

2010

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Ms Amanda Bresnan)

Workplace Privacy Bill 2010

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THE LEGISLATIVE ASSEMBLY
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(As presented)

(Ms Amanda Bresnan)

Workplace Privacy Bill 2010

A Bill for

An Act to regulate surveillance of workers in workplaces, and for other purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 **Part 1 Preliminary**

2 **1 Name of Act**

3 This Act is the *Workplace Privacy Act 2010*.

4 **2 Commencement**

5 (1) This Act (other than the following provisions) commences on the
6 14th day after its notification day:

7 (a) part 3 (Notified surveillance);

8 (b) part 4 (Covert surveillance).

9 *Note* The naming and commencement provisions automatically commence on
10 the notification day (see Legislation Act, s 75 (1)).

11 (2) Part 3 and part 4 commence 6 months after this Act's notification
12 day.

13 **3 Dictionary**

14 The dictionary at the end of this Act is part of this Act.

15 *Note 1* The dictionary at the end of this Act defines certain terms used in this
16 Act, and includes references (*signpost definitions*) to other terms
17 defined elsewhere.

18 For example, the signpost definition '*adverse action*—see the *Fair*
19 *Work Act 2009* (Cwlth), section 342.' means that the term 'adverse
20 action' is defined in that section and the definition applies to this Act.

21 *Note 2* A definition in the dictionary (including a signpost definition) applies to
22 the entire Act unless the definition, or another provision of the Act,
23 provides otherwise or the contrary intention otherwise appears (see
24 Legislation Act, s 155 and s 156 (1)).

1 **4** **Notes**

2 A note included in this Act is explanatory and is not part of this Act.

3 *Note* See the Legislation Act, s 127 (1), (4) and (5) for the legal status of
4 notes.

5 **5** **Offences against Act—application of Criminal Code etc**

6 Other legislation applies in relation to offences against this Act.

7 *Note 1* *Criminal Code*

8 The Criminal Code, ch 2 applies to all offences against this Act (see
9 Code, pt 2.1).

10 The chapter sets out the general principles of criminal responsibility
11 (including burdens of proof and general defences), and defines terms
12 used for offences to which the Code applies (eg *conduct*, *intention*,
13 *recklessness* and *strict liability*).

14 *Note 2* *Penalty units*

15 The Legislation Act, s 133 deals with the meaning of offence penalties
16 that are expressed in penalty units.

1 **Part 2 Object and important concepts**

2 **6 Object of Act**

3 The main object of this Act is to regulate the collection and use of
4 workplace surveillance information.

5 **7 Meaning of *worker***

6 In this Act:

7 *worker* means an individual who carries out work in relation to a
8 business or undertaking, whether for reward or otherwise, under an
9 arrangement with the person conducting the business or
10 undertaking.

11 **Examples—worker**

- 12 1 employee
13 2 independent contractor
14 3 outworker
15 4 person doing a work experience placement
16 5 volunteer

17 *Note* An example is part of the Act, is not exhaustive and may extend, but
18 does not limit, the meaning of the provision in which it appears (see
19 Legislation Act, s 126 and s 132).

20 **8 Meaning of *employer***

21 (1) In this Act:

22 *employer*, of a worker—

23 (a) includes—

24 (i) a person who engages the worker to carry out work in the
25 person's business or undertaking; and

1 (ii) if the person who engages the worker is a corporation—a
2 related body corporate of the corporation; but

3 (b) does not include a person (the *householder*) who engages
4 someone else to perform domestic duties at the premises where
5 the householder lives.

6 **Examples—employer**

7 1 principal contractor is an employer of a subcontractor

8 2 host organisation is an employer of a labour hire worker

9 *Note* An example is part of the Act, is not exhaustive and may extend, but
10 does not limit, the meaning of the provision in which it appears (see
11 Legislation Act, s 126 and s 132).

12 (2) In this section:

13 *related body corporate*—see the Corporations Act, section 9.

14 **9 Meaning of *business or undertaking***

15 In this Act:

16 *business or undertaking* includes—

17 (a) a not-for-profit business; and

18 (b) an activity conducted by a local, state or territory government.

19 **10 Meaning of *workplace***

20 In this Act:

21 *workplace* means a place where work is, has been, or is to be,
22 carried out by or for someone conducting a business or undertaking.

1 **11 Meaning of *surveillance* etc**

2 (1) In this Act:

3 *conduct* surveillance—a person is taken to *conduct* surveillance if
4 the person causes someone else to conduct the surveillance.

5 *data surveillance device*—

6 (a) means a device or program capable of being used to record or
7 monitor the input of information into or the output of
8 information from a computer; but

9 (b) does not include an optical surveillance device.

10 *optical surveillance device*—

11 (a) means a device capable of being used to record visually or
12 observe an activity; but

13 (b) does not include spectacles, contact lenses or a similar device
14 used by a person with impaired sight to overcome that
15 impairment.

16 *surveillance* means surveillance using a surveillance device.

17 *surveillance device* means—

18 (a) a data surveillance device, an optical surveillance device or a
19 tracking device; or

20 (b) a device that is a combination of any 2 or more of the devices
21 mentioned in paragraph (a); or

22 (c) a device of a kind prescribed by regulation.

