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Articles

Under the Lens: Electronic Workplace Surveillance

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Electronic surveillance has become a feature of many Australian workplaces. The first part of this article explores the relationship between this surveillance and the fundamental norms of employment law, including the emerging concept of trust and confidence. Notwithstanding the promise offered by the concept of trust and confidence, it is suggested that electronic surveillance is a rational corollary of the coercive aspects of the relationship established by the fundamental norms of the contract of employment. The second part examines recent New South Wales and Victorian legislation dealing with electronic surveillance. This examination reveals that the NSW legislation offers significantly greater protection for workers than its Victorian counterpart. However, it is also observed that the NSW scheme contains significant gaps, especially in relation to overt monitoring and forms of surveillance other than by video. Finally, it is suggested that although the Victorian legislation does provide some protection for employee privacy, that protection is narrow and, moreover, is likely to be undermined by those provisions which may give employers the opportunity to contract-out of the Act's safeguards.

Introduction

In 1995, Michael Costa, then Acting Secretary of the New South Wales Labour Council, described the use of personal data and surveillance in the workplace as '*the* industrial relations issue of the 1990s'.[1] Although Costa's claim is an exaggerated one, the legal and industrial issues raised by electronic workplace surveillance are undoubtedly gaining prominence.[2]

The rise of workplace surveillance as an issue of public concern is in part due to its centrality in some well-publicised industrial disputes.[3] In New South Wales, a series of disputes between Franklins, a major grocery retailer, and the National Union of Workers (NUW), briefly pushed the issue into the print

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1 See P Lewis, 'Privacy Law to Protect Workers', *Daily Telegraph-Mirror*, 25 July 1995, cited in The Privacy Committee of New South Wales, *Invisible Eyes: Report on Video Surveillance in the Workplace (No 67)*, 1995, pp 5-6 (NSW Privacy Committee).

2 Less hyperbolic and more accurate is one American labour lawyer's description of electronic workplace surveillance as 'the sleeping giant of the 90s': see D N King, 'Privacy Issues in the Private Sector Workplace' (1994) 67 *Southern California L Rev* 441 at 447.

3 S Long, 'Why Your Boss is Bugging You', *The Australian Financial Review*, 27-28 June 1998, pp 26-7; interview with Sally McMannus, Organiser, Australian Services Union, 27 April 1999.

media. This in turn helped thrust the issue onto the legislative agenda and was a significant factor prompting, and indeed shaping, NSW's Workplace Video Surveillance Act 1998 — the first and only workplace-specific, electronic surveillance legislation in Australia.

The media also has played a significant part in transforming electronic workplace surveillance into an issue of public concern. With a fair degree of regularity, newspapers have run sensationalist feature articles with headlines such as 'Bigger Brother',[4] 'Technology Invades our Private Lives',[5] 'Why Your Boss is Bugging You'[6] and 'White-collar factories'.[7] Almost without exception, the media have caste electronic surveillance in sinister terms, highlighting its intrusive capacities and the consequent threat it poses to liberal values such as privacy, individual integrity and autonomy.[8] The media's generally critical approach to electronic workplace surveillance has helped to define the terms of public debate; it is virtually taken for granted that new surveillance technologies are a threat which must be curtailed. Government agencies and legal scholars[9] have generally adopted a similar approach, emphasising the dangers of electronic surveillance and the need for legislative safeguards.

Not surprisingly, many writers, both in journalism and academia, have drawn parallels between the totalitarian monitoring of George Orwell's *1984* and the increasing propensity of employers to resort to electronic surveillance.[10] The fact that the link is so often made is indicative of why the issue has the potential to be particularly sensitive and controversial.

In the popular imagination, Orwell's dystopia is an allegorical representation of the modern totalitarian *state*, that is, of over-reaching *public* power.[11] Electronic workplace surveillance usually involves *private* employers who use their superior position to intrude upon and control

4 S Nicholls, 'Bigger Brother', *The Weekend Australian*, 7-8 August 1999, p 46.

5 D Duclos, 'Technology Invades our Private Lives: Little Castle of the Soul', *Le Monde Diplomatique*, August 1999, pp 14-15.

6 Long, 'Why Your Boss is Bugging You', above n 3, pp 26-7.

7 S Long, 'White-collar Factories', *The Australian Financial Review*, 27-28 June 1998, p 27.

8 See, further, ibid; Nicholls, above n 4; Duclos, above n 5; Long, 'Why Your Boss is Bugging You', above n 3; M Naidoo, 'Warning Over E-mail Privacy', *The Age*, 14 April 1999.

9 A couple of notable exceptions are: A K Bradley, 'An Employer's Perspective on Monitoring Telemarketing Calls: Invasion of Privacy or Legitimate Business Practice?' (1991) *Labor Law Jnl* 259; A F Westin, 'Privacy in the Workplace: How Well Does American Law Reflect American Values?' (1996) 72 *Chicago-Kent L Rev* 283; for a critique of Westin's analysis, see K J Conlon, 'Privacy in the Workplace' (1997) 24 *Labor Law Jnl* 444.

10 See, eg, Nicholls, above n 4; C Wright and J Lund, 'Best-Practice Taylorism: "Yankee Speed-up" in Australian Grocery Distribution' (1996) 38 *Jnl of Industrial Relations* 196 at 211 (describing 'engineered standards' as a 'combination of George Orwell and Frederick Taylor'); King, above n 2, at 447 ('George Orwell would have been pleased'); A Horin, 'Working the Phones', *The Sydney Morning Herald*, 19 September 1998, pp 6-7 ('Do you mind very much Big Brother watching every little move you make?'); Long, 'Why Your Boss is Bugging You', above n 3 ('Woolworths . . . monitors its workers' movements with a far more Orwellian technology'); D Lyon, *The Electronic Eye: The Rise of Surveillance Society*, Polity Press, Cambridge, 1994 ('Orwell's dystopia').

11 Anti-Soviet cold war warriors often buttressed their arguments with references to Orwell's devastating critique of authoritarianism. However, it is clear that this was a misappropriation of *1984*. Orwell, who was, for a time, a socialist, intended *1984* to be a critique of the authoritarian tendencies within Soviet *and* capitalist societies.

employees. Thus, the comparison between Orwell's world and employers' use of electronic surveillance 'is an implicit', though probably unconscious, 'acknowledgment that private sector employers possess state-like powers'.[12] In so far as electronic workplace surveillance provides a striking example of the state-like authoritarianism of wage relations, it challenges some fundamental assumptions underpinning the liberal legal system's way of conceptualising power and rights. As Glasbeek and McRobert put it in their analysis of the legal and political issues surrounding mandatory employer drug-testing:

> inasmuch as it is widely assumed that the real threat to freedom is the inability to control an omnipotent state and that all our efforts to protect and to further our liberties ought to be directed at holding this leviathan in check, employer-mandated drug testing draws attention to the fact that the private power of property owners may well be a more significant fetter on freedom and democracy.[13]

Further, as Collins suggests, when people begin to call into question the assumptions of the public/private distinction, other more far-reaching questions arise:

> Once managerial power is likened to governmental power, old questions concerning the absence of democracy and respect for civil liberties in the workplace begin to press upon us with renewed intensity.[14]

Thus, to the extent that electronic workplace surveillance encourages observers to ponder the scope and even legitimacy of employer power, it presents something of an ideological problem. Demands for public action, however, rarely raise this aspect directly. Still, it underlies the discussion and provides added impetus to calls by civil libertarians, unionists, journalists and academics, for legislative reform to ameliorate the most egregious aspects of electronic workplace surveillance (covert video surveillance of private spaces such as change-rooms, Tayloristic performance monitoring, and so on).[15]

In making the case for law reform, commentators often rely on the notion — sometimes explicit, but often implicit — that '[t]he rapid growth of workplace video surveillance is occurring in a regulatory vacuum'[16] or that the 'pace of technological development has . . . outstripped the pace of legal

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12 Harry Glasbeek and David McRobert make a similar argument in relation to the mandatory drug testing of workers in North America: H J Glasbeek and D McRobert, 'Privatizing Discipline — The Case of Mandatory Drug Testing' (1989) 9 *Windsor Yearbook of Access to Justice* 30 at 50.

13 Ibid, at 33.

14 H Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 *Industrial Law Jnl* 1 at 14.

15 Space does not permit consideration of the full range of electronic surveillance devices currently utilised in Australian workplaces. This article focuses on video surveillance and largely ignores e-mail monitoring as well as listening, tracking and electronic identification devices.

16 The NSW Privacy Committee, above n 1, p 53 (and 'Video surveillance in the workplace in Australia is currently unregulated', p 2); for another explicit articulation of this notion, see NSW Law Reform Commission, *Surveillance: Issues Paper 12*, Sydney, 1997, pp 2-3.

developments' and that 'it is time' for the law 'to catch up'.[17] This way of conceptualising the problem reflects three important understandings which have shaped much of the scholarship on the law relating to this issue.

First, it is assumed that the absence of legislation constitutes a legal vacuum. This notion obscures the role played by the contract of employment in creating a scheme of legal regulation which both engenders and legitimates 'forms of oppressive subordination under the disguise of freely chosen agreements'.[18] It masks the fact that the traditional norms of employment law not only permit electronic workplace surveillance, but actually assume the legitimacy of such forms of employer conduct.

Notwithstanding the relevance of the contract of employment to a legal analysis of electronic workplace surveillance, most commentators largely ignore it.[19] This omission performs an important ideological function: by lifting the phenomenon out of its socio-legal context, the practice of electronic surveillance can be condemned without calling into question those legal and political relations upon which it is based. Moreover, this approach serves to reinforce the public/private distinction by denying that 'the practices comprising the private sphere of life . . . are inextricably linked to and at least partially constituted by politics and the law'.[20]

Second, the idea that the law must, or will, 'catch up' with technology suggests that the process of legislative reform is mainly a technical exercise. To be sure, most commentators recognise that employers and employees have competing interests and, therefore, that the process of arriving at a legislative outcome will be fraught with controversy. Yet, many optimistically suggest that the 'right balance' can be struck. However, in the area of electronic workplace surveillance, as in other areas of labour law, there is no such thing as *the* correct result.[21]

The balance struck by legislation, the particular form of mediation adopted, will depend upon a range of complex political and historical factors, such as the prevailing level of industrial conflict, the perceived legitimacy of this or that measure in the circumstances, and so on.[22] These factors played a fundamental role in shaping the system of conciliation and arbitration which

17 R Boehmer, 'Artificial Monitoring and Surveillance of Employees: The Fine Line Dividing the Prudently Managed Enterprise From the Modern Sweatshop' (1992) 41 *De Paul L Rev* 739 at 741.

18 Collins, 1986, above n 14, at 1.

19 Three Australian exceptions to this observation are: R McCallum and G McCarry, 'Worker Privacy in Australia' (1995) 17 *Comparative Labor Law Jnl* 13 at 16-20; J Nolan, 'Privacy in the Workplace: Part 3, Some Legal Issues' (1995) 2 *Privacy Law and Policy Reporter* 48 at 49-50, 58; S McGregor, 'Privacy Aspects of Electronic Messaging' (1993) 7 *Australian Computer Commentary* 153 at 157-8.

20 K E Klare, 'The Public/Private Distinction in Labor Law' (1982) 130 *University of Pennsylvania L Rev* 1358 at 1417.

21 The conventional lawyer's misplaced optimism about the possibility of attaining 'correct' legal results is even more pronounced in relation to judicial decisions: see R Fischl, 'Some Realism About Critical Legal Studies' (1987) 41 *University of Miami L Rev* 473, especially at 509-11.

22 For a discussion of the role of labour law in mediating class conflict and legitimating existing power relations, see H J Glasbeek, 'Voluntarism, Liberalism, and Grievance Arbitration: Holy Grail, Romance, and Real Life' in G England (Ed), *Essays in Labour Relations Law*, CCH, Ontario, 1986, especially pp 67-72.

emerged at Federation, and they continue to play a crucial role today; the area of electronic workplace surveillance regulation is no exception.[23]

The final point is closely related to the previous two: the notion that the law must catch up with technology is a form of technological-determinism. Technological-determinism, as elaborated by David Noble and others, describes those modes of analysis which tend to suggest that technological change has a life of its own.[24] Theorists such as Noble argue that technology is not some kind of self-perpetuating, independent force, but rather that it is developed and deployed in a manner which serves and buttresses certain power relations and is, in turn, suffused with those power relations.[25]

The idea that surveillance technology has 'outstripped' the law removes from view the flesh and blood decision-makers who have chosen to utilise electronic surveillance techniques in order to survey, discipline and control employees. Technological-determinism obscures the fact that electronic workplace surveillance is simply a new, albeit particularly offensive, method of enforcing the employer's legal rights to secure obedience, to protect property, to ensure fidelity, and so on.[26] Although the Closed Circuit Television (CCTV) may be more effective than the traditional supervisor, both methods of surveillance are part of the same real-life struggle between employer and employee — a point illustrated by the dispute between Franklins and the NUW.

