

**Submission
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INQUIRY INTO WORKPLACE SURVEILLANCE

Organisation: Finance Sector Union

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Inquiry Into Workplace Surveillance

Finance Sector Union Submission

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Legislative Assembly Economy and Infrastructure Committee Inquiry into Workplace Surveillance

This submission supports the submission of the Victorian Trades Hall Council and was prepared by Nicole McPherson – National Assistant Secretary and Alex Cousner – Campaign Manager.

This submission draws and expands on the Finance Sector Union’s submission to the Senate Select Committee on Adopting Artificial Intelligence and the House of Representatives Standing Committee on Employment, Education and Training Inquiry into the Digital Transformation of Workplaces.

Contents

About the FSU	3
Introduction.....	4
Monitoring and Surveillance in the Finance Sector	5
Nature of Monitoring and Surveillance	5
The Role of Artificial Intelligence (AI)	8
Transparency	9
Health and Safety	9
The Need for Strong Regulation	11
Right to an Explanation	12
Recommendations.....	14

About the FSU

The FSU is a registered employee organisation representing approximately 22,000 members across the banking and finance sector throughout Australia. FSU members work in banking, insurance, superannuation, financial planning and finance. Our membership is predominately female, many of whom are engaged in part-time and casual employment.

The FSU is a democratic organisation with representative governance by elected officials and volunteer members. The FSU is a member-led organisation in which rank and file members are elected to honorary official positions to governing bodies within the Union. This includes the National Congress which is the supreme governing body of the Union.

National Congress has the management and control of the affairs of the Union and is comprised of predominately volunteer members. These members are elected by the wider membership to represent their interests. They are not paid officials.

The FSU is proud of its long history representing members to achieve better wages and fairer conditions.

Our members are committed to higher integrity in the finance sector and see their role as advocates for a better industry.

Introduction

“It would be great if I could refuse to have my every working moment, keystroke, idle time, monitored and recorded.”

FSU member, June 2024

Employer monitoring and surveillance of workers is rife in the finance sector.

Every moment of a finance worker’s day is monitored, when they use their swipe card in the morning to access the building, every single conversation they have, every keystroke and mouse click, every moment they spend away from their computer, until they leave the building in the evening. Their activity is measured as a crude and inaccurate proxy for productivity. Artificial intelligence (AI) crunches this data and forms views on whether they worked hard enough and whether they were happy enough doing it.

All of this happens in an almost entirely unregulated environment.

Workers do not know how their employers are monitoring them. They do not know what information is being recorded. They do not know how this information is stored, used or disclosed. And even when this information is used against a worker in disciplinary or performance management processes, employers too often refuse to disclose it, citing that it is “proprietary” or “confidential”.

It is perhaps not surprising that regulation has failed to keep pace with the rapid technological advancements in worker monitoring and surveillance. However, it has now reached a crisis point where workers are paying an enormous cost for employers’ largely unrestrained right to use monitoring and surveillance.

The FSU welcomes this Inquiry and the opportunity to share the experience of finance workers. The FSU believes that worker surveillance is a growing human rights issue in Victoria and we call on the Inquiry to identify practical, effective and fair solutions to protect workers and our community.

Monitoring and Surveillance in the Finance Sector

Finance sector workers are monitored every moment they are at work. Finance sector employers collect information on every aspect of workers' lives at work, and in some cases, outside work.

FSU members are deeply concerned about the growing use of monitoring and surveillance by their employers. FSU members who have been in the finance sector for a long period of time express that they acknowledge that there is a certain level of surveillance that employers will undertake, for example employers having access to emails, and recording phone calls for regulatory purposes. However, there has been a steady increase in the types of surveillance being undertaken, the information being collected, and the conclusions drawn from it.

Nature of Monitoring and Surveillance

FSU members have extensive experience of their employers monitoring their work. Surveillance and monitoring of workers has long been a feature of the finance sector, and its scale has increased alongside technology advancements in this permissive regulatory environment. This is perhaps not surprising in a sector with such a strong profit imperative where surveillance is viewed as one method by which employers are able to extract the maximum output from workers.