1 ***tracking device*** means an electronic device capable of being used to
2 work out or monitor the location of a person or an object or the
3 status of an object.

4 **Examples—tracking device**
5 GPS, biometrics, radio frequency identification

6 *Note* An example is part of the Act, is not exhaustive and may extend, but
7 does not limit, the meaning of the provision in which it appears (see
8 Legislation Act, s 126 and s 132).

9 (2) In this section:

10 ***device*** includes an instrument, apparatus or equipment.

- 1 (3) The notice must be given—
- 2 (a) at least 14 days before the surveillance starts; or
- 3 (b) if the worker agrees to a period of less than 14 days for giving
- 4 the notice—within the agreed lesser period; or
- 5 (c) if a new worker starts work with an employer that already
- 6 conducts surveillance or will start conducting surveillance in
- 7 less than 14 days after the new worker starts work—before the
- 8 new worker starts work.
- 9 (4) The notice must state—
- 10 (a) the kind of surveillance device to be used for the surveillance;
- 11 and
- 12 (b) how the surveillance will be conducted; and
- 13 (c) who will regularly or ordinarily be the subject of the
- 14 surveillance; and
- 15 (d) when the surveillance will start; and
- 16 (e) whether the surveillance will be continuous or intermittent; and
- 17 (f) whether the surveillance will be for a stated period or ongoing;
- 18 and
- 19 (g) the purpose for which the employer may use and disclose
- 20 surveillance records of the surveillance; and
- 21 (h) that the worker may consult with the employer about the
- 22 conduct of the surveillance under section 14.
- 23 (5) A notice may be in the form of a policy of the employer or
- 24 otherwise.

- 1 **14 Requirement for consultation on proposed surveillance**
- 2 (1) This section applies if an employer must give a worker notice under
- 3 section 13.
- 4 (2) The employer must consult with the worker in good faith about the
- 5 conduct of the surveillance for not less than the notice period
- 6 mentioned in section 13 (3).
- 7 (3) For this section, an employer consults with the worker *in good faith*
- 8 if the employer gives the worker a genuine opportunity to influence
- 9 the conduct of the surveillance.
- 10 **15 Additional requirements for optical surveillance devices**
- 11 (1) An employer may only conduct surveillance of a worker using an
- 12 optical surveillance device if—
- 13 (a) the optical surveillance device used for the surveillance is
- 14 clearly visible in the workplace where the surveillance is
- 15 conducted; and
- 16 (b) a sign is clearly visible at each entrance to the workplace,
- 17 telling people that they may be under surveillance in the
- 18 workplace.
- 19 (2) In this section:
- 20 *optical surveillance device* includes a camera casing or other
- 21 equipment that generally indicates the presence of an optical
- 22 surveillance device.
- 23 **16 Additional requirements for data surveillance devices**
- 24 An employer may only conduct surveillance of a worker using a
- 25 data surveillance device if—
- 26 (a) the surveillance is conducted in accordance with a policy of the
- 27 employer on surveillance of workers in the workplace using
- 28 data surveillance devices; and

- 1 (b) the employer has notified the worker, before conducting the
2 surveillance, of the policy in a way that it is reasonable to
3 assume that the worker is aware of and understands the policy.

4 **17 Additional requirements for tracking devices**

5 An employer may only conduct surveillance of a worker that
6 involves the tracking of a vehicle or other thing using a tracking
7 device if there is a notice clearly visible on the vehicle or other thing
8 stating that the vehicle or thing is being tracked.

9 **18 Offences—failure to comply with notified surveillance**
10 **requirements**

- 11 (1) An employer commits an offence if the employer—
12 (a) is required to notify a worker of surveillance under section 13;
13 and
14 (b) the employer fails to comply with a requirement under
15 section 13 in relation to the surveillance.

16 Maximum penalty: 5 penalty units.

- 17 (2) An employer commits an offence if the employer—
18 (a) conducts surveillance of a worker using an optical surveillance
19 device; and
20 (b) fails to comply with a requirement under section 15 in relation
21 to the surveillance.

22 Maximum penalty: 5 penalty units.

- 23 (3) An employer commits an offence if the employer—
24 (a) conducts surveillance of a worker using a data surveillance
25 device; and

1 (b) fails to comply with a requirement under section 16 in relation
2 to the surveillance.

3 Maximum penalty: 5 penalty units.

4 (4) An employer commits an offence if the employer—

5 (a) conducts surveillance of a worker using a tracking device; and

6 (b) fails to comply with a requirement under section 17 in relation
7 to the surveillance.

8 Maximum penalty: 5 penalty units.

9 **Division 3.3 Other matters**

10 **19 Surveillance by agreement**

11 (1) Surveillance of a worker is taken to comply with the requirements of
12 this part if—

13 (a) the worker agrees to the conduct of the surveillance for a
14 purpose other than surveillance of the worker; and

15 (b) the surveillance is conducted in accordance with the
16 agreement.

