present form the Draft Bill would (if enacted) prevent employers from accessing information which is not private to employees and which has not been gathered by means which would traditionally be considered as "surveillance" and would therefore also prevent the media and the public from having access to that information (see heading 4.1 below);
- (c) notice requirements in clause 5 of the Draft Bill should be revised so that they are easier to comply with (see heading 4.2 below);
- (d) clause 15, which provides that an applications for court authority to carry out surveillance is to be heard in closed court, should be amended (see heading 4.4 below) so that:
 - (i) the media can attend applications for a covert surveillance authority unless exceptional circumstances exist which justify exclusion of the media;

- (ii) the prohibition on publication of an application for a covert surveillance authority is restricted to the minimum necessary to avoid defeating the legitimate purpose of any permitted covert surveillance. For example, by prohibiting publication of the identity of the employer or employee concerned until the covert surveillance has ceased.

3. Public policy and constitutional considerations

As discussed above, it has long been recognised that the media has a special role in keeping the public informed and thereby preventing corruption and public mistrust of government and other organisations. This role was noted in the following quote in the context of media court reporting by the Full Federal Court in *R v Davis* (1995) 57 FCR 512 said at 513-514:

Whatever (the media's) motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to the public scrutiny is the surest safeguard against any risk of the court's abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend to the courts in person, in a practical sense this principle demands that the media be free to report what goes on in them...

Government organisations and employers (and large employers in particular) wield power quite similar to that of the Courts. It is appropriate that the same principle of minimising reporting restrictions be applied in relation to them. This has been recognised in legislation including the disclosure requirements in the *Corporations Act 2001* (Cth) and the Freedom of Information Acts.

The fundamental importance of freedom of communication in relation to government and political matters (about which information can flow from the public or the private sector) has been recognised in the form of constitutional protection of freedom of speech. A law will be constitutionally invalid if it effectively burdens freedom of communication about government or political matters either in its terms, operation or effect unless it is reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutional prescribed system of representative and responsible government: *Lange v ABC* (1997) 145 ALR 96.

For example, evidence of the activities of government employees which fall within the broad "surveillance" definition (such as emails) may reveal illegal activities, understaffing or other issues of public interest and importance happening within government departments or government agencies. As presently drafted, the Draft Bill would prevent media organisations from informing the public of these matters (see the discussion of clause 28 under heading 4.3 below). It would result in important information about the functioning of government and the performance of the elected officials responsible for these departments and agencies being kept from the public.

It has been suggested by the Chief Justice of New South Wales that open justice principles are also likely to be constitutionally protected: see *Seen to be Done: The Principle of Open Justice*, the Hon Spigelman JJ (2000) 74 ALJR 290 at 293. If this is the case, then clause 15 of

the Draft Bill, discussed under heading 4.4 below, is also likely to be constitutionally invalid.

4. Specific concerns in relation to the Draft Bill

4.1 Primary prohibition too wide

Clause 8 of the Draft Bill (the "**Primary Prohibition**") prohibits covert surveillance of an employee by an employer at work unless the surveillance has been authorised by a covert surveillance authority and carried out for the sole purpose of establishing whether or not the employee is involved in any unlawful activity at work.

The Primary Prohibition is much wider than it at first appears and will prevent employers from accessing important business and political information. It is also much wider than the prohibition in the Workplace Video Surveillance Act 1998 (NSW).

The Primary Prohibition will also therefore have a serious adverse impact on the media's ability to obtain information from employers and to thereby keep the public informed about issues of public importance, many or most of which involve an employer of some description.

The reason the Primary Prohibition is broader than it appears is that the definition of "surveillance" and thus of "covert surveillance" is extremely wide. Covert surveillance is defined in clause 5 as being "any surveillance of an employee that is not notified surveillance". "Surveillance" includes (clause 3):

- (a) "camera surveillance" of an employee, which is the "monitoring or recording, by electronic means, of visual images of the employee (such as by means of a close-circuit television system)";
- (b) "computer surveillance" of an employee, which is "the monitoring or recording by means of software or other equipment of the information input or output, or other use, of a computer used by the employee (including but not limited to, the sending and receipt of emails and the accessing of internet websites)", and
- (c) "tracking surveillance" of an employee, which is the "monitoring or recording of the geographical location or movement of the employee by means of an electronic device..".

