

**Submission  
No 28**

## **INQUIRY INTO WORKPLACE SURVEILLANCE**

**Organisation:** Victorian Trades Hall Council (VTHC)

**Date Received:** 31 July 2024



Alison Marchant MLA  
Chair  
Economics and Infrastructure Committee  
Parliament of Victoria  
Melbourne VIC 3002

Via: [eic.assembly@parliament.vic.gov.au](mailto:eic.assembly@parliament.vic.gov.au)

Dear Chair,

**RE: INQUIRY INTO WORKPLACE SURVEILLANCE**

On behalf of Victorian Trades Hall Council (VTHC), I thank you for the opportunity to make a submission to this important inquiry.

VTHC is the peak body for 40 Victorian unions that reach into each and every industry in the state. Throughout our history, Victorian unions have been at the forefront of winning fundamental workplace rights - from the 8-hour day to wage theft legislation and family and domestic violence leave.

In 2024, unions and their members report that far reaching surveillance is occurring in Victorian workplaces. Employers are collecting swathes of data about their workers and using this data to undercut fundamental workplace rights. Surveillance is being used to intimidate workers, is causing breaches of occupational health and safety (OHS) standards, being used in hiring and firing decisions, and, when combined with artificial intelligence, is being used to obscure employers from their responsibilities to their workforces.

Accelerated rates of surveillance are cause for significant alarm and Victoria's legislative framework needs to be updated to meet international best practice. The Victorian Government should act with urgency.

The creation of a standalone Privacy in Working Life Act (PIWLA) is this submission's central recommendation. The PIWLA should contain standards about when and how surveillance can be introduced, enshrining a genuine right for workers to be consulted and opt out of surveillance. Worker OHS must be protected, and workers' rights to retain ownership over data they create should be protected.

Should you have any questions about this submission, please do not hesitate to contact Tiarne Crowther, Lead of the VTHC Politics and Research Team on

Yours sincerely,

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## **ABBREVIATIONS**

ACTU = Australian Council of Trade Unions  
ALRC = Australian Law Reform Commission  
AMWU = Australian Manufacturing Workers Union  
APP = Australian Privacy Principles  
ASU = Australian Services Union  
CCTV = Closed Circuit Television  
CPSU = Community and Public Sector Union  
FWA = Fair Work Act  
FWC = Fair Work Commission  
EBA = Enterprise Bargaining Agreement  
EPM = Electronic Performance Monitoring  
ETU = Electrical Trades Union  
FWC = Fair Work Commission  
HCA = High Court of Australia  
ILO = International Labour Organization  
PIWLA = Privacy in Working Life Act  
TWU = Transport Workers Union  
UWU = United Workers Union  
VLRC = Victorian Law Reform Commission  
VTHC = Victorian Trades Hall Council

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## 1. Introduction

*I am unsure about how much surveillance takes place, not given the option to opt out, unsure of extent of it, staff who report to me are not informed and I was asked to keep it secret.*

- C, Health and Community Services Professional, Victoria.<sup>1</sup>

*I feel like I can't stop for a breather, I'm on my feet all day and even just having a sip of water makes me feel guilty.*

- E, Hospitality Worker, Victoria.<sup>2</sup>

*I don't chat to my colleagues as much ... I feel like a naughty child in school. All the morale has disappeared.*

- P, Retail Worker, Victoria.<sup>3</sup>

*I no longer have any faith in my workplace leaders.*

- J, Secondary School Educator, Victoria.<sup>4</sup>

*I feel like a prisoner.*

- A, Hospitality Worker, Victoria.<sup>5</sup>

### **Every day, thousands of Victorian workers enter their place of employment and leave their human rights at the door.**

Employers scrutinise their inner lives, personal activities, medical histories, genetic make-up, mood states and social interactions. Workers are secretly filmed and recorded. Every second of their day is aggressively monitored. Their communications are tracked. Highly sensitive personal data is collected about them with no transparency about its use, storage or sale to third parties. If workers are even asked if they consent, the choice is typically between 'yes' and unemployment.<sup>6</sup> The only grievance system available to them for challenging privacy violations is one in which *they* shoulder the overwhelming burdens of cost, time and emotional distress.<sup>7</sup>

In Australia, workers are afforded only the narrowest protections against intrusive and unreasonable surveillance from their employer – protections which are, in any case, very difficult for them to exercise. This is especially true in Victoria – which lacks even the rudimentary state-level surveillance controls that exist in New South Wales and the Australian Capital Territory.

Presently, the only protection for Victorian workers and their unions against abusive surveillance practices is a patchwork of out-of-date and unfit federal regulations.

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<sup>1</sup> C, Health and Community Services Professional. VTHC Workplace Surveillance Survey, 2024.

<sup>2</sup> E, Hospitality Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>3</sup> P, Retail Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>4</sup> J, Secondary School Educator. VTHC Workplace Surveillance Survey, 2024.

<sup>5</sup> A, Hospitality Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>6</sup> Electrical Trades Union. 2023. Submission to the Commonwealth Attorney General's Department's Review of the Privacy Act 1988. 31 Mar 2023. Available at: <https://www.etunational.asn.au/wp-content/uploads/2023/04/202303-Privacy-Act-Review-ETU-Submission.pdf>, p. 5.

<sup>7</sup> Sarat Chandran, Priya and Coleman, Susan. *Workplace Privacy, Final Report*. Victorian Law Reform Commission. September 2005. Available at: <https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/PrivacyFinalReport.pdf>, p. 97.

The Victorian community is paying an **unacceptable cost** by allowing employers to exercise a near-unlimited right of observation in the workplace: a cost paid in the form of pressurised work environments, burnt out workers, toxic organisational cultures, proliferating stress, and an intensification of work duties without any corresponding improvement in pay or conditions.

As the Victorian Law Reform Commission wrote in 2005, 'privacy is a fundamental aspect of being human.'<sup>8</sup> Twenty years later, employers have only increased their use of surveillance in ways that undermine this basic right. This includes:

- Filming workers taking industrial action as an attempt to intimidate them.<sup>9</sup>
- Monitoring interpersonal relationships between workers.<sup>10</sup>
- Demands for disclosure of workers' private information without explanation as to why it is needed by the employer.
- Use of opaquely collected surveillance data to justify adverse actions against workers.
- Use of surveillance to engineer divisions between workers.<sup>11</sup>
- Use of surveillance to monitor workers health and their personal lives.
- Following, filming or otherwise monitoring workers outside of their working hours.
- Monitoring the mood states and sentiments of individual workers in response to management decisions or organisational changes.
- Using surveillance collected data to pressure workers to accept pay cuts.
- Demanding unnecessary and invasive biometric, psychological or behavioural testing as a condition of work or receiving a job offer.

Through a survey this year, Victorian Trades Hall Council (VTHC) has heard from over 370 workers in a broad range of industries and occupations testifying to the toxic impact of unrestricted surveillance in their workplaces - including early childhood educators, miners, public servants, road transport workers, fast food workers, gig-economy couriers, rail workers, insurance professionals, retail workers, call centre workers, teachers, graphic designers, researchers, and manufacturers.

A catalogue of the surveillance methods these workers are being subjected to, or likely to be subjected to soon, is provided in the table below:<sup>12</sup>

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<sup>8</sup> VLRC. *Workplace Privacy: Final Report*, p. 23.

<sup>9</sup> United Workers Union. 2020. *Technology and Power: Understanding issues of insecure work and technological change in Australian workplaces*. Submission: Inquiry into the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales. Select Committee, Parliament of New South Wales. Available at: [parliament.nsw.gov.au/lcdocs/submissions/69004/f](https://parliament.nsw.gov.au/lcdocs/submissions/69004/f), p. 30.

<sup>10</sup> Mendonca P and Kougiannou N. 2023. "Disconnecting labour: The impact of intraplatform algorithmic changes on the labour process and workers' capacity to organise collectively." *New Technology, Work and Employment*, (Vol. 38), pp. 4-5.

<sup>11</sup> Ibid

<sup>12</sup> Henderson, Troy, Swann, Tom and Stanford, Jim. *Under the Employer's Eye: Electronic Monitoring & Surveillance in Australian Workplaces*. Centre for Future Work. 21 Nov 2018. Available at: <https://futurework.org.au/report/under-the-employers-eye-electronic-monitoring-surveillance-in-australian-workplaces/> - with additions from the author.

**Figure 1: Methods of Workplace Surveillance reported to VTHC**

Automated systems to collect consumer interaction ratings and worker evaluation
AI-Driven 'people analytics' software
Biometrics (such as finger scans, facial recognition, retinal scans)
Closed Circuit Television (CCTV) video surveillance
Digital wearables which track location, speech patterns, frequency of speech, and the content of conversations
Digital performance and quality management in production systems
Digital profiling, social media trawling
Electronic time-stamp attendance systems or surveillance of entry and exits to worksites
Gamification: use of competitive performance ranking systems to boost work intensity, attendance and competition with coworkers
Global Positioning System (GPS) tracking in vehicles, devices and ID cards
Location tracking for off-site contractors and other mobile workers
Monitoring fatigue or distraction with eye-tracking / retinal software
Monitoring content of internal communications including emails, calls and instant messaging applications
Monitoring keystrokes, log-in times and shut-down times
Monitoring telephone calls
Monitoring web browsing
Clock-in and clock-off attendance procedures including biometric finger scans, swipe cards, facial recognition technology or retinal scans
On-call systems operationalised through text, mobile phone, or e-mail
Radio Frequency Identification (RFID) tracking
Swipe cards to track attendance and location
Time-motion data compilation to track output and activity
Health and wellbeing programs
Sentiment and mood analysis software
Telematics (communication of digital information over long distances)
Private investigators, mystery shoppers and other forms of covert human supervision

Although the cases reported to VTHC touch on different parts of this issue, together, they leave a distinctive impression: **workplace surveillance has transformed into a significant human rights issue in Victoria** - upon which decisive action should not be delayed.

The report is informed by a survey of Victorian workers completed by VTHC which reveals, in conjunction with the case studies and the scholarly literature:

1. The harm caused by employers who use surveillance practices that are disproportionate, invasive, and unreasonable;
2. That these practices significantly hinder the ability of workers to exercise or expand their workplace rights;
3. That intrusive surveillance practices have become widespread in Victoria, and
4. Surveillance is being used to intensify workloads without improvements to wages or conditions.

There are many forms of workplace surveillance in Victoria which serve a variety of functions for employers. Intrusive surveillance causes extensive harms to workers. Considering local cause studies and international research, it is clear that Victoria's existing system of



workplace privacy protection is structurally incapable of defending workers from these harms.

Improving workplace privacy protections in Victoria will require listening to workers and their unions and paying close attention to international best practice on this issue – including overseas legislation and the International Labour Organizations’ (ILO) Code of Practice on the Protection of Workers’ Personal Data.<sup>13</sup>

In this submission, Victorian unions have integrated our shared proposals into an extensive alternative framework for regulating workplace privacy: a proposed Privacy in Working Life Act (PIWLA). The Act is a regulatory model fit for the 21<sup>st</sup> century which protects critical workplace and human rights including the rights to privacy, freedom of association, autonomy and dignity at work.

*Recommendation 1: The Victorian Government should introduce new workplace privacy legislation that protects workers from intrusive surveillance by their employer. A Privacy in Working Life Act should stand alone from the existing Surveillance Devices Act - placing limits on the use of optical, audio, visual, digital and location tracking surveillance against workers. It should also include consultation and data information rights for workers.*

## **2. The Forms and Functions of Workplace Surveillance**

In 2017, workers taking industrial action on a mine in Queensland were subjected to a full-scale intelligence operation by their employer.<sup>14</sup>

For days, their homes were encircled by unidentified security agents wearing body cameras. They were filmed at the golf club, in their homes and while walking with their families.<sup>15</sup> Their employer had collaborated with a private security firm to wage ‘Project Zuckerberg’ – a trawl for incriminating material on the union workers’ personal lives.<sup>16</sup> Charter planes were booked, and ‘operatives’ were flown in from around Australia. Cameras were purchased, ‘make sure [they have] long lenses,’ internal emails read, ‘we need to be able to ID individuals.’<sup>17</sup> Operatives assigned abusive and demeaning codenames to individual workers.<sup>18</sup>

In the words of Fair Work Commission Deputy President Ingrid Asbury, this was a **‘quasi-military’ operation**.<sup>19</sup> ‘They are **control freaks**,’ a local union leader said at the time, **‘they think they can act with impunity**.’<sup>20</sup> The reason why employers around Australia hold this belief is because – by and large – they can. The lack of adequate regulation allows and even encourages them to overreach.

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<sup>13</sup> International Labour Organisation. 1997. “Protection of workers’ personal data. An ILO code of practice.” Geneva, Available at: <https://www.ilo.org/resource/protection-workers-personal-data>

<sup>14</sup> Fair Work Commission [2017] 5380 Construction, Forestry, Mining and Energy Union v Oak Creek Coal Pty Ltd s 229 – Bargaining Order (B2017/640) Available at: [Application by Construction, Forestry, Mining and Energy Union \(105N\) - \[2017\] FWC 5380 | Fair Work Commission](#)

<sup>15</sup> Ibid., pp. 20-24, 29.

<sup>16</sup> Ibid., p. 24.

<sup>17</sup> Ibid., p. 34.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid, p. 65.

<sup>20</sup> Stephen Smyth Quoted, QLD District President of the CFMEU. Ibid, p. 24.

Military-style workplace surveillance operations are not unique to Queensland. In Victoria workers also face disciplinary and aggressive monitoring regimes.

Under our economic system, observation of the workplace is a structural necessity. Monitoring the production process is how opportunities to improve efficiency and output can be identified.<sup>21</sup>

Victorian workers want to do their jobs well – they recognise that some degree of supervision is unavoidable in the waged employment relationship. Victorian workers and their unions accept that there are legitimate functions of workplace surveillance, including:<sup>22</sup>

- Ensuring the security of the premises.
- Identifying risks to health and safety.
- Identifying maintenance needs or possible improvements to capital equipment.
- Identifying general patterns in the production process.
- Undertaking supervision for the sake of training.

