



Victorian
Law Reform
Commission

Workplace Privacy Issues Paper

Victorian Law Reform Commission

GPO Box 4637
Melbourne Victoria 3001
Australia
DX 144 Melbourne, Vic

Level 10
10-16 Queen Street,
Melbourne Victoria 3000
Australia

Telephone +61 3 8619 8619
Facsimile +61 3 8619 8600
TTY 1300 666 557
1300 666 555 (within Victoria)
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

CALL FOR SUBMISSIONS

The Victorian Law Reform Commission invites your comments on this Issues Paper and seeks your responses to the questions that are raised. If you wish to make a submission to us on this reference, you can do so by mail, email, phone, fax or in person. If your submission is in writing, there is no particular form or format you need to follow. If you prefer to make a submission by phone or in person, contact the Commission and ask to be put through to one of the researchers working on the Privacy reference. You can send your written submissions by post, or by email to <privacy.reference@lawreform.vic.gov.au>. If you need any assistance with preparing a submission, please contact the Commission. If you need an interpreter, please contact the Commission.

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Preface

This Issues Paper is intended to promote discussion on the first stage of the Victorian Law Reform Commission's reference on privacy, which deals with privacy in the workplace. The Issues Paper discusses the meaning of privacy, provides examples of privacy issues which may arise in workplaces and discusses the existing laws relevant to these issues. Case studies are used to identify areas where law reform may be needed and the Issues Paper proposes some principles which might underpin such reforms. The Issues Paper asks a series of questions on which the Commission seeks comment from employers, workers, and members of the public. The Commission will also be publishing an Occasional Paper, written by Research and Policy Officer, Kate Foord, entitled *Defining Privacy*, which contains more detailed discussion of the meaning of privacy.

The Issues Paper was prepared by a team of authors. In preparing the Paper, the authors were greatly assisted by members of the Advisory Committee, which was established for the purposes of this reference. I am particularly grateful for the assistance provided by Mr Nigel Waters, who provided comments on the application of privacy legislation to the case studies in the Issues Paper, and by Dr Breen Creighton, who gave the Commission the benefit of his expertise on workplace relations legislation. Ms Suzie Jones from the Victorian Bar prepared a paper on workplace issues which the authors drew on in drafting the Issues Paper. I also wish to acknowledge the helpful comments made by Mr Scott Beattie and Dr Peter Grabosky on earlier drafts of the Paper. David Lindsay from the Centre for Law and Media, University of Melbourne, also provided useful comments on Chapter 2. The Commission is, of course, responsible for the accuracy of the Paper and any views which it expresses.

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Julian Burnside QC

Professor Peter Grabosky, Law Program, Research School of Social Sciences,
Australian National University

Nigel Waters, Australian Privacy Charter Council

Dr Breen Creighton, Partner, Corrs Chambers Westgarth

Scott Beattie, School of Law, Victoria University

Allison Stanfield, e.Law Australia

Anna Chapman, Faculty of Law, University of Melbourne

Dr Gordon Hughes, Blake Dawson Waldron

Contributors

Authors

Chris Dent
 Kate Foord
 Professor Marcia Neave AO
 Professor Sam Ricketson

Editor

Trish Luker

Victorian Law Reform Commission

Chairperson

Professor Marcia Neave AO
 The Honourable Justice David Harper

Part-time Commissioners

Her Honour Judge Jennifer Coate
 Professor Felicity Hampel SC
 Professor Sam Ricketson

Chief Executive Officer

Paris Aristotle AM

Operations Manager

Padma Raman

Policy and Research Officers

Kathy Karlevski

Sangeetha Chandrashekeran

Chris Dent

Kate Foord

Nicky Friedman

Melanie Heenan

Siobhan McCann

Jamie Walvisch

Legal Research and Information Officer

Trish Luker

Librarian

Julie Bransden

Administrative Officers

Naida Jackomos

Simone Marrocco

Lorraine Pitman

Terms of Reference

In light of the widespread use of surveillance and other privacy-invasive technologies in workplaces and places of public resort, and the potential benefits and risks posed by these technologies, the Victorian Law Reform Commission will inquire into and report progressively upon:

(a) whether legislative or other reforms should be made to ensure that workers' privacy, including that of employees, independent contractors, outworkers and volunteers, is appropriately protected in Victoria. In the course of this inquiry, the Commission should consider activities such as:

- surveillance and monitoring of workers' communications;
- surveillance of workers by current and emerging technologies, including the use of video and audio devices on the employers' premises or in other places;
- physical and psychological testing of workers, including drug and alcohol testing, medical testing and honesty testing;
- searching of workers and their possessions;
- collecting, using or disclosing personal information in workers' records.

(b) whether legislative or other measures are necessary to ensure that there is appropriate control of surveillance, including current and emerging methods of surveillance, and the publication of photographs without the subject's consent. As part of this examination, the Commission should consider whether any regulatory models proposed by the Commission in relation to surveillance of workers could be applied in other surveillance contexts, such as surveillance in places of public resort, to provide for a uniform approach to the regulation of surveillance.

In undertaking this reference, the Commission should have regard to:

- the interests of employers and other users of surveillance, including their interest in protecting property and assets, complying with laws and regulations, ensuring productivity and providing safe and secure workplaces;
- the protection of the privacy, autonomy and dignity of workers and other individuals;
- the interaction between State and Commonwealth laws, and the jurisdictional limits imposed on the Victorian Parliament;
- the desirability of building on the work of other law reform bodies.

Abbreviations

ABS	Australian Bureau of Statistics
ACA	<i>Accident Compensation Act 1985</i> (Vic)
AIRC	Australian Industrial Relations Commission
ALR	Australian Law Reports
ALRC	Australian Law Reform Commission
AR	Industrial Arbitration Reports (New South Wales)
Aust Torts Reps	Australian Torts Reporter
AWA	Australian Workplace Agreement
Ch	Chancery Reports (United Kingdom)
CJ	Chief Justice
CLR	Commonwealth Law Reports
CPIRA	<i>Commonwealth Powers (Industrial Relations) Act 1996</i> (Vic)
Cth	Commonwealth
EOA	<i>Equal Opportunity Act 1995</i> (Vic)
EOC	Equal Opportunity Commission
Eur. Comm HR	European Commission of Human Rights
EWCA Civ	England and Wales Court of Appeal Civil Jurisdiction
EWHC	England and Wales High Court
Ex D	Law Reports, Exchequer Division (United Kingdom)
FCA	Federal Court of Australia
FLR	Federal Law Reports
FMCA	Federal Magistrates Court of Australia
HCA	High Court of Australia
HPP	Health Privacy Principle
HRA	<i>Health Records Act 2001</i> (Vic)
ICCPR	International Covenant on Civil and Political Rights
ICR	Industrial Cases Reports (United Kingdom)
ILO	International Labour Office
IPP	Information Privacy Principle
IPR	Intellectual Property Reports
IR	Industrial Reports
J	Justice (JJ plural)
LJ	Lord Justice

Mac & G	Macnaghten and Gordon's Reports, Chancery (United Kingdom)
n	footnote
NPP	National Privacy Principle
NSWLR	New South Wales Law Reports
NSWLRC	New South Wales Law Reform Commission
NSWR	New South Wales Reports
OECD	Organisation for Economic Co-operation and Development
OFPC	Office of the Federal Privacy Commissioner
OHSA	<i>Occupational Health and Safety Act 1985</i> (Vic)
OVPC	Office of the Victorian Privacy Commissioner
para	paragraph
QB	Queen's Bench Reports (United Kingdom)
Qd R	Queensland Reports
RPC	Reports of Patent Cases (United Kingdom)
s	section (ss plural)
SDA	<i>Surveillance Devices Act 1999</i> (Vic)
TIA	<i>Telecommunications (Interception) Act 1979</i> (Cth)
VCAT	Victorian Civil and Administrative Tribunal
Vic	Victoria
VLR	Victorian Law Reports
VLRC	Victorian Law Reform Commission
WAIRComm	Western Australian Industrial Relations Commission
WAR	Western Australian Reports
WLR	Weekly Law Reports (United Kingdom)
WRA	<i>Workplace Relations Act 1996</i> (Cth)

Summary

PURPOSE OF THIS ISSUES PAPER

The Attorney-General, the Honourable Rob Hulls MP, has asked the Victorian Law Reform Commission to inquire into two major issues of public concern in relation to privacy: workers' privacy, and privacy in public places. This Issues Paper introduces the first phase of our inquiry, in which we focus on workers' privacy.¹

The purpose of this Issues Paper is:

- to inform people of the scope and nature of our inquiry;
- to invite public comment; and
- to provide people with the necessary background to make informed submissions to the inquiry.

This Issues Paper raises a series of questions which the Commission has identified as being important to this inquiry. The questions are identified throughout the text and are also listed at the end of this summary. The Commission seeks submissions which specifically address these questions, in addition to welcoming feedback on any matter relevant to workers' privacy generally.

WHAT IS PRIVACY?

Privacy is a difficult term to define. In Chapter 2 we outline an approach to defining privacy and then apply this approach to a definition of invasion of privacy. Our aim is to find a way of conceiving of privacy which:

- is capable of covering the range of practices the Commission has been asked to consider;
- provides the framework for an appropriate balance between employers' and workers' interests; and
- provides the framework for a legal definition of privacy.

Privacy is invariably associated with the terms 'autonomy' and 'dignity'. Autonomy can be defined as self-government and dignity as that human quality which

¹ See the terms of reference, page viii.

distinguishes people from property; that which makes people ‘subjects’ not ‘objects’. We have taken this association to provide a minimal set of features of privacy. This cluster of terms then provides the basis for defining the right to privacy as:

- the right not to be turned into an object or statistic; that is, the right of people not to be treated as if they are things; and
- the right to establish and develop relationships with other human beings, in short, the right to relationships.

This approach to defining privacy goes beyond understanding privacy as necessarily about the privacy threshold of the individual, and sees it rather as a social value. Protecting the social value of privacy is about protecting the capacity of people in our society to be subjects, not objects, and to have relationships.

It is often pointed out that in the face of competing interests, privacy almost always loses.² Our approach attempts to redress this imbalance by proposing that privacy can be expressed as a right, and that this *right* to privacy can then form the basis for determining what are legitimate *interests* in privacy.

Of course, the right to privacy is not an absolute right, but must be subject to limitations. In the context of workers’ privacy, these limitations are formed by the employment relationship itself, and the rights and obligations of both employers and employees. Chapter 2 includes questions about our understanding of privacy and we invite submissions that address this question of a proposed test for invasion of privacy. It also asks whether these tests provide a framework for the balance between workers’ rights to privacy and employers’ interests and obligations.

CURRENT WORKPLACE PRACTICES

Chapter 3 includes 16 case studies which highlight a number of practices that either are or may be used in Victorian workplaces. The range of practices covered in these examples fits broadly into four categories: surveillance and monitoring; testing; searching; and the collection, use and disclosure of worker information.

Surveillance and monitoring practices include:

² David Anderson, ‘The Failure of American Privacy Law’ in Basil Markesinis, *Protecting Privacy*, (1999), quoted in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 63 HCA 63 [119] (Gummow and Hayne JJ).

- video and audio surveillance;
- electronic monitoring and surveillance;
- communications monitoring; and
- biometric monitoring and surveillance.

Testing of workers falls into two broad categories: physical and psychological. Both physical and psychological examinations are used to test the suitability of applicants for positions or to test whether or not workers are capable of undertaking the jobs in which they are employed (for example, alcohol testing of workers who operate heavy machinery).

Searching of workers usually involves a physical examination either of workers themselves or of their property. The capacity of new information technologies also means that searches can be conducted electronically.

Employers have access to a great deal of information about workers. Collection of this information includes job applications, the results of any tests given to applicants, references from past employers and other referees, bank account details for payment of wages, emergency contact details and information about worker performance. There are good reasons for employers to have such information, however, there is also potential for abuse of the information.

Workers, and others, may object to practices which they see as affecting their privacy for a range of reasons. The Commission is interested to receive submissions about whether these practices are objectionable or acceptable in relation to issues of privacy. Employers may implement the practices we describe in this chapter for a range of reasons, including protecting property and assets, complying with laws and regulations, ensuring productivity, and providing safe and secure workplaces. We are interested to hear whether these legitimate interests of employers justify some of the practices that people regard as privacy-invasive.

CURRENT LEGAL REMEDIES

Chapter 4 provides an overview of the existing legal framework for the protection of workers' privacy. Firstly, we provide a description of the law as it currently applies to workers. There are two areas of relevant law: privacy laws, including the Commonwealth *Privacy Act 1988* and the Victorian *Information Privacy Act 2000* and *Surveillance Devices Act 1999*; and workplace laws.

Privacy law is described using the same categories as we use in Chapter 3: surveillance, testing, search and information. Protections available vary between the categories and there are significant gaps in the coverage of the law.

The most important piece of workplace law is the Commonwealth *Workplace Relations Act 1996*. Other Acts, including the Victorian *Occupational Health and Safety Act 1985* and the *Equal Opportunity Act 1995*, however, are also relevant. These laws are discussed in order to show the framework upon which regulation in the workplace is built.

Chapter 4 includes an application of these laws to the case studies provided in Chapter 3. It shows that in some areas the protection available to workers currently is very limited. The 'gaps' that exist, under both the privacy and workplace laws, are highlighted. The chapter concludes with a brief description of possible ways of 'filling' these gaps.

POSSIBLE APPROACHES TO PRIVACY REFORM

In Chapter 2 we suggest that the purpose of workplace privacy reform should be to protect individual autonomy and dignity and take account of the impact of practices affecting privacy on society as a whole. Chapter 4 shows that current provisions for workers' privacy may not be sufficient. Chapter 5 proposes broad principles which may be important to consider in designing reforms which meet the objectives of Chapter 2 and fill the gaps identified in Chapter 4.

These principles are:

- to provide an appropriate balance between the interests of employers, employees and third parties who may be affected;
- to provide a minimum standard of privacy protection to all employees;
- to reflect the requirement that any privacy infringement must be proportional to any benefits gained from the infringement;
- to ensure that measures affecting privacy are transparent to workers;
- to be sufficiently flexible to take account of the diversity of workplaces and of different types of employment relationships; and
- to provide certainty to employers and employees about their rights and obligations.

We are seeking comment on the appropriateness of these particular principles as the underpinning of law reform in the area of workers' privacy.

Broadly speaking, once principles are established, there are two main approaches to law reform beyond simply maintaining the status quo: prohibiting some practices which affect privacy; and regulating activities relevant to workers' privacy. It may be that some practices are regarded as being so privacy-invasive, and so little justified by countervailing claims, that prohibition is the best solution.

If regulation is seen as the most appropriate approach to reform, the question arises as to what form of regulation is applicable. There are three well-known regulatory approaches:

- minimum standards imposed which must be met by the relevant organisation or individual;
- co-regulation, which involves the regulatory role being shared between government and an industry body or occupational representative; and
- best practice, where the emphasis is not on compliance with detailed specifications but on the outcome which the regulation is intended to achieve.

Chapter 5 does not make detailed proposals to deal with particular types of privacy infringement, but is intended to provide the basis for development of such proposals in the future.

We are seeking submissions on whether these or other approaches are appropriate to protect workers' privacy and to balance workers' and employers' interests. We are also interested in what types of enforcement mechanisms would best accompany these approaches.

Finally, Chapter 5 deals with some of the legal issues that may arise in the context of drafting legislation to protect workers' privacy. As Victoria has referred much of its legislative power to make laws covering the workplace to the Federal Parliament, there are some limits placed on the process of achieving legislative reform in this area.

Questions

The Victorian Law Reform Commission welcomes your responses to these questions. We hope that this publication has been useful in providing a background to the formulation of your answers. The Commission recognises that not all people will have an interest in all parts of this Paper and we encourage you to answer as many, or as few, of the questions as you choose.

CHAPTER 2: WHAT IS PRIVACY?

Defining Privacy (see paras 2.26–38)

1. We have identified two key aspects of the meaning of privacy as a human right: the right not to be treated as an object, and the right to relationships. Autonomy and dignity are fundamental features of this right. This approach to privacy focuses on the effects on both the individual and society of breaches of privacy. Is this an appropriate approach to defining privacy?
2. If this approach is appropriate, how should it be developed to provide a definition of privacy as the basis for law reform in this area? Are there difficulties involved in making such a definition of privacy the basis of a legal definition?
3. If you do not agree with this approach, how do you think privacy should be defined? Is it necessary to have a definition of privacy?
4. However defined, should the right to privacy be an absolute right or subject to limitations? What limitations do you think are the most important?
5. How should the right to privacy be balanced against competing rights or interests?

Invasion of Privacy (see paras 2.39–53)

6. The proposed tests for invasion of privacy require those making the assessments to ask the following questions:

- Does this practice reduce anyone subject to it to an object?
 - Does this practice deprive the person of the capacity to form or maintain relationships?
 - What is the context in which the practice occurs, and what are the justifications for it in that context?
 - Are these useful tests for assessing whether a particular workplace practice is an invasion of privacy?
7. Do the proposed tests provide an appropriate framework for balancing the interests of employers and employees? If so, why? If not, why not?
 8. Does our working definition of privacy and of the test of invasion of privacy provide the basis for protecting the privacy of all people, especially marginal groups such as those we have discussed in this chapter? If so, how does it? If it does not, why not?
 9. Should people be able to waive or trade their right to privacy? If so, how would this ability to waive or trade privacy affect the privacy rights of marginal groups?

CHAPTER 3: CURRENT WORKPLACE PRACTICES

Surveillance and Monitoring of Workers (see paras 3.9–11)

10. Are there other kinds of surveillance and monitoring practices in the workplace that the Commission should consider?
11. Do you believe that the practices outlined in the case studies in this section constitute invasions of privacy?
12. Are there justifications for these practices? How would you formulate them?
13. Would your attitudes to surveillance and monitoring differ depending on the employment status of the 'worker' (ie employee, independent contractor, volunteer etc)?
14. Should a distinction be made between the covert and overt application of these practices? If so why? If not, why not?

15. Should a distinction be made between surveillance and monitoring of workers who work within their employers' facilities and those who are working in their own homes?

Testing (see paras 3.12–14)

16. Are there any forms of testing that the Commission should investigate other than those described in the case studies in this section?
17. Does the administration of the kinds of tests described involve an invasion of workers' privacy?
18. Can some of these tests nonetheless be justified?
19. If testing, or at least some forms of testing, can be justified, what safeguards or limits should be placed on this? What issues do you believe to be relevant here?
20. Would your attitudes to testing differ depending on the employment status of the 'worker' (ie employee, independent contractor, volunteer etc)?

Search (see paras 3.15–16)

21. Are there any search practices in the employment context that the Commission should investigate other than those described in the case studies in this section?
22. Do the case studies provide instances of invasions of workers' privacy?
23. Can such invasions be justified?
24. Would your attitudes to searches differ depending on the employment status of the 'worker' (ie employee, independent contractor, volunteer etc)?

Information (see paras 3.17–19)

25. Are there instances of uses of workers' personal information that we should consider in our investigation other than those described in the case studies in this section?
26. Should the practices identified in the case studies be regarded as infringements of workers' privacy?
27. Are there justifications for such practices and how would you describe them?

28. Would your attitudes to the practices affecting information privacy differ depending on the employment status of the 'worker' (ie employee, independent contractor, volunteer etc)?

Balancing Competing Interests (see para 3.20)

29. Have we adequately described and appreciated the competing interests that are involved in the listed case studies?
30. Do any of the case studies describe practices to which workers should not be able to consent?

Concluding Questions (see para 3.21)

31. Are there practices that we have not described in this chapter, but which you have encountered in your daily experience and which you think the Commission should investigate?
32. Does the general approach to privacy protection outlined in Chapter 2 provide you with assistance in assessing the acceptability or otherwise of the practices described in our case studies? (Remember here that we viewed privacy as involving two fundamental aspects, namely dignity and autonomy, and that these aspects could be described more fully as involving the right not to be turned into an object and the right to pursue human relationships: see paras 2.19–25.)
33. Could these same practices be conducted in different ways to achieve an outcome less invasive of workers' privacy?

CHAPTER 4: EXISTING PROTECTIONS FOR WORKPLACE PRIVACY

Gaps in Protection Offered by Privacy Laws (see paras 4.79–83)

34. We have identified significant gaps in the protection offered by privacy laws. Existing surveillance legislation will rarely apply in the workplace, and offers no protection for employees who consent to the practice. There are no statutory provisions regarding testing itself, although privacy laws place some limits on how the information derived from the tests can be used. Physical searching of workers without their consent is covered by common law, but there are few restrictions on electronic searches. Workers'

information is protected to some extent, but significant exemptions and exclusions in the Act mean that this protection is limited. Do the gaps in the privacy laws that we have identified need to be filled?

35. Are there any gaps that we have missed?

Certified Agreements (see para 4.89)

36. To our knowledge, there are relatively few certified agreements that contain clauses that protect worker privacy. Why is this so?

Gaps in Protection Offered by Workplace Laws (see paras 4.105–11)

37. We have identified significant gaps in the protection offered by workplace laws. Awards cannot contain clauses protecting privacy. Other industrial instruments (certified agreements and Australian workplace agreements) rarely include privacy-protective clauses and the provisions in the WRA itself generally only assist workers whose employment has been terminated. Do the gaps that we have identified in the workplace laws need to be filled?

38. Are there any gaps that we have missed?

39. If existing workplace laws can be used to protect aspects of workers' privacy, such as through clauses in certified agreements and AWAs, why is it that this has not occurred?

Filling the Gaps (see paras 4.112–15)

40. Are education and regulation the main ways of filling the gaps? Are there any other ways that this could be done?

CHAPTER 5: PRINCIPLES AND POSSIBLE APPROACHES TO REFORM

Some Broad Principles (see paras 5.2–14)

41. We have identified some broad principles that should underpin workplace privacy reform. These principles are:

- to provide an appropriate balance between the interests of employers, employees and third parties who may be affected;
- to provide a minimum standard of privacy protection to all employees;
- to reflect the requirement that any privacy infringement must be proportional to any benefits gained from the infringement;

- to ensure that measures affecting privacy are transparent to workers;
- to be sufficiently flexible to take account of the diversity of workplaces and of different types of employment relationships; and
- to provide certainty to employers and employees about their rights and obligations.

Do the proposed principles provide an appropriate basis for the protection of workplace privacy? Are there any other principles which should be taken into account in considering workplace privacy reforms?

42. Which, if any, aspects of workers' privacy should be covered by minimum standards and should not be subject to bargaining?
43. How should workplace privacy reforms take account of differing circumstances existing in differing workplaces?
44. Should the same minimum privacy standards apply to all types of employment relationships or should different standards apply to part-time or casual employees or outworkers?

Approaches to Reform (see paras 5.15–25)

45. If it is clear that new laws should be made to protect workers' privacy, there are two broad approaches to be considered: prohibition and regulation. Some practices should perhaps be prohibited, attracting penalties for breach of this prohibition. Workplace privacy in general could be subject to regulation, the three major approaches to which are minimum standards, co-regulation and best practice. Which of these approaches is appropriate for the protection of workers' privacy?
46. Are there approaches more appropriate to the protection of workers' privacy that the Commission should consider?

Enforcement Mechanisms (see paras 5.26–31)

47. There are a number of mechanisms that could be applied in enforcing a regulatory regime regarding workers' privacy, including criminal penalties, civil remedies and a complaints procedure. Are there other enforcement measures which the Commission should consider?
48. What is the most effective means of ensuring compliance with workplace privacy laws?

Chapter 1

Introduction

REASONS FOR A REFERENCE ON WORKERS' PRIVACY

1.1 The Commission has been asked by the Attorney-General to examine two major issues of public concern in relation to privacy: workers' privacy and privacy in public places. In the initial phase of our inquiry, we focus on workers' privacy, including examination of the surveillance of workers. During the second phase of the project we will investigate surveillance in public places.³

1.2 There is increasing evidence of public concern about privacy and its infringement.⁴ Both federal and state parliaments have introduced privacy-protective legislation over the past two decades, and federal and state privacy commissions have been established. The introduction of such protections is, in part, a response to the increasing capacity of new technologies to reach into areas previously unassailable.