This definition alone sets the Draft Bill apart from the existing Workplace Video Surveillance Act 1998, which only regulates video surveillance.

The inclusion of the broad definitions of "camera surveillance" and "computer surveillance" above in the Draft Bill make it extend to much material which is not generally considered to be "surveillance" material, is not private information of the employee, and which should not, as a matter of commonsense, be governed by surveillance legislation.

For example, the definition of "computer surveillance" is likely to include work products of employees, such as reports. And "recording by means of ...other equipment of the information input or output" is so broad that it would arguably include making a print out (which records by means of a printer the information input of an employee) and would also include making a photocopy of a document created by an employee on a computer (as the print out of the document is part of the information output of a computer used by an employee). Thus, if an employer has not met the notified surveillance requirements for computer surveillance it will be unable to print, copy or otherwise access work related word documents and other material (such as powerpoint presentations) created by employees without committing an offence under clause 8 of the Draft Bill. This is so even if the employer owns copyright in the documents, the documents relate to the employers' business and relate to a matter of great public importance. If the employer accessed such information (not realising, perhaps, that it was an offence to do so), then it would be prohibited by clause 28, discussed below, from using or disclosing it.

This has serious implications for responsible journalism. Responsible journalists routinely put allegations to organisations to which they relate so that the organisations can respond. The Draft Bill would prevent those employers who lack the sophistication to comply with the complex notice requirements in the Draft Bill from accessing and providing to the media basic materials which would normally be used to give a response. These include computer records such as Word files held on employee computers. Without the benefit of material input from an employer, journalists may be unable to provide comprehensive, factually accurate and balanced reports.

For example, consider the position under the Draft Bill if an ex-employee of a statutory authority went to the media alleging that the statutory authority had fraudulently misused public monies and that there was evidence of that fact in a spreadsheet on the ex-employee's work computer.

If the statutory authority had failed to comply with one of the notice requirements, the statutory authority would be unable to access the ex-employee's computer to find out whether this was the case without first taking the time consuming step of obtaining a covert surveillance authority. Even if the authority was obtained, clause 28 (discussed under heading 4.3 below) would prevent the statutory authority from releasing to the media evidence which refuted the ex-employees claims. In fact, because clause 28 extends to "information" obtained as an "indirect" result of covert surveillance, it would even be likely to prevent the statutory authority from denying Alex's allegations.

The above example shows why the Draft Bill would be likely to be constitutionally invalid: it would place an excessive burden on communication about government and political matters. That burden is excessive in that it goes much further than is necessary to protect legitimate privacy concerns of employees.

The definition of camera surveillance is also too broad. The definition is "the monitoring or recording, by electronic means, of visual images of the employee". This definition would therefore include camera images or video recorder images. Under clause 8 this would

mean that the employer would not be able to take company or social photographs or record videoconferences unless it met the (unwieldy) notice requirements of the Draft Bill.

There is no requirement that the activity recorded be private in any way. This means that, for example, an employer could not take photographs of or videotape one of its employees giving a speech or of employees attending a work function unless it obtained the prior agreement of each or gave notice to each in accordance with the Draft Bill.

If the media later took interest in a conference or event recorded in contravention of the Draft Bill (for example, by asserting attendance was low at a political event, when in fact it was high), the employer could not release the video to the media (for example, to refute the claims) without committing a further offence (see discussion of clause 28 under heading 4.3 below).

The Primary Prohibition should be narrowed by:

- (a) restricting the definition of surveillance to continuous surveillance (eg. by video or by continuous monitoring of a computer) of an employee engaged in private activities at work (eg. sending personal emails out of hours);
- (b) adding a public interest exception to the prohibition; and
- (c) changing the notice requirements as discussed under heading 4.2 below.