In sum, a technological-determinist approach prevents many legal commentators from looking beneath the surface: the issue is presented as a contest between technology and civil liberties, rather than as an episode in an ongoing conflict between employers and employees.

The Scope of this Article

The content of this article is defined by reference to the three assumptions just discussed. Whereas the conventional approach de-contextualises and de-politicises the issue of electronic workplace surveillance, this article attempts to explore the relationship between legal norms, rules and processes, and political and economic imperatives.

Part 1 of this article explores the relationship between electronic workplace surveillance and the fundamental norms of employment law. In particular, it will be argued that electronic surveillance is a tool which reinforces the employer's power in both bureaucratic and class terms:[27] (i) by promoting the *enforcement* of employee obedience; and (ii) by bureaucratising and legitimating employer power, especially the state-like disciplinary powers associated with summary dismissal. The practice of electronic surveillance is situated in this context in order to highlight the fact that it is a rational corollary of the coercive aspects of the social and legal relationship

23 See S Macintyre and R Mitchell (Eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890-1914*, Oxford University Press, Melbourne, 1989.
24 D Noble, *Forces of Production: A Social History of Industrial Automation*, Knopf, New York, 1984.
25 Ibid.
26 Glasbeek and McRobert, above n 12, at 33.
27 Ibid; Collins, 1986, above n 14.

constituted by the basic norms of the contract of employment.

Part 1 also considers whether the emerging concept of trust and confidence might impose some constraints on the employer's ability to conduct electronic surveillance. Although the novelty and 'open-textured' nature of the doctrine make speculation difficult,[28] it is tentatively suggested that the implied duty of trust and confidence may offer employees redress in respect of the most intrusive forms of electronic surveillance. However, it is also suggested that the utility of the duty may be limited by the traditional reluctance of the courts to interfere with managerial control, and by a range of other legal and practical obstacles to securing relief.[29]

Part 2 examines the recent New South Wales and Victorian legislation dealing with electronic surveillance.[30] The legal regime established by each Act is analysed and an attempt is made to identify the political and ideological imperatives which gave each statute its particular shape. In particular, it is suggested that in NSW the high level of industrial conflict associated with the issue created a greater need for mediation and that this fact, together with the presence of a sympathetic Labor Government, led to relatively far-reaching legislative reform. In Victoria, a very different set of circumstances led to the enactment of legislation which, in ideological and practical terms, stands in sharp contrast to its NSW counterpart.

Part 1 — The Relationship Between the Basic Norms of Employment Law and Electronic Surveillance

The relevance of the contract of employment

Traditionally, most employees in Australia have had their rights determined by collective instruments, including awards and agreements under Federal and State industrial laws. However, there are at least two reasons why the norms

28 D Brodie, 'The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 *Industrial Law Jnl* 121 at 126.

29 Space does not permit an examination of the debates surrounding questions such as whether the High Court is in the process of developing some form of constitutional protection for individual privacy interests; whether the creation of a tort of privacy is likely or desirable; whether the common law provides any protection for privacy interests; or the nature and scope of privacy protection afforded by the equitable action for breach of confidence: see A Chapman and J C Tham, 'The Legal Regulation of Information in Australian Labour Markets: Disclosure to Employers of Information About Employees', Working Paper No 22, Centre for Employment and Labour Relations Law, The University of Melbourne, 2001.

30 Workplace Video Surveillance Act 1998 (NSW); Surveillance Devices Act 1999 (Vic). Western Australia also has recently passed legislation which is, in philosophical and conceptual terms, very similar to the Victorian statute. Because of the considerable overlap between the Victorian legislation and the Surveillance Devices Act 1998 (WA), this article only addresses the former. Further, this article does not examine the relevance of the Commonwealth Privacy Act 1988 which imposes some limits on the uses which can be made of personal information pertaining to Commonwealth public sector employees. The Federal Government's extension of that legislation to the private sector is also beyond the scope of this article. These omissions are partly due to lack of space, and partly due to the fact that other writers have dealt thoroughly with these matters: see McCallum and McCarry, above n 19; on the extension of the Privacy Act, see Attorney-General's Department (Cth), *The Government's Proposed Legislation for the Protection of Privacy in the Private Sector: Information Paper*, Canberra, September 1999.

of the individual contract of employment are of practical relevance to the topic of electronic workplace surveillance. First, as Andrew Stewart and others have noted, 'Australian law is increasingly facilitating [privately-bargained] agreements between employers and individual workers'.[31] The contract of employment, among other individualising devices,[32] is thus enjoying a resurgence. For employers, individual contracts are a useful vehicle 'not only for the imposition of changes to working conditions, but more generally for the (re)assertion of their authority over the employment relationship' and 'to improve profitability by driving down labour costs', and 'to induce improvements in productivity'.[33]

The changes wrought by the Workplace Relations Act 1996 (Cth) (WRA) were designed, in part, to provide the catalyst for an increase in the practical significance of the contract of employment. The objects of the Act make the government's intention plain: s 3(c) speaks of 'enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, *whether or not that form is provided for by this Act*'.[34]

In concrete terms, the WRA creates greater space for individual contracts through its 'award simplification' provisions. Section 89A stipulates that federal awards may only provide for the 20 'allowable' matters specified in s 89A(2) and any matters 'incidental' thereto (s 89A(6)). Further, the transitional provisions in Sch 5 of Pt 2 of the Workplace Relations and Other Legislation Amendment Act 1996 (Cth) provide for the 'stripping' back of existing awards; the Australian Industrial Relations Commission is required to delete 'non-allowable' matters, and also to remove work practices which are inefficient, hinder productivity, or provide for matters which are more appropriately dealt with at the workplace level.[35]

While it is difficult to be definitive, especially in the absence of any relevant authority, it is likely that these changes have pushed electronic workplace surveillance beyond the scope of the federal award system.[36] Further, although

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31 See A Stewart, 'The Legal Framework for Individual Employment Agreements in Australia' in S Deery and R Mitchell (Eds), *Individualisation and Union Exclusion in Employment Relations: An International Study*, Federation Press, Sydney, 1999, p 18.

32 Other important legal mechanisms facilitating individualised agreements are Australian Workplace Agreements (AWAs) and the contract for services. Space does not permit a discussion of the relevance of AWAs to electronic workplace surveillance.

33 Stewart, above n 31, p 18; and see also M Moir, 'Individual and Collective Bargaining in Australian Labour Law: the *CRA Weipa* Case' (1996) 18 *Sydney L Rev* 350; J Buchanan and R Callus, 'Efficiency and Equity at Work: The Need for Labour Market Regulation in Australia' (1993) 35 *Jnl of Industrial Relations* 315; and ACIRRT, *Australia at Work: Just Managing?*, Prentice Hall, Sydney, 1999.

34 Emphasis added; see further, s 3(b); and Stewart, above n 31, p 21.

35 See Item 51 of the 'transitional provisions' in Sch 5, Pt 2 of the Workplace Relations and Other Legislation Amendment Act 1996 (Cth).

36 A detailed consideration of the relevance of the federal industrial system to electronic workplace surveillance is beyond the scope of this article. Briefly, however, it seems fairly clear that electronic workplace surveillance would fall outside the 20 'allowable' matters specified in s 89A(2). Although the identification of 'incidental' matters involves difficult questions of fact, it seems likely on the face of s 89A(6) that electronic workplace surveillance would not satisfy the definition. Further, if an award subject to review under the transitional provisions contained any restriction on surveillance which could be construed as

the Commonwealth industrial relations system may still play a part in regulating electronic surveillance through enterprise agreements,[37] many employees subject to the most intensive surveillance are in non-unionised, sunrise industries such as the call centre sector. For many of these workers, the contract of employment is the principal legal instrument governing their employment relationship.[38]

Second, even if awards continued to be relevant, this would not render irrelevant the fundamental norms of the contract of employment. As McCallum and Pittard have noted, the implied duties of obedience, fidelity etc, have always played a central role in shaping the employment relationships regulated by the system of awards.[39] This is not to deny that awards enabled trade unions to make inroads into managerial prerogative by regulating matters such as staffing levels and the demarcation of tasks.[40] Rather, it is to point out that, despite this, collective bargaining as a mode of regulation 'does not call seriously into question the underlying assumption of the contract of employment that the employee should submit himself [sic] to the direction of others'.[41]

Thus, although the pre-WRA award system might well have imposed constraints on electronic workplace surveillance, it would still have adopted the norms established by the contract of employment as its legal starting position.[42] The constancy of these norms indicates, as the writings of both Collins and Glasbeek suggest, that the fundamental legal character of the employment relationship is bound up with prevailing social relations, and is not merely the product of a particular, specifically tailored legal regime or

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a hindrance to productivity, it might fall foul of the simplification criteria in Item 51(6), Pt 2, Sch 5 of the Workplace Relations and Other Legislation Amendment Act 1996 (Cth) (this is hypothetical since no such award exists): see further, *Award Simplification Decision*, (Full Bench, AIRC, H0008 Dec 1533/97 M Print P7500).

37 To date a number of enterprise agreements dealing expressly with electronic surveillance have been certified: see, eg, National Union of Workers and Nuance Global Traders Ltd (C No 31303 of 1999); National Union of Workers and Transport Workers Union of Australia Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union Australia — Electrical Division and Kodak (Australasia) Pty Ltd (C No 38518 of 1999 Kodak (Australasia) Pty Ltd National Distribution Agreement 1999). Such agreements are likely to become more common due to the efforts of unions to organise the call centre sector: Interview with Sally McMannus, above n 3; Interview with Michael Borowick, Australian Workers' Union (Vic Branch), May 2001.

38 Of course, in NSW, Victoria and Western Australia the recently enacted electronic surveillance legislation will now provide the default position for individual employment contracts. However, as will be discussed in Part 2, the statutes are by no means comprehensive and, therefore, in certain respects the contractual position will continue to obtain.

39 R McCallum and M Pittard, *Australian Labour Law: Cases and Materials*, 3rd ed, Butterworths, Sydney, 1995, p 86.

40 As the outcome of the recent battle at ARCO's Curragh mine demonstrates, such constraints are increasingly a thing of the past: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Curragh Queensland Mining Ltd* (1988) 44 AILR 3-860.

41 Although Collins' observation was made in the English context, it is consistent with the Australian experience as described by McCallum and Pittard, above n 39, p 86; H Collins, 'Labour Law as a Vocation' (1989) 105 *Law Quarterly Rev* 468 at 480; see also, H J Glasbeek, 'Ontario's Teachers and Bill 160 — Class War in the Courts' (1999) *Osgoode Hall Law Jnl* 36.

42 Glasbeek, 1999, above n 41, at 36.

instrument. The next section explores this insight in order to situate electronic workplace surveillance within the coercive apparatus established by the basic norms of employment law.

The contract of employment: Property, bureaucracy and control

'Command under the guise of agreement'[43]

According to the orthodox approach to employment law, the contract of employment is a 'personal and voluntary exchange of freely-bargained promises between two parties equally protected by the civil law . . .'.[44] Closely associated with this proposition is the 'unitary' conception of industrial relations which holds that employers and employees share a common interest in maximising the commercial well-being of the enterprise.[45] The idea that employment law is based on voluntarism, equality and consensus has been trenchantly criticised by social-democratic and Marxist commentators.[46] These critics argue that the orthodox view is designed to legitimate capitalist social relations by masking the fact that coercion rather than voluntarism, and conflict rather than consensus, are the real organising principles.[47]

From a purely analytical perspective, the contrast between these two approaches stems from the fact that each has a different frame of reference. Whereas the conventional view looks no further than the formal contractual position, the so-called 'radical'[48] approach analyses ways in which the legal construct of the contract of employment operates within certain social relations.

In light of this, the point of departure for the 'radical' account of employment law is not the contract of employment, but rather the law of private property.[49] The touchstone of a proprietary interest is the right to exclude the rest of the world from the enjoyment of that property.[50] This fact takes on massive social significance because the means of production are

43 Sir Otto Kahn-Freund described the contract of employment in this way in his Introduction to K Renner's *The Institutions of Private Law and Their Social Functions*, Routledge and Kegan Paul, London, 1949, quoted in McCallum and Pittard, above n 39, p 86.

44 Lord Wedderburn quoted in W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials*, 2nd ed, Law Book Company, Sydney, 1993, p 22.