1.3 The centrality of work to people's lives makes the issue of privacy protection in the workplace an important one. Work provides people with more than financial security: it is also a source of social and community life; a place where what one values and works for is shared with others; and a way of contributing to the community in which one lives.

1.4 The rise of information technology has permitted, and perhaps impelled, radical changes to workplace organisation and workplace culture.⁵ These changes, and their effects on workers, are of concern both to workers themselves and to the general public. At the same time, workplace relations have changed with the

3 See the terms of reference, page viii.

4 See Office of the Federal Privacy Commissioner, *Community Attitudes to Privacy*, Information Paper 3 (1995), available at <www.privacy.gov.au/publications/page1.html#19> (18 July 2002).

5 See Breen Creighton and Colin Fenwick, 'Australia' in R Blanplain (ed), *The Evolving Employment Relationship and the New Economy* (2002).

introduction of the *Workplace Relations Act 1996* (Cth).⁶ These factors all raise questions about the best means of dealing with issues involving privacy protection of workers. Identifying gaps in the existing statutory framework is of particular importance.

1.5 The purpose of the Commission's reference is to assess the impact on workers' privacy of newly emerging factors in the work context and, ultimately, to identify the reforms required to adequately protect workers' privacy in Victoria. We will not be considering issues of privacy and genetic information in this inquiry, unless it touches directly on our reference. The Australian Law Reform Commission (ALRC) and the Australian Health Ethics Committee are currently examining regulatory reform in relation to human genetic information, with particular regard to the protection of privacy, protection from discrimination and the attainment of high ethical standards.⁷

1.6 This Issues Paper focuses on workers' privacy, autonomy and dignity. Our terms of reference specifically refer to 'workers', and throughout the Issues Paper we use this term. The main reason for this is that 'worker' is a wider term than 'employee'. Our terms of reference require us to examine not only the privacy of those defined as employees, but also the privacy of volunteers, independent contractors and outworkers, the former two not usually being considered as employees in the law of this area. Throughout the Paper we use the term 'worker' to describe employees as well as those others whose privacy may be infringed in their capacity as 'workers'.

OUR APPROACH TO THIS REFERENCE

1.7 The reference requires us to consider both the interests of employers and the protection of the privacy of workers. To balance these two factors, we must ask why employers might implement some practices, and why employees might object

6 There is now, for example, increasing emphasis on enterprise bargaining, and there has also been a reduction in the matters that can be included in awards.

7 Australian Law Reform Commission and National Health and Medical Research Council Australian Health Ethics Committee, *Protection of Human Genetic Information: Discussion Paper*, Discussion Paper 66 (August 2002). See also the ALRC's web site for more information about this project: <www.alrc.gov.au>.

to them. We must also ask what kinds of practices we are talking about. The following examples will help to highlight these issues.⁸



EXAMPLE 1

Jason is an independent contractor, operating cranes for a large building construction company. Management negotiated with all workers to institute a new policy of drug and alcohol testing for all employees operating heavy vehicles and machinery. The testing was to be random, to be conducted solely to detect the presence of those substances specified in the agreement, and carried out by an independent pathology service. One morning Jason is selected for drug and alcohol testing. His test returns positive for alcohol and cannabis, and his contract is terminated.



EXAMPLE 2

The board of management in a parent-run childcare centre wants to install video cameras in each of the rooms of the centre. The response to this proposal by the childcare workers in the centre varies. Fiona believes that the surveillance will be used for more than just detecting illegal behaviour; she believes her methods of care will be scrutinised. Connie is not so concerned, and George supports the move, believing that the parents simply want to protect their children from risk.

⁸ These four examples form the basis of four of the 16 case studies examined in more detail in Chapters 3 and 4. The majority of the case studies included in this Issues Paper are not based on real cases.



EXAMPLE 3

- Boris is applying for an apprenticeship with a small manufacturing company. He is successful in the interview, and is offered the job conditional upon taking a pre-employment medical test. His results return positive for hepatitis C. The company decides that it cannot risk employing someone who has a drug problem or who may have added health risks because of his hepatitis C status. The apprenticeship offer is withdrawn.



EXAMPLE 4

Marcella works from home for a software developing company. The company has begun random monitoring of content of emails of all workers, including outworkers like Marcella. In the course of this monitoring, Marcella's supervisor discovers that she is receiving and sending emails containing explicit sexual material. All this email traffic occurs very late at night. The supervisor warns Marcella that any repetition of this conduct will result in her dismissal from the company.

1.8 The purpose of this inquiry is to examine the kinds of issues concerning workers' privacy raised in these examples, in the context of the rights and obligations of employers and employees. At one level, this inquiry is concerned with a detailed investigation of the specific laws that regulate the workplace in Victoria and the way in which the law deals with issues relating to workers' privacy. At a more general level, it is also necessary to have regard to the laws that presently regulate particular aspects of privacy, such as information and health privacy, and to consider how these laws affect the particular issues of privacy arising in the workplace. What gaps in protection are there, and how should they be filled? Above and beyond these matters, however, it is important for the Commission to articulate what we mean by the terms 'privacy' and 'invasion of privacy', as discussed in Chapter 2.

1.9 There is a considerable body of literature in a number of disciplines—law, philosophy, sociology, psychology and others—that deals with these questions, and

the Commission has drawn freely on this material in formulating its own approach in Chapter 2. Our primary purpose, therefore, is to seek public comment on this approach, as this will then underpin the detailed investigations that we undertake at the succeeding stages of our inquiry. Have we got it right? In this inquiry the model of privacy that we develop must be applicable in the employment context. This means that it must be capable of application alongside the statutory and common law obligations and rights of employers and employees. Have we developed such a model?

1.10 In addition, we have some detailed questions on which we seek public submissions and information. In Chapter 3, we highlight a number of practices affecting privacy that we believe are happening, or may happen, within Victorian workplaces. We do this through the use of case studies. Once again, we seek public comment on these matters: are there practical issues of concern which we have missed, and have we properly appreciated the significance and impact of those which we have identified? In Chapter 4, we identify the principal laws that affect both workplace relations and the present protection of privacy in Victoria. We then apply the law to the case studies introduced in Chapter 3 to illustrate the effectiveness of the law in the protection of worker privacy. We are particularly concerned here to learn whether we have identified all that is relevant, or whether there are other matters to which we should have regard.

1.11 Finally, in Chapter 5 we consider the way in which reform may occur in this area. Having a clearly articulated approach is one thing (see Chapter 2); putting it into practice is quite another, and there is a wide range of legislative and regulatory options which may be used. At this point of our inquiry, we have made no decisions on these matters. However, in Chapter 5 we set out the issues which we believe to be relevant here. Your answers to the questions we raise will be particularly valuable as we commence our more detailed research.

Chapter 2

What is Privacy?

INTRODUCTION

2.1 In Chapter 1 we provided several short examples of the kinds of privacy issues which are affecting workers.⁹ Before we are able to assess whether the practices we have described might constitute privacy invasions, or whether they can be justified in the light of employers' obligations and interests, it is necessary to consider the meaning of privacy itself.¹⁰

2.2 Many discussions of privacy begin with a declaration that privacy is notoriously difficult to define.¹¹ The term has different meanings, which also vary in different contexts. One thing *is* clear, however: most people use the term in a way that suggests that 'privacy' is meaningful and valuable.

2.3 Despite the difficulties of definition, privacy does enjoy some legal protection: it is recognised as a human right under international treaties and under several constitutional bills of rights in other countries.¹² In Australia, there is no

9 More detailed versions of these and other examples appear in Chapter 3, and in Chapter 4 the available legal remedies for practices described in these scenarios are discussed.

10 For further discussion of approaches to defining privacy, see the Commission's Occasional Paper: *Defining Privacy*, by Kate Foord, Policy and Research Officer. Copies can be obtained by contacting the Commission, or from our web site. You can obtain copies of the relevant Federal legislation from the Australian Government Info Shop, or <www.scaleplus.law.gov.au> and the relevant Victorian legislation from Information Victoria or from <www.dms.dpc.vic.gov.au>. Relevant public authorities for additional information on privacy include the Office of the Victorian Privacy Commissioner <www.privacy.vic.gov.au> and the Office of the Federal Privacy Commissioner <www.privacy.gov.au>.

11 See, for example, the discussions in Australian Law Reform Commission, *Privacy*, Report No 22 (1983), especially Part I, 'Elusive Privacy'; Raymond Wacks, 'The Poverty of Privacy', (1980) 96 *Law Quarterly Review* 73, and Ruth Gavison, 'Privacy and the Limits of the Law', (1980) 89 *Yale Law Journal* 421.

12 See later in this chapter for a discussion of relevant international treaties. Countries whose citizens have express constitutional rights to privacy or bills of rights containing rights to privacy include Argentina, Belgium, Brazil, Bulgaria, Chile, People's Republic of China, Czech Republic, Denmark, Estonia, Finland, Federal Republic of Germany, Greece, Republic of Hungary, Iceland, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Peru, the Philippines, Poland, Portugal,

legal recognition of a 'right' to privacy. Legislatures and courts have been wary of enshrining such a right because of the difficulty of defining privacy in general, and in particular of giving it a satisfactory legal definition. In Australia, there is no comprehensive statutory definition of privacy. Existing legislation does not define privacy as a whole, but focuses on the protection of only one aspect—privacy of personal information.

2.4 Many people argue that such an approach—the identification and definition of particular *interests* in privacy—is the best one, due to the difficulties involved in defining privacy itself. We argue in this chapter that it will not be possible for the Commission to adequately address the issues involved in workers' privacy or surveillance in public places without formulating a working definition of privacy itself. The task of this chapter is therefore to navigate a way through these difficulties to arrive at a concept of privacy that is potentially applicable in a legal or regulatory framework.

2.5 This chapter is divided into two parts. The first section shows why privacy is so difficult to define, and proposes a possible approach to the question of definition. The second part considers how this proposed definition might be used as the basis for a test for determining when invasions of privacy have occurred.

DEFINING PRIVACY

2.6 What, then, are the difficulties involved in defining privacy? We *can* say that privacy is always about a boundary, the crossing of which leads to a breach of privacy. Common sense tells us that the boundary always relates to a person and that each individual is the judge of his or her own privacy threshold.

2.7 But a definition of this kind does not take us very far, because:

- the boundary is subjective, and may vary widely even within the one culture: what is private to one person may carry no such meaning for another;

Russian Federation, Slovak Republic, Republic of Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, Ukraine, United Kingdom. The United States has the so-called penumbra right of privacy: while there is no express privacy provision in the Constitution, the Supreme Court has ruled that there is a limited constitutional right of privacy based on a number of provisions in the Bill of Rights: see Privacy International, *Privacy and Human Rights 2000: An International Survey of Privacy Laws and Development*, (2000), available at <www.privacyinternational.org/survey/>.

- the boundary varies across cultures: what is private in one culture is not necessarily private in another;
- the boundary is fluid and contextual: what is private in a workplace, at least for some people, might be freely shared outside that context;
- the boundary varies historically: what may be commonly regarded as private in one era may not be in another; and
- the aspect of a person to which privacy is attached is indeterminate: is there an inviolable centre of the self that could be equated with the private domain? Is it my feelings that are private, my mind, my relationships, a certain physical zone around my body, or some mixture of all of these?

2.8 Some legal commentators have responded to the definitional problem by arguing that privacy does not need to be defined; indeed, that it should not be defined precisely because it is impossible to arrive at a coherent and useful definition.¹³

Approaches to the Problem of Privacy

DETERMINING PRIVACY RIGHTS AND PRIVACY INTERESTS

2.9 An interest can be broadly defined as a claim which receives some form of legal recognition.¹⁴ Some interests are underpinned by legal rights. Rights claims¹⁵ are sometimes based on the argument that protecting certain qualities or attributes is essential for meaningful human life. In addition, the idea of a right may be used to justify a claim for a new form of legal protection. In this sense rights have a

13 The most prominent exponent of this argument is Raymond Wacks, who, since his important 1980 article 'The Poverty of Privacy', above n 11, has been addressing the consequences of the conceptual problem that privacy poses. His later work that deals with this question includes Raymond Wacks, *Law, Morality and the Private Domain* (2000).

14 Litigation works by a plaintiff bringing an action against a defendant. In order for this action to be heard by the court, there must be a category within which that cause of action is recognised. For a plaintiff to ask the court to recognise a complaint as a new cause of action is, according to Dixon J in his remarks in *Victoria Park*, 'to reverse the proper order of thought in the present stage of the law's development': *Victoria Park Racing and Recreation Grounds Company Limited v Taylor* (1937) 58 CLR 479, 505.

15 The distinction the law makes between subjects, 'who are individual entities holding rights and duties, and objects, which are external to the person, incapable of having rights, and defined by the fact that they are owned, controlled or dominated by legal subjects' is a distinction that is not always rigorously maintained by the law itself: Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates about Property and Personality* (2001), 24.

symbolic value.¹⁶ Law protects some rights, for example people's right not to have their bodily integrity invaded without their consent.

2.10 Both interests and rights are formulated in order to enunciate and enforce social values. However, interests are usually not seen as fundamental to existence as a human being, so that it is not seen as wrong to allow them to be exchanged or traded. By contrast, some rights are seen as fundamental to human existence, so that giving them up or selling them is inconsistent with being human. For example, a person cannot agree to sell herself into slavery. Rights of this kind are more powerful than interests, because they cannot be traded.

2.11 Those who argue that privacy should not be defined often argue that aspects of privacy are already recognised and protected by law, and these aspects of privacy then tell us what the law means by privacy itself. Raymond Wacks, for example, argues that:

- as a result of the elusiveness of a coherent legal conception of privacy, the concept itself cannot form the basis of any right.¹⁷
- consequently, there should not be a rights-based approach to privacy, but rather an identification and protection of *interests* in privacy. The term 'privacy' cannot simply be abandoned; it functions as the underpinning of these interests. However, it is these interests which should be protected, rather than 'privacy' or the 'right to privacy'.

2.12 A similar view has recently been expressed by Gleeson CJ of the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*. In noting that the interests in privacy have not been well defined, his Honour notes: 'The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy'.¹⁸ He then argues against creating rights in privacy itself because of the lack of theoretical or conceptual coherence with regard to the term and its legal use: 'the lack of precision of the concept of privacy is a reason for caution in declaring a new tort'

16 This discussion of the meaning of rights and interests is necessarily limited. There is a vast literature on these topics.

17 On this, Wacks agrees with United States commentator Hixson, who argues that 'a natural "right" to privacy is simply inconceivable as a legal right—sanctioned perhaps by society but clearly not enforceable by government... Privacy itself is beyond the scope of the law.' R F Hixson, *Privacy in a Public Society: Human Rights in Conflict*, (1987) 98, quoted in Wacks, above n 13, 237.

18 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63[40].

of privacy.¹⁹ Gleeson CJ's comments raise the question: if the notion of a 'right' of privacy cannot be readily defined, what does it mean to speak of 'interests' in privacy? How can the law define and protect those interests without defining the right itself?

2.13 The question of whether there is a tort of privacy has been the subject of discussion by Anglo-Australian courts for some time.²⁰ Clearly, there are still several unresolved questions under Australian law about privacy: should it be a right? Or should it be conceived as a set of interests? In this chapter we explore the arguments for both a rights-based and an interests-based approach. The conclusion we reach is that a rights-model and an interests-model are not mutually exclusive, and we argue for a concept of privacy as a set of interests underpinned by a human right.

2.14 We take up these questions by beginning with a discussion of the argument for privacy as a set of interests.

Privacy Interests: Information and Beyond

2.15 Raymond Wacks argues that the interest which is always at the core of any discussion of the right to privacy is 'protection against the misuse of personal, sensitive information'.²¹ For Wacks, information remains 'personal' regardless of context. One advantage his approach offers over those which describe information as 'private' rather than 'personal' is this: while what is private in one context may not be in another, what is 'personal' information will not be subject to such variation.²² This fits in neatly with the approach that is to be found in current Australian privacy legislation, which deals mainly with the protection of information and does not contain any statutory right of privacy.²³

19 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [41].

20 At its simplest, a tort can be defined as a breach of a 'duty owed generally to one's fellow subjects, the duty being imposed by law and not as a consequence of duties fixed by the parties themselves': *MacPherson v Kevin Prunty & Associates* [1983] 1 VR 573, 587 (Murphy J). On a tort of privacy, see *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [185-191] (Kirby J).

21 Wacks, above n 13, 237.

22 Wacks then raises the questions: what is personal, and under what circumstances is a matter to be regarded as personal: *ibid*, 242.

23 See discussion in Chapter 4 of the *Privacy Act 1988* (Cth), the *Information Privacy Act 2000* (Vic) and the *Health Records Act 2001* (Vic) .

2.16 For the purposes of the present inquiry, however, the Commission sees the information model of privacy as inadequate. Firstly, the terms of reference of our inquiry ask us to consider a range of practices that extend well beyond the collection, use, storage and disclosure of information. Secondly, and more significantly, defining privacy as an interest in the privacy of personal information makes the concept of privacy too narrow. The ‘interests-in-privacy’ model, because it does not define privacy itself, leaves the values attached to privacy vulnerable to the phenomenon identified in so much of the literature on privacy: that, in the face of competing interests, privacy almost always loses.²⁴

2.17 The following sections of this chapter will outline a wider conception of privacy, which has the potential to cover the range of practices the Commission has been asked to consider. There is little doubt that information privacy is an extremely important aspect of privacy. As this is the interest currently accepted as a—perhaps *the*—privacy interest that can be protected, the focus of this chapter is on areas which information privacy does not cover.²⁵

2.18 One common way to deal with the difficulties in defining privacy is to divide the concept into a number of distinct privacy interests. At least four such interests are in use in much of the literature on privacy: these are bodily, territorial, information, and communication interests.²⁶ While these categories are clearly of use in providing a framework in which to discuss the types of practices that are potentially privacy-invasive, they do not necessarily exhaust them. Moreover, the

24 David Anderson, ‘The Failure of American Privacy Law’, in Basil Markesinis, above n 2, quoted in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [119] (Gummow and Hayne JJ).

25 On the distinction between two types of privacy, see Anita Allen’s discussion of ‘restricted access privacy’ and ‘decisional privacy’: Anita L Allen, ‘Taking Liberties: Privacy, Private Choice and Social Contract Theory’, (1987) 56 *University of Cincinnati Law Review* 461.

26 Victorian Law Reform Commission, *Privacy Law: Options for Reform* (2001). See also Australian Law Reform Commission, above n 11, Vol 1, 21–2, where the interests in privacy are similarly defined. The Australian Law Reform Commission (ALRC) identifies the same interests in privacy but also adds a number of further possibilities. These include ‘privacies of attention’ and ‘associational privacy’. The latter is identified by the ALRC report as a category arising from United States law in the context of the protection afforded by the First Amendment, and not an appropriate category in the Australian context. The report suggests that in our context this aspect of privacy comes under the information category. Privacies of attention may be dealt with within the category of bodily privacy. The category of bodily privacy, as it is elaborated in the Victorian Law Reform Commission’s publication, covers aspects of the mind where the mind is invaded for specific purposes, for instance, psychological testing and honesty testing, where these are understood as possible invasions of privacy.

question remains: is the interests model an adequate one, or should privacy be defined as a right? What is lost if privacy is not regarded as a right?

PRIVACY RIGHTS

Privacy, Autonomy, Dignity: Fundamental Aspects of Being Human

2.19 As we have seen, privacy is a problematic term to define in law. Whenever there is an attempt to suggest what privacy might mean, the two terms invariably invoked are autonomy and dignity.²⁷ Autonomy and dignity, in turn, are difficult to define. They are philosophical concepts as much as legal ones, and their meaning and use in a legal context has philosophical underpinnings.²⁸

2.20 Both terms were mentioned in the recent High Court case, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*. In this case, the question arose as to whether an 'artificial person' such as a corporation like Lenah Game Meats Pty Ltd might have a right to privacy. In their decision, Gummow and Hayne JJ referred to the judgment of Sedley LJ in *Douglas v Hello!*²⁹ (an English case concerning claims by the actors Michael Douglas and Catherine Zeta-Jones relating to the taking of unauthorised photographs of their wedding), and said:

Lenah can invoke no fundamental value of personal autonomy in the sense in which that expression was used by Sedley LJ. Lenah is endowed with legal personality only as a consequence of the statute law providing for its incorporation. ... But, of necessity, this artificial legal person lacks the sensibilities, offence and injury to which provide a staple value for any developing law of privacy.³⁰

27 The terms of reference of our inquiry explicitly name autonomy and dignity as factors to consider: see page viii. In asking the Commission to investigate this cluster of terms, the terms of reference reflect the understanding of privacy that operates in legal discourse generally: that privacy always refers to and embraces these other two terms.

28 In European philosophy, autonomy and dignity as features of human being have their origins in the work of Immanuel Kant. See Immanuel Kant, *Grounding for the Metaphysics of Morals*, (James W. Ellington trans, 1993 ed). See also Catriona Mackenzie and Natalie Stoljar (ed) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (2000).

29 Lord Justice Sedley, in his decision in *Douglas v Hello!*, recognised a right to privacy in English law on the basis that the law can 'recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy': *Douglas v Hello!* (2000) EWCA Civ 353 [126].

30 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [126].

2.21 In the *Hello!* judgment referred to by Gummow and Hayne JJ, Sedley LJ described autonomy as fundamentally ‘personal’—a quality that clearly only attaches to a ‘natural’ person, rather than an ‘artificial’ person created by statute.

2.22 In the same way, ‘dignity’ can be conceived of as fundamentally personal or human.³¹ As Gleeson CJ remarks in *Lenah Game Meats* ‘the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity’. Dignity is the quality of human beings which distinguishes us from things: human beings are not things, but people; not objects but subjects.³²

2.23 A number of other terms are also associated with privacy, including anonymity, freedom, secrecy, control. Unlike autonomy and dignity, they are not *necessary* terms in defining privacy, but arise when specific interests in privacy are at issue.³³ On the other hand, the notions of autonomy and dignity *are* necessary terms in that they are fundamental to the description of the kind of human being we wish to protect when we seek to protect ‘privacy’. Anonymity, to take one example from the remaining terms, defines the interest one *may* have in not being identifiable in certain transactions or situations, for example in expressing one’s political views frankly.

What is Autonomy?

2.24 The common aspect to various theories of autonomy is ‘the idea of self-determination or self-government, which is taken to be the defining characteristic of free moral agents’.³⁴ This is why autonomy is often said to mean people’s ability to make their own choices and control their own destinies.³⁵

31 See EJ Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’, (1964) 39 *New York University Law Review* 962.

32 ‘Man and generally any rational being exists as an end in himself, not merely as a means to be arbitrarily used by this or that will, but in all his actions whether they concern himself or other rational beings, must be always regarded at the same time as an end.’: Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* (1785): full text available at: <etext.library.adelaide.edu.au/k/k16prm/prm3.html>.

33 See Allen, above n 25.

34 Catriona Mackenzie and Natalie Stoljar, ‘Autonomy Refigured’, Mackenzie and Stoljar (ed), above n 28, 5.

35 Alan Westin, whose work on privacy was enormously influential for some time, in fact defined privacy as the right to control information about oneself, a position which has since come under sustained criticism: see, in particular, Wacks, above n 13, 237.

What is Dignity?

2.25 The concept of human dignity is often invoked to justify the idea that human beings should not be treated as if they are things, that is, that they should not be commodified. The categories of person and property are, according to modern legal orthodoxy, distinct: if one is a person, one is not property.³⁶ Yet it is clear that there are circumstances in which persons become property, the history of slavery being the most notable example. Not only do we now prohibit the buying and selling of people, but as a society we also consider that important aspects of people's humanity should not be traded. For example, private sale of body parts and trade in human reproductive material is prohibited by law.³⁷ Treating a person or part of a person simply as an object or a thing to be traded would strip a person of his or her dignity.