17 (2) For this section, a worker is taken to agree to the conduct of
18 surveillance if a body representing a substantial number of workers
19 in the workplace agrees to the conduct of the surveillance.

20 **20 Offence—restrictions on blocking electronic
21 communication and internet access**

22 (1) An employer commits an offence if the employer stops the delivery
23 of an electronic communication sent to or by a worker, or stops a
24 worker's access to a website.

25 Maximum penalty: 5 penalty units.

26 *Note Electronic communication*—see the dictionary.

- 1 (2) Subsection (1) does not apply if—
- 2 (a) the employer is acting in accordance with a policy of the
- 3 employer on electronic communication and internet access;
- 4 and
- 5 (b) the employer—
- 6 (i) notified the worker, before stopping delivery of the
- 7 electronic communication or access to the website, of the
- 8 policy in a way that it is reasonable to assume that the
- 9 worker is aware of and understands the policy; or
- 10 (ii) was not required to notify the worker under section 21 (2)
- 11 or (3).

12 *Note* The employer has an evidential burden in relation to the matters

13 mentioned in s (2) (see Criminal Code, s 58).

14 **21 Notice of blocking electronic communication and internet**

15 **access**

- 16 (1) If an employer stops delivery of an electronic communication under
- 17 section 20 (2), the employer must give the worker a notice (a
- 18 *stopped delivery notice*) that delivery of the electronic
- 19 communication has been stopped as soon as practicable after it is
- 20 stopped.

21 *Note* *Electronic communication*—see the dictionary.

- 22 (2) However, an employer is not required to give a worker a stopped
- 23 delivery notice if delivery of the electronic communication is
- 24 stopped—
- 25 (a) because the employer believes the electronic communication
- 26 is—
- 27 (i) a communication that is a commercial electronic message
- 28 within the meaning of the *Spam Act 2003* (Cwlth); or

- 1 (ii) a communication or attachment that might result in an
2 unauthorised interference with, or damage to, the
3 operation of—
- 4 (A) a computer or computer network operated by the
5 employer; or
- 6 (B) a program run by a computer or computer network
7 of the employer; or
- 8 (C) data stored on a computer or computer network of
9 the employer; or
- 10 (iii) a communication or attachment that might reasonably be
11 considered to be threatening, harassing or offensive; or
- 12 (b) by the operation of a software program designed to stop a
13 communication of a type mentioned in paragraph (a).
- 14 (3) Also, an employer is not required to give a worker a stopped
15 delivery notice for an electronic communication sent by the worker
16 if the employer was not, and could not reasonably be expected to be,
17 aware—
- 18 (a) of the identity of the worker who sent the communication; or
- 19 (b) that the communication was sent by a worker.
- 20 (4) An employer’s policy on electronic communication and internet
21 access must not provide for delivery of an electronic communication
22 or access to a website to be stopped only because—
- 23 (a) the communication was sent by or on behalf of an industrial
24 association of a worker or an officer of an industrial
25 association; or
- 26 (b) the communication or a website contains information relating
27 to industrial matters.

1 (5) In this section:
2 *industrial association*—see the *Fair Work Act 2009* (Cwlth),
3 section 12.

4 *industrial matters* means matters or things affecting or relating to
5 work done or to be done in an industry, or the rights or obligations
6 of employers or workers in an industry.

7 **22 Offences—use and disclosure of surveillance records**

- 8 (1) An employer commits an offence if the employer—
9 (a) conducts surveillance of a worker; and
10 (b) uses a surveillance record in relation to the surveillance to take
11 adverse action against the worker.

12 Maximum penalty: 20 penalty units.

13 *Note Adverse action*—see the *Fair Work Act 2009*, s 342.

14 (2) Subsection (1) does not apply if the notice given to the worker under
15 section 13 stated that the employer may use the surveillance to take
16 adverse action against the worker.

17 (3) An employer who conducts surveillance of a worker in a workplace
18 must ensure that a surveillance record in relation to the surveillance
19 is otherwise only used or disclosed if—

20 (a) the record is used or disclosed for a legitimate purpose in
21 relation to the employment of a worker or the legitimate
22 business activities or functions of the employer; or

23 (b) the record is disclosed to a member of a law enforcement
24 agency for use in connection with the detection, investigation
25 or prosecution of an offence; or

26 (c) the record is used or disclosed for a purpose directly or
27 indirectly related to a civil or criminal proceeding; or

- 1 (d) the employer reasonably believes that the use or disclosure of
2 the record is necessary to avoid an imminent risk of death of,
3 or serious injury to, someone or substantial damage to
4 property; or
- 5 (e) the record is disclosed under section 23.
- 6 Maximum penalty: 20 penalty units.

