

TRANSCRIPT

LEGISLATIVE ASSEMBLY ECONOMY AND INFRASTRUCTURE COMMITTEE

Inquiry into Workplace Surveillance

Melbourne – Friday 1 November 2024

MEMBERS

Alison Marchant – Chair

Kim O’Keeffe – Deputy Chair

Roma Britnell

Anthony Cianflone

Wayne Farnham

John Mullahy

Dylan Wight

WITNESSES

Matt O’Connor, Deputy Secretary, Industrial Relations Victoria, and

Sharon De Silva, Director, Secure Work, Industrial Relations Victoria, Department of Treasury and Finance.

The CHAIR: I begin today by acknowledging the Wurundjeri Woi Wurrung people of the Kulin nations, the traditional custodians of the land on which we meet today. I pay my respects to their elders past, present and future and extend that respect to all Aboriginal and Torres Strait Islander people here today.

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

Welcome to the public hearings for the Legislative Assembly Economy and Infrastructure Committee's Inquiry into Workplace Surveillance. All mobile telephones 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 of this 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.

Thank you, both of you, for being here today and coming to answer a few questions for the Committee. What I might do first is allow the Committee to introduce themselves. Then we will hand over to you for an opening statement of 10 minutes or so, and then we can jump into questions.

I am Alison, the Chair and Member for Bellarine.

Kim O'KEEFFE: Good morning, Matt and Sharon. I am Kim O'Keeffe, Member for Shepparton and Deputy Chair.

Dylan WIGHT: Hey, I am Dylan Wight, the Member for Tarneit.

Anthony CIANFLONE: I am Anthony Cianflone, Member for Pascoe Vale.

Wayne FARNHAM: I am Wayne Farnham, the Member for Narracan.

John MULLAHY: John Mullahy, Member for Glen Waverley.

The CHAIR: Thank you, I might head over to you.

Matt O'CONNOR: Terrific. Thank you, Chair. And thank you for having us here today. We are delighted to be here to present Industrial Relations Victoria's viewpoint in relation to the Inquiry. I am here with Sharon De Silva, who is the Director, Secure Work, Industrial Relations Victoria, and I would like to acknowledge the work that Sharon and other members of the team, including Sam and Clare, who are in the public gallery, have made to the submission that has been put together and the material that we will present today.

I will make a brief opening statement, Chair, if that is okay. I should indicate from the outset that the submission that you have before you was prepared with input from across the Victorian Government, not just Industrial Relations Victoria. To that end, I also note that you will be hearing today from the Chief Executive of WorkSafe, who will no doubt be able to outline how health and safety matters and regulations intersect with workplace surveillance matters.

Much of our input today will be drawn from our submission, touching on the existing legislative framework in Victoria, and will be consistent with existing Victorian Government policy insofar as it exists in this space to date. Industrial Relations Victoria's primary role in relation to this work will be to work with other areas of government to respond to your recommendations. At this stage we are not engaged in policy work in relation to surveillance other than in preparation for this Inquiry. I should be clear about that. That may mean some of my answers are a little bit disappointing on the excitement scale. If you ask me about whether we are going to go in a certain direction, I will not be able to go too much further than where we exist currently, but I am happy to engage with those issues.

I should also just provide you with a quick overview of Industrial Relations Victoria within the Department of Treasury and Finance. We are the lead agency for developing industrial relations policy and initiatives in

Victoria. We support the Minister for Industrial Relations, who has portfolio responsibility for industrial relations matters in both the private and the public sectors. We lead the Victorian Government's participation in workplace-related reviews and inquiries like this, so that can be at the state level and also the Commonwealth level. We often participate in Senate inquiries and House of Representatives inquiries as well, and we generally support the Government's advocacy and participation in the Commonwealth industrial relations system, particularly important in Victoria of course given the extensive referral of powers that was first made in 1996 and renewed in 2009. So we are heavily engaged with the Commonwealth when changes to the Fair Work legislation occurs and are consulted around that.

We support also public sector departments and agencies with industrial relations matters, enterprise bargaining and the Victorian Government's wages policy. We also provide expert and strategic advice and assistance to government on private sector industrial relations matters, workplace relations reforms and emerging issues and risks—like this one.

The industrial relations portfolio also includes three statutory independent bodies. The Labour Hire Authority, the Portable Long Service Leave Authority and Wage Inspectorate Victoria all sit within the IR firmament, if that is the word. We are responsible for a range of legislation, including the Long Service Leave Act, the Child Employment Act, the Labour Hire Licensing Act, the Construction Industry Long Service Leave Act, the Long Service Benefits Portability Act and the Fair Work (Commonwealth Powers) Act, which is the referral legislation I mentioned earlier.

Our submission goes to the issue of the interaction between Commonwealth and state laws, and while, as I said, we have referred most of our industrial relations powers to the Commonwealth, section 27(2)(m) of the Fair Work Act preserves the state's power to regulate workplace surveillance matters as indeed it does for other states. This means that legislation on regulating workplace surveillance remains within the legislative capacity of the state, unlike some other matters, and to the extent that any final form of any proposed reforms is entered into, they will need to operate consistently with national fair work laws.

