



New South Wales

Workplace Surveillance Bill 2004

Explanatory note

Overview of Bill

The objects of this Bill are:

- (a) to prohibit the surveillance by employers of their employees at work except by notified surveillance (surveillance that is notified to employees) or surveillance carried out under the authority of a covert surveillance authority issued by a Magistrate for the purpose of establishing whether or not an employee is involved in any unlawful activity at work, and
- (b) to restrict and regulate the blocking by employers of emails and Internet access of employees at work, and
- (c) to provide for the issue of covert surveillance authorities by Magistrates and to regulate the carrying out of surveillance under a covert surveillance authority and the storage of covert surveillance records, and
- (d) to restrict the use and disclosure of covert surveillance records.

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The Bill applies only to camera surveillance, computer surveillance (surveillance of the input, output or other use of a computer by an employee) and tracking surveillance (surveillance of the location or movement of an employee).

The Bill repeals and replaces the *Workplace Video Surveillance Act 1998*, which applied only to video (ie camera) surveillance.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act. The expression *surveillance* is defined to mean camera surveillance, computer surveillance or tracking surveillance. The proposed Act applies only to these forms of surveillance.

Clause 4 defines *at work* to mean at a workplace, or at any other place while working.

Clause 5 defines *covert surveillance* to mean any surveillance that is not notified surveillance and defines *notified surveillance* to mean surveillance of which employees are notified in the manner required by the clause.

Clause 6 provides that the proposed Act binds the Crown.

Clause 7 provides that notes do not form part of the proposed Act.

Part 2 Offences concerning surveillance of employees

Clause 8 prohibits the covert surveillance by an employer of an employee at work except as authorised by a covert surveillance authority and only for the purpose of establishing whether or not the employee is involved in any unlawful activity at work. Various exceptions are provided for.

Clause 9 prohibits surveillance by an employer of an employee at work in a change room, toilet facility or shower or other bathing facility. The prohibition applies to notified and covert surveillance.

Clause 10 prohibits the surveillance by an employer of an employee not at work by means of a device used for notified surveillance of the employee at work.

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Clause 11 prohibits the blocking of emails sent to or by an employee and Internet access by an employee unless the employer is acting in accordance with the employer's email and Internet access policy notified to the employee and (except in the case of spam or menacing or offensive emails) the employee is immediately notified that an email has been blocked. An employer's email and Internet access policy cannot authorise blocking of emails or Internet access merely because the content relates to industrial matters.

Clause 12 makes it clear that the proposed Part does not apply to anything done under the authority of a warrant or other authority under Commonwealth law.

Part 3 Covert surveillance

Clause 13 provides that a covert surveillance authority authorises the covert surveillance of employees for the purpose of establishing whether or not an employee is involved in any unlawful activity at work. The covert surveillance is required to be overseen by a nominated licensed security operator.

Clause 14 provides for the making of an application to a Magistrate for a covert surveillance authority.

Clause 15 requires an application for a covert surveillance authority to be dealt with in the absence of the public.

Clause 16 requires that reasonable grounds exist to justify the issue of a covert surveillance authority.

Clause 17 requires a Magistrate in deciding whether to issue a covert surveillance authority to have regard to whether the covert surveillance authority might unduly intrude on the privacy of employees or any other person.

Clause 18 provides for the form of a covert surveillance authority.

Clause 19 provides that the period for which a covert surveillance authority remains in force is the period specified in the authority (not exceeding 30 days or a period specified by the regulations).

Clause 20 provides for the conditions to which a covert surveillance authority is subject.

Clause 21 creates the offence of contravening a condition of a covert surveillance authority.

Clause 22 provides for the variation or cancellation of a covert surveillance authority.

Clause 23 prevents a further application for a covert surveillance authority being made if a previous application has been refused, unless additional relevant information is provided.

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Clause 24 requires a Magistrate who issues a covert surveillance authority to make a record of various particulars and the grounds relied on by the Magistrate for its issue.

Clause 25 provides that a covert surveillance authority is not invalidated by a defect except one that affects the substance of the authority in a material particular.

Clause 26 requires an employer to report to the issuing Magistrate on surveillance carried out under a covert surveillance authority.

Clause 27 imposes restrictions on the storage of records of covert surveillance to ensure that they are protected against loss or unauthorised access or use.