Monitoring and surveillance in the finance sector is pervasive with few (if any) actions taken by workers not subject to some form of employer monitoring or surveillance.

Worker Communication

All employee communication using work systems is monitored and recorded. While the FSU notes there is a regulatory basis for the recording of certain communications, in the finance sector it is more common for all communication to be recorded.

Communication surveillance extends to all communication platforms including telephone, email, Teams, Zoom, instant messaging, corporate social media, LinkedIn, and any other platforms used on corporate systems. Even in-person interactions are monitored in certain circumstances like in bank branches.

With the dramatic rise of workers working from home, or working in teams that are geographically diffuse, it is increasingly common that all communication between workers is via digital channels that are monitored by employers. For worker wellbeing, it is essential that workers can communicate with colleagues in both a formal, professional sense and also in a more informal, collegiate way. Having all communication limited to employer-monitored channels has a chilling effect on how freely workers can

communicate, and potentially exposes them to disciplinary action where their communication does not meet the standards of the employer.

The FSU has represented members in cases with some of our largest finance employers where workers are facing disciplinary action for an informal conversation held on a work platform with a colleague. We have represented members expressing concern to colleagues over Teams about an impending organisational restructure. This communication was read by the employer and allegations put to the worker that they were seeking to undermine the employer and were not behaving in line with the values of the organisation. It was only through the intervention of the Union that this matter was resolved in favour of the worker, but it speaks to a more concerning trend in our sector.

This type of employer surveillance is particularly concerning for Union members and delegates who, at times, use corporate systems to communicate. This is sometimes due to only knowing each other in a work context and therefore having no other means to communicate. Many FSU delegates are concerned that even clearly marked communications relating to Union business are read by employers, as there is nothing to prevent them from doing so. These reservations are shared by many workers in our sector which serves as a barrier to speaking to prospective members about joining the union. Where workers know that all communication is monitored, it is increasingly difficult to have an open conversation with a prospective union member when the employer is inevitably listening.

Employers have a level of oversight of union communication through technology channels that would simply never be allowed in an in-person environment. If an employer representative were listening in to a conversation between a union delegate and union member in a lunchroom, the union would rightly take issue with that. However, when the conversation is held through any other channel, employers have unfettered access. This is not acceptable and must be banned.

Communication with Customers and Members

The FSU understands that recording of interactions with customers, or in the case of superannuation funds, members is at times required for regulatory purposes. It has long been the practice in the finance sector to record these interactions for audit, compliance, and training purposes.

However, we are now seeing customer and member communication analysed with a range of tools to draw conclusions about the nature of the interaction and the quality of the work performed by the worker. Often these tools are powered by AI. In a recent example, an FSU member made a benign comment to a customer that “unfortunately” it was raining at the time. This was detected by the call monitoring as a negative customer interaction due to the use of the word “unfortunately” and the worker was “counselled” or given negative feedback under the threat of performance management on this call.

It was not until the worker was able to listen to the recording with their manager that they were able to ascertain cause of the so-called negative interaction, which resolved the performance concerns.

For many workers, when issues like this are raised with them, they feel like they have no option but to accept them. This is enormously concerning when the monitoring and AI analysis of the information is flawed and certainly does not provide any reasonable basis for disciplinary action against a worker.

Employee Movement

Increasingly, employee movements are subject to employer monitoring. In some sectors, unions have been fighting this intrusion for decades, but it is a relatively newer phenomenon in our sector.