Victorian workers do not object to these practices - they object to being **forced to endure surveillance that goes well beyond what is reasonable in the employment context - and, increasingly, beyond what is humane.**

## **Figure 2: Workplace Surveillance: Process, Performance and Personhood**

For employers, surveillance can enhance a broad range of managerial imperatives – both legitimate and illegitimate. We apply the following definitions of legitimacy with regards to surveillance use:

**Legitimate surveillance observes processes:** It is focussed on examining trends in general operations, the production process, how long certain tasks take, the integrity of the premises, directing, adjusting and superintending production. Data collected is not attributable to specific workers.

**Context-dependent surveillance observes performance:** It is focussed on evaluating the productivity of certain teams or groups of workers. It is context-dependent because performance observation can be used positively for feedback and training, or it can be used negatively as an opaque disciplinary instrument.

**Illegitimate surveillance observes people:** It is focussed on observing and making inferences about individual workers and their capacities as human beings. Includes monitoring of social dynamics, personal life, attitude towards management / industrial relations, mood states, attention levels, opinions, medical history, genetics, health and lifestyle. It is more concerned more with a workers' tendencies as a person rather than the inherent requirements of the position.

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<sup>21</sup> Manokha, Ivan. 2020. "The Implications of Digital Employee Monitoring and People Analytics for Power Relations in the Workplace." *Surveillance & Society*, Vol. 18 (4), p. 540.

<sup>22</sup> VTHC Survey findings indicate that workers overwhelmingly recognise that selective uses of surveillance can be positive for workers and the organisation as a whole.

<b>Process Surveillance</b> <i>Legitimate</i>	<b>Performance Surveillance</b> <i>Context-Dependent</i>	<b>Personal Surveillance</b> <i>Illegitimate</i>
Protecting property and assets	Ensuring compliance with organisational procedures	Scrutinising individual workers' views on industrial relations
Ensuring the health and safety of the work environment	Assessing the effectiveness of certain teams within an organisation	Gathering non-work-related information about workers abilities
Assessing general patterns in the production process	Evaluating the efficiency of production techniques as used by workers	Assessing workers' fundamental capacities as human beings
Examining organisational effects of process changes	Identifying fluctuations in performance of teams in the organisation	Assessing workers' mood states, opinions and personalities
Identifying process-based causes of delay or inefficiency	Evaluating performance changes in response to adjustments to the work environment	Examining workers' private lives including their health, wellbeing and lifestyles

Illegitimate applications of workplace surveillance are not outliers. They are used by some of the most well-known employers in Victoria. As one worker at a prominent fast-food outlet reported:

*My workplace used security cameras 24/7 which were not used for employee or customer safety, they were **only used to watch staff members**. They **hired people to watch these camera feeds** who would take screenshots or videos of people working to send to the work group chat to **constantly criticise** the work being done and **belittle** the staff. These cameras also had an audio feed where they could always hear our conversations and could speak to us about our work through the camera. **Most of the staff were under 18.***

- T, Fast Food Worker.<sup>23</sup>

Where there are allegations of criminality, police or other legitimate surveillance for the purpose of investigation should not be restricted.

Employers use a variety of methods to conduct workplace surveillance. Different methods are applied for different functions. While visual surveillance is typically used for observing the production process, the surveillance of individual workers is more likely to be conducted using AI-driven 'people analytics,' electronic performance monitoring (EPM), or digital surveillance programs.

In telemarketing, public services, administration and sales, **AI-driven employee monitoring software** is used to assess the 'quality' of a worker's interactions with customers. In a survey by the Community and Public Sector Union (CPSU), workers reported that such sentiment analysis software felt like a major risk to their privacy:

*There is a huge issue regarding staff/employee privacy with these AI tools that the organisation has already adopted or wants to adopt. For example, in [my workplace] the program used has significant monitoring and surveillance capabilities including*

<sup>23</sup> VTHC Workplace Surveillance Survey, 2024.

'sentiment analysis' to analyse quality of interactions, for the express purpose of targeting staff for intense ... monitoring.<sup>24</sup>

- Anonymous, Community Services Worker.

Other surveillance methods faced by Victorian workers include **lie detector tests**, psychological evaluations, arbitrary drug screening, health monitoring, facial expression and sentiment analysis, intelligence assessments, and location tracking.<sup>25</sup> These practices are occurring without notice, disclosure or any meaningful form of consent.

In recent years, some employers have begun **mandating workers attach surveillance devices to their bodies** in the form of location, health and productivity tracking 'wearables'.<sup>26</sup>

Wearables have been imposed on Victorian workers in:<sup>27</sup>

- Transport
- Healthcare
- Aviation
- Retail
- Logistics
- Sales
- Aged Care

Intrusive selection tests before or during employment are an additional surveillance method being faced by Victorian workers and job candidates.

These tests are often aimed at identifying individuals who might have some genetic, psychological or circumstantial reason for needing sick leave in future. They can also be geared to filter out job candidates with personalities deemed to make them less compliant to managerial authority.<sup>28</sup> Data from these selection tests has been used as the basis to make discriminatory decisions in hiring, firing and promotions.<sup>29</sup>

Additionally, employers also use surveillance geared at analysing workplace social relations.<sup>30</sup> There is currently nothing preventing the surveillance of Victorian workers' social lives. Employers use social surveillance to produce information about how to make organisational changes in a way that minimises resistance or dialogue with workers:

Case study: Lidl<sup>31</sup>

Lidl is one of Europe's largest food chain stores. In the 2000s, Lidl used detectives and CCTV to discern whether workers were friends with one another, what they talk about, and if they engaged in romantic relations. Information collected about these matters is used to quash requests for full-time conversion or fair pay.

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<sup>24</sup> Community and Public Sector Union. 2023. *CPSU Member Survey on Artificial Intelligence (AI) in the Workplace*. Respondent 465, p. 39.

<sup>25</sup> Wayne Howell, 'Lie Detector Boom', *The Herald Sun* (Melbourne) 26 July 2004, Victorian Law Reform Commission. *Workplace Privacy, Options Paper*. 2004. Available at: [WorkplacePrivacyOptionsPaper.PDF \(lawreform.vic.gov.au\)](https://www.lawreform.vic.gov.au/workplace-privacy-options-paper), p. 45.

<sup>26</sup> Ibid.

<sup>27</sup> VTHC Workplace Surveillance Survey, 2024.

<sup>28</sup> VLRC. *Workplace Privacy, Options Paper*, p. 89.

<sup>29</sup> Ibid.

<sup>30</sup> Manokha, "Employee Monitoring and Power Relations," p. 545.

<sup>31</sup> Fuchs, "Political Economy and Surveillance Theory," p. 681.

*Lidl seems to try to know as much as possible about its employees ... so as to have means of pressure available if one wants to dismiss them, if one ... maybe does not want to make salary increases, if one wants to carry out salary cuts. **It is basically a means for exerting pressure on employees.***<sup>32</sup>

Case study: Bank of America

In 2015, Bank of America introduced a system of ID badges that monitor how much workers talk to one another, how physically active they are, and whether they sit in small or large groups at lunch. The data collected revealed that workers who sat in large groups at lunch experienced 36% less stress during lay-off periods.<sup>33</sup>

Given employers' total lack of transparency on how they are using surveillance in Victoria, there is a genuine concern that such social relations monitoring is already happening here.

Biometric facial scanning technology is another surveillance method that employers are currently free to impose without any obligation to provide disclosure or secure the informed consent of workers. It is especially egregious that this is happening even in workplaces governed by enterprise bargaining agreements (EBAs) which mandate consultation with workers about organisational changes.

Case Study: AMWU vs Laminex<sup>34</sup>

In 2024, the Australian Manufacturing Workers Union (AMWU) applied for the FWC to arbitrate a dispute between the union and the company Laminex. The company sought to introduce a biometric face scanning system for workers to clock on and clock off - developed by a third-party company Kronos Australia. The AMWU contends that Laminex did not adequately consult workers about this, in violation of Clause 34 of the company's 2021 Enterprise Bargaining Agreement.

For road transport workers, Transport Workers Union (TWU) has noted that workplace surveillance regimes are shockingly opaque.<sup>35</sup> Drivers do not receive substantive information about:

- How surveillance collected data is used by employers in performance or behavioural management.
- What recourse drivers have if they feel technologies are too intrusive.
- What recourse drivers have when they feel surveillance technologies are not being used for their intended purposes.
- What recourse drivers have if they feel surveillance technologies are negatively impacting their health and
- Specific details about what and how surveillance technology is being used.<sup>36</sup>

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<sup>32</sup> Connolly, Kate. "German Supermarket Chain Lidle accused of snooping on staff." *The Guardian*. 27 Mar 2008. Available at: <https://www.theguardian.com/world/2008/mar/27/germany.supermarkets>; Quotation is from Stern journalist Malte Arnspenger, retrieved from Fuchs, "Political Economy and Surveillance Theory," p. 681.

<sup>33</sup> Ibid; Waber, Ben. "People Analytics' Through Super Charged ID-Badges." *MIT Sloan Management Review*, 7 Apr 2015. Available at: <https://sloanreview.mit.edu/article/people-analytics-through-super-charged-id-badges/>

<sup>34</sup> Australian Manufacturing Workers' Union v Laminex Group Pty Ltd. C2024/121, 28 Feb 2024, Fair Work Act 2009 (Cth.) s.739 - Dispute Resolution. FWC [2024] 538.

<sup>35</sup> Transport Workers Union. 2020 Submission: Inquiry into the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales, p. 48.

<sup>36</sup> Transport Workers Union, Submission to 2020 NSW Inquiry, pp. 46-49.

In some sectors, surveillance practices have encompassed not only the social lives of workers but their biological states. Transport workers in particular have been exposed to novel technologies that purport to track their level of fatigue.

Case Study: Toll Transport v Transport Workers' Union of Australia<sup>37</sup>

Toll, a transport corporation, installed real time monitoring cameras inside cars to alert the company of workers deemed to be distracted or fatigued. The cameras function by **shining infrared beams onto the face and eyes of workers, sometimes for up to twelve consecutive hours.** This was extremely concerning for workers given a lack of studies about the health effects of these practices. They were also concerned about perpetual observation. The TWU contended that the technology was a means of 'constantly assessing driver behaviour and productivity, rather than ensuring greater road safety.'<sup>38</sup>

*Recommendation 2: Victoria should enshrine a right to protection from adverse action or disciplinary action relating to data gained from surveillance. Employers should not be permitted to use surveillance data to take adverse action against workers.*

*Recommendation 3: New workplace privacy legislation should ban employers from observing non-work-related areas unless this is absolutely crucial for safety and security. Employers often monitor "recreational" areas to intimidate workers who have or are aspiring to have representation by a union. Victoria should implement a specific, non-negotiable obligation prohibiting surveillance of toilet facilities, changing rooms, staff facilities, and in lunchrooms designated for the personal use of workers.*

## 2.1 Post Pandemic Changes

Workplace surveillance technology has proliferated in the years following COVID-19 - becoming more advanced, more precise and more affordable. In April 2020 alone, global demand for worker monitoring technology increased by 108%.<sup>39</sup>

The rise of remote and hybrid work has granted employers unprecedented opportunities to collect information about workers' lives.<sup>40</sup> The pandemic blurred boundaries between work and home, eroding taboos against excessive observation. As one Victorian higher-education worker said to the VTHC about how their work has changed since the pandemic:

*Management [told us] we had to be online on MS Teams all the time, which adds extra pressure. Before COVID we never had to be online on any application. Now it*

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<sup>37</sup> Toll Transport Pty Ltd T/A Toll Shopping v Transport Workers' Union of Australia [2018] FWC 3573.

<sup>38</sup> Transport Workers Union. 2020 Submission to the Select Committee on the Impact of Technological Change on the Future of Work and Workers in New South Wales. Available at: [https://www.parliament.nsw.gov.au/lcdocs/submissions/69334/0030%20Transport%20Workers%20Union%20\(TWU\).pdf](https://www.parliament.nsw.gov.au/lcdocs/submissions/69334/0030%20Transport%20Workers%20Union%20(TWU).pdf), p. 51.