Defining Privacy as a Human Right

2.26 Privacy is a human right under public international law. Article 17 of the International Covenant on Civil and Political Rights (ICCPR) outlines the right to privacy in these terms:

- No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- Everyone has the right to the protection of the law against such interference or attacks.³⁸

2.27 Although, as mentioned earlier, Australia's privacy legislation does not provide a statutory right to privacy, our Commonwealth privacy legislation nevertheless recognises this international human rights context. The *Privacy Act 1988* (Cth) gives effect to Australia's obligations under Article 17 of the ICCPR, an international covenant to which Australia is a signatory. The Act also takes

36 Davies and Naffine, above n 15, 2.

37 In all jurisdictions in Australia, contracts for the sale of or trading in human tissue or body parts are prohibited. In Victoria the primary relevant legislation is the *Human Tissue Act 1982* (Vic).

38 The full text of the ICCPR can be found at <www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>. Article 12 of the Universal Declaration of Human Rights refers to privacy in almost identical terms to the ICCPR, and Article 16 of the Convention on the Rights of the Child applies these terms specifically to the rights of children. These can be found at: <www.un.org/Overview/rights.html> and <www.austlii.edu.au/au/other/dfat/treaties/1991/4.html> respectively.

account of the Privacy Principles of the Organisation for Economic Co-operation and Development (OECD).³⁹

2.28 If privacy is a right, what is it a right to? As long ago as 1983, the ALRC, in its pioneering report on privacy, asked: what are other basic human rights and what is common to these and the right to privacy? It lists the basic human rights that overlap with privacy as:

- the right to freedom of thought, conscience and religion;
- the right not to be enslaved;
- the right to equal treatment with other persons;
- the inherent right to life; and
- the right to freedom of association and peaceful assembly.

The report concludes that the common element can be described thus:

Each of these rights can be seen as an expression of the claim that each individual has to be treated as an autonomous human person, not just as an object or as a statistic.

Violation of these rights involves, in some sense, treating a person as a thing rather than as a person.⁴⁰

2.29 In Europe, interpretation of the right to privacy has also been based on the notion of a human being as having a right not to be reduced to the status of a thing. The European Commission of Human Rights, in its first decision on privacy, found that this right to privacy also involved rights to have relations with others:

For numerous Anglo-Saxon and French authors, the right to respect for 'private life' is the right to privacy, the right to live, as far as one wishes, protected from publicity. In the opinion of the Commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and develop

39 Organisation for Economic Co-operation and Development, 'OECD Recommendations Concerning and Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data', (1980) available from www.cpsr.org/cpsr/privacy/privacy_international/international_laws/1980_oecd_privacy_guidelines.txt.

40 Australian Law Reform Commission, above n 11, 13.

relationships with other human beings, especially in the emotional field for the development and fulfillment of one's own personality.⁴¹

The right of privacy articulated here, then, is the right to be a subject, not an object. To be a subject, to be fully human, is to have relationships with others.

2.30 Applying a rights-based approach, therefore, two distinct aspects of privacy emerge that would remain hidden in an interests-based model. These are:

- the right not to be turned into an object or statistic, that is, the right of people not to be treated as if they are things; and
- the right to establish and develop relationships with other human beings, in short, the right to relationships.

Framed in this way, this right to privacy recognises and encompasses the two fundamental aspects of privacy described above, namely those of autonomy and dignity.

2.31 Although privacy is a right, it cannot be seen as an absolute right, that is, as a right that must be upheld in all circumstances.⁴² It must be balanced against competing interests—those of the State and its agencies as much as those of fellow citizens and the wider community. In the specific context of work, it is necessary to take into account the interests of employers—for example, their obligations in providing a safe workplace and in protecting others from harm, and their interest in having employees perform the work they are engaged to do. However, the recognition of privacy as a right means that its social and political value is recognised and makes it more likely that privacy will be adequately protected.

2.32 How then do we protect the human right of privacy? We argue such protection can only be attained when the right itself is defined in clear and workable terms. That is why we have attempted to define the right of privacy itself in this chapter.

41 *X v Iceland*, (1976) 5 Eur. Comm HR 86.87, quoted in Privacy International, 'Privacy and Human Rights: An International Survey of Privacy Laws and Practice', available from <http://www.gilc.org/privacy/survey/> (March 2002).

42 There is much written on whether there are any 'absolute' rights: see, for example, Alan Gewirth, 'Are There Any Absolute Rights?' in Jeremy Waldron (ed), *Theories of Rights* (1984).

Privacy as a Social Value

2.33 If privacy is understood as a right underpinned by autonomy and dignity, the questions remain: Why, as a society, should we value this particular right? Does its recognition and protection embody an interest that is of as much value to the community as a whole as it is to the individual? Why is privacy a *social* value?

2.34 We have seen that privacy is to be viewed as a fundamental aspect of being human. If as a society we value the capacity of all people to enjoy this fundamental quality, then privacy is a social value. If human beings are allowed this quality of privacy, then a certain kind of society is maintained and protected.

2.35 While privacy may be regarded as a fundamental aspect of being human, it is evident that it can be taken from people. Privacy is a fundamental, but not inalienable, aspect of being human. People can be deprived of the enjoyment of their privacy in a myriad of ways, large and small. Accordingly, if as a society we have decided that these are aspects of human existence that we value, then the role of the law is to protect them, and to enable them to be maintained and expressed. Privacy protection, then, should focus its efforts on cases where people's hold on these fundamental features of privacy is diminishing. The task of privacy protection where privacy is a social value is therefore to protect the capacity of people to maintain this fundamental aspect of being human.

2.36 A distinction is often drawn between what is in the public realm and what is private.⁴³ By contrast, our definition of privacy emphasises the interest that society as a whole (the public) has in the protection of privacy. Although breaches of privacy affect individuals, privacy protection does not focus solely on safeguarding individuals from invasive activity. Under this model, privacy is not the 'property' of the individual whose privacy may be at stake. As Margaret Otlowksi points out, defining privacy in terms of individual rights overlooks the social importance of privacy. 'Consideration must be given to the cumulative effect of the invasion of an individual's personal sphere and the impact that this has on society as a whole.'⁴⁴ This way of defining privacy and its importance means that issues of workers' privacy are concerned with more than balancing the interests of employers and the privacy rights of employees.

43 See, for example, Morton J Horwitz, 'The History of the Public/Private Distinction', (1982) 130 *University of Pennsylvania Law Review* 1423.

44 Margaret Otlowksi, *Implications of Genetic Testing for Australian Employment Law and Practice* (2001) 45.

2.37 On this view, privacy protection involves more than the individual's right to privacy and the individual's choice in how that privacy is to be valued. It is concerned with the public realm because it is about the protection of a certain kind of human being, whose core features are autonomy and dignity. This is not an individual divorced from all connection with others, who can cede rights according to his or her own interests; it is rather the human subject, fundamentally produced by and connected to society, or the particular form of social organisation within which he or she goes about pursuing particular interests. The right of any individual to give up his or her privacy in return for an interest more valuable to that individual is brought into question by such a conception of privacy.⁴⁵ This is an argument for privacy as a social interest, and this social interest is as much about the protection of a 'private' sphere as it is about protection of relations with others.

PRIVACY: A WORKING DEFINITION?

2.38 In summary, then, privacy always includes and refers to autonomy and dignity. This means that the protection of privacy will always encompass the following rights:

- not to be turned into an object or thing, that is, not to be treated as anything other than an autonomous human being; and
- not to be deprived of the capacity to form and develop relationships.

This right of privacy is aimed not just at the protection of the individual's privacy, but at protecting privacy as a social value.

⁴⁵ This idea, that privacy rights may not be cedable, is reflected in General Principle 5.13 of the International Labour Office Code of Practice, *Protection of Workers' Personal Data*, that 'workers may not waive their privacy rights': International Labour Office (1997) *Protection of Workers' Personal Data: An ILO Code of Practice*.

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QUESTIONS

1. We have identified two key aspects of the meaning of privacy as a human right: the right not to be treated as an object, and the right to relationships. Autonomy and dignity are fundamental features of this right. This approach to privacy focuses on the effects on both the individual and society of breaches of privacy. Is this an appropriate approach to defining privacy?
2. If this approach is appropriate, how should it be developed to provide a definition of privacy as the basis for law reform in this area? Are there difficulties involved in making such a definition of privacy the basis of a legal definition?
3. If you do not agree with this approach, how do you think privacy should be defined? Is it necessary to have a definition of privacy?
4. However defined, should the right to privacy be an absolute right or subject to limitations? What limitations do you think are the most important?
5. How should the right to privacy be balanced against competing rights or interests?

INVASION OF PRIVACY

2.39 Given the working definition of privacy outlined above, how are we to assess what constitutes an invasion of privacy?

2.40 At the outset of this chapter, we noted that the boundary for privacy invasion is subjective, cultural, contextual, historical and indeterminate. The ALRC's 1983 report on privacy makes the breadth of these differences between people's privacy thresholds clear:

Some people hate to receive junk mail. Others ... delight in receiving it. Indeed, it is for them a valued contact with the outside world. Some people wish their details to remain strictly private and are strongly against use of these details even by medical researchers. Others welcome such use. Some will even sell their abnormal medical

histories, or those of members of their family, to the mass media, for publication to the community at large.⁴⁶

2.41 Given these extreme differences amongst people, what are the tests that might apply for invasion of privacy, and what assumptions should underpin any such test?

Test for Invasion of Privacy on the Individual Model

2.42 In his decision in *Lenah Game Meats*, Gleeson CJ outlines a possible test of invasion of privacy based on 'reasonableness':

Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.⁴⁷

2.43 The test of 'reasonableness' requires a value judgment. This value judgement is usually based on what the average person would regard as reasonable. Who might this average person be? The concept of the 'ordinary person' has caused much difficulty in areas such as the criminal law.⁴⁸ The reason is clear: despite its apparent neutrality, the 'ordinary person' test is always infused with ideas about gender, race, sexuality and class. This severely limits its capacity as a benchmark for assessing invasions of privacy.

- 'Marginal' categories of people are unlikely to have their views and interests considered. This model tends to represent the values and views of the dominant group, and therefore better serves the interests of white males than it does white females, or Indigenous males or females, or members of

46 Australian Law Reform Commission, above n 11, 11.

47 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 [42].

48 In partial excuses to homicide, for example, what constitutes reasonable grounds for killing may be different for men and women. See Adrian Howe, 'Reforming Provocation (More or Less)', (1999) 12 *The Australian Feminist Law Journal* 127; and Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them', (1997) 21 *Melbourne University Law Review* 237.

other minority religious, ethnic or cultural groups.⁴⁹ This poses a significant problem in privacy protection, because it is clear in some areas that it is precisely the people who least fit the 'ordinary person' category who are most at risk from privacy invasion. For example, in many situations being asked to reveal one's sexual orientation where that orientation is homosexual is potentially more invasive of a person's privacy than being asked to reveal sexual orientation where that orientation is heterosexual.

- The test of reasonableness is difficult to maintain in a multicultural society, for instance, as privacy is valued differently across cultures, and what is reasonably private to the 'ordinary person' in one culture may not be in another.

2.44 This suggests that a test of invasion of privacy based on the reasonableness of the invasion to the ordinary person is, on its own, inadequate.

2.45 An additional difficulty with the reasonableness test as outlined by Gleeson CJ is that it relies on the particular practice causing offence to the individual concerned. The problem with using such a criterion is that there are privacy invasions in which there may be no offence caused at all to the individual concerned: such may be the case, for example, in surveillance.

- In overt surveillance, if the individual has been informed of the surveillance and is not offended by this technique, then the question of whether overt surveillance is a legitimate practice is foreclosed using Gleeson CJ's test.
- Similarly, where there is covert surveillance of an individual or group, there may be no offence caused to the people concerned: consent may not have been obtained and people may never discover that surveillance had been in place and therefore may also never know how the information obtained through that surveillance was used. The exclusive focus on the individual in these situations creates the danger that the social effect of the practice will be overlooked.

2.46 In summary, it seems to be impossible to reach a coherent definition of invasion of privacy that is based on the privacy needs and thresholds of

49 In 1998 the Office of the Federal Privacy Commissioner collaborated with Social Justice Commissioner Mick Dodson to produce a protocol for application of the *Federal Privacy Act 1988* to Northern Territory Aboriginal communities: see Office of the Federal Privacy Commissioner, *Minding Your Own Business: Privacy Protocol for Commonwealth Agencies in the Northern Territory Handling Personal Information of Aboriginal and Torres Strait Islander People* (1998).

hypothetical individuals. Such matters may be taken into account, but should not be the principal focus of any test of invasion of privacy if the definitions outlined in the first section of this chapter are used.

Test for Invasion of Privacy on the Social Model

2.47 We have seen that we cannot equate privacy with the private sphere: privacy concerns are not limited to what happens in areas of life deemed to be private, such as the home. This is nowhere clearer than when considering workers' privacy. The working definition of privacy that we have outlined is based on the recognition that privacy protection is also concerned with the public sphere and is aimed in part at protecting the capacity of society to sustain and promote a certain kind of human being and therefore a certain kind of society. Considerations of what constitutes an invasion of privacy must therefore be concerned with ensuring that this public sphere is protected.

2.48 We have argued in this chapter that reliance on an interests-based model of defining privacy is an insufficient basis for effective privacy protection. These interests must be underpinned by a right to privacy in order:

- to ensure that the interests themselves can be adequately protected; and
- to identify aspects of privacy that do not emerge in an interests-only definition.

2.49 If we accept these arguments, and accept therefore that the right to privacy encompasses the right not to be reduced to an object and the right to relationships, then a test of invasion of privacy would be an assessment of the extent to which any particular law or practice has the effect of depriving people generally of these capacities.⁵⁰

2.50 Such a test would not mean that the individual's right to privacy is absolutely preserved, but rather that this human right, the right to privacy, is regarded as central in formulating principles and methods of privacy protection. In protecting this right to privacy, we would need to ask the following questions.

50 In his discussion of the major privacy cases in the United States, Rubinfeld argues that 'The distinguishing feature of the laws struck down by the privacy cases has been their profound capacity to direct and to occupy individuals' lives through their affirmative consequences. This affirmative power in the law, lying just below its interdictive surface, must be privacy's focal point.': Jeb Rubinfeld, 'The Right of Privacy', (1989) 102 *Harvard Law Review* 737, 801-2.

- Does this practice reduce that subject to an object?
- Does this practice impede the formation and maintenance of relationships?
- If so, how does it do so?
- What is the context in which the practice occurs, and what are the justifications for the practice in that context?

2.51 Consideration of these questions may lead to the acceptance of a test of reasonableness. This would be based on a set of criteria developed from these aspects of the right to privacy, taking account of the need to balance that right against competing interests.

The Importance of Considering Context

2.52 The same practice occurring in two different contexts may be regarded as privacy-invasive in one context, and not so in the other. For example, the compulsory administration of drug testing may be regarded as legitimate if the person subject to that test is a bus driver on country roads; drug testing may be viewed much less favourably if compulsorily administered to office workers in order to test the use of recreational drugs outside office hours.

2.53 There are many factors that make up any one context. In the employment relationship, the context is formed by the interests of employers and the rights of workers, and the necessity of balancing these factors.

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QUESTIONS

6. The proposed tests for invasion of privacy require those making the assessments to ask the following questions:
 - Does this practice reduce anyone subject to it to an object?
 - Does the practice impede the formation or maintenance of relationships?
 - What is the context in which the practice occurs, and what are the justifications for it in that context?
 - Are these useful tests for assessing whether a particular workplace practice is an invasion of privacy?
7. Do the proposed tests provide an appropriate framework for balancing the interests of employers and employees? If so, why? If not, why not?
8. Does our working definition of privacy and of the test of invasion of privacy provide the basis for protecting the privacy of all people, especially marginal groups such as those we have discussed in this chapter? If so, how does it? If it does not, why not?
9. Should people be able to waive or trade their right to privacy? If so, how would this ability to waive or trade privacy affect the privacy rights of marginal groups?

CONCLUSION

2.54 In this chapter, we have outlined a definition of privacy that involves interests and rights. We argue that the right to privacy can be defined with as much precision as the other human rights that we recognise as a result of Australia's international obligations. This right to privacy forms the basis of a test of invasion of privacy, a test based on the extent to which the laws and practices we identify as potentially privacy-invasive do indeed strip people of the right to privacy as we have defined it.

2.55 Clearly, in making recommendations, the Commission will need to take account of the effect of the recognition of a right to privacy on the balancing of employers' and employees' rights and interests in the employment context. We ask you to consider, while reading the following chapters, how this approach might be applied in the context of Victorian workplaces.

Chapter 3

Current Workplace Practices

INTRODUCTION

3.1 In Chapter 2, we examined the concept of privacy and sought to arrive at an approach which could then be applied in the immediate context of Victorian workplaces. Of necessity, the discussion in Chapter 2 was theoretical and philosophical in character, as we sought to identify and describe the fundamental issues involved.

3.2 In this chapter, however, we move from the abstract to the particular—to a consideration of what may actually happen in Victorian workplaces. To a large extent, this treatment is descriptive, and is aided by the use of case studies which highlight the interests involved. In Chapter 4, we will move to an analysis of the existing law and the remedies presently available in the situations outlined in the current chapter, as well as identifying the gaps in protection that remain. This will then set the scene for Chapter 5, in which we will set out the possible options for our continuing research agenda. What practices in the workplace affect workers' privacy?

WHAT PRACTICES ARE WE CONCERNED WITH ?

3.3 The terms of reference refer to a number of different practices that the government believes are of concern.⁵¹ In summary, these are:

- surveillance and monitoring of workers;
- testing of workers;
- searching of workers; and
- use by employers of information relating to workers.⁵²

⁵¹ We have condensed the five categories listed in the terms of reference to four for ease of exposition: see the full terms of reference on page viii.

3.4 This list provides the starting point for our investigation of what is actually happening on the ground. If you believe that there are other kinds of practices that are of significance, please let us know.

3.5 Each of the above practices has implications for the protection of workers' privacy. However, before describing these practices in more detail, it is useful to make the following preliminary observation: our concern is not simply with the protection of workers' privacy. As we noted in chapter 2, the protection of privacy generally involves a balancing of competing interests. In the workplace context, there are obviously other interests which may compete with, or outweigh, the concern to protect workers' privacy. Most important of these will be the interests of employers, a matter that is expressly referred to in our terms of reference, but there will also be the interests of other workers (where the privacy concern is that of an individual or small group of workers) as well as those of the community outside the workplace. The weight to be given to these different interests will obviously vary greatly from case to case and according to the particular industry and occupation concerned. The purpose of the case studies provided in this chapter is to highlight these matters and to provoke your responses.

3.6 We have been asked to consider not only the situation of workers in the standard employer-employee relationship, but also the position of people who are 'workers' in the more general sense of that word, namely independent contractors, outworkers and volunteers. We also need to note that there have been extensive changes in the way in which the 'standard' employer-employee relationship may be structured today, with greater use of such techniques as job-sharing, flexible working hours and 'telecommuting'. The following description of current workplace practices is intended to be wide enough to cover all these permutations in the way in which Victorians work.

3.7 We must have regard to other laws that apply in the workplace, notably those concerned with 'ensuring productivity and providing safe and secure places' of work, as described in our terms of reference.

3.8 We must also have regard to the fact that it is not only State laws that apply in Victorian workplaces, but that Commonwealth legislation applies as well

52 However we categorise such practices there will be overlap between categories. In the United States, for instance, for constitutional purposes testing constitutes a 'search': International Labour Office, *Workers' Privacy— Part III: Testing in the Workplace*, Report No 12 (2) (1993). Similarly, testing itself could be considered a form of information collection.

(see further Chapter 4). This Commonwealth/State interaction will inevitably place constraints on any law reform proposals in this area.

SURVEILLANCE AND MONITORING OF WORKERS

3.9 In a chilling comment, Robert Ley, the head of the German Labour Front, said, at the height of the Nazi regime, 'The only person who is still a private individual in Germany is somebody who is asleep'.⁵³ In 1949, George Orwell, in *Nineteen Eighty-Four*, spoke similarly of the use of surveillance of citizens in the new global totalitarian regimes depicted in that novel. The prospect of surveillance and monitoring of workers in their workplace environment therefore has inevitable connotations of 'Big Brother'. But should this always be so? Are there instances where such practices can be justified? Surveillance and monitoring of workers has a history that long precedes the advent of such devices as the video and sound recorder, telecommunications interception devices and email monitoring programs. The use of technological aids in this area, however, can make surveillance and monitoring practices seem all the more insidious and frightening, on the one hand, and all the more necessary and useful, on the other. Consider the following case studies.

53 Robert Ley, head of the German Labour Front, quoted in Hannah Arendt, *Origins of Totalitarianism* (1973) 339.



CASE STUDY 1

Connie, Fiona and George are childcare workers in a childcare centre that is operated by a parents' co-operative. Connie and Fiona are paid workers, and George is a volunteer, getting experience while he completes his TAFE Certificate in Child Care. The board of management of the co-operative (all parents) are very concerned about growing publicity about paedophilia in the Victorian community, and this is an issue that has been raised in strong terms by several of the parents. The board of management wants to avoid the possibility of any complaints about the conduct of its employees and decides to install video cameras in each of the rooms of the childcare centre. The manager of the centre tells Connie and Fiona what is proposed, but doesn't think to tell George. George overhears Connie and Fiona heatedly discussing the proposal. He joins the conversation, and says he is very pleased with the idea as this will ensure that no false allegations can be made against him by any irate parent, although he wishes he had been informed by management. Fiona, on the other hand, is outraged, as she believes that the videos will be used by members of the board (and by other parent members of the co-operative) to review her methods of care. There have already been extensive debates at parents' meetings about the kinds of disciplinary measures that can be taken by childcare workers. Fiona believes that some parents are 'out to get her', and says she will resign from her employment if the proposal goes ahead. Connie thinks she should chill out: the cameras won't be there to get them.



CASE STUDY 2

Fred works in a small cheese co-op in a country centre. Hygiene is a strong concern of management and it keeps the number of people in each area of the plant to a minimum. Among other things, personnel are required not to have any physical contact with doors and other objects as they pass through into the secure areas. To ensure that staff keep to these areas and observe these procedures, the doors to each area are activated by iris cameras; employees stand less than a metre away from the camera and when the image of their iris is recognised the door automatically opens. Fred is concerned about having unique identifying information about him electronically stored. He has a criminal record, a conviction for grievous bodily harm that resulted from a large brawl after a football match. Fred still travels regularly to the city for football matches. He knows that police are using facial recognition scanning to find likely suspects for such brawls, and believes, perhaps incorrectly, that data obtained by his employer could be used by the police to identify him. He fears that his employer might provide police with access to its database.



CASE STUDY 3

Catherine works in a financial services business, where she spends most of her time on the telephone giving investment advice and taking orders to buy or sell listed securities. All telephone calls are recorded and reviewed on a regular basis by management. Although management negotiated this with staff, Catherine has always found it stressful. Management described the monitoring as a protection for staff and for the business. Catherine has a regular client, Eric, who trades in very large sums of money and who frequently uses foul language to Catherine and often yells at her. In reviewing these calls with management, Catherine has repeatedly pointed out Eric's aggression, and management has simply said that she must learn to cope with such clients. Catherine points out that the monitoring was supposed to be a way of protecting staff, not just merely protecting the business. One day Catherine is speaking to Eric, who becomes angry and starts to abuse her. After seeking to calm him down, Catherine herself becomes angry and tells him to 'get a life and get off the fucking phone!' Eric complains to management, and Catherine is subsequently denied an increment in her regular salary review. She is devastated, and begins to lose confidence in her dealings with other clients.