7 **23 Access to surveillance records of notified surveillance**

- 8 (1) An employer must, on the written request of a worker, allow the
9 worker to have access to surveillance records in relation to the
10 worker.
- 11 (2) However, the employer must not allow access if disclosing the
12 surveillance records would be an offence under section 22 or
13 otherwise unlawful.
- 14 (3) Also, the employer need not allow access to surveillance records to
15 the extent that—
- 16 (a) the employer is satisfied on reasonable grounds that—
- 17 (i) allowing access would have an unreasonable impact on
18 the privacy of other individuals; or
- 19 (ii) the request for access is frivolous or vexatious; or
- 20 (iii) the information relates to existing or anticipated legal
21 proceedings between the employer and the worker and the
22 information would be accessible by the process of
23 discovery in those proceedings; or
- 24 (iv) allowing access would reveal the intentions of the
25 employer in relation to negotiations with the individual in
26 a way that would be likely to prejudice the negotiations;
27 or
- 28 (v) not allowing access is required or authorised under a
29 territory law or the law of another jurisdiction; or

- 1 (vi) allowing access would be likely to prejudice an
2 investigation of possible unlawful activity; or
- 3 (vii) allowing access would be likely to prejudice—
- 4 (A) the prevention, detection, investigation, prosecution
5 or punishment of a criminal offence or breach of a
6 law imposing a penalty or sanction; or
- 7 (B) the enforcement of a law relating to the confiscation
8 of the proceeds of crime; or
- 9 (C) the prevention, detection, investigation or remedying
10 of serious improper conduct; or
- 11 (D) the preparation for, or conduct of, proceedings
12 before any court or tribunal, or implementation of its
13 orders, by or on behalf of a law enforcement agency;
14 or
- 15 (b) a law enforcement body performing a lawful security function
16 asks the employer not to allow access to the information on the
17 basis that allowing access would be likely to cause damage to
18 the security of Australia.

1 **Part 4 Covert surveillance**

2 **Division 4.1 General**

3 **24 Meaning of *covert surveillance*—Act**

4 In this Act:

5 *covert surveillance*—

6 (a) means surveillance of a worker in a workplace conducted by an
7 employer without notifying the worker under part 3 (Notified
8 surveillance); but

9 (b) does not include prohibited surveillance.

10 **25 Definitions—pt 4**

11 In this part:

12 *covert surveillance authority*—see section 26.

13 *covert surveillance record* means a surveillance record in relation to
14 covert surveillance.

15 *surveillance supervisor*, for a covert surveillance authority, means a
16 person named in a covert surveillance authority as responsible for
17 overseeing the conduct of the authorised covert surveillance.

18 *unlawful activity* means an act or omission that is an offence against
19 a territory law or the law of another jurisdiction.

1 **Division 4.2** **Covert surveillance authorities**

2 **26** **Application for covert surveillance authority**

- 3 (1) An employer may apply to the Magistrates Court for authority (a
4 ***covert surveillance authority***) to conduct covert surveillance of a
5 worker in a workplace only for the purpose of finding out if the
6 worker is engaged in an unlawful activity in the workplace.

7 *Note 1* If a form is approved under the *Court Procedures Act 2004*, s 8 for the
8 application, the form must be used.

9 *Note 2* A fee may be determined under the *Court Procedures Act 2004*, s 13 for
10 this provision.

- 11 (2) The application must be in writing and be accompanied by
12 particulars of—

13 (a) the grounds that the employer has for suspecting a worker is
14 involved in an unlawful activity and the name of the worker (if
15 practicable); and

16 (b) the actions (if any) the employer has taken to detect the
17 unlawful activity and the result of the actions; and

18 (c) the name of any worker (if practicable) or a description of the
19 group or class of workers, who will regularly or ordinarily be
20 the subject of the covert surveillance; and

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

24 (e) the kind of surveillance device that is proposed to be used for
25 the covert surveillance; and

26 (f) the period during which the covert surveillance is proposed to
27 be conducted; and

- 1 (g) if an application for a covert surveillance authority for the
2 proposed surveillance has previously been made—the result of
3 the application and, if the authority was issued, any covert
4 surveillance conducted under the authority; and
- 5 (h) anything else prescribed by regulation.
- 6 (3) An application must also nominate at least 1 person to be a
7 surveillance supervisor for the covert surveillance authority.
- 8 (4) If an application for a covert surveillance authority is refused by the
9 Magistrates Court, a further application in relation to the same
10 surveillance may only be made if the further application provides
11 additional relevant information.

12 **27 Hearing in private**

13 A hearing of an application for a covert surveillance authority must
14 be held in private.

15 **28 Issuing covert surveillance authority**

- 16 (1) The Magistrates Court may, on application, issue a covert
17 surveillance authority if satisfied that there are reasonable grounds
18 to issue the authority.
- 19 *Note* If a form is approved under the *Court Procedures Act 2004*, s 8 for the
20 order, the form must be used.
- 21 (2) In considering whether there are reasonable grounds to issue the
22 covert surveillance authority, the Magistrates Court must consider—
- 23 (a) the seriousness of the suspected unlawful activity; and
- 24 (b) whether and the extent to which the proposed surveillance
25 might intrude on the worker's or someone else's privacy; and

- 1 (c) if the proposed surveillance may be conducted in a non-work
2 area—a worker’s heightened expectation of privacy in the area;
3 and

4 *Note 1* Surveillance is prohibited in some non-work areas (see s 41).

5 *Note 2* **Non-work area**—see the dictionary.

