

# TRANSCRIPT

## LEGISLATIVE ASSEMBLY ECONOMY AND INFRASTRUCTURE COMMITTEE

### **Inquiry into workplace surveillance**

East Melbourne – Monday 23 September 2024

*(via videoconference)*

#### **MEMBERS**

Alison Marchant – Chair

Kim O’Keeffe – Deputy Chair

Anthony Cianflone

Wayne Farnham

John Mullahy

Dylan Wight

Jess Wilson

#### **WITNESS**

Professor John Howe, Centre for Employment and Labour Relations Law, Melbourne Law School, University of Melbourne.

**The CHAIR:** Good morning. I would like to start by acknowledging the traditional owners of the various lands on which we are all gathered today. I acknowledge that in this virtual environment we are gathered on many different lands, and I pay my respects to elders past, present and emerging.

I advise that the session today is being broadcast live on the Parliament's website. Rebroadcast of the hearing is only permitted in accordance with the LA standing order 234.

Welcome to the public hearing for the Legislative Assembly Economy and Infrastructure Committee's Inquiry into workplace surveillance. All mobile phones should now be turned to silent.

All evidence given today is being recorded by Hansard and broadcast live on the Parliament's website. While all evidence taken by the Committee is protected by parliamentary privilege, comments repeated outside the hearing, including on social media, may not be protected by this privilege.

Witnesses will be provided with a proof version of the transcript to check. Verified transcripts and other documents provided to the Committee during the hearing will be published on the Committee's website.

Because we are in a bit of a virtual world, I thought it might be easier to introduce the Committee first. I am the Chair, Alison Marchant, Member for Bellarine. We have Wayne Farnham, Member for Narracan; Kim O'Keeffe is our Deputy Chair and Member for Shepparton; and Anthony Cianflone is the Member for Pascoe Vale. We do have a couple of apologies this morning: Jess Wilson, Member for Kew, Dylan Wight, Member for Tarneit and John Mullahy, Member for Glen Waverley will be joining us a little bit later.

Thank you so much, Professor John Howe, for coming along today to talk to the Committee. What we thought we might do is give you maybe 5 minutes for a little bit of a statement that will help us kick this off, and then we have got questions that we might delve into a little bit further, time permitting. I know you did not make a submission, but we do appreciate you have done a lot of work in this area, so we appreciate your expertise and advice to the Committee today. I might hand over to you.

**John HOWE:** Thank you, Chair, and thank you very much to the Committee for the opportunity to appear today and to answer any questions you might have.

Just by way of introduction, I have been a practitioner and an academic in the field of labour law and regulation for over 30 years, and one strand of my research, particularly in recent years, has concerned the role of data science and technology in work and in regulation. I think it is worth in terms of my opening statement distinguishing between data surveillance and algorithmic management, although these concepts all overlap. I also want to note that data is obviously legitimately collected by employers for particular purposes and that certain surveillance that occurs in workplaces and in businesses is legitimate. But the evidence does suggest that the explosion in collection of data, sharing of data, surveillance mechanisms enabled by technological changes and then algorithmic management techniques has resulted I think in extensive misuse of a lot of this data, in surveillance and in management techniques. And that raises serious concerns, as I know you have seen in the many submissions to the Inquiry about the current regulatory frameworks at the Commonwealth and state level.

In Victoria's case you would have to say that frameworks created 25 years ago do not meet the requirements of today, given all the change. I also think at the Commonwealth level there is uncertainty about what is going to happen in the Privacy Act space. We know the government has introduced the legislation to reform the Privacy Act, but at this stage the employee records exemption is still in place. The government has committed to further consultation about that, but we do not know how that is going to play out.

The other thing I would just note is I have been involved in a recent study of enterprise agreements and looking at to what extent parties to enterprise agreements are trying to introduce clauses to allow the legitimate collection of data and use of surveillance and management with safeguards for the protection of employee interests. We found in a study over the last two years in nine industries that less than 5 per cent of those agreements contain clauses addressing and managing workplace surveillance. I think that is another example of where there is a lag between the development of these mechanisms and regulatory responses, whether they are at the government level or at the level of the parties.