That has particular relevance given evidence I think you have already heard about current Commonwealth inquiries and reforms to the Privacy Act. At the moment, as you have been told, there is limited direct federal legislation in relation to workplace surveillance, and therefore theoretically the risk of inconsistency with any state legislation is minimal. But of course that could change, and we have always got to keep one eye on whether or not the legislation or reform that we introduce is consistent or inconsistent with the Commonwealth regulation, and that will be a factor.

One area of overlap I should also mention—and you have also heard evidence about this—is in the area of consultation on change. As you would be aware, federal awards and agreements provide clauses which require employers to consult employees on major change. The extent to which that would include workplace surveillance is probably an interesting academic—or more than academic—point. But potentially of course there is overlap in that space.

Just finally, on the public-sector side of the fence, public sector employers are responsible for ensuring that their workplace surveillance policies and practices comply with the applicable regulatory framework as it exists. I should indicate, perhaps not surprisingly, that IRV does not oversee workplace surveillance by public sector agencies—that would be an impractical and impossible role—but we do provide advice and assistance when asked about it, and public sector employers, like all other employers, do have an obligation to consult on areas of major change. I will finish on that note. Thank you for allowing me to make an opening statement. I am in your hands.

The CHAIR: Thank you. Thank you so much, Matt. That really helps to set the scene for our questions. And thank you for your submission; it was very comprehensive. We really appreciate that. We might just start with some questions, and then we can have a conversation, really. Kim, I might go to you first.

Kim O'KEEFFE: Thank you so much for your submission and to the team that has put it together. It is really great and helps us really get a snapshot of what you are doing and what that looks like moving forward. There is still obviously a lot of work and conversations to be had around that. Your submission does mention that workplace surveillance laws have not kept pace with surveillance technologies, and you have touched on

that. What are the specific technological and workplace changes that have occurred since the pandemic where the law has failed to keep up?

Matt O'CONNOR: I think, Ms O'Keeffe—and I go back to well before the pandemic in a sense—you have got evidence that the last changes to the Surveillance Devices Act were in 2006. It is fair to say that—I am not by any means an expert in IT, and with these sorts of things, like a lot of people, I play catch-up—if you look back over 18 years, there are a few things that are now in place that we probably had not even envisaged could exist let alone understand what they would do. Clearly when the Surveillance Devices Act was introduced it focused on optical surveillance tracking devices, I think, and listening devices, which perhaps are no longer as prevalent as they might have been back then. Clearly since then we have had a range of technologies come into play around monitoring emails and internet usage, with much more sophisticated tracking of geospatial devices and a range of other matters. I think the submissions to the Inquiry and the evidence that you have heard bear out that given that that legislation was last looked at in 2006, we have moved on so far, so I think it is probably time we should be looking at it again.

Kim O'KEEFFE: Yes. I suppose we know the workplace changed during the pandemic. Was there any evidence that some changes had occurred since the pandemic from those learnings during that time of lockdowns and working from home? Obviously there were different reasons why we needed to do that, because people were in a very different workplace situation working from home, and that has continued. I was just interested if there had been anything that had changed since then.

Matt O'CONNOR: Yes. To pick up on that specific point, absolutely. Clearly there was a view from probably employers and to a lesser extent employees that there needed to be some level of surveillance around working from home. We were all grappling with the new world and hybrid work, and no doubt there has been fairly widespread introduction of the kinds of surveillance that did not exist before the pandemic as well. You are quite right.

Kim O'KEEFFE: Thank you. Thanks for that.

The CHAIR: Dylan, on to you.

Dylan WIGHT: Thanks, Chair. And thanks, Matt, for that really comprehensive overview of your role at the beginning there. Your submission talks about the reasons employers may conduct surveillance. I think Kim just sort of touched on some of them around that COVID period and more people working from home et cetera. What steps could Victoria take to ensure that employers only use surveillance for legitimate reasons?

Matt O'CONNOR: I think the best way to answer that question, Mr Wight, is to go back to the starting point here. Again, reviewing the submissions and the evidence that have come before you, I do not think anyone is saying that there should be no workplace surveillance. There are obviously legitimate usages, as you have indicated, in the safety area, monitoring work practices and performance. But clearly there are examples where it has been used in a way that perhaps was not originally intended or has adverse impacts on workers, and there are various examples of that provided to you in the submissions and statements.

In terms of the hierarchy, if you like, of what could be done—again, you have heard about the regulation in other places—it seems to me that you start from the point of Victoria's legislation, which has limited prohibitions in relation to private spaces. You then move to what might be the next level, which is a requirement to notify employees when surveillance is introduced, and as you know, that is a 14-day notice period under the legislation in New South Wales and the ACT. The notice obviously takes you so far. I think the general tenor of the submissions has been that the limited form of consent that is provided by employees currently does not mean much. I know when I turn my computer on and I click on 'Okay', I rarely read what I have just agreed to, and it presumably said Big Brother is watching me and I had better behave. Clearly that does not really add much to the equation.

Once you go beyond notification, I suppose the next level you might look at is the requirement to consult on the introduction of technology, and at that point presumably, if you went to that level—and I am not saying yet that we would—you would introduce the notion of having a conversation about what the surveillance is being used for and whether there are legitimate purposes or not.