- 6 (d) whether there are other appropriate ways to find out if the
7 worker is engaged in an unlawful activity in the workplace;
8 and

- 9 (e) whether it is more appropriate for the suspected unlawful
10 activity to be investigated by a law enforcement agency; and

- 11 (f) whether the person nominated to be the surveillance supervisor
12 in the application is suitable.

13 *Note* Section 29 deals with appointing a surveillance supervisor.

- 14 (3) The Magistrates Court may consider any other relevant matter.

- 15 (4) The covert surveillance authority must state—

- 16 (a) the nature of the suspected unlawful activity and the name of
17 the worker (if practicable) in relation to which the authority is
18 issued; and

- 19 (b) the name of any worker (if practicable) or a description of the
20 group or class of workers who may be the subject of the covert
21 surveillance; and

- 22 (c) the premises, place, computer, vehicle or other thing that may
23 be the subject of the covert surveillance; and

- 24 (d) the kind of surveillance device that may be used for the covert
25 surveillance and where the device may be used or installed;
26 and

- 27 (e) when the covert surveillance may be conducted; and

- 28 (f) the name of each person designated as a surveillance
29 supervisor; and

- 1 (g) the period that the authority remains in force; and
2 (h) the conditions on the covert surveillance authority; and
3 *Note* For the conditions on a covert surveillance authority, see s 31.
4 (i) the requirements for—
5 (i) reporting on the use of the covert surveillance authority
6 under section 37; and
7 (ii) use and disclosure of covert surveillance records under
8 section 39.

9 **29 Appointing surveillance supervisor**

- 10 (1) The Magistrates Court must appoint at least 1 person to be the
11 surveillance supervisor in relation to a covert surveillance authority.
12 (2) The Magistrates Court may appoint a person to be the surveillance
13 supervisor only if satisfied that the person—
14 (a) has the experience or expertise to qualify the person to be a
15 surveillance supervisor; and
16 (b) if the covert surveillance authority allows surveillance to be
17 conducted in a non-work area—is able to adequately
18 accommodate a worker’s heightened expectation of privacy in
19 the area.

20 *Note 1* Surveillance is prohibited in some non-work areas (see s 41).

21 *Note 2* **Non-work area**—see the dictionary.

22 **30 Duration of covert surveillance authority**

23 A covert surveillance authority may be issued for not longer than
24 30 days or another period prescribed by regulation.

1 **31 Conditions on covert surveillance authority**

- 2 (1) A covert surveillance authority is subject to the conditions
3 mentioned in this section.
- 4 (2) A surveillance supervisor must not give another person access to a
5 covert surveillance record.
- 6 (3) However, a surveillance supervisor may give an employer a part of
7 a covert surveillance record—
- 8 (a) for a purpose for which the covert surveillance authority was
9 issued; or
- 10 (b) to identify or detect any other unlawful activity in a workplace.
- 11 (4) A surveillance supervisor must, within 3 months after the expiry of
12 a covert surveillance authority, erase or destroy all covert
13 surveillance records in relation to the authority, other than records
14 required for investigative or evidentiary purposes.
- 15 (5) An employer must, on the written request of a worker, give the
16 worker access to any part of a covert surveillance record that an
17 employer seeks to rely on to take adverse action in relation to the
18 worker.

19 *Note Adverse action*—see the *Fair Work Act 2009* (Cwlth), s 342.

20 **32 Defects in covert surveillance authority**

21 A defect in a covert surveillance authority does not invalidate the
22 authority unless the defect affects the substance of the authority in a
23 material particular.

1 **33 Varying or cancelling covert surveillance authority**

2 (1) The Magistrates Court may, at any time, vary or cancel a covert
3 surveillance authority.

4 (2) The Magistrates Court may vary or cancel a covert surveillance
5 authority on its own initiative or on application made by a worker,
6 employer or other person affected by the authority.

7 **34 Magistrates Court to record details of covert surveillance**
8 **authority orders**

9 (1) If the Magistrates Court issues, varies or cancels a covert
10 surveillance authority, the court must make and keep a written
11 record of the details of, and reasons for, issuing, varying or
12 cancelling the authority.

13 (2) The Magistrates Court must take all reasonable steps to protect the
14 confidentiality of a record under this section.

15 (3) A regulation may prescribe requirements for the following:

16 (a) the keeping of records in relation to the issue of covert
17 surveillance authorities;

18 (b) the inspection of the records;

19 (c) any other matter in relation to the records.

20 **Division 4.3 Restrictions on covert surveillance**

21 **35 Offence—conducting covert surveillance other than**
22 **under covert surveillance authority**

23 (1) An employer commits an offence if the employer conducts covert
24 surveillance of a worker in a workplace.