<sup>39</sup> Brown, Eileen. 2020. "Employee surveillance software demand increased as workers transitioned to home working." ZDNET, 16 Nov 2020. Available at: <https://www.zdnet.com/article/employee-surveillance-software-demand-increased-as-workers-transitioned-to-home-working>

<sup>40</sup> Golden, Jessica and Chemi, Eric. 2020. "Worker Monitoring Tools Seeing Surging Growth as Companies Adjust to Stay-at-Home Orders." CNBC, 13 May 2020. Available at: <https://www.cnbc.com/2020/05/13/employee-monitoring-tools-see-uptick-as-more-people-work-from-home.html>

feels you can't get away sometimes or that you'll be in trouble if you don't want to be visibly "online."<sup>41</sup>

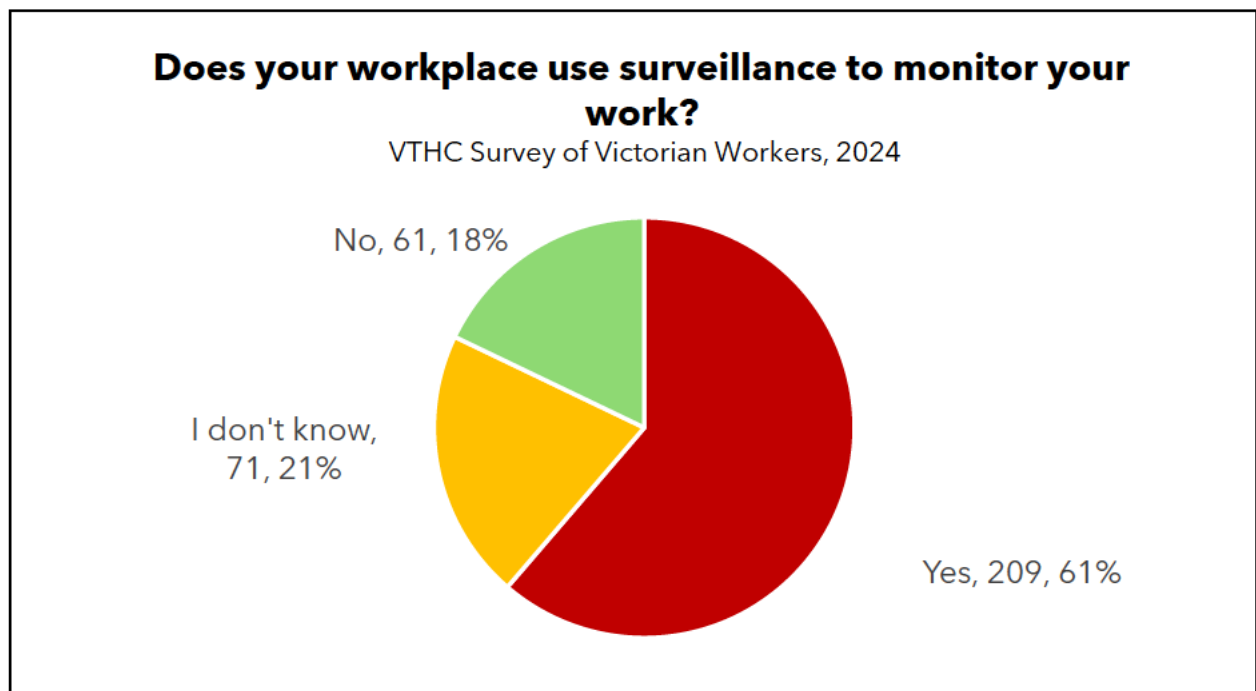
- D, Higher Education Worker

Technologies such as e-Surveiller demonstrate the new scale of employers' observational powers.<sup>42</sup>

Case Study: e-Surveiller<sup>43</sup>

e-Surveiller is an **undetectable** surveillance software used by employers. It enables the simultaneous monitoring of all screens on a network. It logs all incoming and outgoing correspondences, records every program and screen opened, all websites visited, any changes to files, the amount of text written per worker, start-up times, shut down times and log in times. It also records when the computer has been used for personal activities during work hours. **For just US170, a business can install e-Surveiller on an unlimited number of computers.** This software is by no means an outlier. It is representative of the surveillance capabilities held by an increasing number of employers around Victoria.

In our survey, VTHC asked workers if they knew whether surveillance was active in their workplaces and, if so, what form(s) it took:



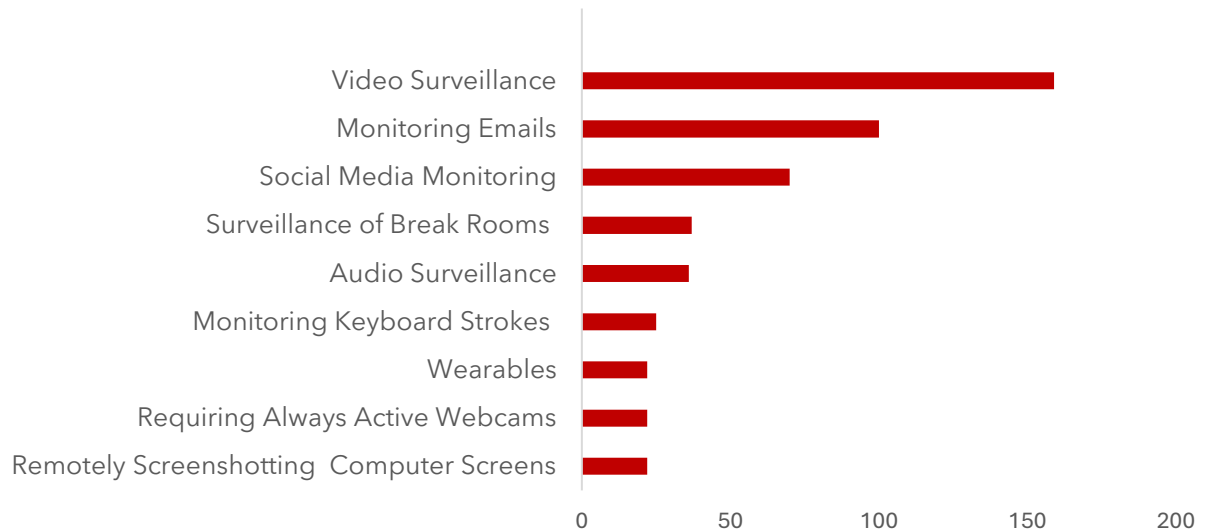
<sup>41</sup> D, Tertiary Educator in Victoria. VTHC Workplace Surveillance Survey, 2024.

<sup>42</sup> For example, one in seven British workers reported a noticeable increase in workplace surveillance since the pandemic: Glavin, "Private Eyes," p. 3.

<sup>43</sup> Fuchs, Christian. 2013. "Political Economy and Surveillance Theory." *Critical Sociology*, Vol. 39 (5), pp. 671-687.

## If so, what kind of surveillance methods are used?

VTHC Survey of Victorian Workers, 2024



Surveillance methods of all kinds – digital, auditory, visual, emotional, geospatial – are being used in more contexts and for more purposes.<sup>44</sup> The volume of data being collected about working people from their employers is unprecedented. How this data is stored and used remains opaque.

Recent advances in surveillance methods include:

- Wearable tracking devices
- AI-driven people analytics
- Advanced biometric testing
- Precise vehicle tracking
- GPS enabled mobile phones and work devices
- Social media tracking
- Neuroinformatics

Many of these technologies, especially algorithm-based management systems, **encourage and even necessitate perpetual data-collection.**<sup>45</sup>

Most disturbingly, perhaps, is the emergence of '**neuroinformatics.**' This refers to technology that collects data about workers' brain activity and attention levels – often in the form of a helmet worn during work hours. This is, possibly, **the most extreme form of**

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<sup>44</sup> Henderson, Troy, Swann, Tom and Stanford, Jim. 2018. *Under the Employers Eye: Electronic Monitoring & Surveillance in Australian Workplaces*. The Australia Institute, Canberra. Available at: <https://futurework.org.au/report/under-the-employers-eye-electronic-monitoring-surveillance-in-australian-workplaces/>, pp. 20, 29.

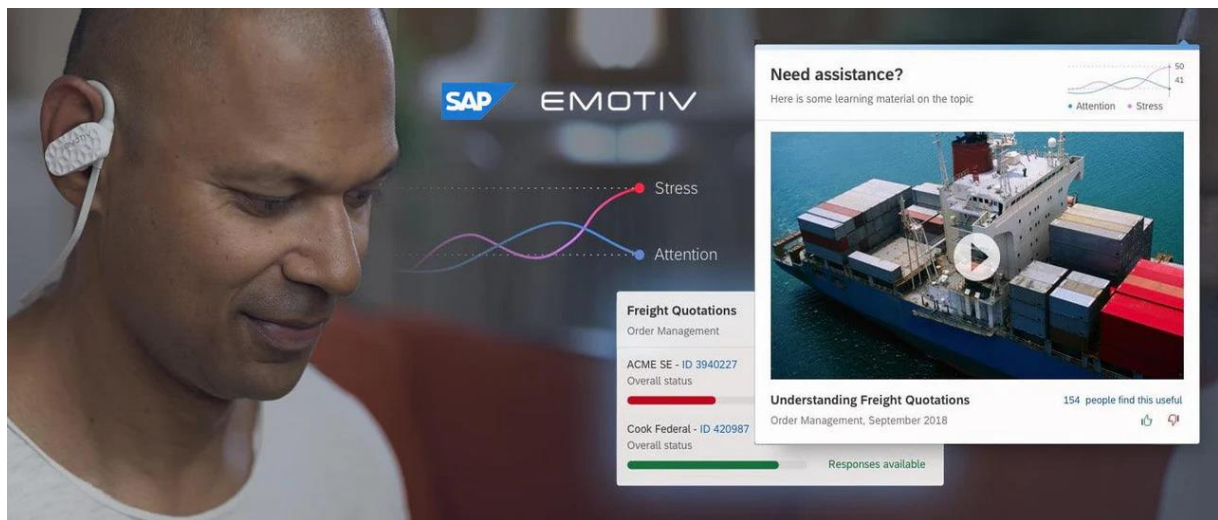
<sup>45</sup> Bucher, Elaine, Leotine, Schou, Kalum, Peter and Waldkirch, Matthias. 2021. "Pacifying the Algorithm – Anticipatory Compliance in the Face of Algorithmic Management in the Gig Economy." *Organisation*, Vol. 28 (1), pp. 44-67.



**surveillance that has ever existed** and is already being deployed by employers overseas and, in a few years, could be seen in Victoria as well.<sup>46</sup>

Case study: Emotiv

A software firm, Emotiv, has developed a technology called Focus UX aimed at detecting workers' cognitive states and then adapting the work process to 'fit what they are able to handle at that moment.' The company describes the technology as both a management instrument and a means to improve 'well-being and productivity in the workplace.'<sup>47</sup>



Compounding these developments has been the continuous growth of precarious 'gig-economy' labour. The rise of insecure, on-demand, digitally-facilitated work has undercut workers' ability to 'resist privacy-invasive practices.'<sup>48</sup> Gig-economy drivers in the TWU have raised the following concerns about monitoring software in their industry:

- Automated performance management programs running at all times.
- Monitoring of breaks, with penalties being incurred for workers declining jobs on the weekend.
- A total lack of a reporting structure for violations of privacy or other workplace rights, and
- A total lack of a right of reply or other natural justice process when surveillance-collected data is used to make decisions about a worker, including deactivating their account.<sup>49</sup>

In many cases, a monitored workplace entails a complete loss of privacy in work communications, where **digital workers cannot speak without the employer hearing**. Employers monitor the contents of emails, instant messaging apps and other correspondences to a functionally unlimited degree.

*Recommendation 4: There should be a total ban on surveillance of workers and their communications when they are not at work, including a prohibition on social media trawling.*

<sup>46</sup> Manokha. "Employee Monitoring and Power Relations," p. 545.

<sup>47</sup> <https://www.emotiv.com/blogs/news/eeg-technology-for-employee-wellness>

<sup>48</sup> Brown, Murray and Witzleb, Normann. 2021. "Big Brother at Work - Workplace Surveillance and Employee Privacy in Australia." *Australian Journal of Labour Law* (AJLL), Vol. 34 (3), p. 174.

<sup>49</sup> Manokha. "Employee Monitoring and Power Relations," p. 545.

*Surveillance of workers outside of working hours in connection to work constitutes a human rights violation. Employers are entitled to reasonable information about whether the job they are paying for is getting done. There is no ethical basis for them to scrutinise how workers spend their free time. Legitimate police and investigative surveillance that complies with the current legal requirements should not be restricted.*

*Union branch committee members (I am one) always use private emails and secure platforms for discussions as we know university email is not secure, and we suspect a level of surveillance.*

- J, Higher Education Worker.<sup>50</sup>

*It is horrible feeling to have absolutely no privacy ...The principal **monitored all emails**, and refused to let staff independently interact with school board members (only via the email system, which he monitored). The school board members also worked for his private company. Staff knew this and felt **totally intimidated**.*

- D, Secondary School Teacher.<sup>51</sup>

*I have had my emails monitored, with a threat of disciplinary action with a view to termination on my return to the workplace. This was done by a former manager who I had previously made a bullying complaint about.*

- J, Educator in Victoria.<sup>52</sup>

*Recommendation 5: The burden on proof should be on employers to demonstrate why it is necessary to introduce surveillance or performance monitoring in a given context. When surveillance is not essential for the safety or security of workers, customers or the premises, it should be banned.*

*Recommendation 6: Strict conditions should be prescribed for the collection of sensitive personal data about workers. Personal data, such as health data, should only be collected where it is necessary for processing sick/personal leave or where legislation requires it, e.g., OHS legislation. If it is absolutely necessary for an employer to collect personal data, meaningful and informed consent from the worker should be acquired. This means compelling employers to disclose why the sensitive data is being collected, how it will be stored, for how long it will be held and how it will be destroyed.*

### **3. The Harms of Workplace Surveillance**

#### **3.1 Ability to Exercise Workplace Rights**

Victorian workers and their unions have bargained, fought for and won a range of protections that improve the basic conditions of working life. These include:

- Limits on the maximum hours of work undertaken in a given week.<sup>53</sup>
- The right to safe working conditions.
- The right to form unions and collectively bargain with employers.<sup>54</sup>

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<sup>50</sup> J, Higher Education Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>51</sup> D, Secondary School Teacher. VTHC Workplace Surveillance Survey, 2024.

<sup>52</sup> J, Educator. VTHC Workplace Surveillance Survey, 2024.

<sup>53</sup> Fair Work Act 2009 (Cth). 2024. "Chapter 2 The Terms and Conditions of Employment," The National Employment Standards. Available at: <https://www.fwc.gov.au/documents/awards/resources/nes.pdf>, Division 3, Section 62.

<sup>54</sup> FWA, "The Terms and Conditions of Employment," Division 5, Section 76C.

- The right to take compassionate, personal, carers, paid family and domestic violence leave.<sup>55</sup>
- The right to take protected industrial action.<sup>56</sup>
- The right to fully utilise annual leave.<sup>57</sup>
- The right to request conversion to permanent employment.<sup>58</sup>
- The right to redress against rights violations including occupational injury, harassment, unlawful dismissal, discrimination or bullying.

Workplace privacy should not be considered simply another important workplace right to be protected. Rather, **privacy is the precondition for the free exercise of all workplace rights.**

By undermining privacy to such degree, **electronic surveillance has fundamentally shifted the power balance in Australian workplaces:**

*[Surveillance] makes me feel like if I ever dispute something unrelated then any lapses that have been recorded without my knowledge could be used against me.*  
- D, Healthcare Worker.<sup>59</sup>

The presence of a monitor with 'universal visibility' can install a systematic fear among workers to report safety risks, take breaks or assert their rights.<sup>60</sup>

For example, when workers know the amount of annual leave they take is being monitored and compared with their colleagues, they will be reluctant to use all of the time off that they are entitled to.<sup>61</sup> This has been confirmed by workplace surveys from the Centre for Future Work.<sup>62</sup>

Findings from the VTHC survey on workplace surveillance also show that employers have installed surveillance in break rooms and non-related areas in such industries as: <sup>63</sup>

- Fast food outlets
- Aged care homes
- Corporate offices
- Hospitality establishments
- Manufactories
- Airlines
- Call centres
- Early learning centres

<sup>55</sup> FWA, "The Terms and Conditions of Employment," Division 7.