Clause 28 imposes restrictions on the use and disclosure of records of covert surveillance.

Clause 29 provides that information obtained inadvertently or unexpectedly as a result of covert surveillance is not considered to have been obtained unlawfully for the purposes of determinations about admissibility of evidence.

Part 4 Miscellaneous

Clause 30 provides that a conferral of functions on a Magistrate by the proposed Act is not a conferral of jurisdiction on Local Courts.

Clause 31 provides for application to a judicial member of the Industrial Relations Commission for the issue, variation or cancellation of a covert surveillance authority by way of review of a Magistrate's decision.

Clause 32 provides for an annual report by the Minister to Parliament on covert surveillance operations.

Clause 33 makes provision for offences by corporations.

Clause 34 is a regulation-making power.

Clause 35 deals with proceedings for offences.

Clause 36 deals with authority to prosecute for an offence under the proposed Act.

Clause 37 gives effect to the Schedule of savings and transitional provisions (Schedule 1).

Clause 38 repeals the *Workplace Video Surveillance Act 1998* and the regulation under that Act.

Clause 39 requires the proposed Act to be reviewed by the Minister after 5 years.

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Schedule 1 Savings and transitional provisions

Schedule 1 provides for the making of savings and transitional regulations as a consequence of the enactment of the proposed Act and also provides for the saving of existing covert surveillance authorities and pending applications for such authorities under the *Workplace Video Surveillance Act 1998*.

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No. , 2004

A Bill for

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

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Clause 1 Workplace Surveillance Bill 2004

Part 1 Preliminary

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Workplace Surveillance Act 2004*.

2 Commencement

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

3 Definitions

In this Act:

at work—see section 4.

covert surveillance—see section 5.

covert surveillance authority means an authority issued under Part 3.

employee has the same meaning as in the *Industrial Relations Act 1996* and includes a person performing voluntary work (that is, a person performing work without remuneration, reward or obligation).

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

- (a) a person for whom an employee performs voluntary work, and
- (b) another person for whom an employee performs work pursuant to any contract or other arrangement between that other person and the employee's employer (such as a labour hire contract).

Note. Paragraph (b) can result in an employee having 2 employers for the purposes of this Act—the employee's actual employer and another person for whom the employee is doing work under (for example) a labour hire contract between that other person and that employer.

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

exercise a function includes perform a duty.

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Workplace Surveillance Bill 2004

Clause 3

Preliminary

Part 1

function includes a power, authority or duty.

law enforcement agency means any of the following:

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

licensed security operator means a person holding a class 2C licence issued under the *Security Industry Act 1997* or a licence of a corresponding kind issued under any Act that replaces that Act.

nominated licensed security operator means a licensed security operator or operators nominated in the application for a covert surveillance authority to oversee the conduct of the covert surveillance operation.

notified surveillance—see section 5.

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

surveillance of an employee means:

- (a) **camera surveillance** of an employee, which is the monitoring or recording, by electronic means, of visual images of the employee (such as by means of a closed-circuit television system), and
- (b) **computer surveillance** of an employee, which is the monitoring or recording by means of software or other equipment of the information input or output, or other use, of

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Clause 4 Workplace Surveillance Bill 2004

Part 1 Preliminary

a computer used by the employee (including, but not limited to, the sending and receipt of emails and the accessing of Internet websites), and

- (c) **tracking surveillance** of an employee, which is the monitoring or recording of the geographical location or movement of the employee by means of an electronic device (such as tracking of the employee or of any vehicle driven by the employee by means of a Global Positioning System tracking device).

Note. This Act does not apply to surveillance by means of a listening device. See the *Listening Devices Act 1984*.

surveillance information means information determined, recorded, monitored or observed as a consequence of surveillance of an employee.

surveillance record means a record or report of surveillance information.

work means work as an employee.

Note. See section 4 for the meaning of “at work”.

workplace means premises, or any other place, where persons work, or any part of such premises or place.

4 Meaning of “at work”

- (1) In this Act, **at work** means at a workplace, or at any other place while working.
- (2) Accordingly:
 - (a) an employee is **at work** when the employee is at a workplace or when the employee is working away from a workplace, and
 - (b) an employee is involved in an unlawful activity **at work** if the employee is involved in an unlawful activity when the employee is at a workplace or when the employee is working away from a workplace.