45 See W B Creighton and A Stewart, *Labour Law: An Introduction*, Federation Press, Sydney, 2000, p 9.

46 Creighton, Ford and Mitchell, above n 44, p 17; Creighton and Stewart, above n 45, p 9.

47 Glasbeek, 1986, above n 22, p 58; Glasbeek and McRobert, above n 12, at 33.

48 This is the label used by Creighton and Stewart to describe conflict theorists, that is, those who regard conflict as endemic to industrial relations: Creighton and Stewart, above n 45, p 9; prominent exponents of this approach include: Klare, above n 20; Fischl, above n 21; E Pashukanis, *Law and Marxism: A General Theory*, Ink Links, London, 1978; Renner, above n 43; C B McPherson, 'Elegant Tombstones: A Note on Friedman's Freedom' (1968) 7 *Canadian Jnl of Political Science* 95; and see the works of H J Glasbeek referred to throughout.

49 See Glasbeek, 1986, above n 22, p 58.

50 See M Neave et al, *Sackville and Neave Property Law: Cases and Materials*, 6th ed, Butterworths, Sydney, 1999.

privately owned and concentrated in very few hands.[51] By virtue of their control over the means of production and the resources which all members of society need in order to subsist, employers have tremendous power over individual non-wealth-owners and society as a whole. The uneven distribution of resources enshrined in property law provides the social basis for the 'wages-work' bargain which Creighton, Ford and Mitchell describe as the 'essence of the employment relationship'.[52]

The worker's lack of choice, and the consequent inequality of bargaining power between the contracting parties, is ignored by the law when it treats the employment agreement as a bargain 'entered into by legally equal parties (that is, between sovereign, autonomous, free wills) . . .'.[53] This is the 'guise of agreement', to use Kahn-Freund's expression, which legitimates the contract in the eyes of the law.[54] Further, contract law is unperturbed by the fact that the inequality between the parties may lead to a 'hard bargain'. The presence of harsh terms is not, on its own, enough to call the agreement into question.[55] Nor is inadequacy of consideration — as long as consideration is sufficient, the law is satisfied.[56]

Moreover, as Chin has noted, employment law is a notable exception from the equitable doctrines designed to ameliorate the severity of the common law.[57] In *Amadio*, Mason J was careful to point out that inequality of bargaining power is not sufficient in itself to establish a 'special disadvantage' for the purposes of unconscionability.[58] The doctrine of duress might also be used to alleviate the employee's plight, but the law makes it clear 'that so long as the pressure . . . arises from antecedent circumstances, rather than from any threat as such, consent is not vitiated'.[59] This 'exceptionalism' seems curious unless employment law is placed in its social context. Concepts like duress are

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51 For the sake of convenience, owners of the means of production will be referred to as 'wealth-owners' or 'employers', others will be referred to as 'non-wealth-owners', the 'propertyless', 'employees' or 'workers'.

52 Creighton, Ford and Mitchell, above n 44, p 181, and especially ch 7.

53 Glasbeek, 1986, above n 22, p 63.

54 'Command under the guise of agreement': Sir Otto Kahn-Freund, Introduction to Renner, above n 43; see further, McCallum and Pittard, above n 39, p 86.

55 *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506 at 512; see further, Stewart, above n 31, pp 23-7.

56 *Blomley v Ryan* (1956) 99 CLR 362 at 405; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 475; 46 ALR 402 (*Amadio*); J W Carter and D J Harland, *Contract Law in Australia*, 3rd ed, Butterworths, Sydney, 1996, ch 10; see further, Stewart, above n 31, pp 24-5.

57 See D Chin, 'Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism' 10 (1997) *AJLL* 38.

58 *Amadio*, above n 56, at CLR 459; *Webb v Australian Agricultural Machinery Pty Ltd* (1990) 6 WAR 305 at 312-13; see further Stewart, above n 31, p 24.

59 Stewart, above n 31, p 24. As Stewart notes, the basic elements of duress are *prima facie* satisfied by the typical pre-employment situation: duress is made out if pressure is exerted by one party on the other party, so that the latter is compelled to agree. However, an employer's 'threat' not to hire an employee unless the employee agrees to certain terms is not regarded by the common law as duress. By contrast, if an employer consents to a proposed agreement because a group of employees threaten to withhold their labour, a court may set the contract aside: see, eg, *Universe Tankships Inc v International Transport Workers Federation* [1983] 1 AC 366; *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152.

concerned with '*illegitimate*' pressure; clearly, the law regards the economic compulsion exerted by employers as legitimate.[60]

In order to understand how these features of the contract of employment regulate electronic workplace surveillance, it is useful to turn to the example of the call centre industry, an industry that is characterised by intensive electronic surveillance.[61] A prospective call centre employee might want surveillance to be an issue in contractual negotiations; she or he might want to impose limits on when, or where or how electronic surveillance is used. According to conventional contract theory, there is no reason in principle why a term limiting electronic surveillance might not be included.[62] In real life, however, the employee's preferences are unlikely to prevail for the reasons just discussed. Indeed, call centres are often set up in locations which allow employers to make the most of the opportunities the individual contract of employment creates: many are established in rural centres which have high levels of unemployment, so-called 'dying towns'.[63] The relative scarcity of employment makes bargaining between employers and employees as if they were equals virtually impossible.

The purpose of the foregoing analysis is not to break new legal ground. Rather, it is to demonstrate that it is misleading to describe the absence of legislation as a legal vacuum.[64] The law of property and the common law of employment give legitimacy to employers' imposition of electronic workplace surveillance by assuming that employees have consented to existing working norms when they enter the contract of employment.[65] Historically, non-wealth owners have called for legislative intervention in the field of industrial relations, not to fill legal vacuums, but precisely because of the fact that the common law contract of employment reinforces a starting position which systematically produces outcomes favouring employers.

Employees can be subjected to measures such as electronic surveillance not in spite of the law, nor because of its absence. This point may be reinforced by an examination of the judicially-developed conceptions of managerial control and the duty to obey.

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60 Marshall J's interpretation of s 170WG(1) of the WRA in *Australian Services Union v Electrix Pty Ltd* (1999) 93 IR 43 provides an interesting contrast to the common law's approach to duress. In that case, an employer's offer to engage a group of workers on AWAs on a 'take it or leave it' basis, was held to raise a serious question to be tried under s 170WG, which prohibits duress in connection with an AWA: see further, J C Tham, '"Take it or Leave it" AWAs: A Question of Duress' (1999) 12 *AJLL* 142; more recent decisions suggest that the courts are likely to take a more conservative approach to s 170WG: see, eg, *MUA v Burnie Port Corporation Pty Ltd* [2000] FCA 1496 (18 September 2000, unreported, BC200006347).

61 See, eg, Long, 'Why Your Boss is Bugging You', above n 3.

62 Provided it is clear and sufficiently certain, and is supported by good consideration, it will be enforceable: Carter and Harland, above n 56.

63 C Johnston, 'Hang ups', *SundayLife! (The Sunday Age Magazine)*, 16 May 1999.

64 Mark Freedland has made a similar argument in relation to the response of labour lawyers to the trend of reducing statutory intervention in the labour market during the 1980s and 1990s: M Freedland, 'The Role of the Contract of Employment in Modern Labour Law' in L Betten (Ed), *The Employment Contract in Transforming Labour Relations*, Kluwer Law International, The Hague, 1995, p 18.

65 Glasbeek, 1986, above n 22, p 64; Collins, 1986, above n 14, at 1.

'A power to command and a duty to obey'

One of the basic precepts of contract law is that the courts will interpret and enforce agreements in order to give effect to the intentions of the parties. However, it does not follow from this general proposition that the parties' express or implied intentions provide the only source of contractual terms.[66] By virtue of the concept of 'terms implied by the operation of law', courts will treat certain terms as part of 'all contracts of a particular class', subject to any express agreement to the contrary.[67]

Over the years, the courts have developed a range of terms which are implied by law in the contract of employment.[68] Prominent among these is the employee's general duty to obey the employer's directions.[69] The fact that this term is included in all employment contracts indicates that the law treats an employee's subservience as an indispensable element of the employment relationship. As Sir Otto Kahn-Freund explained:

> There can be no employment relationship without a power to command and a duty to obey, that is without the element of subordination in which lawyers rightly see the hallmark of the 'contract of employment'.[70]

The limits which the law imposes on the employer's power to command are ill-defined and have long been subject to debate.[71] Although it is clear that employees must submit to lawful commands,[72] there is disagreement over the issue of whether employees are obliged to obey only 'lawful *and* reasonable orders, or merely lawful ones'.[73]

This controversy aside, the courts have, according to Creighton and Stewart, 'shown a considerable preparedness . . . to uphold and extend managerial prerogative'.[74] This trend is illustrated by cases where the courts have upheld the power of employers to exercise authority in relation to matters which are beyond the employee's core tasks, or outside working hours.[75] This

66 The parties implied intentions may be enforced as terms implied in fact. Put simply, terms implied in fact are those which, in the opinion of the court, the parties must have intended to include: *Hart v Jacobs* (1981) 39 ALR 209. Terms implied in fact are 'unique to the particular contract under consideration': *Castlemaine Tooheys Ltd v CUB Ltd* (1987) 10 NSWLR 468 at 486-7 (Hope JA).

67 Ibid; see further, McCallum and Pittard, above n 39, pp 86-7, 91.

68 Ibid.

69 Other implied obligations imposed upon employees include: the duty to exercise care and skill; and the duty of good faith and fidelity: Creighton and Stewart, above n 45, pp 161-8.

70 O Kahn-Freund, *Labour and the Law*, Stevens, London, 1972, p 9.

71 It is difficult to predict with any certainty how courts will view particular conduct. Compare, for example, the contrasting approaches of the courts in *Pepper v Webb* [1969] 1 WLR 514 and *Wilson v Racher* [1974] ICR 428.

72 Although much will depend on the circumstances, refusal to comply with managerial authority may lead to an employee being summarily dismissed, that is, dismissed without notice: Creighton and Stewart, above n 45, pp 184-6.

73 It is clear that an employer cannot require the employee to perform unlawful acts (*Kelly v Alford* [1988] 1 Qd R 404) or to subject himself or herself to personal danger (*Ottoman Bank v Chakarian* [1930] AC 277); see also, G McCarry, 'The Employee's Duty to Obey Unreasonable Orders' (1984) 58 *The Australian Law Jnl* 327; Creighton, Ford and Mitchell have persuasively criticised McCarry's view, above n 44, pp 183-6.

74 Creighton and Stewart, above n 45, p 162.

75 See, generally, McCallum and McCarry, above n 19; Creighton and Stewart, above n 45, pp 162-3. For example, in *Australian Telecommunications v Hart* (1982) 43 ALR 165, the

is not to suggest that employers possess an unqualified power to command, but rather to place electronic workplace surveillance in the context of the employers' existing, judicially-recognised intrusive powers.[76] As the notions of managerial prerogative and 'the authority of management' indicate, the common law has traditionally regarded a hierarchical command structure as an appropriate mode of workplace governance. Thus, while electronic surveillance practices appear aberrant from a civil libertarian perspective, they harmonise well with the common law's conception of the world of work.

Control: description and ideal

Although the courts have played an important role in establishing and articulating the legal basis for the authoritarianism of the employment relationship, it would be a mistake to see this state of affairs as simply the product of judicial hard-heartedness. Rather, it has its concrete basis in capitalist relations of production and the peculiar qualities of human 'labour power'.[77] Edwards explains the problem thus:

> Capitalism itself came into being when labor [sic] power . . . became a commodity . . . What the capitalist buys in the labor market is the right to a certain quantity of what Marx has called *labor power*, that is, the worker's capacity to do work . . . But the capacity to do work is useful to the capitalist only if the work actually gets done. Work, or what Marx called *labor*, is the actual human effort in the process of production . . . Once the wages-for-time exchange has been made . . . [the capitalist] must strive to extract actual labor from the labor power he [sic] now legally owns.[78]

Employers do not face this problem when they purchase other commodities such as tools, machinery, or raw materials. Whereas their value in the production process can be determined with a degree of precision, the value of the labour power is inherently indeterminate.[79]

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court held that the employer was entitled to forbid an employee to arrive at work in a caftan and thongs and to fine him when he persistently refused to change his ways. In *Wall v Westcott* (1982) 1 IR 45, the court ruled that the employee had engaged in conduct justifying dismissal by having a sexual relationship with his employer's wife as an act of revenge against the employer; McCallum and McCarry, above n 19, at 26-7. See also *Re Transfield Pty Ltd* [1974] AR (NSW) 596; Creighton, Ford and Mitchell, above n 44, pp 239-40; McCallum and McCarry refer to a range of analogous cases: above n 19, pp 26-7. The duty of fidelity may also be a source of employer powers which stretch beyond the employee's conduct in the workplace: see generally, R McCallum, *Employer Controls Over Private Life*, UNSW Press, Sydney, 1999.