25 Maximum penalty: 30 penalty units.

- 1 (2) Subsection (1) does not apply if the surveillance is—
- 2 (a) conducted in accordance with a covert surveillance authority;
- 3 or
- 4 (b) conducted by a member or officer of a law enforcement agency
- 5 in the exercise of a function under a territory law or law of
- 6 another jurisdiction; or
- 7 (c) surveillance using an optical surveillance device in a
- 8 correctional centre or another place where a person is in lawful
- 9 custody; or
- 10 (d) surveillance using an optical surveillance device to monitor
- 11 operations carried out in a casino in accordance with the
- 12 *Casino Control Act 2006*; or
- 13 (e) surveillance using an optical surveillance device of a legal
- 14 proceeding or proceeding before a law enforcement agency
- 15 conducted by a person in the exercise of a function under a
- 16 territory law or law of another jurisdiction.

17 *Note* The employer has an evidential burden in relation to the matters

18 mentioned in s (2) (see Criminal Code, s 58).

19 **36 Defences—surveillance for security of workplaces**

- 20 (1) It is a defence to a prosecution for an offence against section 35 if
- 21 the defendant proves that—
- 22 (a) covert surveillance was conducted solely to ensure the security
- 23 of the workplace or people in it (the *relevant purpose*) and the
- 24 surveillance of a worker was extrinsic to the relevant purpose;
- 25 and
- 26 (b) there was a real and significant likelihood of the security of the
- 27 workplace or people in it being jeopardised if covert
- 28 surveillance was not conducted; and

1 (c) the employer notified workers (or a body representing a
2 substantial number of the workers) in the workplace in writing
3 of the intended surveillance for the relevant purpose before it
4 was conducted.

5 *Note* The defendant has a legal burden in relation to the matters mentioned in
6 s (1) (see Criminal Code, s 59).

7 (2) A covert surveillance record in relation to a worker that results from
8 the conduct of surveillance mentioned in this section is not
9 admissible in evidence in a proceeding against the worker unless—

10 (a) for a disciplinary or legal proceeding—the proceeding relates
11 to the security of the workplace or people in the workplace; or

12 (b) for a legal proceeding—the desirability of admitting the
13 evidence outweighs the undesirability of admitting evidence
14 that has been obtained in the way in which the evidence was
15 obtained.

16 **Division 4.4 Reporting on covert surveillance**
17 **authority**

18 **37 Offence—failure to give covert surveillance report**

19 (1) An employer commits an offence if—

20 (a) the Magistrates Court issues a covert surveillance authority to
21 the employer; and

22 (b) the employer fails to give the court a written report setting out
23 the covert surveillance authority information within 30 days
24 after the end of the covert surveillance authority.

25 *Note* If a form is approved under the *Court Procedures Act 2004*, s 8
26 for the report, the form must be used.

27 Maximum penalty: 20 penalty units.

- 1 (2) In this section:
- 2 *covert surveillance authority information* means the following:
- 3 (a) the name of any worker (if practicable), or a description of the
- 4 group or class of workers who were the subject of the covert
- 5 surveillance;
- 6 (b) the period during which the covert surveillance was conducted;
- 7 (c) the kind of surveillance device used and the kind of place
- 8 where the device was installed or used;
- 9 (d) whether any surveillance device has been removed and, if not,
- 10 why not;
- 11 (e) the conditions on the covert surveillance authority;
- 12 (f) details of any covert surveillance records made as a
- 13 consequence of the covert surveillance;
- 14 (g) any action taken or proposed to be taken in light of the
- 15 information obtained;
- 16 (h) any reason why a worker who was the subject of the
- 17 surveillance should not be told of the surveillance;
- 18 (i) details of any previous use of covert surveillance in relation to
- 19 the suspected unlawful activity to which the covert surveillance
- 20 authority applies;
- 21 (j) anything else prescribed by regulation.

1 **38 Orders for covert surveillance record**

- 2 (1) This section applies if an employer gives a report to the Magistrates
3 Court under section 37 in relation to a covert surveillance authority.
- 4 (2) The Magistrates Court may make any order in relation to the use
5 and disclosure of a covert surveillance record that the court
6 considers appropriate, including 1 or both of the following:
- 7 (a) an order that a covert surveillance record be delivered to the
8 court to be kept in the court's safekeeping or to be dealt with
9 by the court as it considers appropriate;
- 10 (b) an order that a stated person or entity be told of the covert
11 surveillance and given access to a covert surveillance record,
12 or part of a covert surveillance record of the surveillance.
- 13 (3) The Magistrates Court must make an order under subsection (2) (b)
14 in favour of the worker the subject of the covert surveillance unless
15 satisfied there is a good reason not to.
- 16 (4) In considering whether there is a *good reason* not to make an order
17 in favour of the worker, the Magistrates Court must consider
18 whether the surveillance was justified or an unnecessary
19 interference with privacy.

20 **Division 4.5 Covert surveillance records**

21 **39 Offence—use and disclosure of covert surveillance other**
22 **than for a relevant purpose**

- 23 (1) A person commits an offence if the person uses or discloses to
24 someone else surveillance information in a covert surveillance
25 record.
- 26 Maximum penalty: 20 penalty units.
- 27 (2) Subsection (1) does not apply if the person did not know, and had
28 no reasonable grounds to know, that the surveillance information
29 was, or was part of, a covert surveillance record.