Dylan WIGHT: And as part of that, would you foresee, I guess, workers having access to that surveillance, particularly in certain circumstances, whether it be around disciplinary issues or things of that nature?

Matt O'CONNOR: Yes, I think that is definitely one element that you would look at in terms of the transparency of the surveillance. What is it, how does the tool work, how is data collected in relation to that and what is done with that data? They are all areas that you would imagine would be part of any consultation that would be required if you went to that point. Obviously if you just go to the sort of notification level and you do not go further than that, then the opportunity to delve into those sorts of issues is more limited, clearly. But I think I am right in saying that in the ACT they go a little bit further than New South Wales in having some level of consultation.

Dylan WIGHT: I think there is consultation in the ACT, yes.

Matt O'CONNOR: The other thing to say about consultation in the industrial relations space is that it has a fairly accepted meaning, which is it is not a veto on the introduction of change, it is a requirement to genuinely consult and take on board feedback, whether it be from unions or employees in this case, but ultimately the decision will still rest with the employer. There are many examples of what that looks like in the industrial relations context under enterprise agreements and in the Fair Work Commission. So you get to what you might call the next level above notification, being consultation. And then there is I suppose theoretically a third level, which is some kind of restriction on the use of surveillance or ban on it, and that is where you are getting into areas where you might, for example, look at covert surveillance—there is a restriction on doing that unless you get an order from court. So you are moving into that space, which would be the next level I think. Then I think the other area which maybe we are also going to talk about is how data is used and managed from that surveillance.

Dylan WIGHT: We have heard some evidence around that consultation, that there are consultation clauses in most modern awards around having to consult when major change occurs, and I think you sort of touched on it in your opening remarks. I think there is such a grey area as to what is a major change in this space. We have just heard evidence that those consultation clauses in those industrial instruments are just not fit for purpose for this and they are not just being utilised for this purpose.

Matt O'CONNOR: I think that is a reasonable comment. I mean, perversely, you might say if you do not know you are being surveilled—

Dylan WIGHT: Then it is not a major change, is it?

Matt O'CONNOR: then there is no change to your work. I do not think you would adopt that necessarily narrow approach, but it may be that employees go through their day-to-day work with no change whatsoever. But I think we need to look at a more expansive coverage of those clauses. I think inevitably—I do not know that anyone has done any sort of sophisticated work on this, but I would imagine that unions and employees are increasingly putting these issues on the bargaining table, and that could well lead to some much more detailed and sophisticated dealing with how you might consult on workplace surveillance. We do not have anything directly in relation to that. For example, in the Victorian Public Service Agreement, which was recently negotiated this year, I think the issue of surveillance might have been touched on briefly. We do have policies which deal with it, but we have not yet got to that level of dealing with it in a very specific way in agreements. But given the advancing technology that we have spoken about over more recent years, it is hard to imagine that will not increasingly become an issue on the bargaining table. I am sure there are examples currently where clauses have gone in—I think in the transport area you might see some clauses around use of tracking devices and things like that which touch on one area—but I think the area is probably ripe for development in the enterprise bargaining and federal space as well.

Dylan WIGHT: Okay. Thank you.

The CHAIR: Anthony.

Anthony CIANFLONE: Thank you. Thank you for appearing and for your submission, and also for quite a few extensive examples about overseas scenarios, which were very helpful. My question is around the establishment or the idea of an independent oversight body. Quite a few of the submissions have flagged the potential need to establish such a body to monitor and oversee and administer any new workplace relations and

surveillance legislation. What is Industrial Relations Victoria's view about the establishment of such a body, and if you are agreeable or supportive or you welcome the opportunity to establish such a body, where do you believe it should sit within the Victorian Government? Should it sit at WorkSafe, in IR Vic or in the office of the information commissioner or stand as its own independent entity?

Matt O'CONNOR: This is one area, Mr Cianflone, where I think I am going to disappoint you slightly—as in, not putting the cart before the horse on this one. What I can say is that there have been examples. There have been some recent examples in government where the move to set up a new body where you might already have existing bodies in place—the merits of that are tested pretty strongly. So I think there is probably more of a default position to look at existing bodies where we can. We have a range of regulatory bodies across the Government, as you know, and if I was to channel the Treasurer, who is also the Minister for Industrial Relations, he would probably lean, I suspect, to looking at options under the existing arrangements. You have heard submissions, and I have seen them—I know OVIC presented a particular view about that. You have got WorkSafe coming this afternoon. Yes, the Wage Inspectorate sits within the industrial relations portfolio, so I think they would be in the mix as well. I think the key here is that in one sense it will depend on the recommendations this Inquiry hands down. If you look at the subject matter that we are covering here, we have not spoken about AI yet, but we are clearly looking at issues that affect workers in the workplace. We are also looking at privacy issues, both in the workplace and perhaps more broadly, particularly with working from home. We are looking at work health and safety issues in terms of the effect that surveillance has on employees, and that is even before you get into the bigger, broader world of AI. So clearly there is a range, and OVIC expressed a view, obviously, that they felt that they were well placed to presumably manage all of that and that there would be consultation with those organisations that I have mentioned and indeed other departments in government to work through what is the best fit. Now, this is obviously presuming that the Inquiry recommends legislative reform, and then obviously the shape of those reforms and the need for enforceability of them will be a factor in determining where it might land. But again, I cannot get too much further down the track than that.