76 A similar comparison was made in the context of mandatory employee drug testing by Glasbeek and McRobert, above n 12, at 35-7.

77 'By labor-power or capacity for labor [sic] is to be understood the aggregate of those mental and physical capabilities existing in a human being, which he [sic] exercises whenever he produces a use-value of any description': K Marx, *Capital Volume 1*, International Publishers, New York, 1967, pp 164-5; see further, R Edwards, *Contested Terrain: The Transformation of the Workplace in the Twentieth Century*, Basic Books, New York, 1979, p 11.

78 Edwards, above n 77, pp 11-12.

79 Marx emphasised this point by describing labour power as 'variable capital': Marx, above n 77, pp 193-203. See also, A Friedman, 'Responsible Autonomy Versus Direct Control Over the Labour Process' (1977) 1 *Capital and Class* 43 at 48; H Braverman, *Labor and Monopoly Capital*, Monthly Review Press, New York, 1974, pp 53-8: '[W]hat the worker sells, and what the capitalist buys, is *not an agreed amount of labor, but the power to labor over an agreed period of time*': p 54; Edwards, above n 77, pp 11-16.

Further, unlike other commodities, the capacity for labour is 'ultimately controlled by an independent and often hostile will'.[80] In light of this, workers might be expected to expend as little effort as possible, especially where work is dull and unfulfilling.[81] Alternatively, they might attempt to assert a degree of control over the direction of work,[82] or reduce the length of the working day.[83] In short, workers are likely to resist being treated as a commodity.[84] On the other side, the employer will strive to extract '60 minutes of useful labour from every worker in every hour' in order to get maximum production at the least possible cost.[85] Thus, the workplace is always a 'contested terrain'.[86]

Edwards has observed that, although methods differ between workplaces and over time, employers invariably seek to establish a 'system of control' in which the following elements are combined:[87]

(i) Direction, or a mechanism or method by which the employer directs work tasks, specifying what needs to be done, in what order, with what degree of precision or accuracy, and in what period of time.
(ii) Evaluation, or a procedure whereby the employer supervises and evaluates to correct mistakes or other failures in production, to assess each worker's performance, and to identify individual workers or groups of workers who are not performing work tasks adequately.
(iii) Discipline, or an apparatus that the employer uses to discipline and reward workers, in order to elicit cooperation and enforce compliance with the capitalist's direction of the labour process.

Through a variety of mechanisms, the law assists employers in addressing these imperatives.[88] The duty to obey, together with the associated powers of discipline and dismissal, satisfy elements (i) and (iii). Criterion (ii), the right to evaluate, is, in turn, an indispensable corollary of the legal power to command and punish; the detection of aberrant behaviour is a precondition to the application of corrective measures. The legal right to command would be

80 Friedman, above n 79, at 48. See further, Braverman, above n 79, p 54.
81 Edwards, above n 77, p 12.
82 The courts have recognised that an employee's 'refusal' to obey, 'though not wilful, may have the effect of controlling the employer's business to such an extent, that, in law, the employee's conduct is inconsistent with a continuation of the employer-employee relationship': *Pastrycooks Employees, Biscuit Makers Employees & Flour and Sugar Goods Workers' Union (NSW) v Gartrell White (No 3)* (1990) 35 IR 70 (*Pastrycooks* case). Employer control is, as discussed below, a defining feature of the contract of employment.
83 Braverman, above n 79, p 56.
84 Edwards, above n 77, p 12.
85 R Delbridge et al, 'Pushing back the frontiers: management control and work intensification under JIT/TQM factory regimes' (1998) 13 *New Technology, Work and Employment* 97. The issue of time has always been at the centre of conflicts between employers and employees: E P Thompson, 'Time, Work-Discipline and Industrial Capitalism' in *Customs in Common*, Merlin Press, London, 1991, pp 389-90.
86 Edwards, above n 77.
87 Ibid, p 18.
88 The significance which the law attaches to employer control is further illustrated by the test for the existence of the contract of employment. The degree of control which an employer exercises in relation to a worker remains the primary, though no longer the sole, criterion distinguishing the contract of service from the contract for services. The current test, known as the 'multiple indicia test', looks to a variety of factors, but continues to accord great importance to control: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513; see further, McCallum and Pittard, above n 39, pp 53-69.

of no practical utility without the power to survey. Surveillance is, therefore, simply a mechanism which enables employers to '*enforce*' the power to command.[89] Because this observation is so self-evident, the issue of supervision has seldom been the subject of judicial controversy.

Seen in this context, electronic surveillance is a perfectly rational response to the perennial problems of discipline and control. Moreover, from the perspective of the law of employment, there is no reason in principle why electronic surveillance should be distinguished from human supervision. Thus, even in the federal statutory unfair dismissal jurisdiction, the use of electronic surveillance has barely raised an eyebrow.[90]

In many situations, electronic monitoring devices are inextricably woven into the actual system of work. The elaborate computerised monitoring techniques employed in call centres are a good example, as are the 'engineered standards' of the grocery warehouse industry.[91] These systems of surveillance have aroused particularly strong opposition because they are seen as defining the very nature of the occupation to which they apply.[92] However, although workers must 'live' their occupation, most contracts of employment leave the crucial questions about the organisation of production within the penumbra of managerial prerogative.[93] The law largely preserves the right of employers to shape, and in some cases, re-shape, the nature of work.[94]

In sum, for the law of employment, employer control is both a description

89 *Re Dispute; Re Dismissal of Union Delegates at Homebush Abattoir* [1966] AR (NSW) 371, 373, 274 (Cook J) quoted in the *Pastrycooks* case, above n 82, at 76.

90 For example, in *J L Cochrane v Coolalinga Caravan Tourist Resort* (AIRC, 874/98 V Print Q3209) a petrol station attendant was dismissed for under-performance partly on the strength of evidence from video cameras. The cameras were ostensibly for the purpose of deterring and detecting customer wrongdoing. In the course of finding for the employer, Commissioner Gay opined that 'there is no basis for terming the use of cameras . . . illegitimate, unfair, or placing staff at a disadvantage', at 3. In *M Smith v Western Hospital* (AIRC, 602/98 M Print Q1359), where Commissioner Foggo was troubled by the use of covert surveillance, but ultimately deferred to management's judgment about the need for such a measure: at 2. See also *Skeppstrom and Knapp v Ansett Australia* (AIRC, 650/99 S Print R5876), where Commissioner Jones was critical of the company's use of electronic surveillance, but only because it 'should have been a tad more sophisticated' — 'poor lighting' was no excuse.

91 See discussion of the industrial dispute between Franklins and the NUW in Part 2 of this article, below.

92 See, for example, C Wright and J Lund, '"Under the Clock": Trade Union Responses to Computerised Control in US and Australian Grocery Warehousing' (1998) 13 *New Technology, Work and Employment* 3 at 198, 204-5.

93 Creighton and Stewart, above n 45, p 7; and P Selznick, *Law, Society and Industrial Justice*, Russell Sage Foundation, New York, 1969, pp 134-6.

94 Creighton and Stewart, above n 45, p 162. In *Cresswell v Board of Inland Revenue* [1984] 2 All ER 713, for instance, the court held that the employer had an implied power to direct that a job be performed by a different method, even if re-skilling was necessary. However, there are limits: Creighton and Stewart note that the courts have made it clear that in relation to issues such as the type of work and the level of remuneration, 'the employer's flexibility is subject to the substantial limitation that, without express authority, the terms of the employment contract may not be unilaterally varied'. Even under collective bargaining regimes, the employer retains the power to decide whether to invest and, if so, 'how much, where to do so, what products shall be made, what amount, what quality . . .' and so on: H J Glasbeek, 'The Contract of Employment at Common Law' in J Anderson and M Gunderson (Eds), *Union-Management Relations in Canada*, Addison-Wesley, Toronto, 1981, p 74.

and an ideal; electronic surveillance is indicative of the type of relationship which the law describes as 'employment', and also a reflection of the norms which the contract of employment is designed to promote.

Electronic surveillance as an example of bureaucratic power

Much of the foregoing discussion of the relationship between electronic surveillance and the employment relationship has been based on the concept of 'market power', to use Collins' term.[95] Collins, drawing on Weber,[96] suggests that the idea of 'market power' must be supplemented by an understanding of how most employment relationships embody private 'bureaucratic power'.[97] In the employment context, bureaucratic power is usually a characteristic of large concerns in which employees are subordinated to a 'miniature legal system' established by the employer's code or book of rules.[98] Collins argues that by presenting managerial decision-making under the code as an exercise of bureaucratic power, 'we can firmly insist that the power should be exercised reasonably' and, in particular, in conformity with public law concepts such as natural justice.[99] The law of unfair dismissal is put forward as an example of this principle in action.[100]

One of the features of bureaucracy is the *impersonal* exercise of power.[101] Bureaucratic power is characterised less by the personal delivery of separate commands, than by the establishment of a set of rules and a system of work.[102] Further, bureaucracy, as Weber conceptualised it, is governed by *instrumental rationality* and therefore disdains all forms of arbitrariness, prejudice, caprice and irrationality: its goal is to find the most efficient means of achieving the

95 Collins, 1986, above n 14, at 2.

96 See H H Gerth and C Wright Mills (Eds), *From Max Weber: Essays in Sociology*, Oxford University Press, New York, 1946.

97 Collins, 1986, above n 14, at 2.

98 Collins contends that '[t]his bureaucratic aspect of subordination arises from the organisational structure rather than from any initial inequality in bargaining power, for it persists even when employees, either individually or collectively, enjoy strong bargaining leverage': ibid, at 1-2.

99 For a recent discussion of the idea that 'abuse of power' is a 'common theme in public law and employment law', see J Laws, 'Public Law and Employment Law: Abuse of Power' [1997] *Public Law* 455.

100 Although Australian and English unfair dismissal regimes differ, Collins' point is just as valid in the Australian setting in so far as the Australian legislation also imposes procedural safeguards aimed at removing arbitrariness and caprice: see generally, A Chapman, 'Termination of Employment Under the Workplace Relations Act 1996 (Cth)' (1997) 10 *AJLL* 2. Collins also cites anti-discrimination law, pay equity legislation, etc; again, his observations in relation to the English variants of these schemes would also apply to their Australian equivalents.

101 M Weber, 'Bureaucracy' in Gerth and Mills, above n 96, pp 215-16; see further, Edwards, above n 77, pp 130-1.

102 In the United Kingdom and Australia, employee disobedience has rarely become the subject of court proceedings and, where it has, it has usually involved a refusal to submit to highly *personalised* regimes of control: see, eg, *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143; *Pepper v Webb*, above n 71; and *Wilson v Racher*, above n 71. *ASLEF* [1972] 2 QB 455 is unusual in so far as it deals with impersonal, bureaucratic power. By contrast, industrial tribunals in both the United Kingdom and Australia are frequently required to deal with all manner of alleged employee disobedience under various unfair dismissal regimes.

desired end.[103] Thus, bureaucratic power tends to take on the appearance of *objectivity*.[104]

In as much as certain aspects of electronic surveillance promote impersonality and instrumental rationality, the phenomenon may be regarded as an incident of bureaucratic power. Indeed, one of the business rationales for adopting electronic surveillance is that it allows the employer to save money by reducing a layer of human management.[105] Further, electronic performance monitoring promotes instrumental rationality by reducing the elements of prejudice, favouritism and error in employee assessment.[106] Thus, in these respects, Collins' notion of bureaucracy can be used to supplement the observations made earlier about the nature of the employment relationship, which rested more on concepts associated with the conflict approach to labour law.

Based on evidence tendered by various employer groups, the NSW Privacy Committee concluded that 'one of the most significant factors behind the growth in the video surveillance market in the past year has been the recent . . . [legislative] changes aimed to protect employees against unfair dismissals'.[107] In response to the need to satisfy quasi-judicial evidentiary standards and the requirements of natural justice, employers have increasingly begun to use electronic monitoring, and especially cameras, to 'collect evidence of misconduct or poor performance'.[108] A review of Australian Industrial Relations Commission decisions reinforces this observation.[109]

Cameras are used in connection with dismissal because employers perceive that they are less open to question than human testimony.[110] Indeed, employers often suggest that employees actually benefit from video

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103 On the growth of instrumental-rationality, see M Weber, *The Protestant Ethic and the Spirit of Capitalism*, Allen and Unwin, London, 1976.

104 M Weber, 'Bureaucracy' in Gerth and Mills, above n 96, pp 215-16.

105 Thus, the Privacy Committee noted that in light of 'the constant pressure to cut costs . . . video surveillance may be an attractive means of reducing staffing costs, particularly those relating to supervision of other employees': NSW Privacy Committee, above n 1, pp 10, 12.