We have been looking at various possible regulatory responses to this. One obviously without government legislation is to try and encourage more enterprise agreements to deal with this issue. That is what is happening in the US and Europe in particular, I think. Also there is the concept of data trusts that can be better used in this space, where employee data can be stored similar to the consumer data right and where workers have some sort of say over how their data is then used beyond the obvious legitimate purposes of employers.

The other area that is interesting is work health and safety regulation. I think that existing regulation is underutilised to protect worker interests in this space. There is certainly potential for more use of existing state workplace health and safety regimes. But I think my time is up, so I will leave it there. I am happy to answer any questions you have for me.

**The CHAIR:** Wonderful. Thank you so much. I might go straight to our Deputy Chair Kim.

**Kim O'KEEFFE:** Thank you. Good morning, John. Thank you so much for joining us. And thank you so much for your input; it is really valuable. Obviously your background and experience is really helpful. You did touch on the enterprise agreements. I am probably interested in that data and how secure that can be. One of our questions is: how common is the sale of workers data to third parties? Why would employers do this, and what are the impacts obviously on the workers? I think some of that is obvious—that they would lose control. What is your answer in regard to how common it is for that to be actually sold or passed on, their data?

**John HOWE:** It seems to be becoming more common. There has been the development of these data brokerage firms. Beyond a firm's employers selling on data to marketers and things like that, which has been going on for a long time, there is now a growing business in this area of buying and onselling data. It is not just the employer seeing an opportunity anymore; it is actively being sought out and promoted by these brokerage firms. I am a lawyer, so I am more interested in responses. I cannot tell you that I have done a particular study of this, but I have read quite a few. It is certainly a growing practice. One area of concern that we identified is where data is on-sold to payday credit providers. It is not so much of a big issue in Australia yet, but it does happen. That is a concern, because I do not think workers ever expected that is where their information would be going.

**Kim O'KEEFFE:** Okay. Thank you.

**The CHAIR:** Thank you. Wayne, I might go to you next.

**Wayne FARNHAM:** Thank you, Chair. Thank you for joining us, John. It is a very interesting topic, this one, and I can see a lot of conflicts occurring from it. In my previous life, John, I was a builder. Surveillance was one thing that evolved in the building industry because of onsite thefts et cetera. But where my concern is, and I suppose there are a couple of points to this, is who actually owns the surveillance data? How does it affect people working from home? What hours can they have surveillance on people working from home? And you just touched on the data sold to third-party agencies. Where do you see this space going? How do you see this being rectified—the balance between surveillance and the sale of data or encroaching on the workers' rights?

**John HOWE:** I think we just need better management mechanisms in place, whether they are going to be set by government or whether they are implemented at enterprise level. We obviously want to protect the—

**Wayne FARNHAM:** Who owns the data?

**John HOWE:** So on the question of who owns the data—if it is being collected by the employer or the business, whether it is surveying employees or contractors and so on—my view would be it is owned by the business initially. It then depends on, I suppose, how the data is being collected, and there are so many different ways that might be done. They might be contracting a firm that is running the software, which is then collecting that data. It will then depend on the contract they have in place with that provider. I think there is not a clear answer to who owns the data.

**Wayne FARNHAM:** How do we get around the working-from-home scenario?

**John HOWE:** In the sense that?

**Wayne FARNHAM:** If they are surveilling people working from home, that is a pretty difficult area to go into. How do we get around that scenario?

**John HOWE:** I think there are legitimate reasons for surveillance, including surveillance to some extent of people working at home. But I just think there need to be certain management principles in place, such as provision of information to workers that they are being surveilled and consultation rights ahead of the implementation of new systems of surveillance so that workers or their representatives get a chance to have some say on the new surveillance technique and how that is going to be used and how their interests are going to be protected.