Monitoring of our members' movement happens in our sector in a range of ways. For most workers, this involves their arrival and departure from the office being tracked, along with their movement between floors through their access or swipe card

With increasing numbers of workers working from home, many finance sector employers have now instituted systems requiring workers to use an app to "reserve": a desk before they attend the office. Often these apps are downloaded onto personal devices and regardless of what permissions these apps require, employees are required to download and use them. Similarly, employees are required to download other apps including for two-factor authentication which require permission like location tracking. Employees are not able to access work systems without these apps, and for the very large number of finance workers who do not have a work-allocated mobile device, they are required to download them to their personal device. These compulsory apps can provide employers with broad access to information like employee location, their contacts, and other information stored on their personal mobile device.

While the FSU accepts that some level of movement tracking is acceptable, in our view it is only acceptable where it is limited to what is genuinely required to ensure the safety of workers. An example of monitoring that we would consider appropriate is tracking the number of employees entering a building to ensure that they are all evacuated in the event of an emergency.

Employee Work Output

Finance sector workers, particularly in contact centres, are accustomed to having their work output subject to invasive surveillance. As surveillance and monitoring technology has improved, the FSU has seen an increase in the roles that are subject to surveillance of their work output.

We are regularly seeing finance workers having measures of work output measured at all times including keystrokes, content on screens, web browsing, log on and off times, and active and inactive times. These measures are broadly used as crude indicators of worker performance and output.

The FSU has serious concerns about these types of metrics being used to assess worker performance, particularly where they provide the only data point in what should be a comprehensive assessment. Instead, we are increasingly seeing employers using metrics such as rates of keystrokes to justify providing “performance counselling” to workers without any broader consideration of the worker’s role or how the worker might be performing their work.

The Role of Artificial Intelligence (AI)

Increasingly, AI is able to process large amounts of data gained through worker surveillance and then draw conclusions about workers including their productivity, quality of their work, and their sentiment towards the employer. AI makes worker surveillance relatively easier for employers, with data able to be collected and analysed, and insights gained with little employer effort. However, the quality of output of AI analysis remains low and highly contestable.

Concerningly though, workers are seldom advised of the role of AI in analysing the data collected on them, or in drawing conclusions from it. Even where a worker does attempt to interrogate a decision made by AI, often the employer themselves is not fully aware of the decision-making processes used by the technology so is unable to explain them to a worker.

The FSU is increasingly seeing the intersection of worker surveillance and AI in the use of sentiment analysis. This involves written or verbal communication being recorded and then analysed using AI to determine the sentiment of the interaction. For interactions between workers and customers, sentiment analysis can be used to attempt to determine if the customer was satisfied with the interaction and whether the worker adopted the persona preferred by the employer. For interactions between workers, sentiment analysis can be used to assess worker opinions on substantially any topic including their role, their employer or their union. This type of technology is invasive, the conclusions drawn are frequently incorrect, and it allows wide scale, granular examination of worker communication that fundamentally undermines their rights.

While the issues associated with AI are separate to those created by worker surveillance and monitoring, AI is enabling employers to use the information gained through surveillance and monitoring to much greater effect than would otherwise be possible. This is just one reason why proper regulation of AI is critical to the fair treatment of workers in Australia.

Transparency

Worker surveillance and monitoring in the finance sector is performed entirely without worker consent.

Workers do not know how they are being monitored, what information is being collected or how it is being used or disclosed. FSU members are concerned that substantially all forms of surveillance can be conducted without their consent or knowledge.

FSU members generally understand that their written communication and phone calls will be monitored. However, advances in surveillance technology are leading to surveillance that our members are not aware is occurring. Often our members only discover a certain type of surveillance is occurring when the resulting information is disclosed as part of a disciplinary or performance management process.

This kind of surveillance is unacceptable, unethical and should not be allowed to continue.

Employers have attempted to argue that disclosing to workers what surveillance is occurring would change worker behaviour and that workers would avoid misconduct if they knew it would be detected. The FSU's view is that employers discover misconduct in a range of ways, and covert surveillance is not required. Further, if a worker avoids misconduct for any reason, this is a positive for both the worker and the employer so arguably disclosing the presence of surveillance would lead to a lower incidence of misconduct. Speed cameras are placed in order to curb the behaviour of motorists and not merely to pass out tickets, the same principle applies here.