106 One advocate of electronic monitoring asserted that the 'benefit to the [employee] is freedom from uncertainty': quoted in Long, 'Why Your Boss is Bugging You', above n 3, at 26.

107 NSW Privacy Committee, above n 1, p 21. The Privacy Committee's report was released in 1995. Thus, the 'recent changes' referred to in the text were the unfair dismissal provisions encompassed in Div 3 of Pt VIA of the Industrial Relations Act 1988 (Cth) which took effect on 30 March 1994.

108 Ibid.

109 See, eg, *M Smith v Western Hospital*, above n 90; *Australian Airlines v Transport Workers' Union of Australia* (AIRC, 584/90 Print J3013); *Transport Workers' Union of Australia v Ansett Airlines of Australia* (AIRC, T029 465/91 Print J7864); and *Federated Clerks Union of Australia v Ansett Transport Industries (Operations) Pty Ltd* (AIRC, C027 116/91 Print J6754); *J L Cochrane v Coolalinga Caravan Tourist Resort*, above n 90; *Painter v Angus & Robertson Bookworld* (AIRC, 102/96 Print N0913); *Doganay v Linpac Aurora Pty Ltd* (AIRC, 921/96 Print N 3480); *Lauder v Geelong Cement* (AIRC, 229/99 B Print R 2735); *Pereira v Australia Post* (AIRC, 1229/97 P Print P5704); *Mobil Oil v Transport Workers' Union of Australia* (AIRC, Mis 637/86 SD Print G5750).

110 See, eg, Retail Traders' Association of NSW, *Submission to NSW Privacy Committee: Inquiry into Visual Surveillance in the Workplace*, February 1995, p 6; NSW Chamber of Manufacturers, *Submission to NSW Privacy Committee: Inquiry into Visual Surveillance in the Workplace*, February 1995, p 3.

monitoring because it is accurate and not susceptible to the mistakes and prejudices that might attend human supervision. Thus, to the extent that it is perceived as reducing arbitrariness and increasing accuracy, electronic surveillance is a logical product of the unfair dismissal regime. Moreover, in as much as electronic surveillance creates the appearance of objectivity, it also serves to legitimate the exercise of the state-like disciplinary powers[111] associated with dismissal for acts of serious misconduct, such as theft.

The implied duty of mutual trust and confidence

So far, it has been suggested that the fundamental norms of judicially-developed employment law tend to reinforce the power of employers to impose electronic surveillance on employees. However, recent developments in the common law indicate that new limits on managerial power may be emerging from within contract law itself. One of the most notable manifestations of this trend is the development of the implied obligation of mutual trust and confidence. The purpose of this section is to examine the likely effect of this new implied term on electronic workplace surveillance.

Although the position in Australia remains embryonic,[112] it is well settled in England that there is an implied term in all contracts of employment to the effect that an employer will not, 'without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.[113] According to the House of Lords, the question of whether trust and confidence has been harmed is to be 'looked at objectively'.[114]

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111 In its submission to the Privacy Committee's inquiry, the NSW Retail Traders' Association inadvertently acknowledged the state-like qualities of some employer security practices when it noted that 'retailers are increasingly employing their own "police force" known as security personnel': Retail Traders' Association of NSW, above n 110, p 4.

112 The leading Australian case on the implied duty of trust and confidence is *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 (Full Court, Industrial Relations Court of Australia) (*Burazin*). The court in *Burazin* appeared to assume that the implied duty is part of Australian law. However, as McCarry noted in his excellent critique of the decision, in order for the implied duty to be part of Australian law, it must meet the test of 'necessity' laid down by the High Court in *Byrne v Australian Airlines* (1995) 185 CLR 410; 131 ALR 422. McCarry suggests that this test could be satisfied quite easily: G McCarry, 'Damages for Breach of the Employer's Implied Duty of Trust and Confidence' (1998) 26 *Australian Business L Rev* 141. See further, *Russian v Woolworths (SA) Pty Ltd* (1995) 64 IR 169; *Linkstaff International Pty Ltd v Roverts* (1996) 67 IR 381; *Raffoul v Blood Transfusion Service of the Australian Red Cross Society* (1997) 76 IR 383; *Emmerson v Housing Industry Association Ltd* [1999] FCA 500; *Easling v Mahoney Insurance Brokers Pty Ltd* [2001] SASC 22.

113 The leading English authority is *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 (*Malik*); in *Malik*, the House of Lords confirmed a line of authority supporting the existence of the implied duty of trust and confidence: see, eg, *Woods v W M Car Services (Peterborough) Ltd* [1983] ICR 666; *Bliss v South East Thames Regional Health Authority* [1987] ICR 700 (*Bliss*); *Scally v Southern Health and Social Services Board* [1991] 4 All ER 563; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597; *Spring v Guardian Assurance* [1994] 3 All ER 129; *Post Office v Roberts* [1980] IRLR 347; *United Bank v Akhtar* [1989] IRLR 507. According to Lord Steyn, the implied duty has its roots in 'the general duty of co-operation between contracting parties': *Malik* [1998] AC 20 at 45.

114 *Malik*, above n 113, at 35 (Nicholls LJ).

The open-textured nature of the obligation means that its operation can only be described in very general terms. Thus, Brodie has observed that 'more often than not, mutual trust and confidence cases strike at "bad behaviour" by the employer'.[115] In a similar vein, Sir John Laws has suggested that the obligation is concerned with employer 'abuses of power'.[116] That is, with arbitrariness, caprice, unreasonableness, disproportionality, defeat of 'reasonable expectations', bad faith, improper purposes, and so on.[117]

The application of the implied duty to any aspect of employment law involves difficult questions of fact and degree; the area of workplace surveillance is no exception. Consider, for instance, McCallum and McCarry's suggestion that the implied duty of trust and confidence might limit 'covert observation of changing rooms'.[118]

A strong case might be made against a male employer who, for an improper purpose, installed and operated covert surveillance cameras in a changeroom set aside for female employees. However, if some of the factors in this scenario are altered, the difficulty of applying the implied term becomes clear: What if the employees were male? What if the surveillance was overt? What if it was authorised by an express term in the contract of employment?[119] What if the employer had no compelling rationale for the surveillance, but there was no evidence of an improper purpose? What if there was evidence that drugs were being sold and consumed in the changeroom? What if several employees had requested the surveillance because of their concerns about drug use?

It is likely that McCallum and McCarry chose the changeroom example because it involves a situation where employees have a heightened expectation of privacy and which is clearly open to employer abuse or, to use Brodie's term, 'bad behaviour'. In practice, many other far more common electronic surveillance practices may lack the impropriety or 'extreme and deliberate conduct' which seem to be requirements of the doctrine.[120] Several examples come to mind:

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115 D Brodie, 'Beyond Exchange: The New Contract of Employment' (1998) 27 *Industrial Law Jnl* 79 at 80.

116 According to Sir John Laws and Hugh Collins, the implied duty of trust and confidence is partly a reflection of a trend towards the incorporation of 'public' law concepts within the 'private' law framework of the common law contract of employment: Laws, above n 99; Collins, 1986, above n 14.

117 Although Brodie refers to public law concepts such as abuse of power, he builds his analysis around the contractual concept of 'good faith', focusing on analogies with established 'contracts of good faith', such as insurance and partnership agreements: see Brodie, 1998, above n 115, especially at 86, 96-7. See further, Laws, above n 99; Collins, 1986, above n 14, at 9. Similarly, Coke J of the New Zealand High Court suggests that the emergence of the obligation of mutual trust and confidence should be seen as part of a pattern, across different fields of law, of the creation of 'remedies for unfair excesses of power': *Re Northwestern Autoservices Ltd* [1980] 2 NZLR 302 at 309.

118 McCallum and McCarry, above n 19, at 17.

119 This example raises the contentious issue of the relationship between express and implied terms. The orthodox view is that a party to a contract is entitled to enjoy the full effect of a clearly stated express power. However, as Brodie notes, this axiom has been called into question by decisions such as *Johnstone v Bloomsbury Health Authority* [1992] QB 333; *Imperial Group Pension Trust v Imperial Tobacco Ltd* [1991] ICR 524 and *United Bank v Akhtar* [1989] IRLR 507: see further, Brodie, 1998, above n 115, at 82.

120 R Naughton, 'The Implied Obligation of Mutual Trust and Confidence — A New Cause of Action for Employees?' (1997) 10 *AJLL* 287 at 289.

- employers in the airline[121] and retail[122] industries could argue that covert and overt video surveillance is justified in areas where theft is believed to have occurred, or where there is a high risk of theft;[123]
- employers in the grocery warehouse industry could mount a strong defence of performance monitoring on the grounds of improved efficiency and productivity;
- employers in the call centre industry could justify audio monitoring by reference to its training benefits and the need for quality control;[124]
- employers in a range of white-collar professions could attempt to justify e-mail surveillance on the basis that it enables the detection of sexual harassment by e-mail (a common practice), as well as the misuse of sensitive information by employees.[125]

Although some employees may feel that their trust and confidence has been undermined by these kinds of practices, this does not make the employer's conduct a breach of the implied term. *Malik* makes it clear that the impact of employer behaviour is to be assessed objectively.[126] In as much as the forms of surveillance just described constitute common commercial practices with clear business rationales, the courts' traditional reluctance to interfere with managerial prerogative may make them unwilling to regard any of them as 'bad behaviour' or an 'abuse of power'. Indeed, despite appearances to the contrary, deference to managerial prerogative is part of the fabric of the implied duty of trust and confidence: like the law of unfair dismissal, it is 'informed by procedural standards', which are not designed to 'impinge on the running of the employer's business to any significant extent'.[127] As Brodie has

121 See, eg, *Australian Airlines v Transport Workers' Union of Australia* (AIRC, 584/90 Print J3013); *Transport Workers' Union of Australia v Ansett Airlines of Australia* (AIRC, T029 465/91 Print J7864); and *Federated Clerks Union of Australia v Ansett Transport Industries (Operations) Pty Ltd* (AIRC, C027 116/91 Print J6754); *Byrne and Frew v Australian Airlines* (1994) 52 IR 10.

122 According to the Retail Traders' Association of NSW, employee and customer theft is an extremely costly problem; the association estimates that it costs the industry $2.15 billion per annum. Further, it suggests that electronic surveillance has been very successful in combating the problem of pilfering — in one case cited by the association, detection of crime increased 34% in one year. It is unlikely that a court would be dismissive of such data: Retail Traders' Association of NSW, above n 110, p 4; note, however, that the effectiveness of electronic surveillance is a contentious issue.

123 As discussed earlier, covert surveillance barely raises an eyebrow in the unfair dismissal jurisdiction: see discussion above at n 90.

124 For a defence of call monitoring in the call centre industry, see Bradley, above n 9.

125 However, the heightened expectation of privacy in this context, and the attendant possibility that employers would encounter very personal information, makes e-mail surveillance closer to the changeroom example and, therefore, more ambiguous. The legal status of e-mail monitoring is further complicated by the as yet untested possibility that the equitable doctrine of breach of confidence could apply to e-mail communication: for a brief consideration of the potential relevance of the duty of trust and confidence to e-mail privacy, see McGregor, above n 19, at 158. For a discussion of employer arguments relating to surveillance and sexual harassment, see NSW Privacy Committee, above n 1, p 20.

126 *Malik*, above n 113, at 46-7 (Steyn LJ).

127 Employees in a Franklins-type situation could argue that the unilateral introduction of new work systems which rely heavily on intensive electronic surveillance is a breach of the implied duty of trust and confidence. However, although this argument is plausible, it is

put it, it is likely that the implied duty 'does not impinge on "good" employers at all'.[128]

Thus, in relation to the above examples there is arguably substantial scope for a court to hold either: (i) that, from an objective point-of-view, these practices are not likely to harm trust and confidence; or, alternatively, (ii) that even if trust and confidence is likely to be harmed, there is a 'reasonable and proper cause' for the employer's conduct.

In light of the foregoing, it is tentatively suggested that the implied obligation of trust and confidence may only offer employees protection against the most arbitrary and intrusive forms of surveillance;[129] or, as Naughton has put it, 'extreme and deliberate conduct on the part of the employer'.[130] It is plausible, therefore, that the operation of the duty will be confined to those examples of electronic surveillance which:[131]

1. offend an important employee interest, such as privacy or dignity;
2. are not reasonably and proportionately referable to legitimate commercial or proprietary interests; and
3. are tainted by impropriety.