<sup>56</sup> Fair Work Act 2009 (Cth.), Sections 340-47, 351, 406-469 and 477. Available at: <https://www.legislation.gov.au/C2009A00028/latest/versions>

<sup>57</sup> FWA, "The Terms and Conditions of Employment," Division 6.

<sup>58</sup> FWA, "The Terms and Conditions of Employment," Division 4A.

<sup>59</sup> D, Healthcare Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>60</sup> Makhona, "Employee Monitoring and Power Relations," p. 547.

<sup>61</sup> Nahum, Dan and Stanford, Jim. 2020. Centre for the Future of Work. *Technology, Standards and Democracy*. Submission to the Select Committee on the Impact of Technological Change on the Future of Work and Workers in New South Wales. Available at: <https://australiainstitute.org.au/report/technology-standards-and-democracy/>, p. 7.

<sup>62</sup> Henderson, T, Swann, T and Stanford, J. *the Employers Eye: Electronic Monitoring & Surveillance in Australian Workplaces*. The Australia Institute, Canberra, 2018. Available at: <https://futurework.org.au/report/under-the-employers-eye-electronic-monitoring-surveillance-in-australian-workplaces/>

<sup>63</sup> VTHC Workplace Surveillance Survey, 2024.

It is important to note that workers report to VTHC that workplace surveillance is occurring in the industries most likely to employ migrants and workers of colour. It is likely that this surveillance might be coupled with other harms perpetrated against migrant workers, for example, withholding of visas. Amazon's surveillance-powered algorithmic hiring tool has also been demonstrated to have in-built biases which led to discriminatory human resourcing decision making.<sup>64</sup>

When workers know that, down to the second, the length of their rest and meal breaks are also being tracked, they cut them down. As one manager of a fast-food store in Victoria reported:

*If we are talking to each other or not working it is picked up on through the cameras. ... they are using the cameras to check if we are working at every single minute we are clocked on. Managers at our store are **not given our mandatory 30 minute and 10 minute rest breaks**, most due to labour costs and **if we try to have them we get disciplinary action.***

- R, Fast Food Worker.<sup>65</sup>

*One of the team leaders I worked with **was fired for asking for a break after a seven-hour shift.** There is a total lack of respect for staff, while working you are constantly being watched on CCTV cameras placed around the restaurant which they monitor staff [with] from home. Staff would often **work 6-7 hours without breaks** and kitchen staff were completely overworked in unsafe conditions. All these guys care about is money, staff are disposable, no matter how hard working or loyal they are.*

- Anonymous, Fast-Food Worker.<sup>66</sup>

Employers also use intrusive surveillance to pressure workers not to take sick or personal leave. As the VLRC found, some even hire private investigators to find out whether workers are 'genuinely' unwell.<sup>67</sup> However, generally speaking, they favour more pernicious techniques - by demanding evidence, calling up GPs or asking intrusive questions, employers make workers feel 'guilty until proven innocent' with regards to putting their health first.<sup>68</sup>

The United Workers Union (UWU) has reported of storage workers at Coles and warehouse workers at L'Oreal facing such intimidation:

Case Study: Cold Storage Workers at Coles

In a HR initiative called 'Spread the Love' workers at a cold storage facility in Australia returning from sick leave or carer's leave had to sign a form indicating the nature of their leave and including such intrusive questions as 'were you given prescription

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<sup>64</sup> Dastin, J "Insight - Amazon scraps secret AI recruiting tool that showed bias against women", Reuters, published 11 October 2018, accessed: <https://www.reuters.com/article/world/insight-amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK0AG/#:~:text=In%20effect%2C%20Amazon's%20system%20taught,the%20names%20of%20the%20schools.>

<sup>65</sup> R, Fast Food Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>66</sup> United Workers Union, *Technology and Power*, p. 24.

<sup>67</sup>Victorian Law Reform Commission. *Workplace Privacy: Options Paper*. 2004. Available at: [WorkplacePrivacyOptionsPaper.PDF \(lawreform.vic.gov.au\)](#), p. 90.

<sup>68</sup> VLRC. *Options Paper*, p. 74.

medication?' Workers receive phone calls while on sick leave from managers as a 'check in' to make sure they are really at home. Workers report that they have to sign these forms as a condition of receiving their leave.<sup>69</sup>

#### Case Study: Warehouse Workers at L'Oreal

At L'oreal, management requests workers provide access to comprehensive medical records. Upon returning to work after sick leave, workers have been asked to provide contact details for their personal GP and sign a waiver to allow access to their records before they can return to work. This practice originated in the United States and has now been adopted in Australia in an increasing number of workplaces.<sup>70</sup>

It should be noted that the presence of union representation has proven to be critical for workers trying to exercise their rights under workplace surveillance regimes. The VLRC itself observed this 20 years ago, and case studies reported to VTHC this year confirm that it remains true today:<sup>71</sup>

*Allegations were made (against me) of breaches of workplace system protocols, protocols that have never been applicable to my department. Camera footage was used in an attempt to incriminate myself and my coworkers until **my Union Organiser shot their arguments down and turned the table on management** with counterarguments and organisational systems requirements which they didn't have.*  
- C, Local Government Employee.<sup>72</sup>

### 3.2 Work Intensification

In many workplaces, the aim of the employer is to maximise the productive output of their business. Apart from efficiency gains through equipment upgrades, this can be achieved in two main ways:

**Extending production:** Increasing the amount of working time - for example, through cutting rest breaks, pressuring workers not to take leave or lengthening the workday.<sup>73</sup>

**Intensifying production:** Accelerating the intensity and efficiency of time spent working - for example, through imposing stricter workplace discipline, upgrading capital equipment or making technical innovations.<sup>74</sup>

When surveillance and monitoring regimes are imposed, both work extension and work intensification occur. That is to say, workers find themselves working much harder and for longer periods of time - without any increases in pay:

It may be observed that the increase in the disciplinary power in the modern workplace contributes to the growth of both forms of exploitation - employees tend to work longer and more intensely.<sup>75</sup>

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<sup>69</sup> United Workers Union. *Technology and Power*, pp. 32-33.

<sup>70</sup> Ibid., p. 32.

<sup>71</sup> VLRC. *Workplace Privacy: Final Report*, p. 23.

<sup>72</sup> C, Local Government Employee. VTHC Workplace Surveillance Survey, 2024.

<sup>73</sup> May also be referred to as 'extensive exploitation.'

<sup>74</sup> May also be referred to as 'intensive exploitation.'

<sup>75</sup> Makhona, "Employee Monitoring and Power Relations," p. 548.

Surveillance technology aimed at evaluating performance often create a pressure to work above one's duties. As Victorian workers told VTHC:

*It's undignified and insulting. It changes the labour I am selling from 'what needs doing during my shift' to **'whatever you can squeeze out of every moment of my shift.'***

- D, Healthcare Worker.<sup>76</sup>

***I am already overworked**, and I feel like I deliver work of a high standard, being monitored and questioned makes me feel demeaned... I also don't see management being monitored in the same way. They hold themselves to different (not punitive) standards.*

- S, Educator.<sup>77</sup>

*My supervisor ... was monitoring me when she was at home by using her mobile phone... She said she could see how long I took for my dinner & tea breaks & also when I went to the toilet & how long I spent in the toilet.*

- R, Educator.<sup>78</sup>

Even the expectation that one is being monitored tends to intensify workloads, regardless of whether monitoring is even taking place.<sup>79</sup> In some industries, such as call centres, the results of electronic performance monitoring (EPM) are often put on display for all workers to see.<sup>80</sup>

For example, gig economy drivers often face a competitive EPM system in which customers are given the opportunity to grade them after every interaction. This pressures drivers to 'game' the algorithm, often by performing unseen and unpaid labour - such as having to be constantly friendly, attentive and open to conversation.<sup>81</sup>

For remote workers, who know that their keystrokes are likely being closely monitored, pressure is embedded to extend work beyond paid hours - especially if there is an expectation that others are doing the same.

Monitoring undermines the control that workers have over the pace of their work. This loss of autonomy causes psychosocial risks (explored further below) but it also heightens job strain.<sup>82</sup>

Surveillance allows employers to **demand and enforce** the expectation that every second of work time is used to generate surplus value.<sup>83</sup> As one Victorian call centre worker reported:

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<sup>76</sup> D, Healthcare Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>77</sup> S, Educator. VTHC Workplace Surveillance Survey, 2024.

<sup>78</sup> R, Educator. VTHC Workplace Surveillance Survey, 2024.

<sup>79</sup> Nahum and Stanford. *Technology, Standards and Democracy*, p. 7.

<sup>80</sup> Van den Broek, Diane. 2004. *Surveillance, Privacy and Work Intensification within Call Centres*. WorkSite.

Available at: <http://www.econ.usyd.edu.au/wos/worksites/surveillance.html>

<sup>81</sup> Makhona, "Employee Monitoring and Power Relations," p. 541.

<sup>82</sup> Carayon, P. 1993. "Effects of electronic performance monitoring on job design and worker stress: Review of the literature and conceptual model." *Human Factors* Vol. (35), pp. 385-395.

<sup>83</sup> Fuchs, "Political Economy and Surveillance Theory," p. 678.

HR would request video footage of doorways if they suspected workers to be clocking out early.  
- C, Healthcare Worker.<sup>84</sup>

Every second of every minute is accounted for. **We are given 6 minutes a day outside of breaks to "not be working"** - such as stretching, toilet breaks, getting a water or coffee, saying hello to a colleague, taking some time after a bad call. We are considered "late" if we log in to take calls even 5 seconds after our start time.  
- K, Call Centre Worker.<sup>85</sup>

It is not uncommon for workers in this industry to have to raise their hands to seek permission to use the bathroom. Surveillance in call centres is so intrusive that researchers have coined the term '**electronic sweatshops**' to describe conditions in this industry.<sup>86</sup>

Case Study: Australian Services Union Call Centre Worker<sup>87</sup>

A major issue faced by ASU members in a number of industries is accusations of 'time theft' - e.g. taking short periods to rest, drink water or use the bathroom between tasks. Workers accused of 'time theft' have been sacked even when they are achieving all of their key performance indicators (KPIs). One ASU delegate who worked from home full-time due to caring responsibilities was terminated due to allegations of 'time theft.' The delegate had worked for the centre for a number of years and was meeting all of their KPIs - yet surveillance showed they weren't meeting impossible standards of performance.

Case Study: Australian Services Union, Legal Sector<sup>88</sup>

In the legal sector, the ASU has reported of workers being penalised for taking time to call their coworkers to debrief about difficult cases or meetings with clients. Employers not only monitored these internal calls but considered them to be an instance of 'time theft,' warranting strict disciplinary action.

When surveillance is known to be in operation, workers will often self-discipline in a process termed 'anticipatory compliance.' This often leads to work intensification. Anticipatory compliance leads workers to internalise the expectation that they must always perform at maximum capacity and experience guilt, shame and self-criticism when this is not possible.

*I'm more stressed... Censoring everything I say, I feel like I can't speak up.*  
- C, Telecommunications Worker.<sup>89</sup>

*I am constantly aware of the presence of cameras, and wondering who is watching me.*  
- M, Administration Worker.<sup>90</sup>

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<sup>84</sup> C, Healthcare Worker. VTHC Workplace Surveillance, Survey, 2024.

<sup>85</sup> K, Call Centre Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>86</sup> Ball, Kirstie and Margulis, T. 2011. "Monitoring and Surveillance in Call Centres: A Review and Synthesis." *New Technology, Work and Employment*, Vol. 26 (2), pp. 113-26. Van den Broek. *Surveillance within Call Centres*. 2004.

<sup>87</sup> VTHC Interview with ASU Industrial Officer, 2024.

<sup>88</sup> Ibid.

<sup>89</sup> C, Telecommunications Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>90</sup> M, Administration Worker. VTHC Workplace Surveillance Survey, 2024.

*We are called when data or sales are 'down' to ask why we aren't selling more ... If staff are seen on camera resting or standing in the store, even if everything's been cleaned and put away, it's noted to our manager, and we receive feedback during the week. Our work expects lots of overtime (lots), but if we sign in, one minute after lunch, we lose fifteen minutes of pay - sign in app doesn't work half the time and we get in trouble for 'not signing in', even if we can provide counter evidence.*  
- E, Retail Worker.<sup>91</sup>

*Recommendation 7: The Victorian Government should protect the right to privacy in worker communications. In many industries, workers are instructed to use instant messaging platforms to communicate with their employer and with each other - including Slack, Microsoft Teams or Zoom. For remote workers, these platforms might be the only available forum for communicating with colleagues. Employers currently enjoy an unfettered ability to monitor these interactions for their own interests. AI-driven surveillance tools and encryption backdoors allow them to use machine learning to discern how workers feel about the company, how their moods are fluctuating, how close they are with certain colleagues, how often they communicate and how they feel about management decisions.<sup>92</sup>*

*Employers argue that because they pay for the device or software, they have the right to observe, in totality, how it is being used. This, they claim, is an uncontroversial and longstanding entitlement of management. Employers make this argument to disguise just how recent and just how extreme their new powers of observation are. Total visibility of work communications is not a normal feature of Australian workplace relations. We would not accept this reasoning if it was applied in analogue form - i.e. just because an employer paid for the floorboards of a restaurant, we wouldn't think that confers the right to covertly monitor every single word said by every worker who walks on top of it.*

*Therefore, in digitally facilitated work, there should be a requirement for employers to implement a protected channel of communication between workers which is free from monitoring. Employer violations of this protected channel should be treated as a serious offence, with appropriate consequences stipulated in the PIWLA.*

### **Case Study: Corporate Wellbeing Programs**

One unexpected way surveillance is being used to intensify workloads is through health monitoring 'wellbeing' programs. Victorian unions have raised alarm about this for over two decades.<sup>93</sup>

In 1913, Henry Ford devised the moving assembly line - a production innovation that accelerated output but exhausted his workers. His company suffered enormous turnover. In response, Ford opened a 'Sociology Department' responsible for monitoring workers' lifestyles and promoting various health initiatives. Inspectors from the Department would visit workers' homes unannounced to collect information about them and their lifestyle choices. Ford believed that by filtering out workers who had 'undesirable' habits, 'personal morals' or lifestyles, he could design a labour force capable of surviving exhausting workloads.

