



Enhancing the workplace or an intrusion of privacy? As surveillance technology continues to evolve, so too will the debate



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Surveillance in the workplace is a topic which attracts controversy. Employers will argue that surveillance technology mitigates the work health and safety risks and can optimise the workplace and productivity, for the ultimate benefit of employees.

In reply, employees and unions will often argue against workplace surveillance, claiming it is an invasion of privacy that strains the inherent trust necessary between employee and employer.

The Fair Work Commission recently considered these issues, handing down two decisions in as many months which affirmed the general right of an employer to introduce surveillance technology in the workplace.

[Toll Transport Pty Ltd T/A Toll Shipping v Transport Workers' Union of Australia \[2018\] FWC 3573](#)

In June 2018, the Commission determined a dispute between Toll Transport and the Transport Workers' Union of Australia regarding Toll's planned installation of surveillance devices in its liquids and linehaul fleets.

The proposed surveillance devices included an infrared driver fatigue/distraction monitoring system, and an upgraded digital video recorder (an inward and outward facing camera monitoring system).

The arguments advanced by the TWU included that:

- the technology's ability to record non-driving activities was unreasonably intrusive;
- there was a concern that captured information could be utilised for a purpose other than ensuring safety; and
- the infrared light emitted from the distraction monitoring system was a safety concern, given the limited evidence available regarding the possible physical detriment to drivers' eyes.

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In its response Toll argued that:

- the technology was expected to have significant safety benefits in terms of fewer accidents;
- the system itself is safe, and the infrared light it emits is not damaging to human eyesight;
- the technology was already being used by a number of competitors, and was required to comply with some of the logistics contracts Toll had entered into;
- the technology helped Toll to comply with its enterprise agreement, which expressly required Toll and transport workers to take all reasonable steps to ensure a safe system of work; and
- it was entitled to introduce the technology in accordance with its managerial prerogative.

Deputy President Clancy concluded that Toll had the right to implement the technology. The Deputy President was satisfied that the safety benefits outweighed the issues raised by the TWU. In reaching this conclusion, the Deputy President acknowledged that Toll had policies in place explaining its intended use of any recorded footage that both parties could rely on if a dispute eventuated. In respect of the safety concerns, the TWU did not present any evidence contradicting Toll's expert witness regarding the impact of infrared lights on drivers' eyes.

Australian Municipal, Administrative, Clerical and Services Union v Canon Australia Pty Ltd T/A Canon [2018] FWC 4146

Not long after the Toll decision, in July 2018 the Australian Services Union disputed the planned implementation of GPS tracking devices by Canon Australia in Victoria. These were to be activated on mobile phones of Canon's Victorian-based repair and servicing technician employees during working hours. The ASU lodged a dispute with the Commission on the basis that the proposed policy contravened Canon's enterprise agreement.

At the Commission the ASU raised a number of arguments, including that:

- the enterprise agreement obliged Canon to minimise any adverse impact of workplace changes on employees, and Canon had not done so;
- the technology constituted an unreasonable intrusion into the working arrangements of employees by tracking personal information such as the location of technicians' homes;
- many of the technicians work flexibly, or spent periods on call, meaning the term "during working hours" required more explanation;
- the policy was inconsistent with provisions in the enterprise agreement regarding hours of work and overtime;
- the primary purpose for installing the technology was to support disciplinary action, in contravention of a specific restriction in the enterprise agreement; and
- there was no basis to believe that the technology would improve customer service, scheduling, or health and safety.

Commissioner Gregory was not persuaded by any of these arguments. He was satisfied, based on the evidence of Canon's use of similar technology in other States, that the primary purpose of its introduction was not to support disciplinary action. The Commissioner also rejected the ASU's restrictive interpretation of the consultation provisions in Canon's enterprise agreement, with the Commissioner confirming that Canon could implement workplace change as long as there was proper consultation.

Commissioner Gregory acknowledged that some employees were

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Commissioner Gregory acknowledged that some employees were apprehensive, but observed that the Commission's function was only to determine whether Canon's proposal breached any terms of the enterprise agreement. He accepted that it was not the Commission's role to second-guess Canon's intentions when altering its business practices.

As Commissioner Gregory was not satisfied that the policy, or its introduction, contravened Canon's enterprise agreement, he dismissed the application, allowing Canon to proceed with the introduction of GPS tracking on employee mobile phones during working hours.

Lessons for employers

These cases highlight that while employees and unions may resist the introduction of surveillance technology in the workplace, Victorian employers will ordinarily be able to do so provided that the technology serves a work-related purpose.

However, it is important to bear in mind that consultation is likely to be required under an enterprise agreement or award before surveillance technology can be implemented. That means that even if you don't need to convince the Commission of the business case for the introduction, you will need to have a compelling case to put to your staff and their unions if you wish to minimise the prospects of a dispute.

You should also be aware that your enterprise agreement may impose additional obstacles to the successful introduction of surveillance technology, so you should ensure that any proposed policy is consistent with your enterprise agreement (if you have one). You should also consider the possible introduction of surveillance technology when next negotiating an enterprise agreement, even if such technology is not currently being contemplated.

Finally, workplace surveillance laws do vary significantly across Australia, so surveillance which is lawful in Victoria may not necessarily be lawful in other States or Territories. You should consider the laws in your jurisdiction before developing a workplace surveillance strategy.

Please contact Russell Kennedy's [Workplace Relations, Employment and Safety Team](#) for tailored advice relating to existing surveillance methods or new technologies your business may be considering.

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