Moreover, even if some forms of electronic monitoring do offend the implied duty of trust and confidence, there are a range of legal and practical reasons why the obligation is unlikely to offer workers a particularly attractive means of resisting electronic workplace surveillance. First, as Stewart has noted, 'litigation in the ordinary courts to assert basic employment rights' would be an undesirable prospect for 'most employees and even unions, given the unpredictable nature of the common law standards, the costs involved and the difficulty of obtaining legal aid'.[132]

Second, if the Industrial Relations Court of Australia's dicta in *Burazin*

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likely to come up against the type of policy consideration advanced by Watkins LJ: 'Employers must not . . . be put in a position where, through the wrongful refusal of their employees to accept change, they are prevented from introducing improved business methods in furtherance of seeking success for their enterprise': quoted in Brodie, 1996, above n 28, at 129.

128 Ibid, at 136.

129 In so far as electronic surveillance involves 'intrusion', a broad analogy may be made with the unjustified indignity and intrusion raised by the facts in *Bliss v South East Thames Regional Health Authority* [1987] ICR 700, where a surgeon was ordered to undergo a psychiatric examination, more as a result of an intra-workplace personality conflict than for any reasonable cause. This was held to be a breach of the implied duty: ibid, at 711, 715.

130 Strictly speaking, the objectivity of the test makes the employer's intentions irrelevant; 'what is significant is the impact of the employer's behaviour on the employee'. However, in practice, the employer's apparent purpose is likely to influence the court's determination of whether or not there has been 'bad behaviour': McCarry, above n 112, at 142; Naughton, above n 120, at 289.

131 The implied term might also affect situations where the surveillance itself is accepted as legitimate, but the employer has damaged the relationship of trust in confidence as a result of the manner in which the record of surveillance is treated. For example: a video surveillance camera may record an incident which leaves an employee open to ridicule; providing the recording to a television program such as 'Australia's Funniest Home Videos' might breach the term; alternatively, failure on the part of the employer to properly secure such a recording might also breach the term if this led to a third party obtaining and misusing the tape. This may lead to unwarranted humiliation of the employee, a harm similar to that suffered by the employee in *Burazin*, above n 112.

132 Stewart, above n 31, p 25.

were to be followed, the remedies open to aggrieved employees would, in many cases, be of little practical significance. In *Burazin*, the court was apparently of the view that an employee could claim damages for economic loss flowing from a breach of the implied duty.[133] However, it went on to state that such a claim could not be made 'during the currency of the employment relationship', because 'the term is intended to bolster an ongoing relationship'; legal action by the employee 'would presumably cause further deterioration in the relationship'.[134] It follows, therefore, that the employee would be 'confined to the remedies of leaving if the breach was sufficiently serious or seeking an injunction to restrain continuation of the breach'.[135] Neither would be a particularly attractive option for most employees.

Third, on the basis of *Bliss*, it is apparently possible for an employee to waive a breach of the duty.[136] In practice, many employees, especially those who are in a weak bargaining position, are likely to waive their right to pursue any action, rather than risk taking on their employer.

Fourth, although Brodie has made a strong case that 'certain implied terms in law should be immune from contracting-out',[137] it is likely that well-advised employers will begin to include terms which limit the application of the implied duty of trust and confidence.[138] Where employees are in a weak bargaining position, they will have little option but to accept contracting-out. Finally, and relatedly, employers may include an express term authorising certain forms of electronic surveillance. Although cases such as *Johnstone v Bloomsbury HA*[139] raise the possibility that such an express term could be read down in light of the implied duty of trust and confidence, the mere chance that this may occur would hardly prompt many employees to embark on expensive litigation.

In sum, therefore, even when the potential ameliorative effect of the implied duty of trust and confidence is taken into account, the common law contract of employment is likely to continue to provide a framework which tends to accommodate, rather than fetter, employer attempts to impose electronic workplace surveillance. Thus, although it is conceptually possible that the 'the very nature of the employment contract is changing', the development of the

133 McCarry tentatively reached this conclusion having noted the considerable ambiguity of the Full Court's reasoning in relation to this point. He also noted that *Burazin* 'would not stand as an obstacle to stigma damages being awarded in Australia [as in *Malik*]': McCarry, above n 112, at 144.

134 *Burazin*, above n 112, at 154. For a compelling critique of this line of reasoning, see McCarry, above n 112, at 145-6.

135 McCarry, above n 112, at 145. However, as Brodie notes, it 'goes without saying' that it is very difficult for an employee to obtain an injunction: see Brodie, 1996, above n 28, at 134-5.

136 See *Bliss*, above n 129. This possibility in turn raises the debate over whether employees can only be taken to have waived their legal rights if they had 'actual knowledge' of those rights: see further, Brodie, 1996, above n 28, at 123.

137 See D Brodie, 'Mutual Trust and the Values of the Employment Contract' (2001) 30 *Industrial Law Jnl* 84; and Brodie, 1998, above n 115, at 82-6.

138 Such a practice would be consistent with the trend towards 'formalised flexibility' described by S Deakin in 'Organisational Change, Labour Flexibility and the Contract of Employment', in S Deery and R Mitchell (Eds), *Individualisation and Union Exclusion in Employment Relations: An International Study*, Federation Press, Sydney, 1999.

139 [1992] QB 333.

implied duty of trust and confidence remains too 'embryonic' to constitute compelling evidence for such a transformation.[140] Further, in light of the contract of employment's historical role as a bulwark of private power, it is difficult to be sanguine about the prospects of such a transformation occurring in the near future. Indeed, contemporary political developments point in a quite different direction: it can be safely assumed that employers and their political allies are not fighting to revive the contract of employment because they long to rein in managerial power.[141]

The common law contract of employment establishes a complex system of legal regulation which, all things considered, serves to legitimate and reinforce the ability of employers to coerce and control their workforces through electronic surveillance and other measures. This system of regulation may be modified by legislative intervention, but to the extent that it remains untouched, the common law, not a vacuum, prevails.

The significance of the Victorian and NSW legislation may be more fully appreciated, if considered from this perspective.

Part 2 — The Legislation

The Workplace Video Surveillance Act 1998 (NSW)

In NSW, the issue of electronic workplace surveillance was thrust onto the legislative agenda as a result of a series of bitter industrial conflicts. Among these, the 1994 dispute between Franklins and the NSW Branch of the NUW is probably the most notable. In early 1994, about 800 workers struck over the introduction by management of so-called 'engineered standards', a type of computerised 'time and motion' work monitoring system.[142] The strike lasted only four days, but it was no less acrimonious for being brief. Hostilities reached their crescendo as police and non-union workers attempted to break the strikers' pickets. Following this violence, the first phase of the dispute ended in compromise: the NUW accepted the 'engineered standards', but managed to extract a pay rise by way of a trade-off.[143]

It wasn't long, however, before the issue of electronic surveillance again sparked conflict between Franklins and the NUW. Shortly after the compromise was reached, Franklins alleged that some of its property was damaged by unionists during the violence; the company claimed that it had video evidence to prove it. One worker was dismissed, prompting another

140 Brodie, 1998, above n 115, at 80.

141 See discussion of the 'individualisation' brought about by the WRA, above. However, although the implied duty of trust and confidence has generally operated to limit employer power, the duty is theoretically *mutual*; in future, it may lead to more extensive obligations being imposed on employees: Brodie, 1998, above n 115, at 79, 86-92.

142 The electronic surveillance techniques associated with 'engineered standards' gave rise to a series of disputes during the early 1990s: see, eg, P Chamberlin, 'Firm Sues Strikers as Stores Run Out', *Sydney Morning Herald*, 13 March 1990, p 11 (Coles Somersby warehouse); and J Lewis, 'Woolworths Sacks 100 in Dispute Over Surveillance', *Sydney Morning Herald*, 18 September 1991, p 7. For a discussion of 'engineered standards', see: Wright and Lund, 1998, above n 92; Wright and Lund, 1996, above n 10, at 196.

143 The union accepted the 'engineered standards' in exchange for a $35.00 per week wage rise: M Russell, 'Franklins to Sack Strikers by Video', *Sydney Morning Herald*, 9 May 1994, p 1.

walkout by 900 workers.[144] The employee in question was subsequently reinstated following a recommendation by the NSW Industrial Relations Commission.[145]

In NSW, the industrial disputes associated with electronic surveillance were crucial in shaping both the terms of the debate which preceded the enactment of the Workplace Video Surveillance Act 1998 (NSW) (the NSW Act),[146] and the content of the legislation itself.[147] In particular, the disputes alerted the trade union movement to the issue of electronic surveillance and prompted some key unions to become vigorous opponents of electronic surveillance.[148] Further, in so far as the disputes highlighted the inadequacy of the common law, the unions were encouraged to adopt legislative intervention as their central demand. Moreover, the Franklins dispute provided a vivid demonstration of the ways in which electronic surveillance could be used by employers as an instrument of class power — in that case, for 'speed-ups' and 'strike-busting'. This no doubt had a bearing on the strident nature of the submissions by some unions to the various government inquiries which preceded the legislation.

The disputes may also have undermined the public image and credibility of employer groups, which mounted a campaign against the enactment of legislation to regulate electronic surveillance. In opposing parliamentary intervention, employers argued, among other things, that: (a) 'self-regulation' would afford employees sufficient protection; and (b) electronic surveillance would be used primarily for crime control, rather than employee performance monitoring. The Franklins dispute raised doubts about these claims and, therefore, weakened the ability of employers to make their case in the public arena.

Another point to note is that as a result of the disputes, the debate over electronic workplace surveillance became defined in terms of irreconcilable employer-employee conflict, a fact which was reflected in the policy-making process. Government agencies, such as the Privacy Committee, did not raise the possibility that a consensus could be reached between employers and employees. Instead they approached the issue on the assumption that there were competing interests which could be traded-off but not reconciled. Indeed, the Privacy Committee and the Law Reform Commission rejected

144 See ibid; M Russell, 'Workers Back at Franklins', *Sydney Morning Herald*, 28 June 1994, p 5.

145 *Franklins Ltd v NUW* [1994] NSW IRComm 77 (Peterson J); NUW (NSW Branch), *Submission to the NSW Privacy Committee Inquiry into Visual Surveillance in the Workplace*, 1995.

146 There were three major components to the policy-making process which preceded the Act, resulting in the following reports: NSW Privacy Committee, above n 1; The Working Party on Video Surveillance in the Workplace, *Report to the Hon J W Shaw QC MLC Attorney General and Minister for Industrial Relations*, 1996; NSW Law Reform Commission, above n 16.

147 Apart from those factors discussed in the text, it is also reasonable to assume that the outcomes in NSW (and Victoria) were also influenced by the lobbying efforts of the electronic surveillance and private security industry. For a discussion of the industry, see NSW Privacy Committee, above n 1, pp 18-19.

148 For example, the NUW opposed both covert and overt video surveillance and submitted that workplace criminality should be dealt with by the police rather than employers: NUW (NSW Branch), above n 145, p 11.

'self-regulation' of covert surveillance, partly because they recognised that a consensus of interests does not exist; employers would use their superior power in the workplace to conduct covert surveillance in ways which offended vital employee interests. Parliamentary intervention was therefore seen as necessary.[149]

Finally, from the government's perspective, the relatively high levels of industrial disputation associated with electronic surveillance created pressure to enact legislation that would partially accommodate union demands and mediate class conflict over the issue. Also, the government was comprised of members of the Australian Labor Party and was therefore more sympathetic, and susceptible, to trade union pressure. Moreover, in so far as the disputes highlighted the ability of employers to exercise state-like powers, the government was confronted with an ideological conundrum. It was under pressure to impose constraints on employer surveillance that were comparable to those which apply to analogous state conduct.

It is suggested that these factors largely explain why the NSW Act provides greater protection for employees than equivalent legislation in other Australian jurisdictions.[150]

The scheme of regulation established by the Workplace Video Surveillance Act

Covert surveillance

The NSW Act imposes strict controls on covert video surveillance. Section 4 defines surveillance as covert 'unless': the affected employee 'has been notified in writing at least 14 days . . . before the intended surveillance';[151] *and* the surveillance cameras are clearly visible;[152] *and* signs indicating the operation of cameras are posted at the entrance to that part of the workplace which is under surveillance.[153]

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149 Thus, the NSW Law Reform Commission concluded that 'employees should have certain minimum standards of privacy which cannot be bargained away': above n 16, p 88.

150 See, for example, Surveillance Devices Act 1999 (Vic); Surveillance Devices Act 1997 (WA); Privacy Act 1988 (Cth).

151 Workplace Video Surveillance Act 1998 (NSW) s 4(1)(a). Note that s 4(1)(a) allows for a 'lesser period of notice' where 'the employer has obtained the agreement of the employee to a lesser period of notice'. See also s 4(1)(3)(b).

152 Section 4(1)(b). The visibility requirements of para (b) are also satisfied if 'camera casings or other equipment that would generally indicate the presence of a camera' are clearly visible. The inclusion of the reference to 'camera casings or other equipment' reflects the wishes of the Employers Federation of NSW: Working Party on Video Surveillance, above n 146, p 12. As discussed in Part 1, employers often conceal cameras in black perspex domes so that their precise target is not discernible: Long, 'Why Your Boss is Bugging You', above n 3, p 26.