FSU is seeking regulation to ensure that workers are advised of any monitoring or surveillance of them, and that their consent is required for monitoring and surveillance beyond what is required by law.

Health and Safety

FSU is concerned about the use of AI and surveillance software in the process of performance objective setting and monitoring. The finance sector generally is one that is highly regulated and has a significant compliance culture baked into it. There has, however, always been a strong focus on sales, and seeking profit in the sector at the expense of ethics. This led to the poor behaviour by the banks and other finance employers that was exposed through the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in 2018.

Despite this, the sector remains driven by performance metrics that are aligned to the sales and profit targets of the employers.

It is clear that large language model and assessment tools are good at handling quantitative data that can then be compared to the relevant metrics. This is, on its face, a good thing for assessing the performance of workers. However, this approach misses the qualitative aspect of the performance appraisal process and can lead to unfair scrutiny or even action being taken against workers on the basis of poor, inaccurate or incomplete data.

One of the psychosocial hazards that we often see manifest in the workplace is that of high workload demands and the stress that can flow from workplaces with unfair and unreasonable work demands.

One FSU member stated that “Algorithms can never understand or interpret the unspoken, unquantifiable intricacies of being a person, and as such will always be flawed, unreliable tools easily turned to harm in the wrong or incompetent hands”.

FSU is concerned that the utilisation of AI technologies for the purpose of assessing the workload and output of workers can lead to unfair and unreasonable work demands. When this is layered with the lack of qualitative assessment measures, this can create a significant issue for workers and can exacerbate the hazard that high workload and work demands can present for workers in the sector.

Utilising these kinds of technology for setting performance targets may lead to some workers being put under greater pressure about their performance if this is not tempered by human beings that can review the expectations in context.

In the finance sector, in many cases there are components of an employee’s pay that are at risk and dependant on their performance in their job and meeting performance targets. Where these performance targets are determined by algorithms, this leads to a high stress scenario for many workers.

FSU knows that the gold standard for safe work practices is job design. This means that all of the elements that make up a job are considered and designed to eliminate or reduce stress on workers. Adhering to the psychosocial hazards guidance from the design phase of the job is key to lowering workplace stress.

Many jobs in the finance sector were not designed with AI and algorithms in mind. Accordingly, there is a major issue that work in the sector is not designed to work with AI without creating further health and safety hazards.

These hazards may include lack of role clarity, workloads which are either high or low, and the possibility of customer aggression toward staff. In our sector, FSU members are increasingly having to deal with the failings of AI due to the poor quality of work that can be performed by the AI algorithms,

including poor quality customer interactions, the need for workers to contact customers for information that may have already been provided, or to communicate distressing decisions made largely by AI. These hazards are largely unconsidered in current risk assessments.

FSU has observed a general unwillingness on the part of the major employers in the sector to consider job design and undertake risk assessment on the processes of work, if and when they change. The FSU has not yet seen a risk assessment from any finance employer on AI and is not aware of any finance employer consulting workers on the development of a risk assessment on AI.

Monitoring work systems for issues such as bullying, sexual harassment or other inappropriate behaviour is a good use of monitoring technology, and one where AI can provide a positive contribution. It is an important component to ensuring that all workers are safe at work and that they are free from harassment or discrimination.

FSU believes that where these technologies are used for monitoring and identifying instances where workers may be behaving inappropriately or breaching employer policy, the evidence and circumstances of those types of breaches must be reviewed by a human prior to being presented to the worker. It is critical that the relevant manager can explain the nature of the breach and how the action is in breach of the relevant policy. This will ensure that otherwise appropriate behaviour is not being taken out of context and that the employer is accountable for the decisions of the business.

The Need for Strong Regulation

The development and use of surveillance and monitoring has exceeded the ability of our current regulatory frameworks to govern it. Much of our regulation does not contemplate the current use of surveillance and monitoring technologies, and the pace at which these technologies are being developed will pose an ongoing challenge for regulation to contain its use.