**Wayne FARNHAM:** I would assume that would include hours, like 9 to 5. You would have to be specific.

**John HOWE:** I think so, yes.

**Wayne FARNHAM:** Thanks, Chair.

**The CHAIR:** Thank you. Anthony.

**Anthony CIANFLONE:** Thanks, Chair, and thanks, Professor, for joining us.

**John HOWE:** Thanks for having me.

**Anthony CIANFLONE:** Just building on what Wayne was asking about—protecting workers data across Victoria—what is your advice? You sort of touched on this in your opening remarks around potential solutions around encouraging more EBAs to make provision for workplace surveillance, the idea around data trusts and workplace OH&S measures. What would your advice be, number one, through this inquiry for us to recommend to government around how we can better protect rights in this space. The second part of that is around EBAs. I think you said that 5 per cent, based on some research you have done, of EBAs make provision for workplace surveillance –

**John HOWE:** Across nine industries.

**Anthony CIANFLONE:** across nine industries. If you can talk a little bit to those two points, it would be appreciated.

**John HOWE:** Certainly. Looking at the current regulatory regime, I think it is inadequate at all levels of government—so at Commonwealth and at state. We do not know what is going to happen at the Commonwealth level. If the Act goes through, certainly that will provide some more protection I think for worker data privacy. With some of the mechanisms around automated decision-making, those protections, if they go through, will benefit workers while still allowing the use of those techniques. But whether or not that employee record exemption is kept, I do think Victoria needs an update to its regulatory regime. Whether that is part of the broader scheme regarding surveillance or we have a specific workplace surveillance Act, I do think ideally Victoria needs its own legislation to address these balance issues you are raising and provide guidance to employers and workers about how to manage these issues. There is a range of different ways you could approach it in the legislation, many of which have been previously canvassed by the Victorian Law Reform Commission. I do think Victoria needs legislation. Maybe that has to wait until we know what is happening at the Commonwealth level, but I do think that is really important.

In terms of our findings, as I said, we looked at nine different industries and they included building, metal and civil construction. We found about 4 per cent of those agreements included clauses. Road transport I think is an important area because obviously there are legitimate reasons for road transport companies wanting to monitor their drivers. But we have seen a lot of over-the-top use of technology in truck cabs and delivery driver cabs and things like that. Still only 6.9 per cent of agreements we found in that industry had these clauses. Electrical contracting was at 7 per cent; mining, 5 per cent; and local government was the highest proportion at about 10 per cent in that local government administration. But then we looked at other industries where you would think this would be an important issue, including health and welfare, and only 1.2 per cent of agreements in the last two years have included these clauses.

**Anthony CIANFLONE:** In our last hearing we heard from quite a few unions, including Trades Hall, where there were almost no examples, from what I can recall of that evidence, of their experience of employers

proactively bringing such measures to any bargaining table as part of a new EBA or updated EBA. How would that work if this space were to be better legislated or enforced or monitored? How would such measures be considered and made provision for in future EBAs? What does that look like?

**John HOWE:** At the moment it kind of depends on what any legislation looks like. To what extent the enterprise agreement needs to address these issues depends on—usually if you have got the legislation in place, that protects everyone, then the enterprise agreement is just going to reinforce that and then look to address the gaps, I suppose, in the regulation. So it kind of depends a bit on what those gaps are going to be in the future, but at the moment there is a lot. In the US, for example, the communications workers union has a policy on this and has modelled enterprise agreement clauses to try and deal with this issue because the legislative frameworks are inadequate. Yes, I think it really does depend on what changes are going to be made to the regulatory framework and then what gaps need to be addressed. Again, I think at the very minimum we are looking at notice of change in what practices are used for data collection, surveillance and algorithmic management; consultation over the introduction of those practices and how they are going to be managed; and then a management framework for issues that arise in relation to the use of the technology. You can have that mandated through regulation, or the state might have a code of practice. You might decide that this is a regime you want to target for particular-sized enterprises, although I think it is common across small to large enterprises. You might have a code of practice which firms have to show they have signed up to and are observing. You might have a best practice approach where you are providing the kind of model practices and looking at different ways the government can promote those, from mandating to more educational approaches.

**Anthony CIANFLONE:** Thank you.

**The CHAIR:** Thank you so much, Professor. I am just mindful of time. We could ask you a whole lot more questions. If there is anything that has sparked your interest today in terms of questions, we do allow you to make a further submission, or if you would like to add anything further to your contribution today, you can send it to the Committee. Thank you so much for your time today. We really appreciate it.

**Witness withdrew.**