CASE STUDY 4

Marcella works as a software developer for a medium-sized company. She has two small children and works from home in a small provincial town, rarely travelling the hour by car it would take to get to the office. Her employer has set up her office at home with furniture, computer equipment, unlimited internet access and an email account. The company recently had to discipline a worker who was sending offensive material to colleagues via email. Since then, there has been random monitoring of content of emails of all workers, including outworkers like Marcella. In the course of this monitoring, Marcella's supervisor discovers that she is exchanging emails with someone she met in an internet 'chat room', containing explicit sexual language and descriptions of sexual acts. All this email traffic occurs very late at night. The supervisor asks Marcella to come into his office for an interview and he tells her that any repetition of this conduct will result in her dismissal from the company. Marcella explains that she has only accessed the chat room outside work hours.



CASE STUDY 5

Alex and Shaun are baggage handlers at a major regional airport. There have been complaints from passengers that bags and cases have been opened and valuable items stolen. The airport management has been unable to track down the offenders and decides to mount secret video surveillance cameras in the baggage handling areas of the terminal. Three days after the cameras become operational, Alex and Shaun are videoed in one of the baggage handling areas, opening suitcases, rummaging through them, and taking out various items, such as clothes and shoes. The manager of the airport calls them into his office the next day, shows them the incriminating video, and dismisses them on the spot.

3.10 Each of the above case studies involves the surveillance or monitoring of the activities of workers within their workplaces. In each instance, there is a justification for the employer using such devices: the protection of children in care in Case Study 1, maintaining hygiene standards in Case Study 2, quality control and possibly the preservation of evidence relating to telephone transactions in Case

Study 3, the prevention of abuse of a facility provided by the employer in Case Study 4 and the detection of theft in Case Study 5. The strength of these justifications may vary from case to case, and may be influenced by certain moral judgments that the employer is making, but in one instance at least (Case Study 1) the aim is to prevent the commission of crimes and harm to third parties. On the other hand, each case study involves an interference with a worker's privacy, even where it is likely that this privacy has hitherto been used as a mask for criminal activity. They also illustrate the wide spectrum of consequences that may flow from such interferences, ranging from outright dismissal (Case Study 5) to the threat of dismissal (Case Study 4) to a threat to resign (Case Study 1) and loss of a salary increment in (Case Study 3). It also seems that one person's invasion of privacy is seen by another person as a sensible precaution to safeguard his interests (Case Study 1). These case studies and their consequences could be varied and multiplied many times, but they serve to illustrate the complex issues to which surveillance and monitoring practices give rise.

3.11 If we assume that there are legitimate interests to protect in each of the case studies given above—the interests of the worker, those of the employer, and those of third parties—it will be clear that these interests are not always easy to balance against each other. Ready answers will not always be obvious or available. Accordingly, we seek your submissions on the following questions.

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QUESTIONS

10. Are there other kinds of surveillance and monitoring practices in the workplace that the Commission should consider?
11. Do you believe that the practices outlined in the case studies in this section constitute invasions of privacy?
12. Are there justifications for these practices? How would you formulate them?
13. Would your attitudes to surveillance and monitoring differ depending on the employment status of the 'worker' (ie employee, independent contractor, volunteer etc)?
14. Should a distinction be made between the covert and overt application of these practices? If so why? If not, why not?
15. Should a distinction be made between surveillance and monitoring of workers who work within their employers' facilities and those who are working in their own homes?

TESTING

3.12 Jockeys must 'weigh in' before they race; drivers need to check the fuel level and the air pressure in the tyres of their cars before starting on a long journey. Why, then, should workers not be tested by employers before they begin a particular task or operation or undertake a new assignment? Why, indeed, should the fitness of a worker for a particular job not be tested before he or she commences employment?

3.13 Testing can take many forms, but inevitably each test will involve some intrusion into the subject's private areas. Consider, for example, tests of a worker's physical and mental health, and note that it is now possible for testing to apply in many different areas of the workplace. Consider the following case studies.



CASE STUDY 6

Boris is applying for an apprenticeship with a small manufacturing company. He has been unemployed since he left school, and even though he has heard that the company is struggling to remain viable he wants the apprenticeship. Boris is successful in the interview, and the managing director informs him that he will be offered the job, provided he agrees to take a pre-employment medical test. Boris takes the test, and his results return positive for hepatitis-C. As the virus is spread by contact with the blood of an infected person, the company concludes that Boris must be an intravenous drug user and decides that it cannot risk employing someone who has a drug problem. They are also unwilling to employ someone who may have added health risks because of his hepatitis-C status. The apprenticeship offer is withdrawn.



CASE STUDY 7

Francine is a middle manager in a large insurance company. A new managing director, Letitia, has just taken office. As part of her 'new broom' approach, Letitia has ordered that everyone in management positions is to take a psychological fitness test. This involves both answering a lengthy written questionnaire and taking part in several group tests which are designed to test 'leadership' and 'decision making' skills. Francine believes such tests are embarrassing and a waste of time. She has worked at the company for over 10 years and has always received good performance appraisals. She refuses to undertake the tests, and is shocked when Letitia calls her in and tells her that her position has now become redundant. Letitia gives no particular reason for this decision, apart from talking generally about the need to 'revitalise the company with persons who have fire in their bellies'.



CASE STUDY 8

Jason is an independent contractor who often works for Bergon, a large building construction company, and spends much of his time operating cranes or front-end loaders. Management has been concerned for some time about safety on its building sites, especially since a fatal accident involving one of its workers. Management negotiated with all workers to institute a new policy of drug and alcohol testing for all employees operating heavy vehicles and machinery. The testing was to be random, to be conducted solely to detect the presence of those substances specified in the agreement, and carried out by an independent pathology service. Jason arrives for work one Monday morning and is selected for drug and alcohol testing. His test returns positive for alcohol and cannabis, and his contract is terminated.

3.14 Once again, these case studies highlight the competing interests involved when testing is applied in the workplace. Many other instances might also be given, including such things as the administration of general aptitude and intelligence tests and genetic testing (currently under investigation by the Australian Law Reform Commission). We therefore seek your responses to the following questions.



QUESTIONS

16. Are there any forms of testing that the Commission should investigate other than those described in the case studies in this section?
17. Does the administration of the kinds of tests described involve an invasion of workers' privacy?
18. Can some of these tests nonetheless be justified?
19. If testing, or at least some forms of testing, can be justified, what safeguards or limits should be placed on this? What issues do you believe to be relevant here?
20. Would your attitudes to testing differ depending on the employment status of the 'worker' (ie employee, independent contractor, volunteer etc)?

SEARCH

3.15 Following the tragic events in the United States on 11 September 2001, the intensive scrutiny and searching of people and baggage on national and international flights has become commonplace. Personal searches may also be conducted in specific circumstances by certain officials, such as police, customs officers and wildlife and fisheries inspectors. Many of us are aware that bags may be inspected when we seek to enter major sporting venues. Searches may be conducted physically, for example requiring people to empty their pockets, open their baggage, to undress themselves, or even to allow internal examinations, such as in the mouth, rectum or vagina. With the aid of technology, searches may also occur electronically, the most familiar kind being the scanning of baggage that occurs at airports. But to what extent do such activities actually occur in the workplace and at the behest of employers, rather than agencies of the State or the controllers of large public venues? Do these practices involve invasions of privacy and to what extent, and in which circumstances, can they be justified? Once again, it is useful to consider these questions in relation to specific case studies.



CASE STUDY 9

Chris works as a storeman in a large department store. Management is concerned at the high incidence of thefts from the stores, and institutes a procedure to search employees as they end their shifts. Employees are required to empty their pockets and open their bags for inspection, and a security guard runs a metal detector over their bodies. There is no other physical inspection that is carried out. Chris finds the whole procedure highly offensive, but knows that he will be viewed unfavourably by his supervisor if he protests.



CASE STUDY 10

Tracey, the new staff manager at a large corporate law firm, is concerned at the possibility that operatives, ie employee solicitors, are making undue use of firm stationery to write private correspondence in 'firm time'. She uses her master key to enter and search employees' offices at night to find 'evidence' of these infractions. One day, when John, a high flying third year solicitor, comes into work, he finds that objects on his desk have been moved and that it appears that someone has been going through his files, some of which contain personal papers. He knows nothing of Tracey's nocturnal activities, and is disturbed to think that someone has been looking at his personal files.



CASE STUDY 11

Clayton is a teacher employed at a large private secondary college. All teachers have been given a personal computer and are linked into the school's internal network. Much of Clayton's communication with students and parents is conducted by email, but he also sends and receives a number of personal email messages, which he stores in a specific folder labelled 'Personal'. Morticia, the school principal, has recently received a reminder from the Department of Education that it is the school's responsibility to prevent harassment, and that there has been a number of recent cases of sexual harassment by email in secondary schools. Morticia is more concerned about the possibility that the school email system is being used excessively for personal communications by staff, although she cannot confirm the extent of this usage. When she receives the reminder from the Department, she decides to obtain a search program that enables her to access individual teachers' email folders: she can check for sexual harassment and gauge the extent of personal usage as she does so. She goes into Clayton's 'Personal' folder and sees that there are only a few such messages stored there. Suspecting that his personal usage of emails is far greater, she searches other folders that have labels that are apparently school-related. In a folder marked 'Curriculum development', she locates and reads a large number of messages that have no relation to this subject or to the school. The following day, she tells Clayton that his email access will be limited for the rest of the year.



CASE STUDY 12

Andrea works as a creative director in a large advertising agency. She has been given a personal computer to use for her work, and this contains many specialised and expensive design programs. Working conditions in the agency are quite relaxed and casual, but Terence, the owner of the agency, is concerned to note that, while Andrea always appears to be in front of her computer, her work output is relatively limited. One day she tells him that she is having trouble with her computer and asks him to get it fixed. Terence does this, but before he returns it to Andrea he opens it up and finds that there are many of Andrea's own files stored on the hard disk. These include all her personal tax and financial information, but also large files containing the drafts of a novel that Andrea has been writing, obviously during working hours. Terence returns the computer to Andrea without comment, but questions her about her novel-writing activities at her next performance appraisal several weeks later. Andrea confesses that she has been doing this during her work time, and that this is the reason for her low productivity. However, she is upset when she realises that Terence has actually seen the draft chapters stored on her computer.

3.16 Once again, these case studies reveal that there is a wide spectrum of possible search activities that may be carried out by employers, as well as a wide range of possible justifications. In Case Study 9, for example, the employer may be suffering financially from the thefts; it would be easy to envisage other scenarios where the reason for the search is concern for the physical safety of other workers or customers, for example, where a forklift operator or timber worker is checked before the shift to ensure that he or she has no drugs or alcohol on their person. Justifications for such searches, however, may shade into the trivial or the absurd, as in the case of Case Study 10. But are the concerns of employers in Case Studies 11 and 12 so trivial where they have provided the employee with valuable equipment and facilities?

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QUESTIONS

21. Are there any search practices in the employment context that the Commission should investigate other than those described in the case studies in this section?
22. Do the case studies provide instances of invasions of workers' privacy?
23. Can such invasions be justified?
24. Would your attitudes to searches differ depending on the employment status of the 'worker' (ie employee, independent contractor, volunteer etc)?

INFORMATION

3.17 It is a truism to say that we live in an 'information age'. As we noted in Chapter 2, most of the past and present debates on privacy have focused on the question of personal information, and these concerns have obviously intensified with the advent of digital storage, processing and communications technologies. Concern over workers' personal information is obviously only a subset of concerns about the use and protection of personal information generally. Nonetheless, as 'work' takes up so much of a person's daily existence, concerns over the collection and use of workers' personal information are of central importance to our current investigation.

3.18 Unlike the practices described above—surveillance and monitoring, testing and search—the collection and holding of personal information is not just a two-way process between employer and worker. Personal information may be collected from a variety of sources—from workers themselves, previous employers, government agencies or the 'public record'. The reasons for doing so can also be highly laudable—to enable employers to know and understand workers fully, to be able to evaluate and assess workers' capacities, to allow employers to encourage and cultivate workers' capacities to develop and achieve the highest level that is possible for that worker, to avoid placing workers in high-risk situations, and to protect the interests of other workers and third parties. However, information, and knowledge of that information, can often be used to the detriment of a person, and this may

have particularly far-reaching consequences in the workplace. Once again, some case studies will serve to highlight the contending interests that arise here.



CASE STUDY 13

Xavier has worked for some years in the computer industry for the one employer, Zavod Information Services (Zavod). While most of his time with Zavod was happy and professionally fulfilling, the last year or so has been difficult because of personality clashes with a new manager, Yvette. One particular clash involved allegations by Yvette that Xavier was flirting with junior male members of staff (allegations which Xavier vehemently denied) and criticisms of Xavier's frequent absences from work (he has a sick partner who is often ill). As a result, Xavier resigned from Zavod at the beginning of August 2002 and applied for a position with another computer company, Excelsior Computing Professionals (Excelsior). His first interview with Excelsior went very well, and the interview committee was noticeably impressed with his qualifications and curriculum vitae. At a second interview, however, the attitude of the committee was more hostile, and the questions turned on his ability to get on with co-workers and his absenteeism from his former employment. One member of the panel asked him rather snidely if he was married. Xavier realises that the committee members must have spoken with Yvette, and is outraged when he subsequently is told that his application to Excelsior has been unsuccessful.



CASE STUDY 14

Wilma suffers from epilepsy. However, the medication she has been on for seven years has stabilised her condition, and she rarely suffers an epileptic episode. Her condition has had no effect on her employment at a call centre that deals with calls to emergency services, and she has seen no reason to tell her employer of her condition or the treatment she is receiving. One day, Wilma is winding down at the pub after a particularly stressful shift, and gets into a heart to heart conversation with Frederick, a close friend and fellow worker. In the course of the conversation, she tells him of her illness and treatment, and he congratulates her on her courage in overcoming it. The next day, however, he decides that this is information that he should communicate to the manager of the call centre. The latter is very concerned about it, and decides to move Wilma from answering calls to carrying out simple filing tasks. She suffers a drop in wages, and is outraged when Frederick tells her what he has done. Wilma attempts to negotiate with management to be reinstated to her former position. After several months of this, she begins to feel quite despairing and finds it harder and harder to go to work. Eventually she applies for stress leave.



CASE STUDY 15

Nerida owns and operates a large department store. She has always been concerned about the honesty of her employees, and has for a number of years engaged a private inquiry agency to conduct regular checks on them. Her rationale for this is that if these checks reveal that a particular employee is in financial trouble, she will be able to watch carefully to ensure that he or she is not taking money from the till. Until recently, the checks provided by the agency have revealed nothing untoward about any of her employees. However, the latest report gives Nerida a shock, as it reveals that her trusted mens' clothing supervisor, Clarence, is subject to a Federal Court order, the enforcement of which will require him to sell his house. This explains, in Nerida's eyes, why Clarence has been looking somewhat dishevelled in the past few weeks as well as why there have been customer complaints about his short temper. Determined to check this downward slide immediately, Nerida offers Clarence early retirement. When he refuses to accept this, Nerida dismisses him immediately.



CASE STUDY 16

For several years, Alfred has been working in a large clothing factory, where he undertakes all sorts of lifting jobs. Unknown to Seth, his employer, Alfred has been in receipt of a partial disability pension throughout this time, the pension relating to an apparent back injury that occurred during a previous employment. When Seth is told this by a government inspector who is checking on pension cheats, he immediately dismisses Alfred. There has been no complaint about Alfred's work during the entire course of his employment with Seth—indeed, he has been one of Seth's most conscientious and hard-working employees.

3.19 As will be seen in Chapter 4, there are particular laws relating to privacy, employment and discrimination that would provide remedies in some, if not most, of the situations exemplified above. This is because the area of information privacy, whether of employees or otherwise, is presently the most heavily regulated area of privacy in Victoria. At this stage, however, we would like you to consider the above scenarios without reference to particular laws, and to consider the following questions.



QUESTIONS

25. Are there instances of uses of workers' personal information that we should consider in our investigation other than those described in the case studies in this section?
26. Should the practices identified in the case studies be regarded as infringements of workers' privacy?
27. Are there justifications for such practices and how would you describe them?
28. Would your attitudes to practices affecting information privacy differ depending on the employment status of the 'worker' (ie employee, independent contractor, volunteer etc)?

BALANCING COMPETING INTERESTS

3.20 The Commission must take into account the context in which the practices described in this chapter are occurring. The primary feature of this context is the employment relationship, in which both employers and employees have obligations: for the employer, some of these are statutory obligations regarding prevention of discrimination, harassment and victimisation, or the provision of safe workplaces. The employment relationship is also characterised by unequal bargaining power between employers and employees, and this raises the question of whether ‘genuine’ consent to the practices we have described is possible. We would therefore like you to consider the following questions.

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QUESTIONS

29. Have we adequately described and appreciated the competing interests that are involved in the listed case studies?
30. Do any of the case studies describe practices to which workers should not be able to consent?

CONCLUSION

3.21 The purpose of this chapter has been mainly descriptive: to identify and describe the principal categories of invasions of workers’ privacy that are currently occurring in workplaces. In the following chapter we will examine the existing laws that may provide remedies and solutions to some of the issues raised in the case studies, as well as identifying possible gaps in protection. At this point in our inquiry, however, we would value the following kinds of responses from you.

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QUESTIONS

31. Are there practices that we have not described in this chapter, but which you have encountered in your daily experience and which you think the Commission should investigate?
32. Does the general approach to privacy protection outlined in Chapter 2 provide you with assistance in assessing the acceptability or otherwise of the practices described in our case studies? (Remember here that we viewed privacy as involving two fundamental aspects, namely dignity and autonomy, and that these aspects could be described more fully as involving the right not to be turned into an object and the right to pursue human relationships: see paras 2.19–25.)
33. Could these same practices be conducted in different ways to achieve an outcome less invasive of workers' privacy?

Chapter 4

Existing Protections for Workplace Privacy

INTRODUCTION

4.1 In the previous chapter, we gave examples of situations in which workers' privacy may be affected by workplace surveillance and monitoring, testing, search and treatment of their personal information. In this chapter, we seek to identify the legal remedies which are currently available to workers in these situations and the gaps in protection that remain. Law reform in this area will be necessary where existing laws fail to provide adequate protection for workers' privacy.⁵⁴

4.2 There are two main areas of law which are relevant to the case studies given in Chapter 3. These are:

- privacy laws, including laws covering surveillance and monitoring and information privacy; and
- laws relating to workplace relations, including such matters as equal opportunity, discrimination and occupational health and safety.⁵⁵

4.3 Privacy laws are capable of protecting aspects of workers' privacy in some of the case studies given in Chapter 3. Workplace laws may also provide a remedy to workers who are aggrieved at what they perceive to be an invasion of privacy. In the case of workplace laws, the remedy available will depend upon the stage at which the alleged invasion of privacy occurs, which may be:

54 For a current analysis of worker privacy protection internationally, see Electronic Privacy Information Center and Privacy International, *Privacy and Human Rights 2002: An International Survey of Privacy Laws and Developments*, Report 2002, in particular 86–95.

55 For more extensive expositions of these laws, readers should consult the specialist texts and commentaries on these matters. In terms of workplace relations law, see, for example, Breen Creighton and Andrew Stewart, *Labour Law—An Introduction* (3rd ed 2000) and James J Macken, Paul O'Grady, Carolyn Sappiden and Geoff Warburton with Chris Ronalds and Juliet Bourke, *The Law of Employment* (5th ed 2002). For a discussion of privacy protection in Victoria, see, for example, Victorian Law Reform Commission, *Privacy Law: Options for Reform*, Information Paper (2001).

- in the pre-employment situation, that is where a person is seeking employment, but there is a possible invasion of privacy on the part of a prospective employer or some other party, for example in relation to the use of personal information about the employee (as in Case Study 13).
- during the course of employment where a worker suffers, or fears that he or she will suffer, harm arising from a breach of the worker's privacy by the employer (as in Case Studies 3 or 9).
- in the post-employment situation, where the loss or cessation of employment has come about because of a possible breach of a worker's privacy by the employer (as in Case Studies 7 or 15).

4.4 While a remedy may be available under privacy laws or workplace relations laws in many of the case studies we consider, in others the law will provide no assistance. Alternatively, while a particular law may cover the situation, the remedy which is available may not address the concerns of the worker or there may be practical reasons why the worker is unlikely to be able to pursue a remedy.

4.5 In the following discussion, we first consider the broad operation of privacy and workplace relations laws. We go on to apply these laws to the case studies considered in Chapter 3, dealing first with the application of privacy laws and then with the remedies which may be provided under workplace relations laws, before a person is employed, during employment and after employment has come to an end. Considering these case studies will enable us to identify gaps in the existing law and to consider whether Victorian law should provide further remedies or whether existing laws could be made to work more effectively.

PRIVACY REGULATION

4.6 Both Commonwealth and Victorian legislation provide some limited privacy protection.⁵⁶ In addition, there is some protection, direct and incidental, under the common law and equity (the 'non-statutory' law applicable in Victoria).

⁵⁶ Some Acts that may incidentally provide some privacy protection will not be discussed in detail here. For example, Part 1D of the *Crimes Act 1914* (Cth) regulates the use of forensic procedures (taking of fingerprints or a sample from the body of a person suspected of having committed a crime), some of which may only be carried out with the consent of the suspect. Nor do we discuss legislation that may interfere with a person's privacy with respect to their civil liberties, for example legislation that may allow people to be tested to determine whether they carry particular diseases, such as an order under s 120A of the *Health Act 1958* (Vic).

It will be seen that the protection of workers' privacy under both legislation and non-statutory laws is, at best, piecemeal.

Commonwealth Legislation

4.7 The main Commonwealth legislation which protects privacy is the *Privacy Act 1988*. This Act focuses on protection of personal information and provides only indirect protection for workers against privacy-invasive activities such as surveillance and monitoring, testing and search.⁵⁷ The *Telecommunications (Interception) Act 1979* (Cth) offers some limited protection in the area of electronic monitoring.⁵⁸

PRIVACY ACT 1988

4.8 The aim of the *Privacy Act 1988* (Cth) is to regulate the collection, use and disclosure of personal information about individuals. The Act originally only covered the Commonwealth public sector, but since 2001 it has applied to much of the private sector as well.⁵⁹ Workers who are employed in either of these sectors may receive some protection with respect to their personal information. The protection which the Act gives workers is limited because it does not apply to 'small business operators', and 'employee records' are specifically excluded from its coverage.

4.9 Generally small businesses are not covered by the *Privacy Act 1988* (Cth). 'Small business operators' are defined as operators of businesses having an annual turnover of less than \$3,000,000.⁶⁰ The small business operator exclusion from the

57 That is, the *Privacy Act 1988* (Cth) does not regulate surveillance or testing activities, however, the Act may still regulate the manner in which information derived from the activities is used.

58 The *Telecommunications Act 1997* (Cth) is concerned with the regulation of Australian telecommunications carriers, and contains some incidental privacy safeguards for the users of the services provided by these carriers: see Part 13 and particularly ss 270 and 276. It does not protect employees against employer monitoring of phone calls because the prohibition against disclosure of communications applies only to 'eligible persons' (broadly, carriers and their employees: s 271). There is also, however, limited protection against testing and search available under other Commonwealth legislation. For example, the *Australian Postal Corporation Act 1989* (Cth) regulates the opening of mail by postal employees. However, such legislation will not be discussed here as it has limited effect in the protection of workers' privacy.

59 The amendments were included in the *Privacy Amendment (Private Sector) Act 2000* (Cth). The Act was passed in 2000; however it did not come into force until 2001.

60 *Privacy Act 1988* (Cth) s 6D(1) and (3).