The FSU is concerned with the use of data gained through surveillance and monitoring in the management of workers.

The FSU supports the Victorian Trades Hall Council's submission, in particular their recommendation to introduce a Privacy in Working Life Act.

For FSU members, it is critical that there is fair, effective regulation to ensure:

- Surveillance is prohibited in workplaces except where it is required for regulatory reasons, to ensure the safety of workers, or in limited circumstances to supervise processes;

- Workers are advised in advance of any proposed surveillance, genuinely consulted, and given the right to opt out of any surveillance not required for regulatory or work health safety compliance;
- No disciplinary or performance management process can be based on information gained through surveillance;
- Workers have a right to access any information generated through surveillance on them.

The FSU further supports the Victorian Trades Hall Council's submission in calling for new psychosocial health regulations to address the risks generated by workplace surveillance, and for WorkSafe Victoria to create a workplace surveillance guide on how to address workplace surveillance.

Right to an Explanation

Based on its use in Europe, the right to an explanation is the fundamental right to receive an auditable, criticisable explanation from an organisation such as an employer where AI technology is in the decision-making process.

In the finance sector, the use of monitoring and surveillance and AI are so intertwined that any regulatory response to AI will necessarily and beneficially constrain the use of monitoring and surveillance.

Because of the limitations of proprietary software and the reluctance of software companies to make their algorithms open source, there is a large problem for workers subject to surveillance and the outcomes drawn from it to ensure that they are able to get auditable information.

This can include algorithms that are designed to assist in hiring decisions, to make decisions about compliance against performance metrics and therefore performance management and termination of employment.

There must be a way for workers to get access to the information that was used to make a decision regarding their employment and to be able to audit how it was used in the decision, if only as a development opportunity, but further, to be able to access their legal rights including in unfair or unlawful dismissal.

Fundamentally the right to an explanation is the right for workers to access this kind of information, and the obligation on employers and the companies building these programs to either show how the decision was made or build a proxy for the decision being made through the algorithm such that it can be relied on for legal purposes and development in the workplace.

Further, there needs to be consideration given to the way in which the laws about employer decision making and the accessory liability for decisions that are made in reliance on data and analysis that is derived from the workplace surveillance and system analysis.

The right to an explanation is an important way to ensure that the rights of workers in Victoria are not subverted through the use of technology that can make decisions and be relied upon without the need for consideration by a relevant manager in the workplace.

Recommendations

The Finance Sector Union makes the following recommendations:

1. That the Government introduce a Privacy in Working Life Act specifically including:
 - a. A ban on worker surveillance except where it is required for regulatory reasons, to ensure the safety of workers, or in limited circumstances to supervise processes;
 - b. Workers are advised in advance of any proposed surveillance, genuinely consulted, and given the right to opt out of any surveillance not required for regulatory or work health safety compliance;
 - c. No disciplinary or performance management process can be based on information gained through surveillance;
 - d. Workers have a right to access any information generated through surveillance on them.
2. A prohibition on any surveillance or monitoring of communications between a trade union, its delegates, members and prospect members.
3. That the Government host a series of forums to get a more complete understanding of the ways employers using and are intending to introduce and adopt surveillance technology in their workplaces and the impact on workers.
4. That the Government develop and pass right to an explanation legislation based on the European model.
5. That the Government adopt changes to the Work Health and Safety laws as well as industrial relations laws to ensure that where material gained through surveillance and AI is used to make decisions about performance, conduct, dismissal and health and safety assessments that the leaders of those businesses be held accessorially liable for those decisions.
6. That there be a moratorium on job losses due to AI for a period of three years to enable employers to identify at-risk roles, and workers to retrain to perform roles that will not be replaced by AI.

The FSU is committed to working with Government, employers, civil society and our community to reform laws on workplace monitoring and surveillance to create safe and fair workplaces for all.