153 Section 4(1)(c). Section 4(2) excludes from the definition of covert surveillance any 'video surveillance of an employee . . . if the employee has agreed to the use of video surveillance . . . for a purpose other than surveillance of the activities of employees'. It would appear that this provision is intended to deal with video surveillance directed at problems such as customer theft, burglary and other non-employee security issues (see the s 7(3) 'defence' discussed below). Subsection (2) also attempts to deal with the problem that even if surveillance cameras are originally installed for only one purpose, they may end up being used for a range of additional purposes ('function creep'): see further, NSW Privacy Committee, above n 1.

Covert surveillance authority

An employer who conducts covert video surveillance is guilty of an offence unless she or he has obtained 'a covert surveillance authority'[154] (CSA) from a magistrate.[155] A 'covert surveillance authority' will only be issued if the prospective surveillance is 'for the purpose of establishing whether or not' an employee is 'involved in any unlawful activity in the workplace'. Section 9(3) stipulates that a CSA does not authorise covert video surveillance for the purpose of monitoring 'the employee's work performance'.[156]

An employer's application for a CSA must be supported by an affidavit or sworn statement setting out, among other things:[157] 'the grounds the employer . . . has for suspecting' that unlawful activity is being carried out by a particular employee or employees;[158] 'whether other managerial or investigative procedures have been undertaken to detect the unlawful activity and what had been the outcome';[159] 'who and what will regularly or ordinarily be in view of the cameras';[160] and 'the dates and times during which the covert video surveillance is proposed to be conducted'.[161]

Sections 13 and 14 provide that a magistrate 'must not issue' a CSA unless she or he is satisfied that it is justified on 'reasonable grounds', and has 'had regard to whether covert video surveillance . . . might unduly intrude on' the 'privacy' of employees 'or any other person'.[162] Section 9(3) further protects employee privacy by stipulating that a CSA does not authorise covert surveillance 'in any change room or toilet facility or shower or other bathing facility in the workplace'.[163]

Operation of covert surveillance authority

An application for a CSA must nominate each licensed security operator who will oversee the covert surveillance operation.[164] Sections 17(1)(a)-(b) and 18 make it an offence for a security operator to 'give any other person access to

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154 Note that s 19 provides for the variation or cancellation of a CSA by a magistrate, acting of her or his own motion, or 'on an application made by any employee, employer or other person affected by the authority'. See also s 25.

155 Sections 7, 9 and 10.

156 Section 9(3).

157 Section 10(2), (4) and (5).

158 Section 10(2)(a).

159 Section 10(2)(b).

160 Section 10(2)(c).

161 Section 10(2)(d).

162 Section 13(2) makes special provision for surveillance of areas where employees spend their spare time (such as a tea room). According to the Working Party's report, this is intended to ensure that surveillance of these areas is 'subject to a higher test in the process of prior judicial authorisation': see Working Party on Video Surveillance, above n 146, p 4.

163 Arguably, these limitations may also exist under the common law by virtue of the implied duty of trust and confidence (see Part 1, above). The Working Party on Video Surveillance in the Workplace recommended that covert surveillance be prohibited in 'locker rooms' as well as 'change rooms'. The Employers' Federation of NSW opposed this recommendation, indicating that covert surveillance should be allowed in locker rooms. It appears that s 9(3)(b) reflects the wishes of the Employers' Federation.

164 Section 10(3). Section 3 defines 'licensed security operator' as a 'person holding a Class 1 licence issued under the Security (Protection) Industry Act 1985 . . .'. This is intended as a safeguard against abuse or surveillance material by unscrupulous operators. However, the NSW Law Reform Commission considered that 'further protections may be needed, particularly in light of Justice Pearson's Report into the Security (Protection) Industry Act

any video recordings' made during the surveillance operations and further stipulates that the operator may only supply the employer 'with any portions of the covert video surveillance that are relevant to establishing the involvement of any employee in an unlawful activity in the workplace'.[165] Sections 17(1)(c) and 18 also require the security operator to 'erase or destroy . . . within three months of the expiry of the authority' those parts of the record of surveillance 'that are not required for evidentiary purposes'.[166]

CSAs remain in force for a period specified in the authority, which is not to exceed 30 days.[167] At the end of that period, the employer must furnish a written report to the authorising magistrate 'setting out briefly the result of the surveillance carried out'.[168]

Overt video surveillance

The NSW Act places no restrictions on overt video surveillance, except those which are implicit in the s 4 definition of covert surveillance.[169] This omission is a product of several factors including: less than determined and united union opposition to overt surveillance;[170] a consensus among the relevant statutory bodies that overt surveillance was a less serious threat to employee interests than covert surveillance;[171] and vigorous employer opposition to all forms of legislative interference in 'private' affairs.[172] Instead of legislating in relation to overt surveillance, the government, through its Working Party, developed a set of guidelines on overt surveillance known as the 'Code of Practice for the

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1985 which suggested that security personnel licensed under that Act might not always be appropriate persons to undertake such tasks': above n 16, p 86.

165 Ibid. The restrictions in s 17(1)(a) and (b) are apparently intended as a further safeguard against 'function creep' and other forms of employer abuse of covert surveillance.

166 Further, s 17(1)(d) provides that if covert video surveillance results in any 'detrimental action against' an employee, the employer must give the employee 'access to the recording within a reasonable period after being requested to do so . . .'.

167 Section 16. The 30 day maximum, adopted pursuant to a recommendation by the Working Party on Video Surveillance in the Workplace, was criticised by the NSW Law Reform Commission on the basis that it falls short of the standard imposed on the state by the Listening Devices Act 1984 (NSW). The Listening Devices Act 1984 sets a maximum of 21 days: NSW Law Reform Commission, above n 16, p 86.

168 Section 23(1).

169 That is, surveillance will only be overt and, therefore, unconstrained by the Act, if it is visible, accompanied by written notification, and accompanied by signs: see s 4.

170 The following trade union bodies only sought legislative intervention in relation to covert surveillance: The Labor Council of NSW; the Australian Liquor, Hospitality & Miscellaneous Workers Union (Miscellaneous Workers Division and Liquor and Hospitality Division): Submission to the Working Party on Video Surveillance in the Workplace, above n 146, pp 10-11.

171 See NSW Privacy Committee, above n 1; NSW Law Reform Commission, above n 16; Working Party on Video Surveillance in the Workplace, above n 146; see especially the Attorney-General's Department Submission to the Working Party, p 18.

172 The NSW Chamber of Manufacturers baldly stated that 'business in general finds legislation to be inhibitive', adding that it 'encourages firms to relocate interstate or offshore': above n 110, p 5; the Retail Traders' Association of NSW (above n 110, p 14) and Employers' Federation of NSW based their opposition to legislation on 'the view that employers have a fundamental right to protect their property': Working Party on Video Surveillance, above n 146, p 11. See further, Australian Chamber of Manufacturers (NSW Branch) and Registered Clubs Association of NSW Submissions to the Working Party on Video Surveillance, quoted in Working Party on Video Surveillance, above n 146, pp 14-15.

Use of Overt Video Surveillance in the Workplace'.[173] Although these guidelines do not have the force of law, the Privacy Commissioner (NSW) is able to exercise its statutory powers of persuasion and encouragement in relation to the Code.[174]

The broader significance of the Workplace Video Surveillance Act

Although the restrictions on video surveillance do not go as far as some of the unions would have liked, several features of the NSW Act indicate that workers achieved some significant gains.[175] First, prior to the NSW Act, employers had virtually an unfettered right to conduct covert video surveillance. Now, employers may be subject to criminal prosecution unless they receive prior court approval, submit to ongoing judicial supervision, and hand control of surveillance operations to a licensed third party.[176] Second, the legislation partially de-stabilises the public/private distinction by imposing procedural constraints on employer powers that are similar to those imposed on analogous state powers.[177] Third, the NSW Act prevents employers from conducting covert video surveillance for the purpose of assessing employee performance. As discussed in Part 1, the power of employers to evaluate employee performance is generally unquestioned.[178]

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173 The Code of Practice is available from the NSW Department of Industrial Relations or the Privacy Commissioner. Employers are under no legal obligation to alert employees to the existence of the Code or to give employees access to the Code. This goes further than the wishes of the Employers' Federation of NSW which did not object to a requirement that employers make employees aware of the Code's existence: see Submission of the Employers' Federation of NSW to the Working Party on Video Surveillance in the Workplace, above n 146, p 13. Little evidence is available on the operation of the Code, however it has been incorporated unmodified into a federal Certified Agreement: National Union of Workers and Nuance Global Traders Ltd (C No 31303 of 1999), App C.

174 That is, the Privacy Commissioner may: conciliate privacy complaints against employers; cite instances of serious breaches of privacy standards in the annual report of the Privacy Commissioner; and in exceptional cases, issue a special report to Parliament regarding particularly intractable breaches of privacy standards: see Personal Information Protection Act 1998 (NSW) s 36(2)(k).

175 Notwithstanding the fact that the legislation fell short of some of the unions demands, the NSW Labor Council's publication has described the Workplace Video Surveillance Act 1998 (NSW) as one of the Carr Government's 'big achievements': P Lewis, 'Jeff Shaw — Keeping the Peace in NSW', *Workers Online*, 26 March 1999, <http://www.labor.net.au/workers/ magazine/6/a_interview_jeff.html>.

176 See Workplace Video Surveillance Act 1998 (NSW) s 10(3), which requires employers to nominate a 'licensed security operator' to conduct surveillance operations and filter the information gathered, see above.

177 It is interesting to note that although the controls under the Workplace Video Surveillance Act 1998 (NSW) are *similar*, they are not quite as stringent as those imposed on the state in equivalent circumstances. Thus, the Law Reform Commission noted that whereas the Listening Devices Act 1984 (NSW) confers the power to issue warrants on Supreme Court judges, the Working Party's recommendations on workplace surveillance, reflected in the eventual Act, provide for approval by a magistrate. The commission argued that 'the intrusions involved [in covert workplace surveillance] are so great that nothing less than authorisation by a court of the status of the Supreme Court of New South Wales should suffice': NSW Law Reform Commission, above n 16, p 87.

178 Of course, covert surveillance is, by its very nature, difficult to detect. The enactment of legislative restrictions is no guarantee that they will be adhered to, or enforced. In time, it may be possible to get a sense of how the Act operates in practice by virtue of the reporting requirements established in s 26.

Notwithstanding these employee gains, and despite the fact that the political climate tended to favour the restriction of employer power, the NSW Act does not cover the field in relation to electronic workplace surveillance. The legislation places no constraints on the right of an employer to conduct overt video surveillance (apart from those which are implicit in the s 4 definition of covert surveillance). Further, the NSW Act only deals with video surveillance; it is silent on computer monitoring, tracking devices and other forms of electronic surveillance.[179] In crucial respects, therefore, electronic workplace surveillance in NSW continues to be governed by the judicially-developed norms of employment law.[180] Thus, although the legislative outcome in NSW partly reflects the success of the political and industrial pressure brought to bear by workers, it also evidences the strength of the ideological precept which holds that government interference with private power should be kept to a minimum.[181] This latter point is reinforced by the analysis of the Victorian legislation, below.

The Surveillance Devices Act 1999 (Vic)

The Surveillance Devices Act 1999 (Vic) (the Victorian Act) was formed in a very different, and far less turbulent, context than its NSW counterpart. The Victorian Act was neither prompted nor shaped by industrial conflict or trade union pressure. Indeed, in the parliamentary debates, neither the Opposition nor the government made more than passing reference to the issue of employee privacy.[182] Further, it was drafted by a Conservative government and not opposed by the Labor Party.[183] These factors largely explain why the legislation is not specifically directed at the problem of workplace surveillance, or the protection of employee privacy. To an even greater extent than the Workplace Video Surveillance Act, the Victorian Act maintains the system of regulation established by the judicially-developed norms of employment law.

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179 Note, however, that the Listening Devices Act 1984 (NSW) makes it an offence to use listening devices to record or to listen secretly to private conversations, including those involving one or more employees. Although the monitoring of face-to-face conversations is not particularly common in workplaces, audio monitoring of telephone conversations, such as occurs within the call centre industry, is a large and growing phenomenon. Telephonic monitoring is covered by the Telecommunications Interception Act 1979 (Cth).

180 Another shortcoming of the NSW Act is its failure to extend protection to so-called 'independent contractors'. The Act's protective provisions only cover 'employees' (s 3). There is a wealth of literature examining the artificiality and deleterious effects of the contract of service/for services distinction: see, eg, Creighton and Stewart, above n 45, pp 7-11.