5 Meaning of “notified” and “covert” surveillance

- (1) Any surveillance of an employee that is not notified surveillance is **covert surveillance** of the employee.
- (2) Surveillance of an employee is **notified surveillance** if:
 - (a) the employee has been notified in writing of the intended surveillance at least 14 days (or, if the employer has obtained

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Workplace Surveillance Bill 2004

Clause 5

Preliminary

Part 1

the agreement of the employee to a lesser period of notice, that period) before the intended surveillance, and

- (b) in addition, in the case of *camera surveillance*:
 - (i) cameras used for that surveillance (or camera casings or other equipment that would generally indicate the presence of a camera) are clearly visible in the place where the surveillance is taking place, and
 - (ii) signs notify people that they may be under surveillance in the place where the surveillance is taking place, and are clearly visible at each entrance to that place, and
 - (c) in addition, in the case of *computer surveillance*, the employee is given notice in advance of the surveillance, and of the nature of the surveillance, that notice being given either:
 - (i) by means of a written notice clearly visible on or in the vicinity of the computer concerned, or
 - (ii) by audible announcement or written notice given by means of the computer concerned when the employee logs onto the computer or starts a program that is the subject of the surveillance, and

Note. Section 11 also imposes restrictions on the blocking of emails and Internet access.
 - (d) in addition, in the case of *tracking surveillance* involving the tracking of a vehicle or other thing, the employee is given notice in advance of the surveillance by means of a notice clearly visible on the vehicle or other thing.
- (3) Surveillance of an employee is also *notified surveillance* if the employee has agreed to the use of surveillance at the premises or place where the surveillance is taking place for a purpose other than surveillance of employees and surveillance is carried out in accordance with that agreement.
- (4) For the purposes of this section:
- (a) employees at a workplace are taken to have agreed to intended use of surveillance by their employer if a body representing a substantial number of the employees has agreed on their behalf, and
 - (b) an employee who is first employed less than 14 days before the intended use of surveillance is taken to have agreed to a lesser period of notice of the intended surveillance if the employee is notified in writing of it before commencing work.

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Clause 6 Workplace Surveillance Bill 2004

Part 1 Preliminary

6 Act to bind Crown

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

7 Notes

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

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Workplace Surveillance Bill 2004

Clause 8

Offences concerning surveillance of employees

Part 2

Part 2 Offences concerning surveillance of employees

8 Offences relating to covert surveillance

- (1) An employer must not carry out, or cause to be carried out, covert surveillance of an employee of the employer (or of a related corporation of the employer) at work unless the surveillance is both:
- (a) carried out or caused to be carried out solely for the purpose of establishing whether or not the employee is involved in any unlawful activity at work, and
 - (b) authorised by a covert surveillance authority.

Maximum penalty: 50 penalty units.

Note. Section 13 makes it clear that a covert surveillance authority does not authorise covert surveillance for the purpose of monitoring an employee's work performance or in any change room, toilet facility, shower or other bathing facility. An employer who carries out or causes to be carried out any such surveillance will be guilty of an offence.

- (2) This section does not make it an offence:
- (a) for a member or officer of a law enforcement agency to carry out, or cause to be carried out, surveillance in the exercise of a function conferred or imposed on the member or officer by or under any other Act or law, or
 - (b) for a person to carry out, or cause to be carried out, camera surveillance in a correctional centre or in any other place where a person is in lawful custody, or
 - (c) for a person to carry out, or cause to be carried out, camera surveillance for the purpose of monitoring operations carried out in a casino in accordance with the *Casino Control Act 1992*, or
 - (d) for a person to carry out, or cause to be carried out, camera surveillance of any legal proceedings or proceedings before a law enforcement agency in the exercise of a function conferred or imposed on the person by or under any other Act or law.
- (3) It is a defence to a prosecution for an offence against this section for an employer to prove that covert surveillance of an employee in the workplace was carried out, or caused to be carried out:
- (a) solely for the purpose of ensuring the security of the workplace or persons in it and that surveillance of any employee was extrinsic to that purpose, and

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Clause 9	Workplace Surveillance Bill 2004
Part 2	Offences concerning surveillance of employees

- (b) that there was a real and significant likelihood of the security of the workplace or persons in it being jeopardised if covert surveillance was not carried out.
- (4) Subsection (3) has effect only if the employer has notified employees at the workplace (or a body representing a substantial number of the employees) in writing of the intended surveillance for the purpose referred to in that subsection before it is carried out.
- (5) Evidence of any surveillance record made as a consequence of surveillance of employees in the workplace for the purpose referred to in subsection (3) that is unrelated to the security of the workplace or persons in the workplace is not to be admitted in evidence in any disciplinary or legal proceedings against an employee unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

9 Surveillance of change rooms and bathrooms prohibited

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

Maximum penalty: 50 penalty units.