4.2 Notification requirements are impractical

The Bill does not prohibit "surveillance" (as broadly defined) where specific notification requirements are met. However, the notification requirements proposed in the Draft Bill are too onerous and are not practical to comply with. Adverse consequences of this include that any employer who has not complied with notice requirements under the Draft Bill will effectively be subject to a 14 day veto before it can access information and release it to the media, even if that information is of great public importance, unless the employee in question agrees it may be used.

For example, in relation to computer surveillance, 14 days written notice *and* a notice on or near the computer (or by way of a log on notice or announcement) is required. By requiring compliance with these onerous requirements to permit access to basic business material held on an employer's computer, the Draft Bill compromises business practices and efficacy to an unacceptable extent.

In relation to camera surveillance, three requirements must be met before the requirement for "notice" is satisfied:

- (a) 14 days written notice of the intended surveillance; *and*
- (b) cameras or equipment are clearly visible in the place where the surveillance is taking place; *and*

- (c) signs notify people that they may be under surveillance in the place where the surveillance is taking place *and* at each entrance to that place.

It is not at all clear why multiple notices are required. Nor is it clear why there should be any notice period at all.

The effect of these unwieldy notice requirements is that employers who do not ensure they comply with all of the requirements of the notice provisions will be prevented from releasing information to the media in a timely manner. For example, if the 14 days written notice has not been given and the employer wishes to release information which falls within the broad "surveillance" definition (eg. a Word document) to the media, then the employer must give the written notice, then wait 14 days to access the material.

Once a matter is raised in the public domain, a period of 14 days is an untenably long time. For example, if a document answered allegations against a Government entity or corporation, then voters or shareholders would have to wait 14 days to have those allegations satisfactorily addressed. Much (eg. loss of an election or a share price plummet) could happen in the meantime. If the employee is on leave or otherwise unavailable to be notified, then it may be necessary to wait an even longer period.

It is no answer to say that access will be permitted if the employee agrees (see clause 5(3)) as there may frequently be circumstances where the employee is unavailable (eg. on leave) or unreasonably withholds consent (eg. if the employee has been given notice of his or her termination).

The Draft Bill also fails to clearly state what happens in relation to the records of former employees. If they are "employees" for the purpose of the Draft Bill, then it may not be possible to access computer records created by them during their employment. It is likely to be difficult or impossible to meet notice requirements in relation to former employees. It may also be difficult or impossible to obtain agreement from former employees. The Draft Bill should be clarified to make it clear that it does not affect access to computer records of former employees.

Free TV submits that the notice requirements should be amended so that:

- (d) it is sufficient if an employee has been made aware of the relevant activity of the employer; and
- (e) There is an exception to the definition of surveillance where the employee has left the organisation, is sick, dead, on leave or is otherwise unavailable. Alternatively, the Draft Bill should be amended so that there are clear and practical steps which may be taken instead of giving notice to or obtaining agreement from the employee in such circumstances.

4.3 Prohibition on publication in clause 28 too wide

The prohibition in Clause 28 of the Draft Bill will place journalists at risk of committing a serious offence in many circumstances in which there is a public interest in them being able to publish without fear. This is likely to unduly chill media reporting and may also render the Draft Bill constitutionally invalid.

Clause 28 of the Draft Bill makes it an offence to use or disclose 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 at work".

This prohibition is not limited to covert surveillance undertaken by the employer. Free TV assumes this is an error, as the apparent intention of the Draft Bill is to regulate surveillance by employers and not any third party surveillance. As a result of the broad definition of "surveillance", this prohibition would make it an offence, for example, for an employee who took a photograph of another employee at work (for example at a birthday morning tea) to disclose that photograph to another person (for example, a mutual friend or to the media). This result is absurd.