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<sup>91</sup> E, Retail Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>92</sup> Bennett Rylah, J. 2024. "How companies are using AI to spy on Slack." *The Hustle*, 15 Feb 2024. Available at: <https://thehustle.co/how-companies-are-using-ai-to-spy-on-slack>

<sup>93</sup> VLRC. *Options Paper*, p. 84.



In Ford's project, we can see the **central aim driving many workplace wellbeing regimes today:** to identify and raise the maximum upper limit of what can be demanded from workers before they burn out. **Employers monitor and intervene in workers' health so as to prevent their 'physiological collapse' under increasingly exhausting methods of production.**<sup>94</sup>

Contemporary conditions of work are increasingly brutal. Work-related fatigue, burnout, psychological breakdowns and chronic diseases are being suffered by working people in increasing numbers.<sup>95</sup> Instead of taking this as an indication that our workplaces need to change, employers use health surveillance to select for job candidates that can endure these conditions.<sup>96</sup>

#### Case Study: Profusion

Profusion, an American company, used a variety of wearable surveillance devices on their workers to track 171 personal metrics - including their sleep quality, heart rates and locations for twenty-four hours a day. The data was used to group them into various ranks such as 'irritated and unsettled' or 'busy and coping.'<sup>97</sup>

Workers faced with health monitoring regimes experience guilt and anxiety.<sup>98</sup> Previously upbeat work environments can become saturated with obsession about hours of sleep, macronutrient intake and step counts.<sup>99</sup> In one case, workers agonised over decisions like smoking a cigarette or socialising with friends on a weeknight, fearing it would affect their employability.<sup>100</sup>

In 2005, the VLRC heard concerns from unions about employers using health surveillance to intensify workloads:

'Unions note that in the context of testing ... fitness becomes an issue of control and is **less about health and more about discipline** - with workers privacy being the first casualty.'<sup>101</sup>

Data about worker health can and has resulted in discrimination with regards to promotion, pay increases and bonuses.<sup>102</sup> In a worker-led model of occupational health and safety, if a worker is fatigued this might be seen as an indication that the work process needs to be moderated, perhaps with more breaks or a change in tasks. In a health surveillance model, data proving a worker is fatigued is interpreted as meaning the worker is at a higher risk of making errors, subpar work or even being a safety hazard. Fatigue, therefore, becomes

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<sup>94</sup> Gramsci, Antonio. 1971. 'Americanism and Fordism,' in Hoare, Quentin (ed.) *Selections from the Prison Notebooks of Antonio Gramsci*, pp. 278-318: p. 303.

<sup>95</sup> Makhona, "Employee Monitoring and Power Relations," p. 549.

<sup>96</sup> Australian Council of Trade Unions. 2002. *Submission G037*. Australian Law Reform Commission Inquiry into the Protection of Human Genetic Information in Australia. ALRC 96.14 Jan 2002.

<sup>97</sup> Makhona, Ivan. 2019. "New Means of Workplace Surveillance: From the Gaze of the Supervisor to the Digitalization of Employees." *Monthly Review*, 1 Feb 2019. Available at: <https://monthlyreview.org/2019/02/01/new-means-of-workplace-surveillance/>.

<sup>98</sup> Makhona, "Employee Monitoring and Power Relations," p. 548.

<sup>99</sup> Spicer, Andre. 2024. "Work 'wellness' programmes don't make employees happier - but I know what does." *The Guardian*, 18 Jan 2024. Available at: <https://www.theguardian.com/commentisfree/2024/jan/17/work-wellness-programmes-dont-make-employees-happier-but-i-know-what-does>

<sup>100</sup> Makhona, "Employee Monitoring and Power Relations," p. 548.

<sup>101</sup> VLRC. *Options Paper*, p. 84.

<sup>102</sup> Makhona, "Employee Monitoring and Power Relations," p. 541.

grounds for an employer to issue directives on the workers lifestyle choices or even to punish them.

### 3.3 Stress Proliferation and Occupational Health and Safety

As of 2024, there exists an established scholarly consensus on how surveillance impacts workers' psychological and physical health.<sup>103</sup>

Surveillance, especially when combined with **secondary stressors** (see below) causes psychological distress, job dissatisfaction, burnout, organisational breakdown and increased turnover.<sup>104</sup>

When surveillance is combined with a lack of union representation, job insecurity, a low-transparency work environment, a loss of autonomy, social disadvantage or marginalisation and an intensified workload, it can have a traumatic impact on working people.

In the worst cases, hostile surveillance practices can scar workers and undermine businesses – embedding a toxic organisational culture of distrust, evasiveness, resentment and reactivity:<sup>105</sup>

*Workplace surveillance can actually drive employees a bit mad. They become **paranoid** and stressed. I left my job because I did not want to work in that environment.*

- D, Secondary School Teacher. <sup>106</sup>

*I had [surveillance] used to attack my work ethic and I felt very violated.*

- B, Early Childhood Educator.<sup>107</sup>

*Myself and others [are] **walking on eggshells**, feeling spied upon, marginalised, **bullied**. Lowered self-esteem for myself and others. Feeling pressured and cowed. Afraid.*

- C, Health and Community Services Professional.<sup>108</sup>

The impact of workplace surveillance is extremely contingent on surrounding factors – the same surveillance technology can produce wildly different effects depending on the workplace, industry or workforce.<sup>109</sup> The factors that determine the risk and severity of surveillance harms on workers are called **secondary stressors**.

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<sup>103</sup> Backhaus, Nils. 2019. "Context Sensitive Technologies and Electronic Employee Monitoring: A Meta-Analytic Review." *IEEE/SICE International Symposium on System Integration.*, Paris, France, 14-16 January 2019, pp. 548-53; IEEE; Ravid, Daniel et. Al. 2023. "EPM 20/20: A Review, Framework, and Research Agenda for Electronic Performance Monitoring." *Journal of Management*, Vol. 46 (1) pp. 100-126; Ball, Kristine. 2021. "Electronic Monitoring and Surveillance in the Workplace: Literature Review and Policy Recommendations." *European Commission*. Luxembourg: Publications Office of the European Union, 2021. Available at: <https://publications.jrc.ec.europa.eu/repository/handle/JRC125716>

<sup>104</sup> Glavin, Paul, Bierman, Alex, Schieman, Scott. 2024. "Private Eyes, They See Your Every Move: Workplace Surveillance and Worker Wellbeing." *Social Currents*, Vol. (0), pp. 4-5.

<sup>105</sup> Glavin, "They See Your Every Move," pp. 4-8." *Social Currents*, Vol. (0), pp. 4-5.

<sup>106</sup> D, Secondary School Educator. VTHC Workplace Surveillance Survey, 2024.

<sup>107</sup> B, Early Childhood Educator. VTHC Workplace Surveillance Survey, 2024.

<sup>108</sup> C, Health and Community Services Professional. VTHC Workplace Surveillance, 2024.

<sup>109</sup> Ball, K, *Electronic Monitoring*, pp. 9-15.

Secondary stressors can be thought of as **harm multipliers**; their presence significantly increases the risks of surveillance harms on workers. A meta-analysis of the psychosocial risks of workplace surveillance undertaken by the European Commission identified the following major secondary stressors:<sup>110</sup>

- A lack of job security and exercisable workplace rights.<sup>111</sup>
- An already substantial degree of job strain, role overload or work intensification.<sup>112</sup>
- A lack of consultation mechanisms in the workplace, autocratic managers, low-transparency decision-making, failure to provide notice or disclosure about surveillance in advance.<sup>113</sup>
- Limited worker influence about the pacing, intensity, timing and onset of monitoring.<sup>114</sup>
- Use of an unclear, inadequate or poorly developed performance rating criteria or a lack of clarity about why it is being introduced in the first place.<sup>115</sup>

Secondary stress, combined with workplace surveillance, disproportionately harms women, workers with disabilities, workers without union representation, enforceable rights or secure contracts, migrants and other disadvantaged groups. For these workers, surveillance forms yet 'another layer of mental health fatigue and burnout,' bringing them closer to breaking point.<sup>116</sup>

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<sup>110</sup> Ball, K, *Electronic Monitoring*, pp. 9-15.

<sup>111</sup> Hales, T.R. et. Al. 1994. "Musculoskeletal disorders among visual display terminal users in a telecommunications company." *Ergonomics*, Vol. 37, pp. 1603-1621; Smith, MJ, et. Al. 1992. "Employee stress and health complaints in jobs with and without electronic performance monitoring." *Applied Ergonomics*, Vol. 23, pp. 17-27.

<sup>112</sup> Carayon, P. 1993. "Effects of electronic performance monitoring on job design and worker stress: Review of the literature and conceptual model." *Human Factors*, Vol. (35), pp. 385-395; Glavin, "They See Your Every Move," pp.1-19; Holland, PJ, Cooper, B, and Hecker, R. 2015. "Electronic monitoring and surveillance in the workplace: The effects on trust in management, and the moderating role of occupational type." *Personnel Review*, Vol. (44), pp. 161-175; McNall, LA and Roch, SG. 2007. "Effects of electronic monitoring types on perceptions of procedural justice, interpersonal justice, and privacy." *Journal of Applied Social Psychology*, Vol. 37, pp. 658-682.

<sup>113</sup> Chalykoff, J and Kochan, T. 1989. "Computer-aided monitoring: Its effect on job satisfaction and turnover." *Personnel Psychology*, Vol. 42 (4), pp. 807-834; Pearson, CAL. 1991. "An assessment of extrinsic feedback on participation, role perceptions, motivation and job satisfaction on a self-managed system for monitoring group achievement." *Human Relations*, Vol. 44, pp. 517-537; Westin, AF. 1992. "Two key factors that belong in a macroergonomic analysis of electronic monitoring: Employee perceptions of fairness and the climate of organizational trust or distrust." *Applied Ergonomics*, Vol. 23, pp. 35-42; Alder, GS, Ambrose, ML, and Noel, TW. 2006. "The effect of formal advance notice and justification on Internet monitoring fairness: Much about nothing?" *Journal of Leadership & Organizational Studies*, Vol. 13, pp. 93-108; Brewer, N. 1995. "The effects of monitoring individual and group performance on the distribution of effort across tasks." *Journal of Applied Social Psychology* Vol. (25), pp. 760-777; Brewer, N and Ridgway, T. 1998. "Effects of supervisory monitoring on productivity and quality of performance." *Journal of Experimental Psychology*, Vol. (4), pp. 211-227.

<sup>114</sup> Stanton, JM and Barnes-Farrell, JL. 1996. "Effects of electronic performance monitoring on personal control, satisfaction and performance." *Journal of Applied Psychology*, Vol. 81, pp. 738-745; Niehoff, BP and Moorman, RH. 1993. "Justice as a mediator of the relationship between methods of monitoring and organizational citizenship behaviour." *Academy of Management Journal*, Vol. 36, pp. 527-556; Lund, J. 1992. "Electronic performance monitoring: A review of research issues." *Applied Ergonomics*, Vol. 23, pp. 54-58.

<sup>115</sup> Aiello, JR & Kolb, KJ. 1995. "Electronic performance monitoring and social context: Impact on productivity and stress." *Journal of Applied Psychology*, Vol. 80, pp. 339-353; Zweig, D and Webster, J. 2003. "Personality as a moderator of monitoring acceptance." *Computers in Human Behaviour*, Vol. 19, pp. 479- 493.

<sup>116</sup> D, Educator. VTHC Workplace Surveillance Survey, 2024.

*I feel like I can't take a break to go to the toilet or have a snack because it is all monitored. **If I'm in pain from my disability I hide it** because I don't want to seem like I can't do my job.*

- E, Entertainment Worker.<sup>117</sup>

Not only are these groups much more likely to work in industries where surveillance is more intense, but they are already likely to face wellbeing harms even without surveillance being in place – such as stress in their personal life, discrimination, excessive scrutiny over their performance, unfair treatment from their employer, being overlooked for promotions or bullying.

Migrant workers and workers of colour are particularly likely to be subjected to surveillance practices that may increase stress. They are often vulnerable to abusive employers. Migrant workers deal with a myriad of factors including racism, their work is often less visible, they are less likely to be able to stand up for their rights, they are less likely to have union representation and they are vulnerable to intimidation from employers about their migration status.

Furthermore, many jobs at the forefront of AI-driven automation, such as customer service work, sales, retail and bookkeeping are disproportionately performed by migrant workers.<sup>118</sup> This is relevant because AI-driven automation requires a massive amount of surveillance data about the work process to be successful.<sup>119</sup> Migrant workers will be at the very forefront of the negative effects of surveillance and automation. They will likely face increasingly distressing surveillance practices combined with the growing threat of job destruction or fracturing. Without new workplace privacy legislation, migrant-dominated workplaces will likely be used as laboratories for novel surveillance techniques just as they have been for algorithmic management and other innovations in disciplinary 'bossware.'

Reform to workplace surveillance practices must consider the unique psychological strain of intrusive surveillance on migrant workers, who are already often being exploited.

Given that so much of the harm of surveillance comes down to a 'multiplier effect' of surrounding workplace stressors, surveillance-related stress proliferation amongst marginalised groups is a serious concern for Victorian unions.

The specificity of impact that surveillance has on particular workplaces may make it seem as though broad-brush, uniform regulation is not necessary. On the contrary, the opposite is true – because it is precisely clear which factors mitigate or exacerbate the harms of surveillance on workers, the necessary conditions for surveillance to be implemented in a responsible and fair way can be identified.