10 Surveillance while employee not at work

An employer must not carry out, or cause to be carried out, surveillance of an employee of the employer (or of a related corporation of the employer) while the employee is not at work by means of a device used for notified surveillance of the employee at work.

Maximum penalty: 50 penalty units.

11 Restrictions on blocking emails or Internet access

- (1) An employer must not prevent, or cause to be prevented, delivery of an email sent to or by, or access to an Internet website by, an employee of the employer (or of a related corporation of the employer) unless:
 - (a) the employer has a policy on email and Internet access that has been notified to the employee as required by this section and the employer is acting in accordance with that policy in

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Workplace Surveillance Bill 2004

Clause 12

Offences concerning surveillance of employees

Part 2

preventing delivery of the email or preventing access to the website, and

- (b) in addition, in the case of the preventing of delivery of an email, the employee is immediately notified by the employer (by email or otherwise) that delivery of the email has been prevented, unless notification under this paragraph is not required as a result of subsection (2).

Maximum penalty: 50 penalty units.

- (2) Notification is not required under subsection (1) (b) if:
 - (a) the email concerned is a commercial electronic message within the meaning of the *Spam Act 2003* of the Commonwealth other than a designated commercial electronic message within the meaning of that Act, or
 - (b) delivery of the email concerned will result in a person being menaced or harassed, or
 - (c) the content of the email or of any attachment to the email is such as would be regarded by reasonable persons as being, in all the circumstances, offensive.
- (3) An employer's policy on email and Internet access is to be notified to an employee by written notice given by means of a computer used by the employee for email or Internet access when the employee logs onto the computer or starts a program that facilitates that email or Internet access.
- (4) An employer's policy on email and Internet access cannot provide for preventing delivery of an email or preventing access to a website merely because the email or website contains information relating to industrial matters.

12 Commonwealth laws

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

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Clause 13 Workplace Surveillance Bill 2004

Part 3 Covert surveillance

Part 3 Covert surveillance

13 Authority conferred by covert surveillance authority

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

14 Application for covert surveillance authority

- (1) An employer or employer's representative may apply to a Magistrate for the issue of an authority authorising covert surveillance generally of any of the employer's employees for the purpose of establishing whether one or more particular employees are involved in any unlawful activity at work.
- (2) The application for the authority must include the following information:
 - (a) the grounds the employer or employer's representative has for suspecting that a particular employee is or employees are involved in unlawful activity,
 - (b) whether other managerial or investigative procedures have been undertaken to detect the unlawful activity and what had been the outcome,
 - (c) who and what will regularly or ordinarily be the subject of the covert surveillance,

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Clause 15

Covert surveillance

Part 3

- (d) the dates and times during which the covert surveillance is proposed to be conducted,
 - (e) in the case of an application made by an employer's representative, verification acceptable to the Magistrate of the employer's authority for the person to act as an employer's representative for the purposes of the covert surveillance operation.
- (3) The regulations may require an application for an authority to include other specified information and may require the application to be in a form prescribed by the regulations.
 - (4) An application for an authority must also nominate each licensed security operator who will oversee the conduct of the covert surveillance operation.
 - (5) A Magistrate must not issue an authority unless the information given by the applicant in or in connection with the application is verified before the Magistrate on oath or affirmation or by affidavit.
 - (6) A Magistrate may administer an oath or affirmation or take an affidavit for the purposes of an application for an authority.
 - (7) The applicant must provide (either orally or in writing) such further information as the Magistrate requires concerning the grounds on which the authority is being sought.

15 How an application for a covert surveillance authority is to be dealt with

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

16 Reasonable grounds for issue of covert surveillance authority must exist

- (1) A Magistrate must not issue a covert surveillance authority unless the Magistrate is satisfied that the application for the authority shows that reasonable grounds exist to justify its issue.
- (2) When determining whether there are reasonable grounds to issue a covert surveillance authority, a Magistrate must have regard to the seriousness of the unlawful activity with which the application is concerned.