- 1 (3) Also, subsection (1) does not apply if the person uses or discloses
2 the information for 1 or more of the following purposes:
- 3 (a) use or disclosure under the conditions of the covert
4 surveillance authority or an order of the Magistrates Court
5 under section 38;
- 6 (b) use or disclosure for a purpose that is directly or indirectly
7 related to establishing whether or not a worker is engaged in
8 unlawful activity while at work for the employer under the
9 covert surveillance authority;
- 10 (c) use or disclosure for a purpose that is directly or indirectly
11 related to a disciplinary or legal proceeding against a worker as
12 a consequence of any alleged unlawful activity while at work
13 for the employer;
- 14 (d) use or disclosure for a purpose that is directly or indirectly
15 related to establishing security arrangements or taking other
16 measures to prevent or minimise the opportunity for unlawful
17 activity while at work for the employer of a kind identified by
18 the covert surveillance record to occur while at work for the
19 employer;
- 20 (e) use or disclosure that is reasonably believed to be necessary to
21 avoid an imminent risk of death of, or serious injury to,
22 someone or substantial damage to property;
- 23 (f) disclosure to a member or officer of a law enforcement agency
24 for use in connection with the detection, investigation or
25 prosecution of an offence;
- 26 (g) use by a member or officer of a law enforcement agency for
27 use in connection with the detection, investigation or
28 prosecution of an offence;
- 29 (h) use or disclosure for a purpose that is directly or indirectly
30 related to the taking of proceedings for an offence;

- 1 (i) use or disclosure for a purpose that is directly or indirectly
2 related to taking any other action under this Act.
- 3 (4) Also, if the covert surveillance record results from covert
4 surveillance conducted other than under a covert surveillance
5 authority, subsection (1) does not apply if the person uses or
6 discloses the information for 1 or more of the following purposes:
- 7 (a) disclosure to a member or officer of a law enforcement agency
8 for use in connection with the detection, investigation or
9 prosecution of an offence;
- 10 (b) use or disclosure for a purpose that is directly or indirectly
11 related to the taking of proceedings for an offence;
- 12 (c) use by a member of a law enforcement agency for any purpose
13 in connection with the detection, investigation or prosecution
14 of an offence;
- 15 (d) if the covert surveillance was in relation to a worker of a law
16 enforcement agency—
- 17 (i) disclosure to a member or officer of a law enforcement
18 agency for use in connection with disciplinary or
19 managerial action or legal proceedings against the worker
20 as a consequence of any alleged misconduct (other than
21 an unlawful activity) or unsatisfactory performance of the
22 worker; or
- 23 (ii) use or disclosure for a purpose that is directly or
24 indirectly related to the taking of disciplinary or
25 managerial action or legal proceedings; or
- 26 (iii) disclosure to a member or officer of a law enforcement
27 agency for use in connection with the training of law
28 enforcement members or officers.
- 29 *Note* The person has an evidential burden in relation to the matters mentioned
30 in s (2), (3) and (4) (see Criminal Code, s 58).

1 **40** **Information inadvertently obtained under covert**
2 **surveillance authority**

- 3 (1) This section applies to information that inadvertently or
4 unexpectedly comes to the knowledge of a person as a direct or
5 indirect result of conducting covert surveillance under a covert
6 surveillance authority.
- 7 (2) For any determination by a court as to the admissibility of evidence
8 in a criminal proceeding before the court, the information is not
9 considered to have been obtained in contravention of section 35.
- 10 (3) Subsection (1) does not apply if the court is of the opinion that the
11 application for the covert surveillance authority was not made in
12 good faith.

1 **Part 5 Prohibited surveillance**

2 **41 Offence—surveillance of private areas etc**

3 (1) An employer commits an offence if the employer conducts
4 surveillance of a worker in a prohibited non-work area.

5 Maximum penalty: 50 penalty units.

6 (2) In this section:

7 *prohibited non-work area* means 1 of the following non-work areas
8 in a workplace:

9 (a) a toilet facility;

10 (b) a change room;

11 (c) a shower or other bathing facility;

12 (d) a parent or nursing room;

13 (e) a prayer room;

14 (f) a sick bay;

15 (g) any other area in a workplace prescribed by regulation.

16 **42 Surveillance of workers not at work**

17 (1) An employer commits an offence if the employer conducts
18 surveillance of a worker if the worker is not in a workplace.

19 Maximum penalty: 20 penalty units.

20 (2) Subsection (1) does not apply if—

21 (a) the employer conducts surveillance of a worker's use of
22 equipment or resources provided by the employer using a data
23 surveillance device; or

1 (b) the employer conducts surveillance using a tracking device that
2 includes a tracking function that cannot be deactivated; or

3 (c) the employer is a law enforcement agency.

4 *Note* The employer has an evidential burden in relation to the matters
5 mentioned in s (2) (see Criminal Code, s 58).

6 (3) For subsection (2) (a), equipment or resources are taken to be
7 provided by an employer if the employer has met the cost of the
8 equipment or resources.

9 **43 Use and disclosure of certain tracking device records**

10 A surveillance record in relation to a worker that results from the
11 conduct of surveillance using a tracking device mentioned in
12 section 42 (2) (b) must not be used or disclosed for any purpose.