- **Codetermined codes of practice to regulate monitoring:** Psychosocial harms are minimised when workers are able to place limits on the extent of surveillance.

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<sup>117</sup> E, Entertainment Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>118</sup> Manyika, J. 2017. "Technology, jobs and the future of work." *McKinsey & Company*, Executive Briefing, 24 May 2017. Available at: <https://www.mckinsey.com/global-themes/employment-and-growth/technology-jobs-and-the-future-of-work>

<sup>119</sup> Victorian Trades Hall Council. Submission to the Parliamentary Inquiry into the Digital Transformation of Workplaces. 24 June 2024. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=d2382919-318d-4f1d-916c-9cc951b70ba2&subId=759158>, p. 15; Klengel E and Wenckebach J. 2021. "Artificial intelligence, work, power imbalance and democracy – why codetermination is essential." *Italian Labour Law e-Journal*. Vol. 14 (2), 157-171; Juego, "Algorithms By and For the Workers," p. 26.

- **Worker control over data collection:** When workers know why and for what ends data is being collected, they are less likely to perceive monitoring as a privacy violation.
- **Promoting alternative and less intrusive forms of work performance management:** When workers' performance is evaluated solely using surveillance data, stress proliferation is much more likely.
- **Maintaining the distinction between work related and private matters:** Surveillance proliferates stress when workers believe that it is being used to capture information about non-work matters.
- **Encourage and facilitate collective bargaining over the terms and limits of workplace surveillance:** Workers' representatives are crucial for securing meaningful consent. The more workers' representatives can influence the employer's monitoring practices, the more the consent requirement will 'develop into a real barrier.'<sup>120</sup>
- **Enforceable penalties against employers who violate workplace privacy rights.**

These conditions can all be promoted, spread and normalised through introducing a Privacy in Working Life Act.

*Recommendation 8: Implement new psychosocial health regulations which specifically apply to the risks generated by workplace surveillance. These regulations should be evidence-based - giving full consideration to the range of interrelated harms that can result from workplace surveillance regimes - as well as the critically important role of secondary stressors. New psychosocial health regulations should also include a recognition of how surveillance disproportionately harms workers who are disadvantaged, casualised or industrially unorganised.*

*Recommendation 9: WorkSafe should work in close consultation with Victorian unions and workers to develop a workplace surveillance guide that provides information about navigating this issue to ensure that monitoring regimes are constructive and not in violation of fundamental rights. The forms, functions and features of workplace surveillance in Victoria are constantly evolving. Accurate information about emergent surveillance technologies and their risks is not readily available for employers and workers alike. Often, the most extensive information about these technologies is provided by the developers themselves who have obvious motivations for understating their potential to cause harm.*

*Recommendation 10: For consent to be meaningful, the party granting it should have a right of refusal. There has to be a genuine opportunity to say 'no.' Workers should have the right to opt out of certain types of surveillance where it can be demonstrated that they pose a risk to their or their workplaces' health and safety. Employers should be banned from taking adverse action against workers who withhold consent from a surveillance practice that demonstrably endangers their wellbeing.*

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<sup>120</sup> ILO, Code of Practice on the Protection of Workers' Personal Data, p. 17.

### 3.4 Harms to Organisational Culture

When employers impose surveillance in a unilateral, opaque and hostile way, it can undermine the function of the entire organisation by embedding 'a culture of fear.'<sup>121</sup>

Employers often use surveillance regimes as a substitute for good management practice – to the detriment of their workers and their own organisations.

**Monitoring is 'a proxy for the extent to which managers trust employees.'**<sup>122</sup> When monitoring is continuous, unlimited and targeted at individuals it suggests that the implied duty of confidence that employers have in their workers does not exist. This spurs resentment and resistance:<sup>123</sup>

*You have to trust your employees ... if you are going to the lengths of surveillance, it clearly indicates a lack of trust and hence that relationship is bound to suffer. It just **crushes the morale of the employee** and in long run the productivity will also suffer. I will never feel happy working for a company that does not trust me and does not value my privacy.*

- A, Financial Services Worker.<sup>124</sup>

*Such surveillance is a guaranteed way to demotivate your staff, who will lose all faith and trust in their leaders.*

- J, Teacher.<sup>125</sup>

According to scholars in contemporary organisational psychology, a poorly implemented surveillance regime can provoke a variety of destabilising effects. This is supported by experiences of Victorian workers reported to the VTHC. These include:

Surveillance causes social withdrawal as workers begin to feel unsafe communicating with one another:

*There is less laughter and joy which is picked up on by customers.*

- E, Retail Worker.<sup>126</sup>

*I am more withdrawn and not as active.*

-R, Counsellor.<sup>127</sup>

Workers have to waste time and energy on managing monitoring regimes and their outcomes:<sup>128</sup>

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<sup>121</sup> Burin, Margaret. 2019. 'They resent the fact I'm not a robot.' *Australian Broadcasting Corporation*, 27 Feb 2019, Available at: [https://www.abc.net.au/news/2019-02-27/amazon-australia-warehouse-working-conditions/10807308?nw=0%20\(accessed%2010th%20May%202021\)](https://www.abc.net.au/news/2019-02-27/amazon-australia-warehouse-working-conditions/10807308?nw=0%20(accessed%2010th%20May%202021)).

<sup>122</sup> Makhona, "Employee Monitoring and Power Relations," p. 547.

<sup>123</sup> VLRC. *Options Paper*, p. 74.

<sup>124</sup> A, Financial Services Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>125</sup> J, Teacher. VTHC Workplace Surveillance Survey, 2024.

<sup>126</sup> E, Retail Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>127</sup> R, Counsellor. VTHC Workplace Surveillance Survey, 2024.

<sup>128</sup> Skarlicki, D., D. van Jaarsveld and D. Walker. 2008. "Getting Even for "Customer Mistreatment: The Role of Moral Identity in the Relationship between Customer Interpersonal Injustice and Employee Sabotage." *Journal of Applied Psychology*, Vol. 9 (6), pp. 1335-1347; Di Domenico, M and Ball, K. 2011. "A Hotel Inspector Calls:

*It's made staff resentful and more stressed because complying with the surveillance adds tasks to our day. Resisting attempts to expand surveillance takes a toll too.*

- P, Aged Care Worker.

*I feel nervous about stepping away from my computer, and I feel like I have to send unnecessary emails to prove that I'm working.*

- S, Primary School Educator, Victoria.<sup>129</sup>

Companies suffer higher rates of staff turnover:<sup>130</sup>

*It made the staff afraid of not meeting the ... insanely high standard of being able to do every job all at once. It also made us worry whether things we say or do on shift would be held against us. This made me and many others resent our jobs and management, leading many people to quit.*

- T, Fast Food Worker.

*This is not the way to get the most out of employees. It gave me such poor mental health I had to leave. Everyone's anxiety was through the roof and it made everyone behave in such a competitive and unhelpful way.*

- F, Graphic Designer.

Reciprocal trust between workers and management is undermined.<sup>131</sup>

*My workplace [is] such a farce at this point, I no longer care. Just open word doc and put something heavy on keyboard.*

- R, Retail Worker.<sup>132</sup>

Many of the workplace surveillance methods discussed in this submission have connotations of incarceration. Under the existing regulatory regime, a variety of militaristic work practices are permitted that resemble penal conditions in a way that it is impossible not for workers notice:

- Fingerprint scanning upon entry or exit.
- Private investigators.
- Monitoring by undercover representatives of the employer.
- Random urine, blood or hair follicle testing, the purposes and storage of which are not disclosed.

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Exploring Surveillance at the Home-Work Interface." *Organisation*, Vol. 18 (5), pp.615-636; Russell, B. 2007. "You Gotta Lie to It": Software Applications and the Management of Technological Change in a Call Centre." *New Technology, Work and Employment*, Vol. 22 (2), pp. 132-145.

<sup>129</sup> S, Primary School Educator. VTHC Workplace Surveillance Survey, 2024.

<sup>130</sup> Tepper, B. 2000. "Consequences of Abusive Supervision." *Academy of Management Journal*, Vol. 4 (2), pp. 178-190.

<sup>131</sup> Botan, C. and M. Vorvoreanu. 2005. "What Do Employees Think about Electronic Surveillance at Work?", in J. Weckert (ed.), *Electronic Monitoring in the Workplace: Controversies and Solutions*. Hershey: Pennsylvania, Idea Group Publishing, pp. 123-144; Zweig, D. 2005. "Beyond Privacy and Fairness Concerns: Examining Psychological Boundary Violations as a Consequence of Electronic Performance Monitoring," in J. Weckert (ed.), *Electronic Monitoring in the Workplace: Controversies and Solutions*. Melbourne: Idea Group Publishing, pp. 101-122.

<sup>132</sup> R, Retail Worker. VTHC Workplace Surveillance Survey, 2024.

Treating workers like criminals every day that they come in to work does not bode well for organisational culture.

*I have worked in ... a vehicle building company that had the values "Respect", "Trust." [They] had **extensive surveillance** and we had to enter the site with a clear bag only. There were **drug sniffer dogs**. It was **oppressive** and **felt as though we weren't trusted**, or at times, criminals.<sup>133</sup>*

- S, Autoworker.

*This does nothing to promote a healthy workplace. This encourages a toxic work environment of distrust and does not bring out the best performance in people.*

- C, Healthcare Worker.<sup>134</sup>

*We are here as people and should not be scrutinised unless we are doing something fraudulently.*

- J, Supermarket Worker.<sup>135</sup>

### 3.5 Impacts on women workers

Analysis by UK thinktank, Institute for Public Policy Research, found women and young workers are more likely to be subjected to workplace surveillance. Additionally, women workers tend to work in industries where we know surveillance is already occurring, for example in the retail, services and health care industries. In the retail sector, workers report surveillance being commonly used to set point of sale analytic performance-based goals. It is highly likely that the burden of workplace surveillance will be placed more onerously on women workers.<sup>136</sup>

Increased surveillance of women workers means they are more likely to be subjected to psychosocial injuries, who are already at an increased risk of being subjected to gendered violence at work.

The increase of workplace surveillance will have a specific impact on women workers. It is unfortunately a common experience of women to be subjected to sexual harassment, with 1 in 5 being subjected to stalking, and 1 in 5 being subjected to sexual violence.<sup>137</sup> Additionally, gendered violence including harassment, stalking and coercive control, remains an all-too-common occurrence for Australian women. An employer's unfettered right to track and monitor workers must be considered in this specific context.

However, we also note women workers report that the use of cameras can help to make them feel safer in certain environments, and this right to women's safety at work should not be overlooked.

This inquiry should consider commissioning further research on the impact of workplace surveillance on women and gender diverse workers.

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<sup>133</sup> S, Autoworker. VTHC Workplace Surveillance Survey, 2024.

<sup>134</sup> C, Healthcare Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>135</sup> J, Supermarket Worker. VTHC Workplace Surveillance Survey, 2024.

<sup>136</sup> <https://www.theguardian.com/global-development/2023/mar/26/dystopian-surveillance-disproportionately-targets-young-female-minority-workers-ippr-report>

<sup>137</sup> <https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>



## 4. Improving Workplace Privacy Legislation in Victoria: Comparisons.

### 4.1 Case Study: The Workplace Privacy Act 2011 (ACT)

In 2011, the ACT Labor Government introduced the Workplace Privacy Act. The legislation is over a decade old and does not sufficiently address the concerns raised in this submission, but it does offer certain provisions which should be replicated in Victoria, including:

- Broader prohibitions on where surveillance can take occur in the workplace.
- Notice and disclosure requirements for surveillance.
- Consultation requirements for introducing surveillance.
- Strict conditions for secret / covert surveillance.
- Right of access for workers over the surveillance data collected about them.

The ACT legislation bans surveillance in toilets, washrooms, lactation rooms, changerooms, prayer rooms, parent rooms, sick bays and first aid rooms.<sup>138</sup> It also, similar to the NSW Workplace Surveillance Act (2005), entitles workers to 14 days' notice before surveillance is conducted - with this notice having to include disclosures about how and why the surveillance is being conducted, such as:

Both ACT<sup>139</sup> and NSW<sup>140</sup>

- 13(4)(a) / 10(4)(a): The kind of surveillance device used.
- 13(4)(b) / 10(4)(b): How the surveillance will be conducted.
- 13(4)(d) / 10(4)(c): When the surveillance will start.
- 13(4)(e) / 10(4)(d): Whether the surveillance will be continuous or intermittent.
- 13(4)(f) / 10(4)(e): Whether the surveillance will be for a period or ongoing.

ACT Only:

- 13(4)(g) the purpose for which the employer may use and disclose surveillance records of the surveillance.
- 13(4)(c) who will regularly and ordinarily be the subject of surveillance.
- 13(4)(h) that the worker may be able to consult with the employer about the conduct of surveillance.

It should be emphasised that **Victorian workers are afforded none of these disclosure protections.**

Findings from the VTHC survey confirm that **unless required by legislation, employers will generally not be transparent about how they use surveillance.** Of the total sample, less than 20% stated that their employer discussed surveillance methods with them prior to their implementation.<sup>141</sup>

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<sup>138</sup> Workplace Privacy Act 2011 (ACT), Section 41(1), 41(2)(a), (b), (c), (d); Section 41(2)(e), (f), (g), (h).

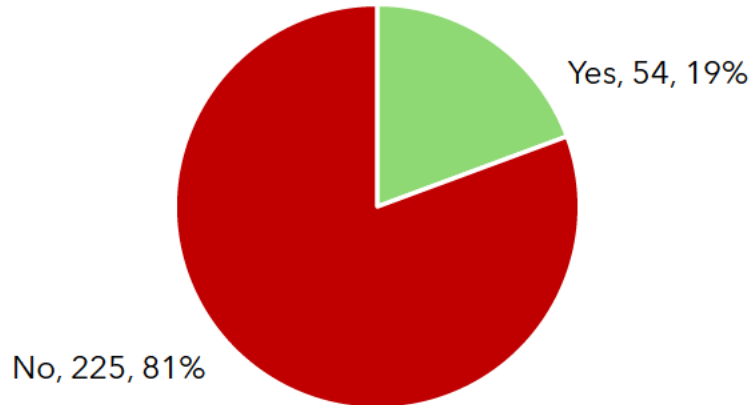
<sup>139</sup> Workplace Privacy Act 2011 (ACT), Available at:

<sup>140</sup> Workplace Surveillance Act 2005 (NSW), Available at:

<sup>141</sup> VTHC Survey on Workplace Surveillance 2024, s = 279 (225 No, 54 Yes).