Anthony CIANFLONE: I understand. The submission, as I said, did go through quite comprehensively a lot of the regulatory and legislative frameworks overseas in terms of how this is being rolled out, but I was not really clear around: overseas are there such bodies that are established specifically, whether it is in Europe or America, to oversee their respective legislation?

Matt O'CONNOR: You are probably testing the limits of my research.

Anthony CIANFLONE: You can take it on notice.

Matt O'CONNOR: No, no. What I can say, Mr Cianflone, is if recommendations emerge from this Inquiry and the Government accepts them, then we would definitely look at some of the examples, not just in Australia but elsewhere. I think the answer is, and I think our submission bears this out, there is still not a lot of direct workplace surveillance legislation even out in those what you might call more progressive areas. I think our submission touches on California, but I do not know, Sharon, if you know off the top of your head whether California set up an enforcement body to police it. I will not put you on the spot. But we would certainly look at examples in terms of framing up what we might recommend to government, as I said, in consultation with other departments across government.

Anthony CIANFLONE: Thank you.

The CHAIR: Wayne.

Wayne FARNHAM: Thank you, Chair. Thanks for coming in, Matt and Sharon. You touched on earlier that New South Wales and the ACT are dealing with surveillance at the moment. There are probably a couple of points to this. Do you think Victoria should look at what they are doing at the moment and learn from what they are doing? The other part of this is: you also mentioned we have got to be careful of an overlap with federal as well, so do you feel as though there should be a more national approach to it, that it should be kept jurisdictional or that we should try and work something out between everyone in a broader approach so it is all consistent across borders essentially, so that we do not have this conflict with the Victorian and New South Wales border, especially in those border towns? What are your thoughts on that?

Matt O'CONNOR: That is an excellent question, Mr Farnham.

Wayne FARNHAM: You can call me Wayne. Mr Farnham is my old man.

Matt O'CONNOR: No worries. It is a very good question, and I am not going to duck it; I will have a go.

Wayne FARNHAM: Have a go.

Matt O'CONNOR: Perhaps the best way to deal with this is to look at what we are doing in the labour hire space. We are in the thick, at the moment, of developing a national harmonised model for labour hire in consultation with the states and the Commonwealth. That was obviously a decision made by workplace relations ministers across the country, and it occurred in a climate where you had Victoria and Queensland, the ACT and to a lesser extent South Australia with existing labour hire licensing schemes but none in the other states. It is probably not dissimilar to where we are in relation to workplace surveillance, although I think the legislation is a lot less developed. If you look across the various states and territories, we have got New South Wales and the ACT with some requirements around notification and in the ACT's case consultation, we have got Victoria's perhaps more limited regime and then not a lot in the other states and territories. So the area is ripe for a national discussion, I would have thought.

It is complicated by the fact that, and again you have heard evidence about this, there are I think three things going on at the federal level—there is a Senate inquiry, a House of Reps inquiry, and then there are recently introduced amendments to the Commonwealth Privacy Act, which have been described as a first tranche, with a second tranche to follow. I have not gone through those inquiries and the legislation tooth and nail, but it does seem that they are still on the edge of workplace surveillance; the inquiries are more targeted at the broader topic of artificial intelligence and to an extent data and privacy issues. The terms of reference in at least one of them do raise surveillance as an issue, and so it is possible that those inquiries will come out with recommendations around some kind of workplace surveillance regime, but I would say only 'possible'. It is not clear, in my mind at least, where that is heading.

It is fair to say that certainly at the Commonwealth level there is plenty of space for them to look at workplace surveillance in a way they have not so far. If that happened, and the timing of this is obviously important, if there were recommendations around some kind of workplace regime that would apply at the Commonwealth level, then clearly we would need to, as this inquiry would of course, look at what that would be intended to cover, the timetable for rolling that out and whether or not there is an opportunity for harmonisation around that. But they are all issues that—you know, a lot of that is in the hypothetical space at the moment, because—

Wayne FARNHAM: So would it be fair to say your suggestion to this committee would be that we have to be mindful of what comes out and what is going on federally at the moment, and do you think some of our recommendations should be consistent with that view?

Matt O'CONNOR: I think I would only go so far as to say that, as best you can, you will want to take into account where those inquiries are heading.

Wayne FARNHAM: Sure.

Matt O'CONNOR: And of course there is a timetable issue around this in terms of your report and their report.

Wayne FARNHAM: Yes, that is true too. We are much more efficient.

Matt O'CONNOR: Well, that is right. So if you land first, then you may not have much to take into account at the Commonwealth level. So I think it is probably fair to say you would have one eye on it, because as I think I said in my introduction, again hypothetically, if the Commonwealth were, under their powers—and there is a question about this: what are their constitutional powers to do it—to introduce blanket workplace surveillance, and let us just say they were going to, then the states and Victoria would need to look at that and make a call, as we do in other cases, as to whether there is space for us to legislate or whether there would be direct inconsistency issues as well. You would need to work through all of those things.