181 Indeed, the strength of this precept may also be reflected in the fact, noted above, that the Workplace Video Surveillance Act imposes similar, but lower, standards than the Listening Devices Act in relation to judicial authorisation and duration of surveillance.

182 See, eg, Mrs Wade (Attorney-General, Liberal), Second Reading, Legislative Assembly, Hansard, 25 March 1999, p 49 *et seq*; Mr Hulls (Niddrie, ALP), Legislative Assembly, Hansard, 22 April 1999, p 546; see, also, Scrutiny of Acts and Regulations Committee (Vic), *Alert Digest No 2 of 1999*, 13 April 1999.

183 Mr Hulls (Niddrie, ALP), Legislative Assembly, Hansard, 22 April 1999, p 546.

The scheme of regulation established by the Surveillance Devices Act

As mentioned earlier, the Victorian Act is not confined to video surveillance.[184] It also regulates listening devices, tracking devices and data surveillance devices. In light of the substantial similarities between the provisions relating to optical, listening and tracking devices, only those pertaining to optical surveillance will be considered in the text.[185]

'Private activity'

Section 7 of the Victorian Act makes it an offence for an employer[186] to conduct electronic optical surveillance of a 'private activity' to which the employer is not a party, 'without the express or implied consent of each party to the activity'.[187] 'Private activity' is defined as any conduct 'carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves'.[188] The definition expressly excludes 'an activity carried on outside a building' and activity 'in circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else'.[189] In order to clarify the intention behind this provision, the Explanatory Memorandum (EM) provides the following examples:

> Circumstances in which the parties to an activity ought reasonably expect that they may be observed by someone else include:
>
> - activities in places accessible to the public;
> - activities in those parts of workplaces accessible to other employees or invitees of that workplace; . . .
>
> Circumstances in which parties to an activity may reasonably expect that they may not be observed by someone else include:
>
> - activities in toilet cubicles and shower areas;[190]

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184 In the Victorian Act, video surveillance is subsumed within the category of 'optical surveillance'. Section 3 defines an 'optical surveillance device' as 'any device capable of being used to record visually or observe a private activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment'.

185 On listening devices, see s 6. On tracking devices, see s 8.

186 Although the Victorian Act speaks only of 'persons' and 'law enforcement officers' and makes no specific reference to employers and employees, this discussion will refer to 'employers' rather than 'persons' in order to facilitate a comparison with the NSW Act: see s 3 'Definitions'.

187 The Victorian Act also attempts to prevent the misuse of information gathered as a result of electronic surveillance: see s 11.

188 See s 3 'private activity'.

189 Ibid. See further, W B Creighton and C Fenwick, 'The Evolving Employment Relationship and the New Economy: an Australian View', *Bulletin of Comparative Labour Law*, No 40, Kluwer (forthcoming 2001).

190 On one reading, the example suggests that the prohibition is only intended to prevent surveillance of 'cubicles', not other areas within a toilet facility. However, even if such a reading is to be preferred, the Explanatory Memorandum (EM) is not decisive: see s 35(b) of the Interpretation of Legislation Act 1984 (Vic). Thus, notwithstanding the EM, it would be open to a court to hold that an individual may reasonably expect that their activities will not 'be observed by someone else' anywhere within a toilet facility, not merely when they are inside the cubicles (if the example in the EM was adopted, men using a urinal might not

- activities in change rooms;[191] and
- activities in those parts of workplaces where the parties to the activity may exclude others from observing the activity, such as in an office with covered windows.

Assuming these examples are accurate, the Victorian Act does little to restrict the right of employers to conduct video surveillance. Subject to the implied prohibition relating to 'private spaces', employers will be free to conduct indefinite covert and overt electronic surveillance of their employees,[192] for any purpose whatsoever, including performance monitoring.[193] As the first two examples from the EM indicate, Parliament has designed the legislation in a way which allows most employees to be placed under electronic surveillance most of the time: the majority of low-status employees in the retail, clerical and manufacturing sectors spend the bulk of their working day in areas which are 'accessible to the public' or 'accessible to other employees or invitees'. In general, only high status employees have 'an office with covered windows'.

'Consent'

As noted above, an employer is not guilty of an offence under s 7 if the 'express or implied consent of each party to the activity is obtained'. In so far as this provision applies to employees, it has the potential to undermine s 7's apparent attempt to protect certain 'private spaces'. As discussed in Part 1, most employees lack sufficient bargaining power to overcome the wishes of an employer, both at the time of formation and after work has commenced. In light of s 7, well-advised employers might include an express term in certain contracts of employment to the effect that the employee has 'consented' to employer surveillance of their 'private activities'.[194] Alternatively, an employer might simply inform current and prospective employees of their

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be protected from video surveillance). The failure of the Victorian Act to expressly identify protected spaces, leaves the way open for nice arguments about the application of the concept of 'private activity'. The NSW Act, by contrast, expressly prohibits covert surveillance in 'any change room or toilet facility or shower or other bathing facility in the workplace': s 9(3) Workplace Surveillance Act 1998 (NSW): see Explanatory Memorandum, Surveillance Devices Bill (Vic), 26 March 1999, pp 1-2.

191 Arguably, the limitations on surveillance of toilets, shower areas and change rooms may also exist under the common law by virtue of the implied duty of trust and confidence (see Part 2, above). If this proposition is valid, it provides further support for the suggestion that the Victorian legislation is likely to produce similar outcomes to those that would occur under the common law contract of employment (see below).

192 In contrast with the NSW Act, the Victorian Act does not distinguish between covert and overt surveillance. Further, apart from the provisions specifically pertaining to police, the Victorian Act imposes no limits on the duration of surveillance or the identity of persons who may carry out surveillance: cf Workplace Video Surveillance Act 1998 (NSW) ss 16 (duration) and 17 (licensed security operators).

193 Unlike the NSW Act, the Victorian Act does not refer to, let alone limit, the purposes for which surveillance may be conducted. Under the Victorian Act, surveillance may be conducted for any purpose, provided it is otherwise lawful. Moreover, in contrast with the NSW Act, the Victorian Act does not require employers to demonstrate 'reasonable grounds' justifying surveillance; employers are not required to justify their behaviour to any one provided it is within the law: cf Workplace Video Surveillance Act 1998 (NSW) ss 9, 10 and 13.

194 Alternatively, an employer might seek a variation to that effect. If that were the case, the same arguments about inequality of bargaining power would apply.

wish to conduct surveillance of private spaces: a current employee who did not object might be said to have indicated 'implied consent' to the surveillance;[195] similarly, a prospective employee who was informed of the surveillance activities, but accepted employment none the less, might also be taken to have demonstrated 'implied consent'.[196] Thus, while the Surveillance Devices Act purports to offer employees some protection, it also provides employers with the means of contracting-out of that protection.

The broader significance of the Surveillance Devices Act

The Surveillance Devices Act 1999 applies to law enforcement officers as well as 'private' citizens, including employers. However, unlike its NSW equivalent, the Victorian Act does not require employers to obtain judicial authorisation before performing electronic surveillance; only law enforcement officers are subject to this constraint.[197] Although the legislation imposes legal constraints on employer surveillance, it does not subject employers to judicial supervision. Further, s 9 regulates the installation and use of 'data surveillance devices' by law enforcement officers, but places no encumbrances of any kind on the use of such devices by employers, or other 'private' citizens.[198] Thus, central to the Victorian Act is a double-standard, which, in turn, is based on the proposition that the state poses a greater threat to individual liberty than private power. In this respect, the statute reflects and reinforces a key aspect of the ideological division between public and private spheres.

Parliament's respect for private power is also reflected in the Act's narrow definition of 'private activity', as well as its adoption of the notion of 'consent'. As a consequence of these provisions, the Act offers employees only slender protection from electronic workplace surveillance. Indeed, by employing the concept of 'consent', the Victorian Act reinforces the voluntarist ideology of 'private' contract law, and, in practical terms, creates the possibility that employers will exploit their superior bargaining position to overcome the limitations imposed by the legislation. Thus, although it creates a different starting position,[199] it is possible that the Victorian Act will result in outcomes which, in some cases, are substantially similar to those produced under the judicially-developed scheme of regulation.

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195 An even more difficult question would arise if an employee objected but did not resign.

196 Similar concepts figure prominently in the United States context. See *Watkins v L M Berry & Co* 704 F 2d 579 (11th Cir, 1983); analysis in D McCartney, 'Electronic Surveillance and the Resulting Loss of Privacy in the Workplace' (1994) 62 *UMKC L Rev* 859 at 875; similarly, the concept of 'implied consent' is one of the two most common affirmative defences under the Electronic Communications Privacy Act 1986; see *Griggs-Ryan v Smith* 904 F 2d 112 (1st Cir, 1990); and the discussion in King, above n 2, at 450-7.

197 See Pt 4 and Pt 6.

198 Section 3 defines a 'data surveillance device' as 'any device capable of being used to record or monitor the input of information into or the output of information from a computer, but does not include an optical surveillance device'. It appears that a 'data surveillance device' would include a mechanism used to count key-strokes or inspect e-mail.

199 Subject to any limitation imposed by the implied duty of trust and confidence, and any express term to the contrary, the likely starting position at common law is that an employer has a right to conduct electronic surveillance of 'private activity' without the knowledge or consent of the objects of that surveillance. The starting position under the Surveillance Devices Act 1999 (Vic) is that an employer does not have a right to conduct surveillance of 'private activity'; consent is necessary: see, eg, s 7.

In sum, therefore, the Victorian legislation does very little to modify the system of regulation established by the common law contract of employment.[200]

Summation

Most legal scholars who have addressed electronic workplace surveillance have de-contextualised and de-politicised the issue. This article is an attempt at an alternative approach. Instead of focusing exclusively on narrow legal issues, the emphasis is on the relationship between legal norms, rules and processes, and political and economic imperatives.

Part 1 explored the relationship between electronic workplace surveillance and the fundamental norms of the common law contract of employment. Particular attention was paid to: (i) the ideology of voluntarism, and its role in legitimating unequal and coercive social relations, which compel workers to accept employment in workplaces where they are subject to practices such as electronic surveillance; (ii) the employer's powers to command employees and control production, and the way electronic surveillance facilitates the enforcement of these legal rights; and (iii) the bureaucratic aspect of employer power, and the role played by electronic surveillance in deepening workplace bureaucracy. In sum, it was suggested that electronic surveillance is a rational corollary of the coercive aspects of the relationship established by the fundamental norms of the contract of employment.

Part 1 also considered whether the emerging implied duty of trust and confidence may impose some constraints on the capacity of employers to conduct electronic surveillance. It was cautiously suggested that the implied term may offer employees protection against the most arbitrary and intrusive forms of surveillance. However, it was also noted that even if some forms of electronic surveillance do breach the duty of trust and confidence, there are a range of legal and practical reasons why the obligation is unlikely to offer an appealing avenue of redress against electronic workplace surveillance.

The discussion in Part 1 was underpinned by the proposition that the common law contract of employment engenders a complex system of legal regulation; this system of regulation may be modified by statute, but to the extent that it remains untouched, the common law, not a vacuum, holds sway.

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200 The discussion in this Part has emphasised the differences between the NSW and Victorian regimes. Looked at from a different perspective, however, the Acts share some fundamental similarities. If space permitted, insights from the works of Melossi, Pavarini and Foucault, could be employed to explore the proposition that although each Act places different constraints on the power of employers to conduct electronic surveillance, both statutes construct workers as a potentially deviant class. Within this schema, workers are, by definition, always suspect and the natural objects of surveillance, discipline and control; thus, images of shop-floor petty theft loom large in the policy discussions which preceded the NSW and Victorian legislation; the white-collar criminal barely rates a mention. The work of those theorists concerning the common origins of the modern factory and the modern prison suggests that the intensive levels of surveillance in modern workplaces and modern prisons might be more than a mere coincidence. The author is currently preparing a paper which elaborates on these questions: see further, D Melossi and M Pavarini, *The Prison and the Factory: Origins of the Penitentiary System*, Macmillan, London, 1981; F Engels, *The Condition of the Working Class in England*, Blackwell, Oxford, 1958; M Foucault, *Discipline and Punish: The Birth of the Prison*, Pantheon, New York, 1977.

Against this background, Part 2 analysed the recent NSW and Victorian legislation dealing with electronic surveillance. This examination revealed that the NSW Act offers significantly greater protection for workers than its Victorian counterpart. However, it was also observed that the NSW scheme contains significant gaps, especially in relation to overt monitoring and forms of surveillance apart from CCTV. Finally, it was suggested that although the Victorian Act does provide some protection for employee privacy, that protection is narrow and, moreover, is likely to be undermined by those provisions which may give employers the opportunity to contract-out of the legislation's safeguards.