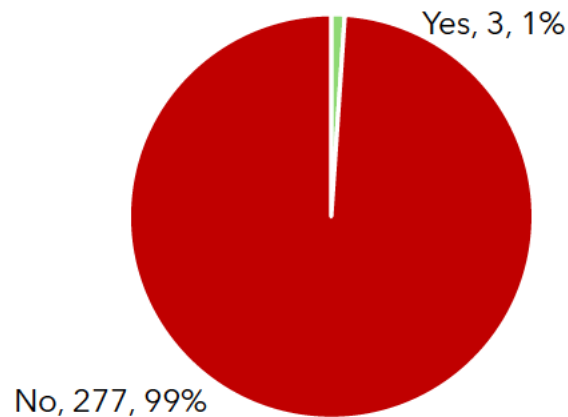
## Did your employer discuss the surveillance methods with you?

VTHC Survey of Victorian Workers, 2024



## Were you given the choice to opt-out of surveillance?

VTHC Survey of Victorian Workers, 2024



Implementing notice requirements for surveillance would be a modest but crucial first step to bringing workers' privacy in line with the rest of the country.

Victorian workplace privacy laws should also draw inspiration from the Workplace Privacy Act 2011 (ACT) which stipulates that:

- 14(2) **The employer must consult in good faith about the conduct of the surveillance and that,**
- 14(3) Good faith means the worker has a genuine opportunity to influence the conduct of the surveillance.

- 23(1) **Workers have the right to access to surveillance records about them** if they ask their employer in writing.
- 23(3) If an employer refuses access to these records, their contents cannot be used in legal proceedings or to take adverse action against the worker they relate to.<sup>142</sup>

How secret surveillance is regulated by the ACT and, to a lesser extent, NSW should also be noted. This is a vital component of workplace privacy protection that is lacking entirely in Victoria.

In the ACT, employers can only conduct covert surveillance on their workers under the following conditions:<sup>143</sup>

1. They have **applied for authorisation from a magistrate** - who is required by legislation to consider:
  - a. The extent of risk to workers privacy.
  - b. Whether the surveillance is being conducted in an area where workers have an expectation of privacy.
  - c. Whether there are other appropriate ways to collect information other than covert surveillance.
  - d. Whether it would be more appropriate for law enforcement to look into the matter.
2. If authorisation is granted, an **independent surveillance supervisor** must be appointed.<sup>144</sup>
  - a. The supervisor cannot be an employee and must be independent of the employer.
3. If authorisation is granted, it cannot be issued for longer than a 30-day period.<sup>145</sup>
4. If authorisation is granted, it can be cancelled by the magistrate on their own initiative or due to an application from a worker or other affected person.<sup>146</sup>

A broad summary of how Australia's different workplace surveillance laws operate is provided below:

**Figure 7. Comparison of Interstate Workplace Surveillance Laws**

	ACT	NSW	VIC
Ban in toilets	✓	✓	✓
Ban in wash / bathing rooms	✓	✓	✓
Ban in prayer rooms	✓		
Ban in change rooms	✓	✓	✓
Ban in lactation rooms	✓		✓
Ban in parent rooms	✓		
Ban in first-aid room	✓		
Ban in sick bays	✓		
Ban employers blocking delivery of an email or access to a website because it relates to industrial matters	✓	✓	
Independent surveillance supervisors	✓		

<sup>142</sup> Workplace Privacy Act 2011 (ACT), Sections 22(2)(a) and 22(2)(b).

<sup>143</sup> Ibid., Section 28(2)(a)-(f).

<sup>144</sup> Ibid., Section 29(2)(b).

<sup>145</sup> Ibid., Section 30.

<sup>146</sup> Ibid., Section 33(2).

Notice requirements	✓	✓	
Visible notice for tracking vehicles and devices	✓	✓	
Disclosure of the ordinary subject of surveillance	✓		
Disclosure of the surveillance purpose	✓		
Disclosure of how and the type of surveillance	✓	✓	
Disclosure of when surveillance commences	✓	✓	
Disclosure of whether it is limited or ongoing surveillance	✓	✓	
Disclosure of whether its intermittent or continuous surveillance	✓	✓	
Employers must provide workers with access to surveillance data about them if requested in writing	✓		
Employer must consult in good faith with workers	✓		

*Recommendation 11: Employers should be banned from conducting covert (undisclosed) surveillance in all but the most extreme of circumstances. Judicial review and/or police authorisation should be mandatory for any use of covert surveillance against workers. Covert surveillance authorisations should also be specific, temporary, and periodically subject to review. There should be onerous penalties on employers who use covert surveillance without authorisation.*

*Recommendation 12: There should be a ban on the disclosure or on-selling of data generated by workplace surveillance to third parties. Irresponsible data handling practices expose working people to data breaches that can have traumatic effects. In the information age, data is money. Selling data about workers without telling them or including them in the profits is not a legitimate means of revenue raising - it is theft.*

*Recommendation 13: Legislate obligations for employers to act with transparency - and conduct a serious codesign process. If employers want to use workplace surveillance they should be required to:*

- a. Be able to demonstrate the need to protect people or property,*
- b. Give 14 days' written notice to workers outlining exactly how, when, and where surveillance is to be conducted,*
- c. Meaningfully consult with workers and their union before implementing surveillance,*
- d. Take steps to ensure the safety of data storage generated by surveillance, and inform/consult with workers and their union about that storage, and*
- e. Inform new employees of any surveillance that is in place before they commence their employment.*

*Recommendation 14: Workers should have the right to access any data generated by surveillance. They should be free to access, in full, information about the volume of data being collected about them as well as the contents of this data. Workers should also be free to deploy data collected about them at work in collective bargaining - for example, to demonstrate the extent of unpaid overtime being performed or the value of their contributions to the company.*

*Recommendation 15: Employers who neglect their obligations under new workplace privacy legislation should face fines large enough to deter further bad behaviour.*

*Recommendation 16: When individual or groups of workers have suffered abusive surveillance or data-management practices, civil remedies should be available to them where breaches are proven.*

*Recommendation 17: Unions and a relevant governmental authority should have powers of investigation and to launch enforcement proceedings before the Court on matters of workplace privacy violation or data misuse. Given how widespread intrusive surveillance practices have become, it is necessary to ensure that workplace privacy protections are genuinely enforceable.*

## **4.2 Overseas Laws**

Even the ACT laws do not come close to approaching international best practice with regards to workplace privacy legislation:

- In Spain, surveillance is banned in all parts of the workplace not explicitly used for work.<sup>147</sup>
- In Italy, it is forbidden to use genetic data to make any hiring or firing decision, even if both parties consent.<sup>148</sup>
- In Iceland, any electronic monitoring must include a visual notice identifying the surveillance controller.<sup>149</sup>
- In certain provinces of Canada, it is illegal to take adverse action against a worker for refusing a request that contravenes their right to privacy and data protection.<sup>150</sup>

Further examples of how to appropriately regulate this issue are provided by the International Labour Organisation.

## **4.3 The International Labour Organisation Code of Practice and Meaningful Consent**

Since 1997, the International Labour Organisation (ILO) has had a Code of Practice on the Protection of Workers Personal Data.<sup>151</sup> The Code of Practice provides a valuable example of what should be considered a best-practice surveillance regulatory regime.

Although the Code of Practice is not designed to replace existing laws, the ILO recommends that it should be used in the development of new regulations, legislation and collective bargaining agreements concerning workplace privacy and data rights.<sup>152</sup>

By comparison with the ILO Code, we can recognise how incomplete even the laws in NSW and the ACT are at substantively protecting workplace privacy – let alone those in Victoria.

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<sup>147</sup> *National Data Protection Authority*. Containing Provisions to Adapt the National Legislation to General Data Protection Regulation (Regulation(EU) 2020/PS/00261), Relevant provisions: Article 5(1)(c) GDPR and Article 12 GDPR.

<sup>148</sup> *Personal Data Protection Code*. Provisions to Adapt the National Legislation to General Data Protection Regulation (Regulation (EU) 2016/679) ('GDPR').

<sup>149</sup> *Data Protection Act*. Act No. 90/2018 on Privacy and Processing of Personal Data. Article 14, Section 3.

<sup>150</sup> *Personal Information Protection Act*. Province of Alberta. Part 7: 'General Protections,' Section 58(a)(b)(c)(d).d

<sup>151</sup> *International Labour Organisation*. 1997. "Protection of workers' personal data. An ILO code of practice."

Geneva, Available at: <https://www.ilo.org/resource/protection-workers-personal-data>

<sup>152</sup> Hendrickx, Frank. 2022. *International Labour Organisation*. "Protection of workers' personal data: General principles," Available at: <https://www.ilo.org/media/374156/download>.

The ILO approaches workplace privacy from a much more realistic perspective than our current regulatory regime. As the Electrical Trades Union (ETU) noted in 2023, existing privacy legislation contains a ‘fundamental misunderstanding of the nature of consent.’<sup>153</sup> The ILO recognises that because of the power imbalance inherent to any workplace, consent to surveillance cannot be meaningful unless it is supported by a myriad of external protections as well as the right to union representation and collective bargaining internally.

The ILO Code of Practice is extensive. All of its provisions related to the topics discussed in this submission are included in Appendix Item 2 – however, a selection of some of its most notable inclusions is provided below. These should be given critical consideration during the design of new privacy legislation for Victoria:

**Figure 8: ILO Code of Practice Relevant Provisions**

Code	Provision
5.2	Personal data should only be used for the purposes for which it was originally collected.
5.6	Personal data collected by electronic monitoring should not be the only factors in evaluating worker performance.
5.8	Workers and their representatives should be kept informed of any data collection process, the rules that govern that process and their rights.
5.13	Workers must not be able to waive their privacy rights.
6.3	Disclosures to workers about data collection should be in plain language and contain extensive detail about how the data is going to be stored, used and for what period of time it will be held.
6.5-6.6	Employers should not collect data pertaining to a workers sex life, political or religious beliefs, criminal record, membership of a trade union or other personal beliefs.
11.2	Workers should have access to all personal data collected about them.
12.2	Worker’s representatives should be informed and consulted about: <ul style="list-style-type: none"> <li>1. The introduction or modification of systems that process workers’ personal data.</li> <li>2. The introduction of any form of electronic monitoring of workers behaviour.</li> <li>3. The purpose, contents and manner of tests being conducted regarding personal data of workers, including how these tests are interpreted.</li> </ul>
5.13	Workers may not be permitted to waive their privacy rights.

## 5. Victoria’s Existing Workplace Privacy Regime

### 5.1 The Victorian Law Reform Commission Report

Twenty years ago, Victoria held the world’s first parliamentary inquiry into workplace privacy.<sup>154</sup> In a ‘ground-breaking’ report, the Victorian Law Reform Commission (VLRC) confirmed that there existed ‘significant legislative gaps’ in the protection of Victorians workers’ fundamental rights to privacy. After hearing from a range of experts, workers, unions, employers and community members, the VLRC warned that:

<sup>153</sup> ETU, *Privacy Act Review*, p. 6.

<sup>154</sup> VLRC. *Workplace Privacy: Final Report*, p. xii.

1. Workers' data was being used for purposes not directly connected employment relationship;
2. Being collected at a volume disproportionate to any appropriate purpose;
3. Surveillance was taking place without reasonable consultation and notice to the affected workers and
4. Surveillance-collected worker data was being stored without adequate safeguards to ensure appropriate and reasonable conduct.<sup>155</sup>

In the 20 years that have passed since the VLRC's report, none of these issues have been resolved. **The central finding of the VLRC report was that in practice, the issue of what falls into the scope of legitimate surveillance is decided by employers.**

This is because if a worker's right to privacy is violated it falls on them as the complainant to bear the burden of escalating the issue - often at the cost of significant time, resources and emotional turmoil.<sup>156</sup> Consequently:

In the context of privacy, the assumption seems to be ... **that workers are only provided with as much privacy as the employer is willing to tolerate.**<sup>157</sup>

In the absence of ... express legislative requirements, the issue of what falls within the scope of the work relationship is usually left to the employer (as the more powerful party) to determine.<sup>158</sup>

Victorian workers are, to this day, experiencing the impact of this complete lack of workplace privacy protection:

*I was recorded (audio) without consent by my direct manager on her mobile phone during a private conversation. It wasn't dealt with properly at the time that I complained about it ... I feel targeted and I don't feel safe at work.*  
- J, Hospitality Worker.<sup>159</sup>

The 2006 amendment to the Surveillance Devices Act 1998 (Vic) introduced in response to the VLRC report restricted surveillance in toilets and other sensitive areas but did not resolve a single one of the four major concerns identified by the Commission (see above.)

This has meant that all Victorian workers have by way of workplace privacy protections is to be found in the legal system and in Commonwealth statutes.

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<sup>155</sup> Ibid., p. xiii.

<sup>156</sup> Office of the Victorian Information Commissioner. 2018. *Identifying Realistic Outcomes in Privacy Complaints*. D21/6828, Available at: <https://ovic.vic.gov.au/privacy/for-the-public/privacy-complaints/identifying-realistic-outcomes-in-privacy-complaints/>; Department of Justice. 2004. *New Directions for the Victorian Justice System 2004-2014: Attorney General's Justice Statement*. Available at: <https://vqls.sdp.sirsidynix.net.au/client/search/asset/1292526>

<sup>157</sup> Craig, John. 1999. *Privacy and Employment Law*. London: Hart Publishing Oxford, p. 76.

<sup>158</sup> VLRC. *Options Paper*, p. 82.

<sup>159</sup> J, Hospitality Worker. VTHC Workplace Surveillance Survey, 2024.