Even if clause 28 is limited to employer covert surveillance, the prohibition will seriously affect the ability of the media to provide important information to the public. As currently drafted, a media organisation and journalist would risk committing an offence if they published documents or emails which they had reasonable grounds to suspect had been recorded by an employer without complying with the notification requirements under the Draft Bill. This could catch a wide variety of situations in which there was a clear public interest in the material being published (eg. a corporation releasing information to the effect that a senior executive was corrupt which it obtained by checking his or her computer records without first giving 14 days written notice). Further, even if the employer in this situation had a covert surveillance authority issued, under the Draft Bill, journalists would not have access to or an ability to use surveillance records to report on this activity.

The wide definition of 'surveillance', in combination with the publication prohibition in clause 28, creates an absurd level of restriction that goes well beyond what is necessary to achieve any reasonable privacy objective. If, for example, an employee went missing and the employer wanted to provide a photograph of the employee taken at a work social function to the media so that efforts could be made to find him or her, the employer would be unable to provide a photograph to the media without breaching clause 28 unless the employee had agreed to the photograph being taken by the employer when it was taken or the notice requirements in the Draft Bill had been met. To comply with those requirements, the employer would have to have given the employee 14 days written notice that the photograph would be taken and would have to ensure that signs notifying people they may be under surveillance were at the place where the photograph was taken and at each entrance to that place.

If the employer provided the photograph to a journalist and the journalist reasonably suspected the photograph was obtained in breach of the Draft Bill, then the journalist could not publish the photograph without committing an offence. This would make no sense as it is clearly in the interests of the employee and of the public that the photograph be published.

(a) **Clause 28 should be removed**

Free TV submits that clause 28 should be removed on the basis that existing regulation is sufficient. Privacy concerns are adequately addressed in relation to the media by existing media regulation. The *Privacy Act 1988 (Cth)* (the "**Privacy Act**") and State and Territory Privacy Acts provide sufficient privacy protection in relation to non-media organisations.

The adequacy of existing media privacy regulation has been recognised in the Privacy Act, which contains a journalism exception.

The main privacy rules which apply to commercial broadcasters are in the Commercial Television Industry Code of Practice. These requirements are tailored to take into account applicable public policy considerations. Clause 4.3.5 provides that:

"In broadcasting news and current affairs programs, licensees ... must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast".

This constitutes an effective and appropriate restraint on publication of workplace related private information by commercial broadcasters in the absence of an overriding public interest.

(b) **If not removed, clause 28 should be substantially redrafted**

For the reasons above, Free TV strongly advocates the removal of clause 28. If this submission is rejected, then clause 28 should at least be redrafted by lifting the knowledge threshold, restricting it to employer surveillance and including a public interest exception.

"Reasonable cause to suspect" is a low threshold. Does a journalist have such grounds if, for example, he or she receives footage of a politician or policeman receiving corrupt payments from a business person? (on the grounds that neither would presumably consent to the footage). What if he or she receives a word document from an employer which the journalist knows is generally poor at meeting privacy and other requirements?

This low threshold, coupled with uncertainty as to how it will apply, may have the effect of seriously undermining journalists' ability to keep the public informed. The Draft Bill does not even permit a person to disclose the information in question to a lawyer for the purpose of obtaining advice.

If clause 28 is not removed altogether, the words "or having reasonable cause to suspect" should be omitted from the clause. Clause 28 should also be restricted to surveillance by an employer.

In addition, the Draft Bill should be amended to include an exception to the clause 28 prohibition where the use or disclosure is in the public interest. Under the Draft Bill if an employer discovered by computer surveillance of an employees computer which had not been conducted in accordance with the Draft Bill (for example, there was no notice on the computer or at the start up stage) that that a product had been mistakenly distributed to the market with a problem requiring recall. As this information would form part of a surveillance record, the employer would be unable to use or disclose this information to the media so as to conduct a product recall and the media would be unable to use the information as it was obtained using covert surveillance. From this perspective a public interest exception is required in the Draft Bill.

4.4 Closed court proceedings

Clause 15 of the Draft Bill is completely inconsistent with open justice principles and must be amended. The clause provides that an application for a covert surveillance authority is to be held in a closed court. This means that the media will not have access to proceedings. Denial of access to the media is contrary to open justice principles discussed under heading 3 above.