Act does not apply to businesses that provide a health service and hold any health information except in an employee record, businesses that disclose personal information about another individual to anyone else for a 'benefit, service or advantage' or businesses that provide a 'benefit, service or advantage' to collect personal information about another individual from anyone else.⁶¹

4.10 The employee records exclusion provides a further and significant limitation to the protection which the Privacy Act gives workers' personal information. 'Employee records' are defined as being 'in relation to an employee...a record of personal information relating to the employment of the employee'.⁶² The Act provides examples of what will constitute an employee record, rather than providing a comprehensive definition. Importantly, health information is included as an example of information that may form part of an employee record.⁶³ The exemption applies to an employee record relating to a 'current or former employment relationship between the employer and the individual'.⁶⁴

4.11 The Privacy Act sets out 'Information Privacy Principles' (IPPs) which govern use of personal information in the public sector. The use and disclosure of information in the private sector is governed either by the 'National Privacy Principles' (NPPs) or an approved privacy code.⁶⁵ Both sets of principles may be summarised as dealing with the following matters:⁶⁶

61 *Privacy Act 1988* (Cth) s 6D(4). The definition also covers credit reporting businesses (defined as a business that involves the preparation or maintenance of records containing personal information: s 6). Small business operators that are contracted service providers for a Commonwealth contract are also bound by the National Privacy Principles in the Act.

62 *Privacy Act 1988* (Cth) s 6.

63 The information that would constitute an employee record includes: (a) the engagement, training, disciplining or resignation of the employee; (b) the termination of the employment of the employee; (c) the terms and conditions of employment and the termination of employment of the employee; (d) the employee's personal and emergency contact details; (e) the employee's performance or conduct; (f) the employee's hours of employment; (g) the employee's salary or wages; (h) the employee's membership of a professional or trade association; (i) the employee's trade union membership; (j) the employee's recreation, long service, sick, personal, maternity, paternity or other leave; and (k) the employee's taxation, banking or superannuation affairs: *Privacy Act 1988* (Cth) s 6.

64 *Privacy Act 1988* (Cth) s 7B(3)(a).

65 *Privacy Act 1988* (Cth) s 13A with the Principles being listed in Schedule 3 of the Act.

66 This summary is taken from Victorian Law Reform Commission, above n 55. The summary omits reference to the Privacy Principles relating to the use of 'unique identifiers'.

- *Collection of personal information:* Collection must be necessary for the activities of those who collect the information, it must be collected lawfully and fairly, and at the time it is collected individuals must be told who is collecting the information and how it will be used.
- *Use and disclosure of personal information:* As a general principle, information can only be used or disclosed for its original purpose unless the person has consented to its use or disclosure for another purpose.
- *Accuracy of personal information:* Reasonable steps must be taken to ensure that personal information is accurate, complete and up-to-date.
- *Security of personal information:* Reasonable steps must be taken to protect the personal information from misuse, loss, unauthorised access, modification or disclosure.
- *Openness in relation to the practices:* Those who collect personal information must set out in a document their practices and must make this document available.
- *Access and correction rights:* As a general principle, individuals must be given access to their personal information and must be allowed to correct it or attach to it a statement claiming that the information is not accurate, complete or up-to-date.
- *Anonymity:* Private sector organisations must give people the option of entering into transactions anonymously where it is lawful and practicable.⁶⁷
- *Restrictions on transborder data flows:* As a general principle, private sector organisations can only transfer personal information about an individual to a foreign jurisdiction if they believe that the information will be protected by a law or a contract which upholds privacy principles similar to the information privacy principles, or if the individual gives consent.⁶⁸
- *Special provisions for sensitive personal information:* In the case of information held by the private sector, a higher level of protection applies to sensitive personal information, which includes information about a person's health, political or religious beliefs or affiliation, and sexual

67 The anonymity principle is only in the private sector National Privacy Principles.

68 Restriction on transborder data flows is not explicitly covered by the public sector Information Privacy Principles.

preference. The NPPs require that this information must only be collected with the individual's consent.⁶⁹

4.12 If a person feels that the Act has been breached, she or he can file a complaint with the Federal Privacy Commissioner⁷⁰ and the complaint can then be investigated.⁷¹ The Commissioner can also direct either party to the complaint to attend a 'compulsory conference'.⁷² After an investigation, the Commissioner may declare that the complainant's privacy was interfered with and that the agency should not repeat or continue the conduct that interfered with the complainant's privacy.⁷³ The determinations of the Commissioner may be enforced through proceedings in the Federal Court of Australia or the Federal Magistrates Court.⁷⁴

TELECOMMUNICATIONS (INTERCEPTION) ACT 1979

4.13 As its name suggests, the main aim of the *Telecommunications (Interception) Act 1979* (Cth) is to prohibit the interception of telecommunications, for example, by tapping a person's telephone.⁷⁵ Employer monitoring of communications is not prohibited in the usual situation where the employee is aware of the monitoring.⁷⁶ The reading of an email may not be covered by the Act as it may not be considered

69 There are no special provisions for the collection, use and disclosure of sensitive information in the Information Privacy Principles. There is, however, other legislation in relation to certain kinds of sensitive information that may bind the Commonwealth public sector. For example, a person's criminal history cannot be disclosed where the convictions were spent, quashed or pardoned: *Crimes Act 1914* (Cth) Part VIIC.

70 *Privacy Act 1988* (Cth) s 36.

71 *Privacy Act 1988* (Cth) s 40. The Act also includes provision for 'representative complaints' which are complaints 'where the persons on whose behalf the complaint was made include persons other than the complainant': s 6. The conditions for making a representative complaint are contained in s 38.

72 *Privacy Act 1988* (Cth) s 46.

73 *Privacy Act 1988* (Cth) s 52(1)(b)(i).

74 *Privacy Act 1988* (Cth) s 55A. Under this section, if the 'court is satisfied that the respondent has engaged in conduct that constitutes an interference with the privacy of the complainant, the court may make such orders (including a declaration of right) as it thinks fit': s 55A(2).

75 In Victoria, the *Telecommunications (Interception)(State Provisions) Act 1988* applies the provisions of the *Telecommunications (Interception) Act 1979* (Cth) to Victorian law enforcement personnel. The *Telecommunications (Interception) Act 1979* (Cth) allows interception in some situations: for example, employees of a carrier can lawfully intercept a communication in the carrying out of their duties, and communications can be intercepted under a warrant or in some emergency situations.

76 *Telecommunications (Interception) Act 1979* (Cth) s 6(1). The interception of communications is also not prohibited where it is done on the premises of the employer by use of equipment that is part of the service provided by the telecommunications carrier: s 6(2).

to be the interception of a communication 'passing over a telecommunications system'.⁷⁷

Victorian Legislation

4.14 There are a number of Victorian Acts that protect privacy. Personal information is protected by the *Information Privacy Act 2000* (Vic) and the *Health Records Act 2001* (Vic). The coverage of this legislation is described below. The *Surveillance Devices Act 1999* (Vic) provides some protection against unwanted surveillance and monitoring. Criminal law legislation also provides some limited privacy protection by imposing penalties on a person who touches another person without her or his consent, except in certain specified situations. This may offer some protection against searching and testing a person without their consent.

INFORMATION PRIVACY ACT 2000

4.15 The *Information Privacy Act 2000* (Vic) applies only to information collected, used and disclosed by the Victorian public sector.⁷⁸ It offers protection to Victorian public sector employees with respect to information held by their employer and to other people with respect to any personal information about them held by the Victorian public sector. This means that personal information about Victorian public sector employees held in their employee records is protected, while information in employee records in the private sector is not similarly protected. This Act operates in a similar manner to the *Privacy Act 1988* (Cth), with the collection, use and disclosure of information being regulated by a set of Information Privacy Principles that are substantially similar to the Principles in the Federal Act.

77 The technology of emails is that between the sender and intended receiver of an email, the message may 'sit' on a network or Internet Service Provider server. If 'passing over' is considered to be the passage from the sending to the emailing computer, then accessing the email as it is 'sitting' on a server may be an 'interception'. If, however, 'passing over' were limited to the transmission of the message in the cables or optic fibres, then the accessing of an email when it is on the server would not be considered to be an 'interception'. There is another point of doubt with respect to emails. This point relates to the nature of a 'telecommunications system'. It is unclear from the Act whether a networked computer system in a workplace would be considered to be a single entity or a 'telecommunications network' separate from the carrier's telecommunications network. If it is a separate network made up of a number of computers, then the accessing of emails in the workplace may be subject to the Act.

78 The Act also extends to cover contracted service providers, but only in relation to its provision of services under a State contract which contains a provision binding the service provider to the privacy principles included in the Act: *Information Privacy Act 2000* (Vic) s 9(1)(j).

HEALTH RECORDS ACT 2001

4.16 The *Health Records Act 2001* (Vic) (HRA) applies only to health information, but it applies to a broader range of bodies than the *Information Privacy Act 2000* (Cth). Its purpose is to promote the ‘fair and responsible handling of health information by protecting the privacy of an individual’s health information...and providing individuals with a right of access to their health information’.⁷⁹ It does so by setting out Health Privacy Principles (HPPs) covering matters such as the collection, use and disclosure of health information and access to and correction of such information.⁸⁰ The Act applies to public hospitals, public sector agencies and private sector health service providers and other organisations that collect, hold or use health information.⁸¹ The Act appears to apply to health information in ‘employee records’ in the private sector which, as explained above, are not covered by the *Commonwealth Privacy Act 1988*.

SURVEILLANCE DEVICES ACT 1999

4.17 The *Surveillance Devices Act 1999* (Vic) (SDA) provides some protection against surveillance. It makes it an offence for a person to install, maintain or use an optical surveillance device or listening device to record private conversations and activities⁸² to which they are not a party, without the consent of the participants. It also makes it an offence to communicate or publish material obtained from using these devices, without the consent of each party involved.⁸³ This prohibition applies even if the person publishing the information is a party to the private activity or conversation.⁸⁴ Restrictions are also imposed on the use, installation and maintenance of tracking devices without the consent of the person whose location is being tracked and the communication of information obtained from the use.⁸⁵ Certain law enforcement activities are exempted from these

79 *Health Records Act 2001* (Vic) s 1.

80 *Health Records Act 2001* (Vic) s 19, Schedule 1.

81 For a discussion of the relationship between the *Health Records Act 2001* (Vic) and the *Privacy Act 1988* (Cth), in particular with respect to personal information about workers, see below para 4.77.

82 *Surveillance Devices Act 1999* (Vic) ss 6, 7.

83 *Surveillance Devices Act 1999* (Vic) s 11(1).

84 *Surveillance Devices Act 1999* (Vic) s 11(2).

85 *Surveillance Devices Act 1999* (Vic) ss 8, 11.

prohibitions.⁸⁶ There are no controls on the use, installation or maintenance of a 'data surveillance device' in relation to computer use except where this is done by a law enforcement officer, who must have the consent of the person on whose behalf information is being 'input or output' from the computer, unless the law enforcement officer has a warrant or emergency authorisation to use the device.⁸⁷ The Act does not prevent an employer from installing a data surveillance device or authorising a law enforcement officer to do so.⁸⁸

4.18 There are two significant limitations to the application of the SDA. First, it does not apply to the use of devices where the person subject to surveillance has agreed to it.⁸⁹ In the employment context workers may have little practical capacity to object to surveillance. Secondly, the regulation of listening and optical surveillance devices only applies where the conversations and activities being monitored ought reasonably be expected to be private.⁹⁰ As discussed below, the definitions of 'private activity' and 'private conversation' are quite restrictive. As a result, in most situations, workers in their workplace will often be unable to rely on the SDA to protect them against surveillance in the workplace. However, the information that an employer may collect through the use of surveillance devices may still be subject to the provisions of the *Privacy Act 1988* (Cth).⁹¹

CRIMINAL LEGISLATION

4.19 The main Victorian statutes dealing with the criminal law are the *Crimes Act 1958* (Vic) and the *Summary Offences Act 1966* (Vic). There are no specific provisions here that protect worker privacy, but these Acts may impose criminal

86 A warrant or emergency authorisation is required for the installation, use or maintenance of these surveillance devices or their installation, use or maintenance must be authorised by a law of the Commonwealth: *Surveillance Devices Act 1999* (Vic) ss 6(2), 7(2)(a), (b), 8(2). A law enforcement officer can install an optical surveillance device if it is authorised by an occupier of premises and this is necessary for the protection of the person's lawful interests: s 7(2)(c).

87 *Surveillance Devices Act 1999* (Vic) s 9(2).

88 A law enforcement officer must not knowingly install, use or maintain a data surveillance device 'without the express or implied consent of the person on whose behalf [the] information is being input or output': *Surveillance Devices Act 1999* (Vic) s 9(1).

89 *Surveillance Devices Act 1999* (Vic) ss 6(1), 7(1), 8(1). The consent may be either express or implied.

90 *Surveillance Devices Act 1999* (Vic) ss 6(1), 7(1) read with s 3.

91 See the discussion of the *Privacy Act 1988* (Cth) above paras 4.8–12.

penalties when workers are assaulted⁹² or have their data remotely accessed from their private computer.⁹³

Non-statutory Laws

4.20 Traditionally, the courts have provided remedies for breaches of certain rights in relation to an individual's body and his or her property. These include actions for battery,⁹⁴ assault,⁹⁵ trespass to goods,⁹⁶ and breach of confidence.⁹⁷ On the other hand, unlike United States courts, Australian courts have generally refused to recognise that there is any general right of action in respect of breaches of privacy.⁹⁸ Even if these remedies are available to a worker complaining of a breach of privacy, the expense of proceedings and the potential damage to the relationship between the worker and employer makes it unlikely that they will be pursued.⁹⁹

92 *Crimes Act 1958* (Vic) s 31.

93 It is an offence to gain access to a computer system without lawful authority: *Summary Offences Act 1966* (Vic) s 9A.

94 A direct act involving contact with another person's body without her or his consent: see, for example, *Wilson v Pringle* [1987] QB 237.

95 Under these common law actions, assault is not the same as the criminal offence of assault (for example, under s 23 of the *Summary Offences Act 1966* (Vic)). The common law writ of assault is actionable where a person directly threatens another so as to cause the other person to apprehend imminent physical contact, *Barton v Armstrong* [1969] 2 NSWLR 451. Note that assault in this sense only relates to the threat; if physical contact ensues, then an action in battery may be available to the person who suffered the contact.

96 Trespass to goods is a direct act by a person that interferes with another's possession of those goods, *Hutchins v Maughan* [1947] VLR 131.

97 An action of breach of confidence provides some protection against the publication of confidential information; see, for example, *Argyll v Argyll* [1967] Ch 302 and *Coco v Clark* [1969] RPC 41. For a discussion of actions for breach of confidence see Staniforth Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (1999) Chapters 25–7. For recent discussions of breach of confidence see the two Naomi Campbell cases: *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB) and *Campbell v Frisbee* [2002] EWHC 328 (Ch). There are also 'privileges' that protect certain classes of communication, for example, legal professional privilege, which prevents the disclosure of communication between a person and her or his legal counsel without the person's consent: *Baker v Campbell* (1983) 153 CLR 52.

98 For example, the High Court of Australia did not consider that remedies are generally available for invasions of privacy in *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63. This case also discusses the differences between the Australian and United States approaches to privacy protection.

99 Except, perhaps in the case of highly paid employees.

Table 1: Privacy Laws Relevant to Workers

Area of Privacy	Relevant Law	Coverage	Limits to Coverage
Information	<i>Privacy Act 1988</i> (Cth)	Commonwealth public sector and private sector organisations	<ul style="list-style-type: none"> • Does not cover most small businesses • Does not cover employee records
	<i>Information Privacy Act 2000</i> (Vic)	Victorian public sector	
	<i>Health Records Act 2001</i> (Vic)	Health service providers (both Victorian public and private sector)	<ul style="list-style-type: none"> • Only covers 'health information', but includes health information in employee records
Communications	<i>Telecommunications (Interception) Act 1979</i> (Cth)	Interception of telecommunications	<ul style="list-style-type: none"> • Does not apply where employee is aware of the monitoring
Surveillance	<i>Surveillance Devices Act 1999</i> (Vic)	<p>The installation, use and maintenance of listening, optical surveillance, tracking and data surveillance devices</p> <p>The publication or communication of material obtained from the use of the devices</p>	<ul style="list-style-type: none"> • Not available if person consents • Regulation of listening devices only protects private conversations • Regulation of optical surveillance devices only protects private activities • Regulation of listening and optical surveillance devices does not apply where a person who is a party to the activity uses the device • Regulation of data surveillance devices limited to use by law enforcement officer
Territorial , for example, body or property searches	Criminal and common law remedies, for example, battery	Apply generally in the community	<ul style="list-style-type: none"> • Not available if person consents

VICTORIAN INDUSTRIAL RELATIONS AND EMPLOYMENT REGULATORY FRAMEWORK

The Victorian Industrial Relations System

4.21 Workplace relations laws may also be relevant to workers' privacy. Indeed, the Explanatory Memorandum to the *Privacy Amendment (Private Sector) Act 2000* (Cth)¹⁰⁰ indicated that the intention of the Government was that privacy in the workplace should be regulated by the workplace relations legislation.¹⁰¹ Victoria does not have an industrial or workplace relations system separate from the federal system, which is to be found in the *Workplace Relations Act 1996* (Cth) (WRA). The extent of the operation of the latter in Victoria arises from the referral in 1996 by the Victorian Government of most of its industrial relations powers to the Commonwealth.¹⁰²

4.22 The specific matters referred by Victoria included State conciliation and arbitration powers; agreements regulating terms and conditions of the employee/employer relationship; minimum terms and conditions; and the termination or proposed termination of employment.¹⁰³ Certain matters were not referred and remain a matter for State legislation: these include equal opportunity and workers' compensation.¹⁰⁴ However, the referral of powers may not include powers with respect to independent contractors except in circumstances relating to their freedom of association.¹⁰⁵

100 The Act that amended the *Privacy Act 1988* (Cth) to cover the private sector.

101 Explanatory Memorandum to the *Privacy Amendment (Private Sector) Act 2000* (Cth), 80–1.

102 The powers were referred by the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic). This Act and the referral of powers will be discussed in more detail in Chapter 5.

103 While the referral of power gives Federal Parliament concurrent power, the scope of the provisions of the *Workplace Relations Act 1996* (Cth) has the effect that federal industrial law usually operates exclusively. See Chapter 5 for discussion of the effect of the referral of powers.

104 *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) s 5.

105 This is on the basis that such workers do not usually come under the definition of 'employee'. In addition, in the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic), provision is made for the referring of the matter with respect to the freedom of association of 'employees, employers and independent contractors' (s 4(6)), while the referral of all other matters only specifies 'employees'. This point was made with respect to independent contractors being excluded from the referral of powers in *Independent Report of the Victorian Industrial Relations Taskforce* (2000) 64–5.

4.23 The effect of the referral of powers referred to above is that where an employee in Victoria is not subject to an industrial instrument recognised under the WRA (these are awards, certified agreements and Australian workplace agreements), the terms and conditions of their employment are regulated by a limited number of minimum standards prescribed in Schedule 1A of the WRA,¹⁰⁶ and the common law contract of employment.¹⁰⁷ Those minimum standards do not include matters relevant to privacy. This group of employees is known as ‘Schedule 1A employees’.¹⁰⁸

4.24 In investigating the current Victorian workplace laws that may be relevant to the protection of privacy, it is therefore necessary to have regard to the following:

- provisions in common law contracts of employment;
- provisions in awards, collective certified agreements or individual Australian workplace agreements (AWAs), which are ‘industrial instruments’ recognised under the WRA;
- provisions in the WRA relating to unfair and unlawful termination, unlawful conduct and the industrial dispute prevention and settlement powers of the Australian Industrial Relations Commission (AIRC); and
- relevant Victorian legislation, including the *Equal Opportunity Act 1995* (Vic)(EOA); the *Occupational Health and Safety Act 1985* (Vic)(OHSA); and the *Accident Compensation Act 1985* (Vic)(ACA).

CONTRACT OF EMPLOYMENT

4.25 In theory, employees can agree with their employer to include express terms relating to the kinds of practices outlined in Chapter 3, that is surveillance/monitoring, testing, searching and the use by employers of information about themselves. In practice, most employees, particularly those who are only protected by the minimum standards in Schedule 1A, are unlikely to

106 The minimum conditions are four weeks paid annual leave, paid sick leave, maternity leave, parental leave, adoption leave (and entitlement to work part-time), notice period on termination.

107 Only those employees who are in a relatively strong bargaining position are likely to have terms and conditions that exceed the statutory minimum.

108 It has been estimated that in 2000 there were approximately 356,000 employees (about 21% of the workforce) who rely almost entirely on Schedule 1A for protection: *Independent Report of the Victorian Industrial Relations Taskforce* (2000), 14.

consider the privacy implications of these practices and/or will lack the necessary bargaining power to negotiate terms that protect their interests in this context.¹⁰⁹

4.26 In addition to express terms, however, the courts have recognised that terms may be implied into employment contracts in certain circumstances.¹¹⁰ One such term that may be relevant in the privacy context is a term of mutual trust and confidence,¹¹¹ namely that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between itself and its employees.¹¹² The application of this implied term in Australian law is as yet uncertain, and accordingly its relevance in the area of privacy protection is untested. It does have the potential to provide some protection to workers.

WORKPLACE RELATIONS ACT 1996 (CTH)

4.27 The *Workplace Relations Act 1996* (Cth) contains the regulatory framework for Victorian employees. The main provisions that are potentially relevant to the protection of workers' privacy deal with the following matters:

- the making, certification and approval of awards, certified agreements and AWAs that govern wages and conditions;
- the settlement and prevention of industrial disputes by the AIRC;
- remedies for unfair and unlawful termination; and
- unfair contracts.

109 See discussion in Chapter 5.

110 Courts and tribunals are, however, usually reluctant to imply terms into a contract, as to do so freely would run counter to the assumption that contracting parties are independent actors with full knowledge of what they wanted to agree on. Courts, however do imply some terms in order to make the contract 'workable' or as a 'legal incident of a particular class of contract': *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 345 (Mason J). Terms can also be implied through custom of an industry or the conduct of the parties and as a result of legislation.

111 This duty applies to employees as well as employers, however its importance here lies in the extent of the obligations it imposes on an employer: Macken et al, above n 55, 114.

112 See *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144; *Raffoul v Blood Transfusion Service of the Australian Red Cross Society* (1997) 76 IR 383; and Greg McCarry, 'Damages for Breach of the Employer's Implied Duty of Trust and Confidence' (1998) 26 *Australian Business Law Review* 141. For a discussion of this duty in the context of electronic surveillance see Julian Sempill, 'Under the Lens: Electronic Workplace Surveillance' (2001) 14 *Australian Journal of Labour Law* 111, 128–33.

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

4.28 The Australian Industrial Relations Commission plays an important role in the operation of the WRA. Its main powers relevant to privacy issues are facilitating agreements, preventing and settling industrial disputes (such as in making awards) and hearing and determining unfair dismissal applications. Two of the main powers of the AIRC are conciliation and arbitration. Conciliation includes mediation and the active facilitation of negotiation between parties.¹¹³ That is, conciliation focuses on the parties themselves achieving agreement. Arbitration, on the other hand, involves the AIRC adjudicating an industrial dispute. The parties present their cases to the AIRC and the Commission decides the outcome. The AIRC's functions of facilitating agreements and preventing and settling industrial disputes may be relevant in circumstances where there is an award or certified agreement covering the workplace. The role of the AIRC in conciliation and arbitration under the WRA is more prominent in unionised workplaces.¹¹⁴

PROTECTION UNDER THE *WORKPLACE RELATIONS ACT 1996* (CTH)

4.29 Protection of workers' interests under the WRA is achieved through the industrial instruments given statutory force under the Act—awards, certified agreements and AWAs—and Schedule 1A. In theory, some of them could provide for the extent of and manner in which an employer undertakes activities affecting workplace privacy, such as the kinds of practices outlined in Chapter 3.