## 5.2 Common Law

Australian common law imposes very limited constraints on the surveillance of private sector workers. Although workers can theoretically bargain over the limits to surveillance in their contracts, this is not an option that most are readily able to take up.

Limits on multi-employer bargaining and decades of anti-union legislation have systematically undercut the workers' power to collectively bargain over surveillance and other terms of employment.

In the absence of negotiated limits, the employer gets a free hand to decide what kind of monitoring is appropriate. In 2014, the High Court ruled in *Commonwealth Bank of Australia v Barker* [HCA 32] that employers have no implied contractual duty not to act in ways that severely harm trust between them and their workers - such as through aggressive surveillance.<sup>160</sup> The High Court confirmed in 2020 in *Smethurst v Commissioner of Police* that the tort of invasion of privacy is not recognised by Australian common law.<sup>161</sup>

## 5.3 Commonwealth Statutory Law

Three Commonwealth statutory laws are relevant to workplace surveillance:

- The Privacy Act 1988
- The Telecommunications (Interception and Access) Act 1979
- The Fair Work Act 2009

The most relevant Commonwealth provisions are found in the Privacy Act, which stipulates the Australian Privacy Principles (APP). The APPs govern the storage, use and handling of personal and sensitive information in Australia. It is the central framework for Australian privacy law in Australia and specifies standards for the appropriate use of data.

However, employee and small business records are currently excluded from the APPs - rendering them immune to a raft of critical privacy and data protection obligations.

As the ETU has noted, the Privacy Act, therefore, empowers employers to collect 'highly sensitive subject matters ... which, if collected in another context ... would be subject to the utmost protections.'<sup>162</sup> This includes:

- Medical history, health information relating to disability, illness, injuries and fitness.
- Banking and financial information.
- Personal identification information.
- Information provided in applications for personal, sick, mental health, carers, family and domestic violence.

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<sup>160</sup> *Commonwealth Bank of Australia v Barker*, [2014] HCA 32 (2014) 253 CLR 169. Judgement summary available at: <https://www.hcourt.gov.au/assets/publications/judgment-summaries/2014/hca-32-2014-09-10.pdf>

<sup>161</sup> *Smethurst v Commissioner of Police*, [2020] HCA 14 (2020) S196/2019. Judgement summary available at: <https://cdn.hcourt.gov.au/assets/publications/judgment-summaries/2020/hca-14-2020-04-15.pdf>

<sup>162</sup> Electrical Trades Union. 2023 *Privacy Act Review*. Submission to the Commonwealth Attorney General's Department's Review of the Privacy Act 1988. Available at: <https://www.etunational.asn.au/wp-content/uploads/2023/04/202303-Privacy-Act-Review-ETU-Submission.pdf>, p. 5.



- Pre-employment blood testing of candidates, with results disclosed to corporations that are based internationally and do not have to comply with Australian privacy laws<sup>163</sup>

Existing federal legislation, therefore, provides little protection for workers over their privacy or data rights – especially if they have consented to a form of monitoring – with *implied* consent being defined as acceptable.<sup>164</sup>

Victorian unions support the Albanese Labor Government’s in-principle commitment to removing the small business and employee records exemptions from the Privacy Act 1988. Although this is a very positive step, it is only a small component of ensuring improved workplace privacy protection in Victoria.

## **6. Introducing a Privacy in Working Life Act**

Victorian workers deserve a seat at the table when it comes to ensuring fair and ethical surveillance practices. VTHC heard this consistently from workers across a range of industries:

*Inform staff of the reasons for why whatever is being done and what will be done. Give staff a right of reply, have a process for any necessary remediation, and have the right for legal and union action if any changes or penalties are to be imposed.*  
- P, Educator.<sup>165</sup>

*Respect and honest communication is best work practice – not surveillance.*  
- L, Allied Health Professional.<sup>166</sup>

*You need to be transparent as to the details, reasons, justifications, legalities.... Would you [the employer] be comfortable having your own work being under surveillance by the workers?*  
- S, Tourism Worker.<sup>167</sup>

The most intrusive surveillance practices, such as genetic testing, neuroinformatics, surveillance of non-work-related areas, mood or retinal observation, lifestyle observation, health monitoring and social monitoring should be categorically prohibited unless authorised by an advanced, open and accountable system of judicial review.

Workplace surveillance should be subject to a comprehensive system of protections that is capable of addressing the broad range of risks identified in this report. This can be achieved through the introduction of a Privacy in Working Life Act (PIWLA), a synthesis of all of the recommendations made by Victorian unions and provided in full below:

1. A new PIWLA should prohibit surveillance in the workplace by employers. The prohibition must apply to optical, audio, location tracking, data surveillance, and biometrics scans.

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<sup>163</sup> ETU, *Privacy Act Review*, p. 3.

<sup>164</sup> VLRC. *Options Paper*, p. 77.

<sup>165</sup> P, Educator. VTHC Workplace Surveillance Survey, 2024.

<sup>166</sup> L, Allied Health Professional. VTHC Workplace Surveillance Survey, 2024.

<sup>167</sup> S, Tourism Worker. VTHC Workplace Surveillance Survey, 2024.

2. A specific, non-negotiable obligation prohibiting surveillance in toilet facilities, changing rooms, staff facilities, and in lunchrooms designated for the personal use of workers.
3. Surveillance may be permissible only when it is used to ensure the safety of workers and others in the premises, to protect property, or to supervise processes.
4. Under a new PIWLA, if employers want to use surveillance they must:
  - a. Be able to demonstrate the need to protect people or property,
  - b. Give 14 days written notice to workers outlining exactly how, when, and where surveillance is to be conducted,
  - c. Meaningfully consult with workers and their union before implementing surveillance,
  - d. Take steps to ensure the safety of data storage generated by surveillance, and inform/consult with workers and their union about that storage, and
  - e. Inform new employees of any surveillance that is in place before they commence their employment.
5. Workers must retain the right to opt out of certain types of surveillance, including where it can be demonstrated there is a risk to workplace OHS.
6. Workers retain the right to access any data generated by any surveillance.
7. A new PIWLA must ban surveillance on workers when they are not at work, including the prohibition on social media trawling.
8. Personal data such as health data must only be collected where it is necessary for processing sick/personal leave or where legislation requires it, e.g., OHS legislation. Where it is necessary, personal data should only be collected if the worker has provided informed consent and if the employer has outlined how long it will be stored for and how the data will be destroyed.
9. Covert surveillance must not be used in any circumstances, except where it is authorised by an authority such as the police or by a warrant.
10. A new PIWLA must also enshrine a right to protection from adverse action or disciplinary action relating to data gained from surveillance.
11. There must be a ban on the disclosure or on-selling of data generated by surveillance to third parties - with the exception of where it is necessary for law enforcement agencies.

## 7. Conclusion

The surveillance practices Victorian workers and their unions are currently facing are unacceptable and, in many cases, abusive.

Even the term 'workplace surveillance' cannot adequately capture what is happening in workplaces around this state.

With AI-driven facial expression analysis, wearables, sentiment monitoring, biological and genetic testing, social media trawling, and personality evaluation - **it is not the workspace or even the work process being scrutinised, it is the fundamental capacities of the worker as a human being.**

Employers have the right to information directly relevant to the inherent requirements of a role. Employers are not agents of law enforcement, psychiatrists or priests - the private lives of working people are none of their business. It is not their place to meticulously monitor workers' personality dispositions, who they sit with at lunch, who their friends are, where they go on their breaks, their political beliefs, when they go to bed, how they spend their weekends, whether they utilise their leave, their gender identity or their medical histories.

The only legitimate information to gather during the employment relationship is that concerning a worker's ability to undertake their role under fair and reasonable conditions.

The prevalence of extreme surveillance overreach in Victorian workplaces suggests a growing confusion amongst employers about their appropriate role in society and about what it actually means to hire somebody.

Employers hire workers to work on a job for a period of time - providing payment for each hour, day or week of work. Wages buy units of productive time. Wages do not buy people. Wages do not purchase the right to unlimitedly observe another human being.

Victoria deserves a system of workplace privacy protections that recognises the dignity of all people engaged in employment. Only through a Privacy in Working Life Act can balance and trust be restored to our workplaces - and with that, workers' ability to freely exercise their fundamental rights.

It is the view of VTHC that the Victorian Government should take action to protect workers from these threats by introducing a Privacy in Working Life Act.

## 8. Appendix

### 8.1 Definitions

**Adverse action:** Actions taken by an employer against an employee (or a prospective employee) that involve disciplining, dismissing, injuring, demoting or discriminating against them.

**Covert Surveillance:** The surveillance of a worker in a workplace conducted by an employer without notifying the worker.

**Data Processing:** The storage, collection, combination, resale or other use of persona data.

**Electronic monitoring:** Refers to gathering employee data with technology to examine their activities.

**Electronic performance monitoring: (EPM)** Refers specifically to using technologies to collect and analyse performance of employees.

**Personal data:** Any information related to an identified or identifiable worker including professional status, name, image, address, family status, health information, education, career, income, behaviour, opinions, membership of a trade union.

**Social sorting:** The use of data-derived electronic profiles of employees to drive decision making about them.

**Surveillance:** Any collection and processing of data, whether personally identifiable or not, for the purposes of influences and managing those whose data have been garnered.

**Tracking device:** An electronic device capable of being used to work out or monitor the location of a person or an object or the status of an object.

### 8.2 Index of Recommendations

1. Legislate new workplace privacy protections in the form of a Privacy in Working Life Act.
2. Protect workers from adverse actions based on surveillance-collected information.
3. Ban workplace surveillance in non-work-related areas.
4. Ban surveillance of workers outside of working hours.
5. Limit workplace surveillance to ensuring the security and safety of the premises.
6. Legislate to protect workers' sensitive personal data.
7. Protect privacy in worker communications.
8. Implement new psychosocial OHS regulations which recognise surveillance-related harms.

9. Engage with unions to develop a WorkSafe guide for the use and risks of workplace surveillance.
10. Ensure workers can opt-out of surveillance that threatens their health and safety.
11. A ban on covert surveillance unless authorised by a magistrate or police warrant.
12. A ban on the undisclosed resale of workers' personal data.
13. Mandatory notice, disclosure and consultation requirements for introducing or expanding surveillance in the workplace.
14. Ensure workers can access and use data collected about them at work.
15. Legislate fines for employers who violate workplace privacy legislation.
16. Ensure civil remedies are available for workers who have suffered abusive monitoring practices or mishandling of their personal data.
17. Extend powers of investigation to Unions and Wage Inspectorate Victoria over workplace privacy violations.

### **8.3 The Privacy in Working Life Act**

1. The new PIWLA should prohibit surveillance in the workplace by employers. The prohibition must apply to optical, audio, location tracking, data surveillance, and biometrics scans.
2. A specific, non-negotiable obligation prohibiting surveillance in toilet facilities, changing rooms, staff facilities, and in lunchrooms designated for the personal use of workers.
3. Surveillance may be permissible only when it is used to ensure the safety of workers and others in the premises, to protect property, or to supervise processes.
4. Under a new PIWLA, if employers want to use surveillance they must:
  - a. Be able to demonstrate the need to protect people or property,
  - b. Give 14 days written notice to workers outlining exactly how, when, and where surveillance is to be conducted,
  - c. Meaningfully consult with workers and their union before implementing surveillance,
  - d. Take steps to ensure the safety of data storage generated by surveillance, and inform/consult with workers and their union about that storage, and
  - e. Inform new employees of any surveillance that is in place before they commence their employment.
5. Workers must retain the right to opt out of certain types of surveillance, including where it can be demonstrated there is a risk to workplace OHS.
6. Workers retain the right to access any data generated by any surveillance.
7. A new PIWLA must ban surveillance on workers when they are not at work, including the prohibition on social media trawling.
8. Personal data such as health data must only be collected where it is necessary for processing sick/personal leave or where legislation requires it, e.g., OHS legislation. Where it is necessary, personal data should only be collected if the worker has provided informed consent and if the employer has outlined how long it will be stored for and how the data will be destroyed.

9. Covert surveillance must not be used in any circumstances, except where it is authorised by an authority such as the police or by a warrant.
10. A new PIWLA must also enshrine a right to protection from adverse action or disciplinary action relating to data gained from surveillance.
11. There must be a ban on the disclosure or on-selling of data generated by surveillance to third parties - with the exception of where it is necessary for law enforcement agencies.

Additionally, workplace surveillance must be specifically scoped in to fall under OHS powers. We recommend:

12. New psycho-social health regulations specifically apply to the risks generated by workplace surveillance.
13. A workplace surveillance guide be produced by WorkSafe (in consultation with VTHC and unions) about how to address workplace surveillance.

Lastly, in terms of enforcement we propose:

14. Fines be issued against employers who breach obligations imposed under a new PIWLA.
15. Civil remedies be available to individual workers (or groups of workers) who have suffered loss due to wrongful workplace surveillance.
16. Unions and the Wage Inspectorate Victoria have powers of investigation and to launch enforcement proceedings before the Court.

#### 8.4 Comparison of Domestic Legislation.

	ACT	NSW	VIC
Ban in toilets	✓	✓	✓
Ban in wash / bathing rooms	✓	✓	✓
Ban in prayer rooms	✓		
Ban in change rooms	✓	✓	✓
Ban in lactation rooms	✓		✓
Ban in parent rooms	✓		
Ban in first-aid room	✓		
Ban in sick bays	✓		
Ban employers blocking delivery of an email or access to a website because it relates to industrial matters	✓	✓	
Independent surveillance supervisors	✓		
Notice requirements	✓	✓	
Visible notice for tracking vehicles and devices	✓	✓	
Disclosure of the ordinary subject of surveillance	✓		
Disclosure of the surveillance purpose	✓		
Disclosure of how and the type of surveillance	✓	✓	
Disclosure of when surveillance commences	✓	✓	
Disclosure of whether it is limited or ongoing surveillance	✓	✓	
Disclosure of whether its intermittent or continuous surveillance	✓	✓	
Employers must provide workers with access to surveillance data about them if requested in writing	✓		
Employer must consult in good faith with workers	✓		