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Clause 17 Workplace Surveillance Bill 2004

Part 3 Covert surveillance

- (3) When determining whether there are reasonable grounds to issue a covert surveillance authority authorising covert surveillance of a recreation room, meal room or any other area at a workplace where employees are not directly engaged in work, a Magistrate must:
- (a) have regard to the affected employees' heightened expectation of privacy when in such an area, and
 - (b) be satisfied that each licensed security operator nominated in the application for the authority is both competent and fit to oversee the conduct of the surveillance in such an area, and is capable of adequately accommodating in the conduct of the operation the employees' heightened expectation of privacy.

17 Privacy must be considered

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

18 Form of covert surveillance authority

- (1) A covert surveillance authority is to be in the form prescribed by the regulations.
- (2) The authority is to specify the following:
 - (a) the purpose for which it authorises the carrying out of covert surveillance,
 - (b) the kind of covert surveillance (camera, computer or tracking) that it authorises and the equipment authorised to be used for that surveillance,
 - (c) where practicable, the name of any person who is likely to be the subject of the covert surveillance,
 - (d) the premises, place, computer, vehicle or other thing that is to be the subject of the covert surveillance,
 - (e) each nominated licensed security operator who is to oversee the conduct of the covert surveillance,
 - (f) the period for which the authority remains in force,
 - (g) the requirements of sections 26 (Report on use of authority) and 28 (Restrictions on use and disclosure of surveillance records),
 - (h) the conditions to which the authority is subject.

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Workplace Surveillance Bill 2004

Clause 19

Covert surveillance

Part 3

19 Duration of covert surveillance authority

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

20 Conditions of covert surveillance authority

- (1) A covert surveillance authority issued to an employer or employer's representative is subject to the following conditions:
 - (a) except as provided by paragraph (b), the nominated licensed security operator and any of his or her supervisees must not give any other person access to any surveillance record made as a consequence of the covert surveillance,
 - (b) the nominated licensed security operator and any of his or her supervisees may supply the employer, or employer's representative, only with any portions of a surveillance record made as a consequence of the covert surveillance that are relevant to establishing the involvement of any employee in an unlawful activity at work in accordance with the authority conferred by the authority or for identifying or detecting any other unlawful activity at work,
 - (c) the nominated licensed security operator specified in the authority must erase or destroy (or cause a supervisee to erase or destroy) within 3 months of the expiry of the authority all parts of surveillance records made as a consequence of the covert surveillance that are not required for evidentiary purposes,
 - (d) if, as a consequence of the carrying out of covert surveillance of an employee, the employer or employer's representative takes, or proposes to take, any detrimental action against the employee, the employer or the employer's representative must give the employee (and his or her lawyers, if any) access to the surveillance record within a reasonable period after being requested to do so by the employee (or his or her lawyers),
 - (e) such other conditions as are prescribed by the regulations or specified in the authority.
- (2) In this section:

detrimental action means action causing, comprising or involving any of the following:

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Clause 21 Workplace Surveillance Bill 2004

Part 3 Covert surveillance

- (a) discrimination, disadvantage or adverse treatment in relation to employment,
- (b) dismissal from, or prejudice in, employment,
- (c) a disciplinary proceeding.

supervisee, in relation to a nominated licensed security operator, means any person conducting covert surveillance under the oversight of the nominated licensed security operator.

21 Contravention of condition of authority

A person who, being the holder of, or a licensed security operator nominated in, a covert surveillance authority, contravenes any condition of the covert surveillance authority is guilty of an offence.

Maximum penalty: 50 penalty units.

22 Variation or cancellation of authority

- (1) A Magistrate may at any time vary or cancel a covert surveillance authority (whether issued by that Magistrate or another Magistrate).
- (2) A Magistrate may vary or cancel an authority on the Magistrate's own initiative or on application made by any employee, employer or other person affected by the authority.
- (3) The Magistrate may deal with an application for the variation or cancellation of an authority, subject to this Part and the regulations, in such manner as is decided by the Magistrate.