Schedule 1A

4.30 There are around 561,000 Victorian workers whose employment is regulated by the minimum conditions in Schedule 1A. Around 205,000 of these are professional and managerial workers, who are usually in a position to negotiate common law employment contracts which give them wages and conditions well above the specified minimum. The remainder, many of whom are employed in small workplaces¹¹⁵ rely almost solely on Schedule 1A to determine their terms and conditions, because they are not covered by awards and lack the capacity to engage

113 Creighton and Stewart, above n 55 [4.08].

114 For a discussion of unfair dismissal applications, see paras 4.38–46 below.

115 *Independent Report of the Victorian Industrial Relations Taskforce* (2000) 38 and see footnote 108

in collective bargaining.¹¹⁶ Schedule 1A employees tend to be low paid workers.¹¹⁷ Young people are disproportionately represented among this group of employees with limited bargaining power.¹¹⁸ Around one third of women and one third of men in the Victorian workforce are Schedule 1A employees,¹¹⁹ but they are concentrated in different industries.

Awards

4.31 One of the stated aims of the award system is to operate as a safety net of fair minimum wages and conditions.¹²⁰ The conditions in awards are better than those offered in Schedule 1A, but are in turn usually less favourable than what can be achieved in certified agreements.¹²¹

4.32 There is very little scope for awards to protect worker privacy. The AIRC may only arbitrate provisions in awards that are ‘allowable matters’¹²² or matters that are ‘incidental’ and ‘necessary’¹²³ to the effective operation of the award.¹²⁴

116 Employers in small business are unlikely to be named as parties to awards and, in many cases, are not members of the industry groups which are parties to awards.

117 *Independent Report of the Victorian Industrial Relations Taskforce* (2000), 54.

118 *Ibid* 48.

119 *Ibid* 46.

120 *Workplace Relations Act 1996* (Cth) s 88A(b).

121 See paras 4.33–6 below.

122 These matters are listed in the *Workplace Relations Act 1996* (Cth) s 89A(2) and are: classifications of employees and skill-based career paths; ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours; rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system; incentive-based payments (other than tallies in the meat industry), piece rates and bonuses; annual leave and leave loadings; long service leave; personal/carer’s leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave and other like forms of leave; parental leave, including maternity and adoption leave; public holidays; allowances; loadings for working overtime or for casual or shift work; penalty rates; redundancy pay; notice of termination; stand-down provisions; dispute settling procedures; jury service; type of employment, such as full-time employment, casual employment, regular part-time employment and shift work; superannuation; and pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer’s business or commercial premises. In addition to the 20 allowable matters, the Act does include provision for a model anti-discrimination clause to be included in awards: s 89A(8).

123 *Workplace Relations Act 1996* (Cth) s 89A(6).

124 There are also provisions for awards that are made when the AIRC terminates the ‘bargaining period’ of a dispute in certain circumstances. These circumstances are limited to where industrial action that is being

Privacy issues, such as surveillance, monitoring and the like, are not mentioned in the list of allowable matters, and it is unlikely that such matters could be regarded as incidental and necessary to the effective operation of the award. There is further provision under the WRA for the AIRC to exercise its arbitral power in relation to 'exceptional matters', but again it is unlikely that privacy issues would be seen as falling within this category.¹²⁵ Accordingly, the capacity for awards, under the current legislation, to protect workers' privacy, is virtually non-existent.

Certified Agreements

4.33 Certified agreements can be negotiated between an employer and a union¹²⁶ or between an employer and employees.¹²⁷ They are given statutory force following a process of certification by the AIRC,¹²⁸ which is intended to ensure that they are 'genuinely' approved by a majority of the workers affected and that the agreement satisfies a 'no disadvantage test'.¹²⁹ Subject to meeting certain procedural and

taken as part of the bargaining period may endanger life or the Australian economy and where the employees are covered by paid rates awards: s 170MW(3), (7). These awards are referred to as 'MX awards' (after the section which provides for them to be made). These awards are not limited to the 20 'allowable matters' and will generally reflect what was at issue in the bargaining process: *Workplace Relations Act 1996* (Cth) s 170MY(2). *Workplace Relations Act 1996* (Cth) s 170MX(5) sets out the matters to which the AIRC must have regard in arbitrating an 'MX award'. There are, however, only a limited number of such awards.

125 *Workplace Relations Act 1996* (Cth) s 89A(7). In order to include an 'exceptional matter' in an award, the Commission has to be satisfied that a 'party to the dispute has made a genuine attempt to reach agreement on the exceptional matter; there is no reasonable prospect of agreement being reached on the exceptional matter by conciliation, or further conciliation, by the Commission; it is appropriate to settle the exceptional matter by arbitration; the issues involved in the exceptional matter are exceptional issues; [and] a harsh or unjust outcome would apply if the industrial dispute were not to include the exceptional matter': s 89A(7). As a result of these requirements, it is unlikely that privacy would be considered to be an 'exceptional matter'.

126 *Workplace Relations Act 1996* (Cth) s 170LJ and s 170LO agreements.

127 *Workplace Relations Act 1996* (Cth) s 170LK agreements.

128 *Workplace Relations Act 1996* (Cth) s 170LT. The Act also includes a list of circumstances where the AIRC must refuse to certify an agreement: s 170LU. These circumstances include where the AIRC believes the agreement would be discriminatory.

129 A description of the test is in *Workplace Relations Act 1996* (Cth) s 170XA. This test, in brief, requires that employees should not be disadvantaged overall in relation to their terms and conditions of employment. Disadvantage occurs where the agreement 'would result, on balance, in a reduction in the overall terms and conditions' when measured against a relevant or designated award. It has been recognised, however, that the test is not merely a mathematical exercise and can include a subjective assessment on the part of the Commission (*Shop, Distributive and Allied Employees Association v Bunnings Building Supplies Pty Ltd* (1997) M Print P 6024). That is, the terms and conditions are not to be compared with awards on a term-by-term basis; rather an overall effect of no-disadvantage must result. (If such an effect does result, the

substantive requirements,¹³⁰ employees may take ‘protected industrial action’¹³¹ (for example, a strike or a work ban¹³²) in relation to their claims, thus enhancing their bargaining capacity. While the process of negotiation is occurring, the AIRC may conciliate but not arbitrate.¹³³ Once an agreement is made and certified by the AIRC, employees cannot take protected action until after the ‘nominal expiry date’¹³⁴ of the agreement.¹³⁵

4.34 Provisions in certified agreements reflect the issues which are important to employers and employees in a workplace and are not subject to the constraints of an award.¹³⁶ Because they are negotiated collectively, they may give employees the opportunity to bargain more favourable terms than those available under an award. Only workers in relatively strong bargaining positions will be able to achieve the best protection of their privacy interests. Workers in small businesses are less likely

agreement may be certified by the Commission if satisfied this is not contrary to the public interest (*Workplace Relations Act 1996* (Cth) s 170LT(3). There are however, few examples of where this has occurred.) The no-disadvantage test does not prevent trading off some benefits and conditions for others. It is therefore, for example, possible to ‘trade off some sick leave for other beneficial terms and conditions of employment: Marilyn Pittard, ‘Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements’ (1997) 10 *Australian Journal of Labour Law* 62, 84.

130 *Workplace Relations Act 1996* (Cth) ss 170MN and MO.

131 *Workplace Relations Act 1996* (Cth) s 170ML.

132 Protected action, however, cannot include engaging in a secondary boycott: *Workplace Relations Act 1996* (Cth) s 170MM.

133 *Workplace Relations Act 1996* (Cth) s 170N. This limitation on the AIRC does not prevent the AIRC exercising its arbitration powers to deal with an application to vary an award by making a safety net wage adjustment: s 170N(2).

134 A requirement for certification of an agreement is that it contains a ‘nominal expiry date’ that cannot be more than three years after the date on which the agreement will come into operation: *Workplace Relations Act 1996* (Cth) s 170LT(10).

135 A recent decision, *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCA 61, decided that where no agreement on the inclusion of such a term was reached, but the claims initiating the bargaining period included a claim for such a provision, then employees covered by the agreement may be able take ‘protected industrial action’ in relation to that claim even though the agreement is in place. This decision, however, does not seem in keeping with the requirements of the Act that state ‘an employee, organisation or officer... must not, for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement or award, engage in industrial action’: *Workplace Relations Act 1996* (Cth) ss 170MN(1).

136 Certified agreements made under *Workplace Relations Act 1996* (Cth) ss 170LJ and LK are required to be ‘about matters pertaining to the relationship’ between the employer and the workers (*Workplace Relations Act 1996* (Cth) s 170LI). This, however, has been interpreted broadly, see *Re Amalgamated Engineering Union; Ex parte Shell* (1992) 174 CLR 345.

than those in larger workplaces to have certified agreements. Many women and young people work in small businesses.¹³⁷

4.35 The provisions of such agreements could relate expressly to privacy issues.¹³⁸ There are already a number of agreements that deal with practices such as email monitoring,¹³⁹ keystroke monitoring,¹⁴⁰ call monitoring,¹⁴¹ video surveillance,¹⁴² drug and alcohol testing,¹⁴³ psychological testing,¹⁴⁴ and bag and

137 There has also been discussion to the effect that, in general, women have not received the same level of advantage as men from the shift to certified agreements and are disadvantaged by more flexible working arrangements. See for example, Human Rights and Equal Opportunity Commission, *Stretching Flexibility: Enterprise Bargaining, Women Workers and Changes to Working Hours*, 1996 and Barbara Pocock, 'Equal Pay 30 Years On: The Policy and the Practice' (1999) 32 *Australian Economic Review* 17.

138 Certified agreements may be varied during the life of an agreement: *Workplace Relations Act 1996* (Cth) s 170MD. The AIRC may only approve a variation if it is satisfied that a majority of workers whose employment is subject to the agreement genuinely approve the variation: *Workplace Relations Act 1996* (Cth) s 170MD(3).

139 For example, 'the employer undertakes that email will not be routinely read or monitored. Email will be monitored and retrieved only if the employer is legally obliged to do so or has reasonable cause to believe that an employee has committed a criminal offence or serious disciplinary offence. In these situations, email will be monitored and retrieved in consultation with a union representative or employee selected representative unless the matter is deemed as an emergency and could result in a malfunction of the system: Maroondah City Council Enterprise Agreement No 4 2001 (AG809112).

140 For example, 'systems are not to be used to measure the number of keystrokes made by an individual in any given period': Australian Taxation Office (General Employees) Agreement 2001 (AG811550).

141 For example, Origin Energy (Melbourne) Customer Contact Centre Agreement 2002 (AG813955).

142 Some of the agreements include reference to the use of security video cameras, such as to the locations of the cameras and access to the video tapes: National Union of Workers; Transport Workers Union of Australia; and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union Australia—Electrical Division and Kodak (Australasia) Pty Ltd (C No 38518 of 1999 Kodak (Australasia) Pty Ltd National Distribution Agreement 1999). Other agreements state that 'unless it is deemed necessary by the parties for security reasons, during the life of this Agreement there shall be no use of electronic monitoring, in any form, of any types of rate of work performed by employees. 'Electronic monitoring' includes, but is not limited to, systems monitoring individual quantity and duration of phone calls, "eavesdropping" devices and video surveillance': Australian Municipal, Administrative, Clerical and Services Union and Victorian Canine Association Inc (C No 37134 of 1999 Victorian Canine/ASU Inc Enterprise Agreement 1999).

143 For example, 'both the Company and employees have a duty of care not to allow any employee whose performance at work is, or could be, adversely affected by the use of alcohol or drugs to continue working. To assist in the maintenance of this position, employees agree to participate in random and incident specific alcohol and drug testing in accordance with Company Policy': Mermaid Marine Dampier Supply Base Certified Agreement 2001 (AG813058).

144 One agreement makes specific reference to psychological testing as a technique for selection for promotion: AMP Asset Management Australia Ltd and Financial Sector Union of Australia (C No 26098

locker searches.¹⁴⁵ One certified agreement of which we are aware includes a separate clause highlighting the need to protect worker privacy.¹⁴⁶

4.36 Certified agreements must include dispute resolution procedures.¹⁴⁷ If a dispute arises about a privacy issue and there is a dispute settlement clause empowering the AIRC to determine an issue in dispute, the AIRC is not restricted to dealing with the ‘allowable award matters’ that can be included in awards.¹⁴⁸

Australian Workplace Agreements

4.37 Australian workplace agreements (AWAs) are agreements between an employer and an individual employee which are given statutory force under the WRA.¹⁴⁹ They are approved by the Office of the Employment Advocate rather than certified by the AIRC.¹⁵⁰ Only a small proportion of employees under the

of 1998). It should be noted that this agreement has passed its nominal expiry date. Another agreement states that psychological testing will play no part in the selection process for redundancies: Interface Manufacturing Pty Ltd and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and the Textile Clothing and Footwear Union of Australia (AG804751).

145 For example, the National Union of Workers and The Nuance Group (Australia) Pty Ltd (AG811578) agreement includes a clause relating to security guidelines, which gives effect to a policy contained in a Schedule to the agreement. The policy states that locker searches will be carried out ‘from time to time’ and that workers are ‘expected to co-operate in routine bag inspections’. Another section of the policy, however, states that ‘all staff are expected to cooperate with these security guidelines. Persons conducting inspections will have regard to individuals’ privacy. For example where possible inspections will be carried out by a checker of the same gender as the owner of the property inspected’.

146 ‘World Vision Australia, in accordance with our core values and the National Privacy Principles of the *Privacy Amendment (Private Sector) Act 2000*, shall respect the dignity and privacy of all individuals with whom it is engaged. [The] Customer Service Centre management and staff shall take reasonable steps to protect the personal information held within the Customer Service Centre from misuse, loss, unauthorised access, modification or disclosure. [The] Customer Service Centre management shall ensure the following: i. Privacy and confidentiality training will be provided to all staff and volunteers; ii. All staff and volunteers sign a confidentiality agreement; and iii. Access to information and information systems by all staff or volunteers will be limited to that required by staff or volunteers’ current roles’: World Vision of Australia—Customer Service Centre Certified Agreement 2002 (AG 815070).

147 *Workplace Relations Act 1996* (Cth) s 170LT(8).

148 *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* [2001] HCA 16.

149 ‘An employer and employee may make a written agreement, called an Australian workplace agreement, that deals with matters pertaining to the relationship between an employer and employee’: *Workplace Relations Act 1996* (Cth) s 170VF(1).

150 *Workplace Relations Act 1996* (Cth) s 170VPB. The AIRC may approve an AWA if the AWA has been referred to it by the Employment Advocate: *Workplace Relations Act 1996* (Cth) s 170VPG.

Federal system are parties to an AWA.¹⁵¹ Employers must ensure that the AWA includes provisions relating to discrimination¹⁵² and a dispute resolution procedure.¹⁵³ Other terms in AWAs could give workers privacy protection or allow employers to introduce practices which affect workers' privacy.¹⁵⁴ The terms included will depend on the relative bargaining strength of the parties.¹⁵⁵ In some cases it will be difficult for employees to negotiate for the inclusion of clauses protecting their privacy.

151 There are no statistics that provide precise information as to the numbers of workers who benefit from particular workplace arrangements. The Australian Bureau of Statistics (ABS) has, however, released figures which show that in August 1998, 59% of the workforce were in an employment relationship that gave them leave entitlements (an indicator that they were permanent employees), 18% were 'self-identified casuals', 4% were 'other employed persons', 7% were owner managers of incorporated enterprises and 13% were owner managers of unincorporated enterprises (Australian Bureau of Statistics, *Forms of Employment Australia 2000* (Cat. No. 6359.0)). In addition, the ABS has released figures that indicate that 24% of employees were paid the award rate, 41% of employees were subject to individual agreements and 35% were subject to collective agreements. Of the individual agreements, only 1.5% of employees in the private sector and 3% in the public sector were subject to pay set by registered individual agreements. From another perspective, in the private sector, 48% of employees were paid under unregistered individual agreements, 27% were covered by awards only and 22% were paid according to registered collective agreements. All data sourced from Australian Bureau of Statistics, *New Figures on Award and Agreement Coverage in Australia 2000* (Cat. No. 6305.0). Both sets of statistics are available from <www.abs.gov.au/ausstats> (12 June 2002).

152 *Workplace Relations Act 1996* (Cth) s 170VG(1).

153 *Workplace Relations Act 1996* (Cth) s 170VG(3). In addition, AWAs must pass the no-disadvantage test and contain a nominal expiry date in the same manner as certified agreements.

154 *Workplace Relations Act 1996* (Cth) s 170VQ(6) deals with the relationship between an AWA and certified agreement. Under this section a certified agreement, during its nominal life, will prevail over a subsequent AWA to the extent of any inconsistency unless the certified agreement includes an express clause that an AWA will prevail (such express clauses are, however, not common). Otherwise, an AWA will entirely exclude an expired certified agreement or any certified agreement that is certified during the nominal life of the AWA.

155 The *Workplace Relations Act 1996* (Cth) does provide that a 'person must not apply duress to an employer or employee in connection with an AWA or ancillary document': s 170WG(1). But there is no express provision preventing an employer from offering employment on the basis that the employee enters into an AWA: Joo-Cheong Tham, "'Take it or Leave It" AWAs: A Question of Duress?' (1999) 12 *Australian Journal of Labour Law* 142, 145. However, the Act does provide that employers must ensure that AWAs do 'not include any provisions that prohibit or restrict disclosure of details of the AWA by either party to another person': s 170VG(2). This provision can be considered to ensure that employees can show their AWAs to outside parties as a limited protection against harsh agreements.

Unfair and Unlawful Termination of Employment Provisions under the WRA

4.38 The WRA contains provisions relating to unfair and unlawful terminations of employment. If an employee is dismissed following an invasion of her or his privacy by an employer, the employee may be able to apply for relief under these provisions, against the termination, on the grounds that it is harsh, unjust or unreasonable and/or that it is unlawful.¹⁵⁶ These provisions also may apply in circumstances of ‘constructive dismissal’,¹⁵⁷ where an employee resigns because the employer’s conduct has made it impossible to continue. These may include circumstances where an employee has been demoted.¹⁵⁸

4.39 If an application under s 170CE is arbitrated, the AIRC may order that the employee is reinstated¹⁵⁹ but, in practice, compensation is the more common remedy.¹⁶⁰ Compensation here is generally for financial loss¹⁶¹ and is subject to a statutory limit of six months salary for award employees and a specific amount for non-award employees.¹⁶²

156 *Workplace Relations Act 1996* (Cth) s 170CE.

157 *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200.

158 Although, according to commentators, the ‘issue is not settled [as to] whether an employee who has been demoted may complain of unfair dismissal, even if they continue working for the employer’: Creighton and Stewart, above n 55, [11.64]. A recent decision that supports this view is *Song v Ainsworth Game Technologies* [2002] FMCA 31 in which a worker who was unilaterally changed from a full-time worker to a part-time worker was held to have been dismissed. The rationale for extending ‘constructive dismissal’ to circumstances of demotion is that the worker is no longer working under the same contractual conditions as she or he was before the demotion. Therefore, in effect, the demotion can be seen as a change in employment contracts.

159 If an employee is ordered to be reinstated, the AIRC may make any order it ‘thinks appropriate to maintain the continuity of the employee’s employment’ and any order to ‘cause the employer to pay to the employee an amount in respect of the remuneration lost, or likely to have been lost, by the employee because of the termination’: *Workplace Relations Act 1996* (Cth) s 170CH(4).

160 *Workplace Relations Act 1996* (Cth) s 170CH.

161 There is some suggestion that there may be damages payable for breach of contract on the basis of the hurt suffered by the worker on termination of her or his contract (see, for example, *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 and *Malik and Mahmud v Bank of Credit and Commerce International* [1998] AC 20); however, in most cases it has been considered that there is no damages available for non-financial pain: *Addis v Gramophone Co. Ltd.* [1909] AC 488.

162 Equivalent to an amount of six months of the wages/salary for award employees; or for non-award employees an amount of six months of the wages/salary or \$40,800 whichever amount is smaller: *Workplace Relations Act 1996* (Cth) s 170CH(8) and (9). The AIRC must have regard to a number of circumstances when calculating compensation. These include the effect of the order on the viability of the employer’s undertaking, the length of the employee’s service with the employer and the efforts (if any) of

Who is Entitled to make an Application?

4.40 These provisions do not apply to independent contractors; nor do they cover all Victorian employees. The provisions do not cover:¹⁶³

- employees who have been employed for a specified task;
- non-award employees earning more than \$81,500;¹⁶⁴
- some casuals;¹⁶⁵ and
- fixed-term employees.¹⁶⁶

Process for Obtaining Relief

4.41 Applications must generally proceed first to a conciliation conference. An overwhelming majority of applications are settled either before or at this stage.¹⁶⁷ Where the circumstances of the termination involve practices of the kinds described in Chapter 3, it is possible that the settlement could include agreements as to their future use (in a case of reinstatement).

4.42 Where no settlement is reached at the conciliation conference, the applicant may have the matter arbitrated. A claim that the termination was 'harsh, unjust or unreasonable' must be heard and determined by the AIRC. Where it is also claimed that the termination was unlawful, the claimant may elect to have this determined by either the AIRC or the Federal Court of Australia.

the employee to mitigate any loss (for example, by finding other employment): *Workplace Relations Act 1996* (Cth) s 170CH(7).

163 This list is not exhaustive, the exceptions are contained in *Workplace Relations Act 1996* (Cth) s 170CC and *Workplace Relations Regulations 1996* (Cth) 30B.

164 This amount is indexed.

165 Casuals are not excluded from the unfair dismissal and unlawful termination provisions if the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and the employee has, or but for a decision by the employer to terminate the employee's employment would have had, a reasonable expectation of continuing employment by the employer.

166 If an employment contract includes provision for the termination of the contract (by either party) prior to the end of the fixed term, then the contract is not a 'fixed-term' contract for the purposes of the unfair dismissal and unlawful termination provisions of the *Workplace Relations Act 1996* (Cth).

167 Seventy-eight percent of termination of employment matters finalised by the AIRC in 2000–1 were finalised at or prior to conciliation: Australian Industrial Relations Commission, *Annual Report 2000–1*, 12.

‘Harsh, Unjust and Unreasonable’

4.43 The AIRC must be satisfied there was a valid reason for dismissal—that is, a ‘sound, defensible or well founded’ reason¹⁶⁸—based on the conduct of the employee or the employer’s operational requirements (such as, a genuine redundancy). Even where there is a valid reason the termination may still be found to be harsh, unjust and unreasonable if there was procedural unfairness, for example where an employee has not been warned and given an opportunity to respond.¹⁶⁹ When assessing the ‘fairness’ of a dismissal, the AIRC should accord a ‘fair go all round’ to both the employer and employee concerned.¹⁷⁰

Unlawful termination

4.44 Certain terminations of employment are unlawful under the WRA,¹⁷¹ for example, where this is on such grounds as absence because of illness or injury, the employee’s activities as a trade unionist¹⁷² or, such matters as their sex, race, disability, sexual preference and age.¹⁷³ If an employer’s privacy-invasive practice

168 *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373 (Northrop J).

169 When coming to its determination, the AIRC must have regard to (a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer’s undertaking, establishment or service; and (b) whether the employee was notified of that reason; and (c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and (d) if the termination related to unsatisfactory performance by the employee—whether the employee had been warned about that unsatisfactory performance before the termination; and (da) the degree to which the size of the employer’s undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and (db) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and (e) any other matters that the Commission considers relevant’: *Workplace Relations Act 1996* (Cth) s 170CG(3).

170 *Workplace Relations Act 1996* (Cth) s 170CA(2).

171 *Workplace Relations Act 1996* (Cth) s 170CK.

172 In addition, s 298K of the *Workplace Relations Act 1996* (Cth) prohibits a wide range of conduct by employers—from dismissal to altering a person’s position to their prejudice, whether they be an employee, independent contractor or engaged on a contract for service, for a reason that includes a ‘prohibited reason’. ‘Prohibited reasons’ include membership or non-membership of a trade union: s 298L. If a practice of the kind described in Chapter 3 was carried out by an employer for one of these prohibited reasons, then this would provide a means by which the aggrieved employee could seek relief in the Federal Court (including penalties, injunction (permanent and interim) and reinstatement) both during and after the employment relationship has ended: s 298U. When an applicant alleges that the employer’s conduct is for a prohibited reason and the employer must then show that the employer’s action was not for a prohibited reason: s 298V.