Wage theft is a recent example where there was no Commonwealth regulation. Victoria had wage theft laws. The Commonwealth introduced their laws, which were clearly intended to cover the field, which is the expression that is used, and left no room for our laws to continue. Those are things that we weigh up, in this

portfolio particularly, quite regularly. It is a really shifting space—so a longwinded answer to your question—because those inquiries are still progressing slowly. I mean, you can obviously see the amendments that have been introduced—in September, I think—to the Privacy Act. They do not really, as far as I can see, get too far into the workplace surveillance space. I am not sure of tranche 2. I am not aware of what is in tranche 2, but they may. I am not sure if there is publicly available information around that yet.

Wayne FARNHAM: You did not duck it; you did well.

The CHAIR: John.

John MULLAHY: Thanks, Chair. Thanks, Matt and Sharon, for attending today. Your submission goes to the discussion on work intensification, the importance of KPIs—it is the buzzword of today—and that the KPIs are shifting from incentives to discipline. My question is: in what ways can constant workplace surveillance intensify work, and what are the risks that that poses to workers?

Matt O’CONNOR: It is a good question. As I said at the outset and a number of people in this inquiry have said, there are legitimate uses of workplace surveillance. I think there is a scale around monitoring workplace practices and processes, and you could presumably argue that up to a certain point the use of surveillance to improve work processes is a legitimate exercise. Clearly there is evidence. We do not bring any of our own research into this—we have not done our own reports—but we summarise some of the material that is around on this issue, both reports that had been done before this inquiry and some that have been presented to the Inquiry. But clearly there is a line in which some surveillance involves a level of monitoring of individual employees that does create stress and tension and presumably becomes counterproductive. That is something I think you will hear about from WorkSafe today, which is obviously all employers have an obligation to provide a safe workplace and consult on anything that might impact on that. I do not think it is controversial to say that there are certain uses of surveillance which would stray into those areas, and you have got evidence before you in the submissions around that. As I said, I think there is a continuum along which you sometimes might overstep the mark in terms of the use of that, where it gets more into monitoring individual employees rather than a system of work, which I think would need to be looked at.

John MULLAHY: The example of gig workers where essentially their whole job is based on the fact of their delivery and all that sort of thing means that the surveillance is there for their job, essentially.

Matt O’CONNOR: The whole job is surveillance; that is right. Sharon has some familiarity with this because she has done a lot of great work in the gig worker space. As you know, again, this is another area, coming back to Wayne’s question, where Commonwealth regulation has come in more recently, but Victoria did a lot of work in the gig economy space in terms of introducing standards which touch upon this issue of the use of technology and things like that and the right for employees to know how that technology is being used. I know it is a big issue for gig economy drivers who do not know why they are missing out on jobs or why they have suddenly been taken off the platform.

John MULLAHY: The explanation of the algorithm.

Matt O’CONNOR: That is right. The algorithm is everything, but how does it work? How does it work on Spotify—why does that song suddenly come up after I played this one? But I think, yes, that comes back to the transparency issue, which I think is a lot of this. The question really is: how far do we go in terms of assisting employees to understand how this technology actually affects them? That is the key, I think.

John MULLAHY: Thank you.

The CHAIR: Sharon, do you want to elaborate on the gig—

Sharon DE SILVA: I was just about to say that we did release some voluntary standards that are on the internet, which we could forward to you, that cover some of the types of issues that might help employers and employees in managing those relationships relating to transparency, so things around consultation and ensuring that workers understand the terms of their arrangements and how those arrangements affect their income and outcomes. We could forward that to you if that is useful.

John MULLAHY: That would be great.

The CHAIR: Did you want to elaborate on the gig economy kind of work that you have seen? Is there anything particular that we need to note in that gig economy space?

Sharon DE SILVA: I think Matt has touched on it, in the sense that the notion of algorithms and other mechanisms of determining rates of payment and the rewards for how quickly you might deliver something determine those outcomes, and workers would not necessarily know how those algorithms are calculated or determined. That is probably one of the important things. They are very clearly linked to outputs and income that you earn, but there is not necessarily that knowledge or understanding about how that is worked out. So if you work on a Friday night and it is a really peak period of time and you are paid more for delivery, there is not necessarily a clear understanding of those relationships with those peak times because they relate to things like surges in work or not having enough drivers on the road and those sorts of things. Whereas when you have an award or an enterprise agreement, you clearly can see your rate of pay and the hours that you work, overtime rates and other things, where it is very clear. But for gig workers, they would often get something on their app, and they would click ‘Yes. I agree to those terms,’ much like the policies that you agree to when you sign on as a public servant and you do not necessarily know exactly what they are or how they might determine your pay or income.

Matt O’CONNOR: I think there is a broader question here too around the extent to which you broaden your recommendations to cover all forms of worker. As you know, gig workers by and large are not common law employees, so in terms of regulation it is hard to see why the workplace surveillance issues are any different. In fact they are probably more accentuated in the gig economy space than, say, for the standard common law employee area. So that is certainly a factor that would need to be built into both the recommendations and our response to them around perhaps not adopting too narrow a definition of ‘worker’ in this space.