1 **Part 6** **Miscellaneous**

2 **44** **Offences—security of surveillance records**

- 3 (1) An employer commits an offence if the employer fails to take
4 reasonable steps to protect surveillance records it holds from
5 misuse, loss, unauthorised access, modification or disclosure.

6 Maximum penalty: 20 penalty units.

- 7 (2) An employer commits an offence if—

8 (a) a surveillance record is no longer needed for any purpose for
9 which the record may be used or disclosed under this Act; and

10 (b) the employer fails to take reasonable steps to destroy or
11 permanently de-indentify the surveillance record.

12 Maximum penalty: 20 penalty units.

13 **45** **Report on covert surveillance to Legislative Assembly**

- 14 (1) The Minister must give the appropriate Legislative Assembly
15 committee a written report each year about covert surveillance
16 undertaken under this Act during the year, including—

17 (a) the number of covert surveillance authorities applied for and
18 issued; and

19 (b) the kind of surveillance device authorised to be used by the
20 covert surveillance authorities issued.

- 21 (2) The Minister must give the report to the appropriate Legislative
22 Assembly committee as soon as practicable after 31 December in
23 each year.

1 (3) In this section:

2 ***appropriate Legislative Assembly committee*** means—

3 (a) a standing committee of the Legislative Assembly nominated
4 by the Speaker; or

5 (b) if no nomination under paragraph (a) is in effect—the standing
6 committee of the Legislative Assembly responsible for the
7 consideration of industrial relations issues.

8 **46 Approved forms**

9 (1) The Executive may, in writing, approve forms for this Act.

10 (2) If the Executive approves a form for a particular purpose, the
11 approved form must be used for that purpose.

12 *Note* For other provisions about forms, see the Legislation Act, s 255.

13 (3) An approved form is a notifiable instrument.

14 *Note* A notifiable instrument must be notified under the Legislation Act.

15 **47 Regulation-making power**

16 The Executive may make regulations for this Act.

17 *Note* A regulation must be notified, and presented to the Legislative
18 Assembly, under the Legislation Act.

19 **48 Review of Act**

20 (1) The Minister must review the operation of this Act as soon as
21 practicable after the end of its 1st year of operation.

22 (2) The Minister must present a report of the review to the Legislative
23 Assembly within 3 months after the day the review is started.

24 (3) This section expires 2 years after the day it commences.

1 **49 Court Procedures Act 2004**
2 **New section 41 (2) (fa)**

3 *insert*

4 (fa) the *Workplace Privacy Act 2010*, section 27; and

Dictionary

(see s 3)

Note 1 The Legislation Act contains definitions and other provisions relevant to this Act.

Note 2 For example, the Legislation Act, dict, pt 1, defines the following terms:

- Corporations Act
- correctional centre
- Executive
- exercise
- function
- Magistrates Court
- Minister (see s 162).

adverse action—see the *Fair Work Act 2009* (Cwlth), section 342.

business or undertaking—see section 9.

computer means an electronic device for storing or processing information.

conduct surveillance—see section 11.

covert surveillance—see section 24.

covert surveillance authority, for part 4 (Covert surveillance)—see section 25.

covert surveillance record, for part 4 (Covert surveillance)—see section 25.

data surveillance device—see section 11.

1 ***electronic communication*** means communication by electronic
2 means.

3 **Examples**

4 email, instant messaging

5 *Note* An example is part of the Act, is not exhaustive and may extend, but
6 does not limit, the meaning of the provision in which it appears (see
7 Legislation Act, s 126 and s 132).

8 ***employer***—see section 8.

9 ***law enforcement agency***—

10 (a) see the *Spent Convictions Act 2000*, dictionary; and

11 (b) includes an entity prescribed by regulation.

12 ***non-work area*** means an area in a workplace where a worker is not
13 directly engaged in work.

14 **Examples**

15 tearoom, recreation room

16 *Note* An example is part of the Act, is not exhaustive and may extend, but
17 does not limit, the meaning of the provision in which it appears (see
18 Legislation Act, s 126 and s 132).

19 ***optical surveillance device***—see section 11.

20 ***prohibited surveillance*** means surveillance prohibited under part 5.

21 ***surveillance***—

22 (a) see section 11; or

23 (b) for part 3 (Notified surveillance)—see section 12.

24 ***surveillance device***—see section 11.

25 ***surveillance information*** means information obtained, recorded,
26 monitored or observed as a result of surveillance conducted in
27 relation to a worker.

28 ***surveillance record*** means a record or report of surveillance
29 information.

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- 1 *surveillance supervisor*, for part 4 (Covert surveillance)—see
2 section 25.
- 3 *tracking device*—see section 11.
- 4 *unlawful activity*, for part 4 (Covert surveillance)—see section 25.
- 5 *worker*—see section 7.
- 6 *workplace*—see section 10.
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Endnotes

- 1 Presentation speech**
Presentation speech made in the Legislative Assembly on 2010.
- 2 Notification**
Notified under the Legislation Act on 2010.
- 3 Republications of amended laws**
For the latest republication of amended laws, see www.legislation.act.gov.au.
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