Whilst there are obvious reasons not to allow publication of identifying details of persons in respect of whom authorities are given while surveillance is pending or under way:

- (a) the media should have access to the court under open justice principles unless there are exceptional circumstances justifying exclusion;
- (b) concerns about alerting subjects of surveillance should be addressed by means of restrictions on publication of reports which identify subjects and by way of restrictions on public access to proceedings (see, eg. similar provisions in relation to NSW children courts); and
- (c) there should be a mechanism which allows the media to publish the details of proceedings after surveillance has ceased in appropriate circumstances.

This approach would be consistent with existing statutory restrictions on publication. For example, the *Children (Criminal Proceedings) Act 1987* (NSW) recognises that the interests of the child need to be protected but the media should still have an ability to inform the public about decisions made in such proceedings. This is achieved by:

- (i) Excluding members of the public from proceedings to which a child is a party, but *permitting any person preparing a report for a public news medium to attend* unless the court otherwise directs;

- (ii) Prohibiting the identification of children involved in proceedings, but *permitting the publication of other details of the proceedings.*

The approach taken in the *Children (Criminal Proceedings) Act 1987* (NSW) provides an effective balance which protects the interests of the child and protects against judicial corruption, thus preserving the public's confidence in the system. The same approach should be taken in the Draft Bill.

Use of a blanket prohibition (closed court) instead of these more appropriate and less extreme measures calls the constitutional validity of clause 15 into question. If, as is likely to be the case, open justice principles are constitutionally protected, then they would be likely to render invalid any law which restricts media reporting of court proceedings unless it is reasonably appropriate and adapted to meet a competing and legitimate end. Clause 15 is excessive in that it imposes a blanket prohibition where a limited restriction would suffice and would therefore be invalid under such a test.

5. **Case Study: The effect of the Draft Bill on case law**

The High Court decision of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (**Lenah Game Meats**) provides an illustration of the impact that the Draft Bill will have on the balance privacy rights of individuals with freedom of speech principles.

In *Lenah Game Meats* unauthorised video surveillance was taken in a possum abattoir. The surveillance was graphic and was provided to the ABC anonymously. *Lenah Game Meats* applied for an injunction to prevent the ABC broadcasting the footage. If the Draft Bill was enacted, the ABC would have to consider whether there were *reasonable grounds to suspect* (under clause 28 of the Draft Bill) that the footage was made as a result of covert surveillance. While it is unlikely that the employer conducted the surveillance, it could still be covert surveillance for the purposes of clause 28. Clause 28 does not require that the covert surveillance be conducted by an employer, as the definition of surveillance does not require that the surveillance be conducted by an employer. As such if the employees were unaware of the surveillance then it will be covert surveillance for the purposes of the Draft Bill.

The test of *reasonable grounds to suspect* is very low. Arguably, it would be met if, for example, people in video footage of a workplace were not looking to camera at all. Thus, as presently drafted, clause 28 of the Draft Bill would prevent the media from using this film even if it was in the public interest that the film be shown. In *Lenah Game Meats* the videotape in question was anonymously provided to the ABC and *Lenah Game Meats* failed to restrain the broadcast of that tape. If clause 28 of the Draft Bill is enacted, the opposite result may follow.

The facts in *Lenah Game Meats* are relevant as if a similar case occurred, the proposed Bill would result in a differing decision. It is noted that it is often the case that a person (such as a disaffected employee) will anonymously provide a covertly filmed videotape of an inappropriate or illegal activity to the media.

This example also highlights the issue as to the constitutional validity of the Draft Bill if enacted. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (**Lenah Game Meats**), it was noted that "the concerns of government and political character must not be narrowly defined". Consequently, though it was not necessary to decide the case on this ground, at least one member of the Court considered that a communication about animal welfare issues may constitute a political communication.

Yours Sincerely

Julie Flynn
Chief Executive Officer