23 Further application for authority after refusal

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

24 Records relating to covert surveillance authority

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

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Clause 25

Covert surveillance

Part 3

- (2) The Magistrate is to take all reasonable steps to preserve the confidentiality of information contained in such records and the privacy of any persons concerned. However, this subsection does not prevent the Magistrate from supplying any information to the Minister that is required for the purposes of a report under section 32.
- (3) The regulations may make provision for or with respect to:
 - (a) the keeping of records in connection with the issue of covert surveillance authorities, and
 - (b) the inspection of any such records, and
 - (c) any other matter in connection with any such records.

25 Defects in authority

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

26 Report on use of authority

- (1) The employer or employer's representative to whom a covert surveillance authority is issued must furnish a report in compliance with this section to the Magistrate who issued the authority.

Maximum penalty: 20 penalty units.
- (2) The report is to be in writing, setting out briefly the result of the surveillance carried out and specifying the following:
 - (a) if practicable, the name of any employee who was the subject of the surveillance,
 - (b) the period during which the surveillance was conducted,
 - (c) details of the type of surveillance device used and of the type of place where any surveillance device was installed or used,
 - (d) whether any surveillance device has been removed and, if not, why not,
 - (e) details of the conditions of the covert surveillance authority,
 - (f) details of any surveillance record made as a consequence of the surveillance,
 - (g) any action taken or proposed to be taken in light of the information obtained,

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Clause 27 Workplace Surveillance Bill 2004

Part 3 Covert surveillance

- (h) any reason why an employee who was the subject of the surveillance should not be informed of the surveillance,
 - (i) details of any previous use of covert surveillance in connection with suspected unlawful activity with which the authority is concerned.
- (3) The regulations may require the report to include other specified information and may require the report to be in a form prescribed by the regulations.
 - (4) The report is to be made within 30 days after the expiry of the authority.
 - (5) If the Magistrate who issued a covert surveillance authority has died, has ceased to be a Magistrate or is absent, the report is to be furnished to another Magistrate.
 - (6) The Magistrate to whom the report is furnished may make such orders as the Magistrate thinks appropriate with respect to the use or disclosure of any surveillance record made as a consequence of surveillance conducted in accordance with the authority, including either or both of the following orders:
 - (a) an order that a surveillance record made as a consequence of the surveillance be delivered up to the Magistrate to be kept in the custody of the Magistrate or dealt with as the Magistrate may otherwise order,
 - (b) an order that a specified person or body be informed of the surveillance and given access to, or to part of, any surveillance record made as a consequence of the surveillance.

27 Storage of surveillance records of covert surveillance

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

Maximum penalty: 20 penalty units.

- (2) An employer or employer's representative to whom a covert surveillance authority is issued is to ensure that any portion of a surveillance record made as a consequence of covert surveillance

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Covert surveillance

Part 3

under the authority that is in the possession or under the control of the employer or employer's representative is protected against loss or unauthorised access or use.

Maximum penalty: 20 penalty units.

28 Restrictions on use and disclosure of surveillance records

- (1) Except as permitted by this section, a person must not make use of or disclose to another person surveillance information or a surveillance record knowing or having reasonable cause to suspect that the information has been obtained or the record made as a result, direct or indirect, of covert surveillance of an employee at work.

Maximum penalty: 20 penalty units.

- (2) If the covert surveillance of an employee was authorised by a covert surveillance authority, the following use or disclosure of the surveillance information or record is permitted:
- (a) use or disclosure that is authorised or required by the conditions of the covert surveillance authority or an order of a Magistrate under section 26,
 - (b) use or disclosure for a purpose that is directly or indirectly related to establishing whether or not an employee is involved in unlawful activity at work in accordance with the authority conferred by the covert surveillance authority,
 - (c) use or disclosure for a purpose that is directly or indirectly related to taking disciplinary action or legal proceedings against an employee as a consequence of any alleged unlawful activity at work,
 - (d) use or disclosure for a purpose that is directly or indirectly related to establishing security arrangements or taking other measures to prevent or minimise the opportunity for unlawful activity at work of a kind identified by the surveillance record to occur at work,
 - (e) disclosure to a member or officer of a law enforcement agency for use in connection with the detection, investigation or prosecution of an offence,
 - (f) use or disclosure for a purpose that is directly or indirectly related to the taking of proceedings for an offence,
 - (g) use or disclosure for a purpose that is directly or indirectly related to taking any other action authorised or required by or under this Act.