The CHAIR: I might just lead on from that, then, and talk about algorithms and things like that. What are you seeing in the AI space, and do we have enough safeguards around the use of AI?

Matt O’CONNOR: I think again you will test my technological expertise here, although I have been involved in some discussions about the use of AI in government. It is worth noting that there is some work going on within the Department of Government Services around how AI is used across the public service, and some guidance is coming out around that. The particular issue is just some of the privacy issues that can arise when you input material into a generative AI tool. That has been the focus of the work so far. I think there is a general view that we do not want to stifle innovation and there are lots of really interesting and productive uses to which AI can be put, but there are also some security issues around some of the tools that are available on the internet and the level of privacy that they do or do not involve. That has been the focus of the discussion within the service.

For the purposes of this inquiry I think AI is probably just another tool that is used in the workplace surveillance pantheon, if that is the word. In terms of the actual risks associated with the use of AI, I think that is a distinct topic and one that I mentioned before—the various policy areas of government that would look at this. I would not describe that broader issue as a purely industrial relations issue. It is more about use. There are probably job industry issues that arise from it. Obviously there are concerns about AI displacing workers, which is a much bigger issue and, without being presumptuous, probably bigger than this inquiry. We have really been approaching the issue of AI as part of the tools—that workplace surveillance is just another one. That brings you back to, again, the design of regulation here. Again, I know this has been discussed by various submitters. We have had examples of why if you try to define things too narrowly, 5 minutes later something else is invented, so you definitely want to be considering how any reform that was recommended was able to cope with other new areas, and AI is obviously one of the more recent ones.

The CHAIR: Some witnesses have talked about how AI has to be fed something to make decisions anyway, so what is that information being fed to it? But also the decision-making process—what outcomes are they coming to?

Matt O’CONNOR: The guidance I spoke about before in relation to the Department of Government Services also makes that point, which is: we are still as public servants responsible for our decisions and our policy advice. We do not hand that over to AI and just let it roll—exactly. It is just as important to check the input that is going into that AI and verify that it is accurate and reputable. They are all challenges that no doubt

most workplaces are grappling with, but particularly in the public service where decisions that are made have such an impact across the economy.

The CHAIR: I know I am no tech expert either, but the evidence is talking about how even platforms or technologies that may have been initiated to just watch your keystrokes actually have a different application as well behind the scenes. They can do another couple of things, and then employers go, ‘Oh, that might be interesting to watch as well.’ AI, the way it is developing, is very unknown in what it will actually be able to do into the future.

Matt O’CONNOR: We have talked about consultation, that the level and the timing of that consultation and the updating of that consultation would be an issue if you were minded to recommend some requirement to go down that road. Then there would be a question about at what point that consultation needs to reoccur if the technology suddenly reveals some other new application that no-one had thought of in the first place. I think we refer in our submission to a case in the Fair Work Commission which involved some geotracking, and the fact that it was not the main purpose of the technology. The legislation basically said there were restrictions on its use if it was the primary purpose, but in this case it was the secondary, and the Fair Work Commission accepted evidence related to it. I think that bears out the fact that, yes, with these technologies people just do not know at the moment what they can do. It is still going to keep unfolding and probably at a more exponentially faster rate.

The CHAIR: It is almost experimental, though, isn’t it, as we go?

Matt O’CONNOR: It is. Yes, that is right.

The CHAIR: Thank you. We have still got time for a few more.

Kim O’KEEFFE: Are you sure?

The CHAIR: Yes.

Kim O’KEEFFE: My question is around the employer, because at the moment I think some of them are quite concerned about what this might look like for them to be compliant. So if Victoria were to introduce specific workplace surveillance laws, what supports could the Victorian Government provide employers to assist with the compliance?

Matt O’CONNOR: It is an excellent question. Look, it is one that we face whenever we introduce new reforms. Inevitably part of the advice would be—again, I am in a hypothetical space—if recommendations were made to introduce new requirements, then as part of that we as a department would always seek resources to ensure that we were able to provide education and assistance. Maybe the best example to give you is the Wage Inspectorate Victoria. It has a compliance function, yes, but it also has always had very much at the forefront of its activity education and bringing employers along, particularly with new legislation. A lot of effort is put into making sure that there is, even before the legislation comes into effect, education, advice and assistance. In this case, with employers, I would very much see that as being part of the equation, and it is required.

Kim O’KEEFFE: Great. Thank you, Matt. And I suppose there is concern around cost—you know, what this means to my business if this is going to be a significant change and how we actually support those businesses along the way or organisations or whatever that is. I think they have been watching this space and wondering what that might mean—because things are tough, as we know—and to what sort of extent this is going to impact.

Matt O’CONNOR: I mean, again looking at the only examples we have in Australia at the moment, if you look at New South Wales and the ACT, the obligation is to notify and to consult. You might need additional resources perhaps in terms of a HR resource to manage something like that. So I do not see that being in itself a huge cost. I think the cost is in buying the stuff in the first place, probably.