173 *Workplace Relations Act 1996* (Cth) s 170CK(2)(f).

results in the termination of a person's employment on unlawful grounds, the worker may have a remedy under these provisions. Where an employee alleges that she or he has been terminated on unlawful grounds, the onus is on the employer to prove that the termination was not for a proscribed reason.¹⁷⁴

4.45 If the Federal Court finds that a worker has been terminated for a proscribed reason,¹⁷⁵ the Court may order that the worker be reinstated,¹⁷⁶ that compensation be paid to the worker,¹⁷⁷ that the employer pay a penalty,¹⁷⁸ or any order that it thinks necessary to remedy the effect of the termination.¹⁷⁹

4.46 A finding by the AIRC or Federal Court that the use of a practice of the kind described in Chapter 3 has been a factor or circumstance giving rise to an unfair or unlawful termination may have an educative effect and result in changes that reduce offensive aspects of its use in the workplace.¹⁸⁰ However, in practice, such a finding may only have a limited effect on workplace practices.¹⁸¹

Independent Contractors under the WRA

4.47 The WRA protects independent contractors where they are bound by 'unfair contracts', but only where the contractor is an individual, rather than a

174 *Workplace Relations Act 1996* (Cth) s 170CQ. A limited defence to such an allegation related to an employee's attribute is that of an inherent requirement of the position: s 170CK(3).

175 It may also be possible for a dismissed worker to bring an action for a breach of the implied duty of trust and confidence, see above para 4.26.

176 *Workplace Relations Act 1996* (Cth) s 170CR(1)(b). However, 'in considering whether the discretion to order reinstatement should be exercised, a central consideration is whether a satisfactory working relationship can be re-established between the parties': *Ettridge v TransAdelaide* (1998) 80 IR 422, 430 (von Doussa J).

177 *Workplace Relations Act 1996* (Cth) s 170CR(1)(c).

178 *Workplace Relations Act 1996* (Cth) s 170CR(1)(a). The maximum penalty is \$10,000. The penalty may be paid to the worker: *Stewart v Nickles* [1999] FCA 888.

179 *Workplace Relations Act 1996* (Cth) s 170CR(1)(d).

180 The penalty that may be imposed under *Workplace Relations Act 1996* (Cth) s 170CR(1)(a) is 'punitive in character and must be assessed having regard, inter alia to...the need to deter the repetition of the conduct whether by the employer in question or generally': *Fox v St Barbara Mines Ltd* [1998] FCA 621, (French J).

181 In both the AIRC and Federal Court jurisdiction, parties bear their own costs in applications under s 170CE unless claims/ behaviour were unreasonable in proceedings in the AIRC (*Workplace Relations Act 1996* (Cth) s 170CJ) or claims made in the AIRC or Federal Court were vexatious (*Workplace Relations Act 1996* (Cth) s 347).

company.¹⁸² This may occur where unfairness or unjustness arises in relation to the relative strength of the bargaining positions; the exertion of undue influence or pressure; inadequate remuneration compared to that of a comparable employee; or any other matter the Federal Court considers relevant.¹⁸³ A contractual term which affects privacy could be challenged on this basis. These unfair contract provisions are concerned with unfairness and harshness at the time of contract only.¹⁸⁴ If the Court finds that a contract is unfair it can order that the contract be set aside or varied.¹⁸⁵

EQUAL OPPORTUNITY ACT 1995

4.48 The provisions of the *Equal Opportunity Act 1995* (Vic) (EOA) may also provide indirect protection against practices which affect workers' privacy.¹⁸⁶ The EOA prohibits discrimination on the grounds of various attributes (such as sex, age, impairment, marital status, sexual orientation and lawful sexual activity)¹⁸⁷ and prohibits sexual harassment in various contexts such as in the workplace, in education and in the provision of goods and services. Discrimination can be direct or indirect,¹⁸⁸ and employers can be held vicariously liable for conduct by their employees or agents that is discriminatory or amounts to sexual harassment.¹⁸⁹

182 Such contracts are contracts *for* services rather than contracts *of* service, the latter binding 'employees'. See *Workplace Relations Act 1996* (Cth) ss 127A–127C. In other words, there is no explicit provision in the *Workplace Relations Act 1996* (Cth) covering unfair contracts where those contracts are made between employees and employers. There is, however, unfair contracts legislation covering workers in New South Wales and Queensland.

183 *Workplace Relations Act 1996* (Cth) s 127A(4). The test of unfairness for such contracts would include consideration of current industry standards, awards, related statutory rights and possibly also Australia's treaty obligations. The conception of fairness itself would extend to substantive and procedural fairness and unconscionability: Macken et al, above n 55, 512.

184 *Finch v Herald & Weekly Times Ltd* (1996) 65 IR 239; *Harding v EIG Ansvar Ltd* [2000] FCA 46.

185 *Workplace Relations Act 1996* (Cth) s 127B(1).

186 In addition, there are a number of Commonwealth anti-discrimination Acts that may provide indirect privacy protection. These include the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*.

187 *Equal Opportunity Act 1995* (Vic) s 6 contains a list of attributes on the basis of which discrimination is prohibited.

188 *Equal Opportunity Act 1995* (Vic) s 7. Direct discrimination is defined in s 8 and indirect discrimination is defined in s 9.

189 *Equal Opportunity Act 1995* (Vic) s 102. This section does not apply if the employer proves that they took reasonable steps to prevent the employee or agent contravening the Act: s 103.

4.49 The reach of the EOA in the workplace extends to job applicants.¹⁹⁰ In particular, the Act prohibits a person from requesting information that could be used to form the basis of discrimination.¹⁹¹ The EOA also covers independent contractors.¹⁹² Victimisation of a person alleging discrimination, making a complaint or being part of any proceedings under the Act is prohibited.¹⁹³ There are, however, a number of express exceptions to discriminatory conduct in the workplace, notably those based on ‘genuine occupational requirements’.¹⁹⁴

4.50 Where one of the practices described in Chapter 3 constitutes discrimination or sexual harassment, the EOA provides a mechanism for an employee, prospective employee, ex-employee, independent contractor or person engaged on contract for service to make a complaint and pursue a remedy.

4.51 A complaint under the EOA is lodged with the Equal Opportunity Commission (EOC). The complaint is investigated by the EOC which then either refers it for conciliation,¹⁹⁵ advises the complainant that conciliation is inappropriate¹⁹⁶ or declines to deal with it.¹⁹⁷ Most complaints are referred for conciliation and many complaints are settled at this stage. Settlements may contain conditions relating to privacy protection, especially if there is a continuing employment relationship.

4.52 If a complaint is not settled the complainant may refer it to the Victorian Civil and Administrative Tribunal (VCAT) for hearing.¹⁹⁸ If it finds the complaint proven, VCAT has a wide range of remedial and preventative orders at its disposal,

190 *Equal Opportunity Act 1995* (Vic) s 13.

191 *Equal Opportunity Act 1995* (Vic) s 100.

192 *Equal Opportunity Act 1995* (Vic) s 15.

193 *Equal Opportunity Act 1995* (Vic) s 96. Victimisation is defined in s 97.

194 *Equal Opportunity Act 1995* (Vic) ss 17, 22, 23, 25. For example, the exception under s 25 applies to employment that involves the ‘care, instruction or supervision of children’. The exception under s 17, which relates to discrimination with respect to the gender of the worker, applies to employment that can be performed only by a person having particular physical characteristics (other than strength or stamina) that are possessed only by people of that sex and employment that includes the conduct of searches of the clothing or bodies of people of that sex.

195 This is an option open to the Equal Opportunity Commission where it considers it reasonably possible that a complaint may be conciliated successfully: *Equal Opportunity Act 1995* (Vic) s 112.

196 *Equal Opportunity Act 1995* (Vic) s 117.

197 *Equal Opportunity Act 1995* (Vic) s 108.

198 *Equal Opportunity Act 1995* (Vic) s 136.

including an order preventing further contraventions of the Act; an order for compensation; and an order that the respondent to the action do 'anything specified in the order with a view to redressing any loss, damage or injury suffered by the complainant as a result of the contravention' of the Act.¹⁹⁹

OCCUPATIONAL HEALTH AND SAFETY ACT 1985 AND ACCIDENT COMPENSATION ACT 1985

4.53 Employers are obliged to provide a safe workplace for their employees under the *Occupational Health and Safety Act 1985* (Vic) (OHSA).²⁰⁰ Employees likewise have an obligation to take care of their own and other workers' health and safety.²⁰¹ Such duties may justify invasions of privacy, for example, drug and alcohol testing where dangerous equipment is in use. However, it is possible that there will be situations where the invasion of privacy is so extreme that it may result in psychological injury to an employee for which they may be entitled to compensation.

4.54 Where employees suffer injuries (whether physical or mental)²⁰² arising out of or in the course of their employment and their employment was a significant contributing factor,²⁰³ they can apply to the Victorian WorkCover Authority, under the *Accident Compensation Act 1985*, for compensation for those injuries.²⁰⁴

199 *Equal Opportunity Act 1995* (Vic) s 136(a).

200 *Occupational Health and Safety Act 1985* (Vic) s 21.

201 *Occupational Health and Safety Act 1985* (Vic) s 25.

202 'Injury' is defined as 'any physical or mental injury': *Accident Compensation Act 1985* (Vic) s 5.

203 *Accident Compensation Act 1985* (Vic) s 82(2). Compensation is not, however, 'payable in respect of an injury consisting of an illness or disorder of the mind caused by stress unless the stress did not arise wholly or predominantly from (a) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or (b) a decision of the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment; or (c) an expectation of the taking of such an action or making of such a decision: *Accident Compensation Act 1985* s 82(2A).

204 There has already been a prosecution under the *Occupational Health and Safety Act 1985* for what amounted to the bastardisation of an apprentice (failing to prevent the employee from being harmed because of the worker's apprentice status). The prosecution, in the Magistrates' Court in 2000, involved a case where an apprentice was abused to the extent that he became a patient in a psychiatric hospital: Worksafe Victoria Recent Prosecutions: Cases Heard 1 January – 31 December 2000, available from <workcover.vic.gov.au/vwa/legis.nsf/RPCContent/RecentProsecutions/SFile/2000_Recent_Prosecutions.pdf> (18 June 2002). There is no specific provision in the *Occupational Health and Safety Act 1985* (Vic) with respect to apprentices, however, employers can be prosecuted under s 21(1) and (2)(e). These provisions require the employer to provide and maintain a safe workplace and to provide the training and supervision

Occupational stress is a workplace injury for which a worker may receive compensation. Where the use of one of the practices described in Chapter 3 causes mental illness or disorder in an employee, this illness or disorder could be a workplace injury for which a worker may receive compensation.²⁰⁵

necessary to employees necessary to perform their work in a safe manner. In addition, there is a recognition by the Victorian WorkCover Authority as to the importance of the non-physical health of workers. The Authority is currently in the process of producing a *Code of Practice for the Prevention of Bullying and Violence in the Workplace* and the Authority states that 10% of all claims lodged with the Authority are as a result of occupational stress: <www.workcover.vic.gov.au/dir090/vwa/home.nsf> (18 July 2002).

205 *Accident Compensation Act 1985* (Vic) ss 93, 93A, 93B.

Table 2: Workplace Relations Law Relevant to Worker Privacy

Relevant Law	Mechanisms	Remedies	Limits to Privacy Protection
<i>Workplace Relations Act 1996 (Cth)</i>	Awards		Privacy not an allowable award matter
	Certified Agreements	Dispute resolution procedures in an AWA or certified agreement could be used to resolve privacy disputes	Privacy protection (in both certified agreements and AWAs) limited by bargaining strength of parties
	Australian workplace agreements		
	Unfair dismissal	Compensation	Only available to limited categories of workers Only available at end of employment relationship
	Unlawful termination	Compensation Penalties	
	Unfair contracts	Variation or setting aside of contract	Limited to independent contractors
Contract of employment	Implied employer duty of trust and confidence	Damages for breach of contract	Limited to employer/employee relationships Not fully described in Australian law
<i>Occupational Health and Safety Act 1985 (Vic)</i> and <i>Accident Compensation Act 1985 (Vic)</i>		Compensation for injuries (physical or mental) suffered in the workplace	Incidental privacy protection (eg protects against victimisation and bullying)
<i>Equal Opportunity Act 1995 (Vic)</i>		Complaint of discrimination and harassment can be made to the Equal Opportunity Commission	Incidental privacy protection. Can be seen to protect the 'autonomy and dignity' of job applicants and workers (for example, through the prohibition on requesting information that could be used to form the basis of discrimination)

HOW DO THESE LAWS PROTECT WORKERS' PRIVACY?

4.55 This section describes the way in which the laws discussed above provide remedies to the kinds of practices outlined in Chapter 3. The section is broken into two parts. The first focuses on the protections available under the privacy laws and the second examines the manner in which workers' privacy may be protected by workplace laws. The case studies contained in Chapter 3 are used to illustrate the effectiveness (or otherwise) of these laws.

How do Privacy Laws Protect Workers?

SURVEILLANCE AND MONITORING OF WORKERS

4.56 The *Surveillance Devices Act 1999* (Vic) (SDA) offers limited protection to workers whose privacy is infringed by their employer's use of surveillance. There is no restriction on surveillance when employees consent.²⁰⁶ For example, the monitoring of Catherine's telephone calls in Case Study 3 (where Catherine reacted to an abusive client) is unlikely to be a breach of the SDA, because management negotiated the recording of calls with their staff. (The recording by employers of clients' conversations with employees could however be an offence under the Act, if callers were not informed that their calls were monitored).²⁰⁷ Similarly, in Case Study 2, if Fred had consented to use of the iris camera the employer would not be guilty of an offence under the Act.

4.57 The SDA has limited application to employers' use of listening or monitoring devices because most activities and conversations in workplaces will not come within the definition of private conversations or activities. A private activity is defined in section 3 as an activity:

carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include (a) an activity carried on outside a building; or (b) an activity carried on in circumstances in which parties to it ought reasonably to expect that it may be observed by someone else.²⁰⁸

206 *Surveillance Devices Act 1999* (Vic) s 6(1), 7(1), 8(1), 9(1).

207 *Surveillance Devices Act 1999* (SDA) s 6(1) states that a 'person must not knowingly install, use or maintain a listening device to... record... a private conversation to which the person is not a party, without the express or implied consent of each party to the conversation'.

208 *Surveillance Devices Act 1999* (SDA) s 3.

4.58 The childcare centre²⁰⁹ in Case Study 1 and the baggage-handling areas of the airport in Case Study 5 are places where the participants in the activities ‘ought reasonably to expect that their activity may be observed by someone else’, so that provisions prohibiting installation, use and monitoring of optical surveillance devices do not apply.

4.59 The SDA may not cover all forms of surveillance. For example, it is not clear whether the door-opening device which was used to admit Fred to some parts of the workplace in Case Study 2 comes within the SDA definitions of an ‘optical surveillance device’ or a ‘tracking device.’ An optical surveillance device is an ‘instrument, apparatus or activity’ which is ‘capable of being used to record visually or observe a private activity’.²¹⁰ It is not clear that an iris camera fits within this definition.²¹¹ The camera could perhaps be seen as a ‘tracking device’ as it is an ‘electronic device the primary purpose of which is to determine the geographical location of a person or an object’. That is, the primary purpose of the door-opening device is to verify that an authorised person, identifiable through its stored data, is standing in a particular location—in front of the camera. Again, Fred’s consent means that the Act does not apply.

4.60 Employer monitoring of email does not appear to be covered by the SDA.²¹² It is also doubtful whether the *Telecommunications (Interception) Act 1979* (Cth) extends to the monitoring of workers emails, as in Case Study 4, the case of Marcella, the software developer who works from home. Whether or not the Act applies may depend on whether her emails are monitored through being ‘read’ when they are stored on the hard drive of the computer (after they have been sent or received) or while they were ‘passing over’ the system between being sent and

209 The privacy of the children may be invaded also, but unless they are involved in a private activity the Act does not apply.

210 *Surveillance Devices Act 1999* (SDA) s 3 (certain devices are excluded).

211 If the camera is permanently mounted in a workplace, particularly if it has a limited focal length, then it may not be capable of recording or observing any activity, that is, the limitations of the lens of the camera may prevent it from ‘observing’ or ‘recording’ any meaningful images of an activity occurring beyond the focal length of the camera.

212 *Surveillance Devices Act 1999* (Vic) s 9 prohibits a law enforcement officer from installing, using, maintaining or retrieving a device to record input or output from a computer without the consent of the person for whom information is being put into or taken out of the computer. If emails were monitored by such a device, s 9 would apply.

received. The Act can only apply if the emails are intercepted as they are ‘passing over’ the system.²¹³

4.61 If the Act does apply, it is unlikely, for reasons of expense and inconvenience, that Marcella would want to institute proceedings under the Act.²¹⁴ No other privacy laws appear to apply to the interception of emails by employers. There has been judicial comment to the effect that it would be ‘desirable’ for workers to be ‘made aware, in clear terms, of the criteria establishing the circumstances that constitute acceptable and unacceptable use of their employers’ email or IT system’.²¹⁵ In addition, the Office of the Federal Privacy Commissioner has released guidelines on ‘workplace email, web browsing and privacy’.²¹⁶ Privacy guidelines do not provide workers with substantive protections, but they may affect workplace practices by educating employers and workers about acceptable practices.

TESTING

4.62 Neither State nor Federal privacy laws explicitly regulate the testing of workers or of people applying for jobs. However the *Privacy Act 1988* (Cth) applies to the collection of information by an organisation if the information is collected for inclusion in a record.²¹⁷ This means that testing is indirectly regulated if the results of the test are to be recorded. The NPPs applicable to private sector organisations provide that an ‘organisation must not collect personal information unless the information is necessary for one or more of its functions’.²¹⁸ The

213 See above n 77.

214 Civil remedies are available to an ‘aggrieved person’ under s 107A of the Act.

215 *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia* [2000] FCA 441, para 82 (Merkel J). This decision arose from the use, by a union representative, of the employer’s email system to disseminate union material. Some certified agreements now include clauses that allow unions to use employer IT systems, for example, ‘the Union and its representatives will have access to Council’s email system for union purposes, to send and receive emails both internally and externally’: Maroondah City Council Enterprise Agreement No 4 2001 (AG809112). More broadly, there are certified agreements that now include email and internet use policies, for example, Australian Institute Of Management—Victoria and Tasmania College of Education and Training Enterprise Agreement 2002 (AG 816954).

216 Available from <www.privacy.gov.au>.

217 *Privacy Act 1988* (Cth) s 14 and IPP 1 applying to the public sector. A similar principle applies to private sector bodies covered by the Act under s16B. This provision appears to apply to both public and sector bodies, despite the heading to the Division.

218 National Privacy Principle 1.1. See also Information Privacy Principles in *Privacy Act 1988* (Cth) s 14.

*Information Privacy Act 2001*²¹⁹ and HRA²²⁰ also contain principles which may be relevant to collection of information by testing.

4.63 In Case Study 6, Boris was to be apprenticed to a small employer. Small business operators are not covered by the Privacy Act, but the HRA applies to the collection of health information by the employer.²²¹ Boris appears to have consented to taking a medical test, so that the consent requirement in the HPPs is satisfied,²²² but the employer will be in breach of the Act unless collecting the information by use of the test was necessary for the performance of the employer's functions. (The organisation which does the testing would also be subject to these Principles.) Boris's consent means that the common law action of 'battery' is not available.²²³

4.64 In Case Study 7, where Francine declined to take the psychological test, Principle 1 of the NPPs applies to the employer, assuming the information is to be held in a record. The information which is obtained by use of the psychological test probably comes within the definition of personal information.²²⁴ It is arguable that the employer cannot collect this information because it is not sufficiently related to the employer's functions. However given the widespread use of such tests, this argument may not succeed.

4.65 In Case Study 8, the NPPs will apply to the large construction company Bergon, assuming that the results of the tests are included in a record. The NPPs apply to its collection of personal information.²²⁵ If Principle 1 relating to collection applies, the collection of the information by random drug and alcohol testing may be necessary to ensure workplace safety. If so, Principle 1 relating to the collection of information is satisfied.

219 Principle 1 of the Information Privacy Principles contained in Schedule 1 of the *Information Privacy Act 2000* (Vic).

220 Principle 1 of the Health Privacy Principles contained in Schedule 1 of the *Health Records Act 2001* (Vic).

221 The employer is covered by s 11 because it collects, holds or uses health information.

222 His participation in the tests may be considered to be implied consent for both the testing and the provision of information to his prospective employer.

223 Consent is usually a defence to any claim of battery; however, this is not always the case. For example, in contact sports, there is an assumption of implied consent to a degree of physical contact. However, contact in excess of the implied limit may constitute a battery, see, for example, *Giumelli v Johnston* (1991) Aust Torts Reps 81-085.

224 *Privacy Act 1988* (Cth) s 6.

225 *Privacy Act 1988* (Cth) s16B.

SEARCH

4.66 The physical search of workers or their property is not covered by the Privacy Act, unless the search is for the purpose of collecting information for inclusion in a record. Workers who are searched usually consent to the search, so that they cannot rely on common law remedies such as assault or battery.²²⁶ Consent to the search would therefore prevent Chris (the department store storeman in Case Study 9)²²⁷ from bringing any legal action. If a worker's property is damaged as the result of a search the worker could have an action for damages for trespass to goods under the common law. However this would probably not assist solicitor John in Case Study 10, as his 'goods' suffered no damage.²²⁸ Even if a right to bring a legal action is theoretically available, the legal costs involved would deter most workers from suing.

4.67 There is no common law remedy which protects a person from electronic searches. However the *Summary Offences Act 1966* (Vic) prohibits unauthorised access to computers.²²⁹ In Case Study 12, if Andrea, the advertising creative director, has been given the computer as a workplace 'perk', then Terence's access to her files may be a criminal offence.²³⁰ The same will be true in Case Study 11, where the school principal accesses Clayton's folders. However, if the employers in

226 There are also certain situations where there is legislative backing for the search of workers, see for example, s 45 of the *Corrections Act 1986* (Vic).

227 A set of guidelines has been handed down, *In re Security Arrangements in Retail Stores* [1979] AR 72, that detail appropriate procedures for the search and interviewing of retail staff. The guidelines do not, however, make reference to searches of the clothes or bodies of employees. The guidelines, with respect to physical searches, only describe searches of bags, parcels and lockers. It was noted, however, that 'no man or woman upon entering into an employment contract thereby agrees to forego those basic civil liberties which distinguish our society from more barbarous regimes': [1979] AR 72, 79 (Macken J).

228 A successful action for trespass to goods may be possible without the goods having sustained damage. Chief Justice Latham (in dissent) said that 'the handling of a chattel without authority is trespass': *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, 214. In addition, under the doctrine of 'asportation', damages may be payable simply because the goods have been moved from one place to another. For example, in *Kirk v Gregory* (1876) 1 Ex D 55, an action for trespass to goods was successful after jewellery had been moved from one room of a house to another. The plaintiff, however, was only awarded nominal damages.

229 *Summary Offences Act 1966* (Vic) s 9A.

230 If Andrea authorised Terence to fix the computer then she may have authorised unlimited access to the computer and the files on the hard drive of the computer.

both Case Studies 11 and 12 had retained ownership of the computers it is unlikely that accessing files on those computers would be an offence.²³¹

WORKERS' INFORMATION

4.68 State and Federal information privacy legislation gives personal information a higher level of privacy protection than other aspects of privacy. However, the exclusions and exemptions in the Privacy Act and the limited coverage provided by the State Acts mean that workers' personal information receives only piecemeal protection.