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Part 3 Covert surveillance

- (3) If the covert surveillance of an employee was not authorised by a covert surveillance authority, the following use or disclosure of the information or record is permitted:
 - (a) disclosure to a member or officer of a law enforcement agency for use in connection with the detection, investigation or prosecution of an offence,
 - (b) use or disclosure for a purpose that is directly or indirectly related to the taking of proceedings for an offence.
- (4) This section does not prevent the use or disclosure of a surveillance record, or of information in a surveillance record, that has previously been received in evidence in proceedings before a court or tribunal conducted in public.

29 Information obtained inadvertently pursuant to authority

- (1) Information that has inadvertently or unexpectedly come to the knowledge of a person as a direct or indirect result of the carrying out of covert surveillance authorised by a covert surveillance authority is, for the purposes of any determination by a court as to admissibility of evidence in criminal proceedings before the court, not considered to have been obtained in contravention of section 8 (Offences relating to covert surveillance).
- (2) Subsection (1) does not apply if the court is of the opinion that the application on the basis of which the covert surveillance authority was granted was not made in good faith.

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Clause 30

Miscellaneous

Part 4

Part 4 Miscellaneous

30 Functions under Act of Magistrates

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

31 Application to judicial member of Industrial Relations Commission

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

32 Annual report

- (1) The Minister must, as soon as practicable after 31 December in each year, prepare a report in respect of operations pursuant to covert surveillance authorities during the year and table the report, or cause it to be tabled, in both Houses of Parliament as soon as practicable after it is prepared.

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Part 4 Miscellaneous

- (2) A report under this section:
 - (a) must include details of the number of covert surveillance authorities sought, and the number of such authorities issued, during the year to which it relates, and
 - (b) may report on such other matters relating to covert surveillance authorities and the use of covert surveillance as the Minister considers appropriate.

33 Offences by corporations

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

34 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, the regulations may make provision for or with respect to:
 - (a) the use, possession, storage and destruction of any surveillance records made in the course of covert surveillance of the activities of an employee, and
 - (b) applications for the issue, variation and cancellation of covert surveillance authorities and how such applications are to be dealt with.
- (3) A regulation may create an offence punishable by a penalty not exceeding 5 penalty units.

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Clause 35

Miscellaneous

Part 4

35 Summary procedure for offences

- (1) Proceedings for an offence against this Act or the regulations are to be dealt with summarily:
 - (a) before a Local Court, or
 - (b) before the Industrial Relations Commission in Court Session.
- (2) The provisions of section 197 of the *Industrial Relations Act 1996*, and of the regulations under that Act, relating to appeals from, and the stating of a case by, a Local Court to the Industrial Relations Commission in Court Session apply to proceedings before a Local Court for offences against this Act.

36 Authority to prosecute

- (1) Proceedings for an offence against this Act or the regulations may be instituted only:
 - (a) with the written consent of the Minister, or
 - (b) with the written consent of an officer prescribed by the regulations, or
 - (c) by the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate, or
 - (d) by a person who was the subject of the surveillance with which the alleged offence is concerned.
- (2) In proceedings for an offence against this Act or the regulations, a consent to institute the proceedings, purporting to have been signed by the Minister or a prescribed officer, is evidence of that consent without proof of the signature of the Minister or prescribed officer.

37 Savings and transitional provisions

Schedule 1 has effect.

38 Repeals

The following are repealed:

Workplace Video Surveillance Act 1998

Workplace Video Surveillance Regulation 1999

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Clause 39 Workplace Surveillance Bill 2004

Part 4 Miscellaneous

39 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

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Savings and transitional provisions

Schedule 1

Schedule 1 Savings and transitional provisions

(Section 37)

Part 1 Preliminary

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of this Act

2 Definition

In this Part:

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

3 Covert surveillance authorities under repealed Act

A covert surveillance authority in force under Part 3 of the repealed Act immediately before the repeal of section 9 of that Act is taken to be a covert surveillance authority issued under this Act.

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Workplace Surveillance Bill 2004

Schedule 1 Savings and transitional provisions

4 Pending applications for covert surveillance authorities under repealed Act

An application for a covert surveillance authority pending under Part 3 of the repealed Act immediately before the repeal of section 9 of that Act is taken to be an application for a covert surveillance authority made under this Act.