Kim O’KEEFFE: Yes. Too true.

Matt O'CONNOR: But yes, look, inevitably there are resourcing issues, but I think your first point around employers, particularly small businesses needing assistance and advice, is something that we in government try and resource ourselves.

Kim O'KEEFFE: As you can imagine, we have heard from both sides. Some organisations are really supportive of seeing quite significant change, and others are very opposed to that. They do not often see the need to actually go to what they are doing at the moment, so it is an interesting time.

Matt O'CONNOR: No, and again that is perhaps not unusual in this space. I have to say that in reviewing the submissions and the evidence that has been given, I would not describe this issue as partisan as some others in the IR space. I mean, as I said before, I think there is an acceptance that some level of workplace surveillance is beneficial. I mean, it was interesting to read the Business Council of Australia submission, where they talked about obviously if you are a national employer and you are already complying with the New South Wales regulation, then it makes sense that the rest of your business does the same for consistency. So for national employers you would expect that quite a few of them adopt that approach, which is a minimum requirement in one place. They would obviously consult with their New South Wales colleagues as to whether or not it was causing grief, but generally I was interested to read that a lot of their members basically use those standards outside New South Wales and the ACT.

Kim O'KEEFFE: It is an interesting perception too. I have been talking to some of my close associates and friends about what I am doing on this committee, and they are quite interested, actually. Again, it is quite interesting. One lot will say, 'There goes our privacy—to what level?' and the other will say, 'I feel safer. This is going to be a much-needed change.' I think that is the balance that we are seeing, and hopefully somewhere during this inquiry we will get that real level of expectation but also requirement.

Matt O'CONNOR: I think that is right, and I think that is where you cross over from that 'us versus them' approach. There are definitely benefits. Particularly in the safety space in warehouses and things like that, you can imagine employees feeling a lot safer if they know that there is CCTV footage or other things.

Kim O'KEEFFE: We found it really interesting too with the submissions that have come through—just the diverse opinions—but some of the input has been so helpful and so interesting.

Dylan WIGHT: Can I just ask something on that point, Chair? It was sort of around compliance. Compliance can be at times difficult in any sort of industrial legislation or industrial landscape, particularly in small businesses. You sort of said with that education piece, particularly for those small businesses that do not have those large HR resources that larger companies do, that the Victorian Government would do a lot of the education piece. What exactly does that actually look like?

Matt O'CONNOR: Well, there are various forms that can take. There is obviously the use of the internet and sites. There are many sites particularly in our area where you will be able to access hopefully pretty clear and concise information that steers you in the right direction. There are consultation sessions that can be set up where people are invited to attend, and that could be online, obviously, as well as in person. Then when issues arise—and again this is what you would call scalable enforcement. I mean, you do not drop the hammer hard, particularly early on, and there are various enforcement tools that are used in other places, like infringement notices, which are short of prosecuting someone for a civil penalty, where you might issue an infringement notice and a requirement to fix the problem but there is not necessarily a conviction or a fine in relation to those things. So you start off with education and you start off with bringing people on board and just making sure they understand their obligations. Then if there is repeat conduct, you obviously look at going up the scale.

Dylan WIGHT: And do you think employer associations probably are going to have to play a role in that? Take the VACC, for instance. Most quite small automotive shops are members of the VACC, some of the larger dealerships and OEMs and stuff obviously are not. You know, they might use those employer associations to contact their members to let them know. Honestly I would suggest that somebody that might own a mechanic shop and employ two people in Dandenong would not have a clue that we have passed this legislation—if we do.

Matt O'CONNOR: Absolutely. A general answer is yes. We would expect that employer associations would be willing and wanting to participate in disseminating information around the laws, and we would work with them as we would work with unions as well to make sure that the message gets out there in any way it can.

They regularly would engage in that activity once new laws come in, whether it is at the federal or the state level. They will always be working to keep their members informed, and we interact with them in a range of other areas across the industrial relations space to do that.

The CHAIR: Anthony.

Anthony CIANFLONE: To what extent does IR Victoria believe that current workplace surveillance activities or standards, or lack thereof, are impacting things from a worker point of view? I guess we have heard—which I totally acknowledge and sympathise with—from a business point of view what some of the complications or difficulties may be in terms of implementing new regulation or laws. But in terms of a workers point of view under current standards, we have heard from quite a few different unions in terms of how their members and workplaces are impacted. For example, we heard from the laundry sector around how there are screens along their respective assembly lines to monitor how many items are being processed by respective workers and then the other side of that around the impact on anxiety and the like in the workplace. From your point of view, from a workers point of view, how is surveillance impacting or affecting workers on the ground?

Matt O'CONNOR: I go back to something I said earlier, which is that, not for any particular scientific reason, we have not embarked upon our own extensive research into this space, probably because we are just dealing with a myriad of other issues, and we obviously work to the government of the day in terms of policy priorities. Frankly I am not in much of a different position to you in this case in that I have read the submissions and there is available research. If you go all the way back to 2005, there was a Law Reform Commission report on workplace surveillance which led to some of the changes that happened in 2006. But I think the answer to your question is IRV does not have any independent information about the impact on workers; we pretty much rely on the published research and submissions to that inquiry. But clearly, if you look through those submissions and that research, you can see the impact that unbridled or inappropriate use of surveillance can have on workers. Again, I am not sure whether Joe Calafiore from WorkSafe will give you any examples of the safety area, but again there might be examples that crop up there.

Anthony CIANFLONE: Even from a public sector point of view, given your role broadly across the public sector and all the different departments and entities and organisations, there may be some unique insight or experiences from your dealing around the respective EBAs that you guys work through.

Matt O'CONNOR: It is a good question. I have to say, and this is really anecdotal, so many issues crop up in this space from the public sector side of things in disputes that we are involved in and are assisting with. This is not one which has got too high up the pile, if that makes sense. I do not know what the reason for that is other than I suspect we are still in that exploratory stage. I think one of the keys is 'What's the surveillance used for?' The surveillance is probably happening, and in 90 per cent of the cases the surveillance continues and there are no—well, 90 per cent might be a bit much, but in a lot of cases there are no necessary repercussions from the use of the surveillance. If it has been used for the purposes that it was intended and those purposes were legitimate, then you probably do not have an issue. It is only when a dispute arises that it bubbles to the surface and you might get—there are some examples, and I do not know whether we have had a recent public sector case—someone who is disciplined or dismissed where surveillance was part of that happening. That might become an issue, say, in the Commonwealth Fair Work Commission about how that technology was used and whether it was inappropriate. So you have those sorts of individual cases that only arise once there is some dispute or the employer takes action in relation to that, on which I think certainly in the core VPS is not something that statistically has appeared on our screen. It might be a bit different in the broader public sector as you go out into the agencies.

Anthony CIANFLONE: But it could be a bit of a catch 22 as well, going back to your earlier comments along the line that this is not an issue that really has elevated itself into that EBA sort of standalone level as yet, and that may very well be because, as we have been discussing, a lot of employees really are not fully aware or do not give proper affirmative consent to being monitored across their respective workplaces as it currently stands under legislation.

Matt O'CONNOR: Yes. I think that is a fair point. I think there is evidence around the fact that—well, we talked before about if consent is really consent when you are just clicking it on. Then even if you were minded to not consent, what would you do then—not turn your computer on? Or would you go to your manager and say—

Anthony CIANFLONE: Pen and paper.

Matt O'CONNOR: That is right. So the ability for an individual employee, particularly at a more junior level, to actually challenge the use, I think it is fairly axiomatic that it is minimal.

Anthony CIANFLONE: Thank you.

The CHAIR: Thank you. Wayne.

Wayne FARNHAM: Back to me. Matt, I am going to lean into biometric data.

Matt O'CONNOR: Now you are really testing me.

Wayne FARNHAM: Better you than me, Matt, that is all I can say. How well are our existing laws protecting the privacy of workers with biometric data? That is one point. The other one is: what are some of the best practices that you are aware of around this space?

Matt O'CONNOR: This is definitely not an area on which I can speak with too much authority. This is where you are probably looking at OVIC and the privacy area. We have not spoken a lot about privacy today. In a general sense I think I did say it was a key plank in all of this. Again, I am not speaking with any great authority on this, but I think the privacy of biometric data is just a subset of the broader issue around the privacy of employee data, and again I would not say that other than in the public sector space there is a lot of regulation around how data is used, how it is stored, whether it is destroyed when it is no longer of use—

Wayne FARNHAM: Or sold.

Matt O'CONNOR: or sold—indeed. So they are all issues, and they have come up obviously in the submissions as well. I cannot give you any precise answer around whether biometric data has its own set of circumstances. I imagine it does, but it is not something that—this would be very much on the outer of Industrial Relations Victoria's sort of purview; this is more in the privacy and data protection space.

Wayne FARNHAM: I was going to ask another question, but we have not got much time, so I will go to you.

John MULLAHY: Yes?

Wayne FARNHAM: Yes. You go.

John MULLAHY: Chair, if that is okay.

The CHAIR: Yes.

Wayne FARNHAM: Sorry, Chair.

The CHAIR: No, you are right.

John MULLAHY: If we look broader out—obviously you did not want to give too much of a thing there on the biometric data—with regard to broader data that has been produced from workplace surveillance, what aspects of the European Union's data protection laws could Victoria adopt to safeguard that workplace surveillance data?

Matt O'CONNOR: I think I might answer that question by saying that obviously, like we would in a lot of cases, putting aside this inquiry, if we were looking at examples from around the country and the world, yes, we would look at some of those examples, and I think we would probably look at them because frankly the regulation of employee data across Australia seems still pretty piecemeal from what I can tell, and again I say that without being an authority in this space. This is an area where, if recommendations were made, I do not see we would be taking the lead on those; it would be the areas in government that deal with the privacy legislation. But in a general sense, looking at where there are not a lot of examples in the Australian jurisdictions, then looking at the European experience would certainly be one area you would go to. I am sorry I cannot be more specific than that—I would be overstepping the mark, I think.

The CHAIR: Thank you. We are out of time now to ask any more questions, but thank you so much for the submission and for being here today to answer our questions. It is very much appreciated.

Witnesses withdrew.