SMALL BUSINESS OPERATOR EXCEPTION

4.69 As noted above,²³² small business operators are generally not bound by the Privacy Act.²³³ The 'small business operator'²³⁴ exception means that the small cheese co-op in Case Study 2 is not bound by the Privacy Act, so that Fred is not protected against disclosure of this information to the police.²³⁵

EXCLUSION OF EMPLOYEE RECORDS

4.70 The NPPs applicable to private sector employers under that Act do not apply to the collection, use and disclosure of information contained in 'employee records'.²³⁶ An 'employee record' is defined as being, 'in relation to an employee...a record of personal information'²³⁷ relating to the employment of the employee'.²³⁸

231 As with Marcella in Case Study 4, discussed above, para 4.61, it would be desirable, in Case Study 11, for there to have been an email policy in place to offer guidance to workers such as Clayton.

232 Paras 4.8–10.

233 Unless they choose to be bound or if they are data traders.

234 See above para 4.9.

235 Even if the stored image of his iris constitutes a 'record', then it is likely to be an 'employee record' in which case it is excluded from the Act. The value of the information to the police, however, given that the data of Fred's irises may not be compatible with software for facial identification, is a technical question beyond the scope of this Paper. For a recent discussion of the effectiveness of facial recognition software see Michael Brooks, 'Face-off', *New Scientist*, 7 September 2002, 38.

236 Commonwealth public sector employers do not benefit from the employee records exemption as the exemption only applies to 'organisations'. Organisations are defined as individuals, bodies corporate, partnerships, unincorporated associations and trusts that are not small business operators, political parties, Commonwealth public sector agencies or State or Territory authorities or instrumentalities: *Privacy Act 1988* (Cth) s 6C.

237 'Personal information' means 'information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an

The Act gives some examples of information which may be part of an employee record.

4.71 Even if the cheese co-op in Case Study 2 were bound by the NPPs, because it had a turnover of \$3,000,000 or more, it is not clear whether Fred's iris image would be protected against disclosure. The iris image seems to come within the definition of personal information,²³⁹ but it may be an 'employee record' because it is 'information relating to the employment' of Fred, in which case it is not protected.

4.72 Similarly in Case Study 13, if Zavod is a sufficiently large organisation to come within the Privacy Act, a record relating to Xavier's work practices is exempt because it is an employee record (Xavier was the worker who was refused a job on the basis of information disclosed by his previous employer). There is nothing in the Act to prevent Zavod disclosing the content of an employee record to Excelsior.²⁴⁰ If Zavod disclosed personal information about Xavier that was not part of his employee record the disclosure must comply with the NPPs regulating disclosure.²⁴¹

4.73 While the disclosure by Zavod of information about Xavier might be excluded from the operation of the Privacy Act under the 'employee record' exemption, the collection, use or disclosure of that information by Excelsior will not be covered by that exemption.²⁴² Excelsior must comply with the collection principles under the NPPs.²⁴³ National Privacy Principle 1 states that an organisation must not collect personal information (for inclusion in a record) unless the information is necessary for one or more of its functions.²⁴⁴ If the

individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion':
Privacy Act 1988 (Cth) s 6.

238 See above n 63 and accompanying text for a list of the information that is included as part of an 'employee record'.

239 *Privacy Act 1988* (Cth) s 6.

240 The House of Representatives Standing Committee on Legal and Constitutional Affairs noted that there is 'some information that an employer should be able to disclose to future employers... [including] performance related information such as confidential references': *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000* (2000) [3.31].

241 National Privacy Principle 2. The NPP would not apply if Zavod is a 'small business operator'.

242 The definition of 'employee record' is limited to current and former employment relationships, not prospective employment relationships: *Privacy Act 1988* (Cth) s 7B(3)(a).

243 Unless Excelsior is exempt as a small business operator.

244 National Privacy Principle 1.1.

information disclosed by Zavod to Excelsior was collected by Excelsior for reasons related to its functions Excelsior will not be in breach of NPP 1, so long as it makes Xavier aware of certain matters.²⁴⁵ The information related to Xavier's sexual preference does not seem to be necessary for Excelsior's functions, and its collection would therefore be a breach of the NPPs.²⁴⁶ It is also 'sensitive information', which generally cannot be collected without the individual's consent.²⁴⁷

4.74 In Case Study 16, the government inspector may have breached the IPPs contained in the Privacy Act by disclosing information about Alfred's receipt of a disability pension to Seth.²⁴⁸ The IPPs limit disclosure of information by government agencies.²⁴⁹ Although disclosure is permitted where it is reasonably necessary to protect public revenue the inspector does not need to notify the employer of Alfred's receipt of the pension. Alfred would therefore be able to complain to the Federal Privacy Commissioner.²⁵⁰

4.75 In Case Study 14, Frederick is not bound by either the Federal or State privacy legislation.²⁵¹ In theory Wilma, the epilepsy sufferer, could bring an action against Frederick for breach of confidence. The requirements for such an action are:

245 National Privacy Principle 1.5

246 For a discussion of the complaints procedure under the Act, see para 4.12.

247 National Privacy Principle 10 and see *Privacy Act 1988* (Cth) s 6 for the definition of sensitive information. This will not apply unless Excelsior includes the information in a 'record': see *Privacy Act 1988* (Cth) s 16B.

248 *Privacy Act 1988* (Cth) ss 13,14 and IPP 11 read with s 6. The government inspector is likely to be part of a Commonwealth agency, given her or his focus on pension cheats, and therefore would be bound by the *Privacy Act 1988* (Cth).

249 Principle 11 of the Information Privacy Principles states that a 'record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned)'. The Principle includes a number of exceptions that relate to situations where the individual concerned is reasonably likely to be aware that the information will be disclosed, where the individual has consented to the disclosure, to prevent or lessen a serious and imminent threat to the life or health of a person, where it is authorised by law or where it is reasonably necessary for the enforcement of the criminal law, a law imposing a pecuniary penalty or for the protection of the public revenue.

250 See para 4.12 above for a discussion of the complaints procedure under the Act.

251 The *Privacy Act 1988* (Cth) does bind individuals who are bodies corporate (s 6C(1)), however, it does not bind every individual.

the information itself...must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it...²⁵²

4.76 However, she is not likely to wish to bring an action against a friend and there may be doubt that a conversation in a pub, despite the sensitive nature of the subject matter, would be considered to be 'imparted in circumstances importing an obligation of confidence'. If, however, the information was disclosed in confidence Wilma may have an action for breach of confidence against her employer, as this may extend to third party recipients of confidential information.²⁵³ Possible remedies could include an injunction restraining her employer from using this information to her detriment and/or an award of monetary compensation.

4.77 Suppose that Wilma's employer included the information about her epilepsy in her employee record and later disclosed that information to a third person. As we have seen, employee records are not covered by the NPPs under the Privacy Act. However employers who 'collect, hold or use health information'²⁵⁴ are subject to the HPPs in the HRA. Where there is an inconsistency between State and Federal Acts, the Federal Act will prevail to the extent of the inconsistency.²⁵⁵ However, the provisions protecting health records in the Victorian Act do not appear to be inconsistent with the exemption of employee records in the Privacy Act, so that Wilma could complain about disclosure of the information.²⁵⁶

4.78 In Case Study 15, if Nerida's business is of sufficient size to be covered by the Privacy Act, her use of a private inquiry agency to collect information about her employees must comply with the NPPs relating to the collection of

252 *Coco v Clark* [1969] RPC 41, 46 (Justice Megarry).

253 See for example, *Argyll v Argyll* [1967] Ch 302 and *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 307.

254 See para 4.16 above.

255 For a discussion of the effect of inconsistency between State and Federal Acts, see Chapter 5.

256 There may, however, be a potential inconsistency where the employee records are disclosed to a potential employer. That is, where there is health information contained in a job 'reference' the prospective employer is bound by the requirements of the *Privacy Act 1988* (Cth) as the employee record is not an exempt document for the prospective employer (see para 4.73).

information.²⁵⁷ NPP 1.4 provides that, if it is reasonable and practicable, an organisation must collect personal information about an individual only from that individual. Nerida may argue that it was not reasonable to collect this information from Clarence. The private inquiry agency is covered by the Act, even if it falls within the small business exception in the Act. It is bound by the NPPs because it ‘discloses information about another individual to anyone else for a benefit, service or advantage’.²⁵⁸ The definition of ‘personal information’ in the Privacy Act would cover information about a court order.²⁵⁹ Again the question here is whether it was unreasonable to expect the private inquiry agent to collect the information from Clarence. If it could have been collected from Clarence, collection by another means would be a breach of NPP 1.4.²⁶⁰ Where an organisation collects personal information about an individual from someone else they must also ensure that the individual is made aware of matters specified in the NPPs, including the fact that the organisation is able to obtain access to the information and the purposes for which it is collected.²⁶¹

GAPS IN PROTECTION OFFERED BY PRIVACY LAWS

4.79 Our discussion of these case studies reveals significant gaps in the protection offered by privacy laws. For example, the SDA:

- may not cover all forms of surveillance;
- will rarely apply to surveillance in the workplace, because of the restricted definition of ‘private activities’ and ‘private conversations’; and

257 This would only be if the collection was for the purpose of including the information in a record, see *Privacy Act 1988* (Cth) s 16B. Under NPP 1.2 information must be collected by lawful means and not in an unfair or unreasonably intrusive way.

258 *Privacy Act 1988* (Cth) s 6D(4).

259 *Privacy Act 1988* (Cth) s 6. Note, however, that the Act has limited application to Federal courts: s 7(1)(a)(ii), 7(1)(b). The collection of information from a court order, as a public record, may not, in itself, be a breach of NPP 1.2, which requires that information must be collected by fair means and not in an unreasonably intrusive way.

260 Under *Privacy Act 1988* (Cth) s 16B the Act applies only to the collection of personal information to be contained in ‘a record or a generally available publication’. The definition of ‘record’ under s 6 does not include ‘a generally available publication’ Information about a Federal Court order is probably not a generally available publication as defined in s 6. However even if it is, the IPP dealing with collection appears to apply to the collection of such information.

261 National Privacy Principle 1.5.

- offers no protection to employees who agree to employer use of surveillance devices.

4.80 Privacy legislation does not explicitly regulate workplace testing, though it places some limits on collection of information by testing and on the use or disclosure of that information.

4.81 The common law provides remedies for workers who are searched without their consent. There are few legislative restrictions on electronic searches by employers.

4.82 Privacy protection for workers' personal information is limited by the small business operator exclusion and the employee records exemption in the Privacy Act. In addition, the IPPs and NPPs relating to the use and collection of information may not provide adequate protection in the workplace context. Health records are protected under the HRA, but information on other private matters contained in an employee record or held by a small business is usually not protected.

4.83 Many practices which affect privacy are not regulated by law. Overall privacy protection for workers is limited. In some workplaces workers will be under pressure to consent to practices which affect their privacy.

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QUESTIONS

34. We have identified significant gaps in the protection offered by privacy laws. Existing surveillance legislation will rarely apply in the workplace, and offers no protection for employees who consent to the practice. There are no statutory provisions regarding testing itself, although privacy laws place some limits on how the information derived from tests can be used. Physical searching of workers without their consent is covered by common law, but there are few restrictions on electronic searchers. Workers' information is protected to some extent, but significant exemptions and exclusions in the Act mean that protection is limited. Do the gaps in the privacy laws that we have identified need to be filled?
35. Are there any gaps that we have missed?

How do Workplace Laws Protect Workers?

4.84 In this section we consider how workplace laws apply to the case studies in Chapter 3. As highlighted above, the relevance of workplace laws, including occupational health and safety and anti-discrimination laws, differs according to the stage of the employment relationship at which the practice which is said to affect privacy occurs. Workplace laws, to a large extent, only cover paid workers. Therefore, volunteers, such as George the volunteer childcare worker in Case Study 1, do not receive any protection from these laws.²⁶²

²⁶² Volunteers are limited in terms of the protection they gain under workplace laws because they do not have a contract of employment. That is, because they do not receive remuneration for the work they do, there is no contract. Protections under workplace laws, whether it be the *Workplace Relations Act 1996* (Cth) or the duty of trust and confidence (to be discussed below, para 4.94) in Australia are limited to workers who are a party to a contract. Volunteers may, however, receive some protection under the *Occupational Health and Safety Act 1985* (Vic) and the *Equal Opportunity Act 1995* (Vic). Volunteers may, however, be named as in a certified agreement, see for example, the World Vision Agreement, above n 146.

BEFORE THE COMMENCEMENT OF THE EMPLOYMENT RELATIONSHIP

4.85 The WRA does not generally apply to people who are applying for jobs as they are not, as yet, ‘workers’.²⁶³ However, anti-discrimination laws can sometimes provide an indirect remedy for invasions of privacy. For example, Boris, in Case Study 6, may have a discrimination claim under the EOA as he was discriminated against on the grounds of impairment.²⁶⁴ Because he was denied a job as a result of his hepatitis-C status, he could complain to the EOC and have his complaint conciliated. If conciliation fails he may require that the complaint be referred to VCAT. He may receive compensation or some other remedy.²⁶⁵

4.86 Xavier, in Case Study 13, may also have a remedy against Excelsior under the EOA, because of Excelsior’s use of the information which they have received from Zavod. Excelsior has discriminated against Xavier. The discrimination may be on the basis of his sexual orientation²⁶⁶ or it may be on the basis of his status as a carer.²⁶⁷ A complaint to the EOC will not ensure that Xavier gets the job with Excelsior but he may end up being paid compensation as the result of conciliation of his complaint or a VCAT order.²⁶⁸

263 There are no direct provisions in the *Workplace Relations Act 1996* (Cth) that apply to workers who are not yet employed. However, some provisions of the Act do require the AIRC to have regard to anti-discrimination conventions and legislation in the performance of its functions (see for example, ss 93, 93A). The conventions (for example, the ‘Convention concerning equal opportunities and equal treatment for men and women workers: workers with family responsibilities’, included as Schedule 12 of the *Workplace Relations Act 1996* (Cth)) and legislation (such as the *Disability Discrimination Act 1992* (Cth)) do contain provisions that relate to discrimination in the hiring and termination of workers. In addition, the freedom of association provisions of the *Workplace Relations Act 1996* (Cth) apply to the hiring (or more specifically a refusal to hire) and termination of workers: s 298K.

264 ‘Impairment’ is defined to include the ‘presence in the body of organisms that may cause disease’: *Equal Opportunity Act 1995* s 4; and Boris is covered because it is unlawful to discriminate against job applicants: s 13. The definition of disability in the *Disability Discrimination Act 1992* (Cth) includes ‘the presence in the body of organisms capable of causing disease or illness’ (s 4), therefore, Boris could also bring an action under that Act. It should be noted that in addition to the other workplace laws discussed in this chapter, apprenticeships are also governed by Part 5 of the *Vocational Education and Training Act 1990* (Vic). These provisions do not, however, have direct bearing on the protection of privacy of apprentices.

265 *Equal Opportunity Act 1995* (Vic) s 136.

266 *Equal Opportunity Act 1995* (Vic) s 6(l).

267 *Equal Opportunity Act 1995* (Vic) s 6(ea).

268 *Equal Opportunity Act 1995* (Vic) s 136(a)(ii). Compensation may include lost wages and damages for hurt and humiliation suffered by Xavier. For a discussion of the complaints process see para 4.51 above.

DURING THE EMPLOYMENT RELATIONSHIP

WORKPLACE RELATIONS ACT 1986

4.87 The privacy protection provided to workers in the case studies in Chapter 3 will depend on the nature of their employment relationship. As noted in the first section of this chapter, workers may be employed under an award, a certified agreement, an AWA or solely under a contract of employment. Which of these applies will depend on a number of factors, including the sector of the economy in which they work, whether it is unionised, and the extent of the worker's negotiating power.

Awards

4.88 In some of the case studies the worker will be covered by an award. As was discussed above,²⁶⁹ awards under the WRA are currently limited to 20 'allowable matters', none of which relate directly to privacy issues, with the consequence that awards do not offer any direct privacy protection.

Certified Agreements

4.89 There is likely to be a certified agreement covering some of the workplaces in our case studies. These agreements may include limits on practices that affect worker privacy in workplaces. There is increasing use of surveillance and monitoring measures by employers (see Case Studies 2, 3, 4 and 5). To our knowledge, however, there are an increasing number of certified agreements which contain clauses dealing with drug and alcohol testing procedures but relatively few that include provisions covering other measures affecting privacy.

269 Paras 4.31–2.

Table 3: Likely Coverage of Industrial Instruments in Chapter 3 Case Studies

Case Study (Number)	Award/ Certified Agreement	Case Study Example (Number)	Award/ Certified Agreement
Childcare centre workers (1)	Yes	Store-person in department store (9)	Yes
Cheese co-op worker (2)	No	Corporate lawyer (10)	No
Financial services business consultant (3)	No	Teacher in private secondary college (11)	Yes
Software developer (4)	No	Creative director in advertising agency (12)	No
Airport baggage-handlers (5)	Yes	Computer firm worker (13)	No
Apprentice at small manufacturer (6)	Yes	Call centre operator (14)	Probably not
Manager in large insurance company (7)	Possible	Manager, department store (15)	No
Independent contractor (8)	No	Clothing factory worker (16)	Yes

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QUESTION

36. To our knowledge, there are relatively few certified agreements that contain clauses that protect worker privacy. Why is this so?

Dispute Resolution Under Awards or Certified Agreements

4.90 The award may,²⁷⁰ or certified agreement will,²⁷¹ contain dispute resolution procedures. Dispute resolution procedures could be used to resolve disputes about employers' introduction of video surveillance in Case Study 1 or the denial of increments provided for in a certified agreement in Case Study 3.²⁷² In practice workers will usually need the assistance of a trade union to rely on these procedures.²⁷³

Individual Agreements

4.91 Where a worker is employed under an AWA or a contract of employment, remedies for interferences of privacy will depend on whether provisions relating to privacy are included in the agreement or contract.

4.92 There may be grounds for an action for breach of contract if the particular practice exceeds the limits specified in the contract. For example, the use of surveillance in the childcare centre in Case Study 1 could be included as an express term of an agreement along with a specified purpose for that surveillance (such as countering allegations of paedophilia). If the parents' co-operative then used the surveillance for a different purpose (such as monitoring Fiona's performance) then the employer would be in breach of the agreement.²⁷⁴ Remedies available for breaches of contract are usually limited to the payment of damages.

4.93 The drug and alcohol testing policy,²⁷⁵ in Case Study 8, may have been included in a clause of Jason's contract as the policy had been negotiated with the

270 'Dispute settling procedures' is one of the 20 allowable award matters.

271 *Workplace Relations Act 1996* (Cth) s 170LT(8).

272 In addition, Alex's employment, in Case Study 5, may be subject to an award or a certified agreement, which would mean that the trade union might make the intrusive searches of staff members a 'dispute'. Given the limits placed on the AIRC by the provisions of s 89A (the allowable award matters), if a trade union did notify the AIRC of the dispute, the Commission would not be able to arbitrate on a dispute involving intrusive searches.

273 Registered trade unions, employers and the Minister are the parties who can notify under *Workplace Relations Act 1996* (Cth) s 99.

274 Employees can also breach the employment contract. For example, it seems clear that Andrea, in Case Study 12, was working on her novel during working hours. If she was, then she may be considered to be in breach of her contract. This can be seen as a failure on her part to live up to the 'wages/work bargain': Creighton and Stewart, above n 55, [9.07-10].

275 Such policies are common in many workplaces, and often implemented in order to enhance the safety of those workplaces.

workers in that workplace.²⁷⁶ The WRA offers little protection to independent contractors, as they are not usually considered to be ‘employees’. The protection under the Act is limited to the provisions on unfair contracts discussed above.²⁷⁷

IMPLIED DUTY OF TRUST AND CONFIDENCE

4.94 Where there is no express term in the contract, some of the practices highlighted in Chapter 3 could amount to a breach of an implied term. An employer’s duty to maintain ‘trust and confidence’ in the employment relationship could perhaps provide some protection for workers against interferences with their privacy.²⁷⁸ For example, excessive use of video cameras in the childcare centre in Case Study 1 might be considered to be a breach of that implied duty. As with express terms, if an employer breaches an implied term, then the worker may be able to take court action against the employer for breach of contract.²⁷⁹ As the implied duty is not well established in Australian law, any action by an employee would have to be a ‘test case’. The test case may not succeed and workers may be reluctant to incur legal costs where the outcome of the case is uncertain.²⁸⁰ The financial backing of a union may be of assistance in conducting a test case.

4.95 Francine, in Case Study 7, may have a better chance of success in an action for breach of duty of trust and confidence. One of the English decisions that discusses the duty relates to an employee being asked to undergo psychological tests. The court, in that case, decided that such a requirement was a breach of the duty.²⁸¹ However there may be an express term in the agreement permitting some testing during the employment relationship. If there was such a clause, then

276 Alternatively, his contract may have required him to comply with the various occupational health and safety policies of the workplace.

277 See above para 4.47.

278 See above para 4.26 for a discussion of this implied duty.

279 The only remedy available would be damages and not reinstatement. As noted above (n 161), damages is not likely to include compensation for any personal hurt suffered by the worker as a result of the breach.

280 John, in Case Study 10, may also have an action for breach of contract on the basis on duty of trust and confidence if his employer’s activities continue, and they affect his state of mind.

281 *Bliss v South East Thames Regional Health Authority* [1987] ICR 700. The courts in the United Kingdom have, however, recently decided that remedies for a breach of the duty of trust and confidence, in circumstances of the dismissal of a worker, may only be available ‘if the employer acts in a harsh and oppressive manner that inflicts unnecessary and substantial financial damage on the employee’: *Johnson v Unisys Limited* [2001] 2 All ER 801 (Lord Steyn). This limitation means that the vast majority of dismissals will not give rise to an action for the breach of the duty of trust and confidence.

Francine would not be able to rely on the implied duty of trust and confidence. Indeed she could be in breach of the contract by not undergoing the agreed tests.

WORKERS' COMPENSATION LEGISLATION

4.96 This may provide incidental protection for workers' privacy in some instances, irrespective of the terms of their employment contract.²⁸² This damage does not have to be in the form of physical injury. In Case Study 3, therefore, Catherine may be able to obtain a remedy on the basis of the stress that she has suffered as a result of the monitoring of the telephone calls. In addition, Wilma, the epilepsy sufferer in Case Study 14, may be eligible for compensation through WorkCover for her stress.²⁸³

ANTI-DISCRIMINATION LEGISLATION

4.97 This also may provide some protection to workers during their employment relationship. Thus, Marcella in Case Study 4 may have a claim under the EOA. The basis of her claim would be discrimination on the grounds of 'lawful sexual activity'.²⁸⁴ Her emails were not unlawful;²⁸⁵ nor were they being forwarded to any other workers in the company (which potentially could constitute sexual harassment²⁸⁶). Nonetheless, she received a 'final warning' from her supervisor. As a result, she may be able to complain to the EOC.²⁸⁷ The EOC may act to conciliate the complaint.²⁸⁸ If conciliation is unsuccessful, Marcella may require the EOC to refer the complaint to VCAT with the aim of removing the 'final warning' from her employment record.²⁸⁹ Wilma, in Case Study 14, may also have an action against her employer for discrimination under the EOA. The grounds for

282 See above paras 4.53–4.

283 For a discussion of compensation payable for stress, see above, para 4.54.

284 *Equal Opportunity Act 1995* (Vic) s 6(d).

285 Emails may be considered to be unlawful if they amount to sexual harassment under the *Equal Opportunity Act 1995* (Vic). Section 85 of the Act includes 'unwelcome conduct of a sexual nature' under the description of what may constitute sexual harassment. 'Unwelcome conduct of a sexual nature' is, in turn, defined to include 'making orally or in writing, any remark or statement with sexual connotations to a person'.

286 Part 5 of the *Equal Opportunity Act 1995* (Vic) contains the provisions regarding the prohibition of sexual harassment.

287 *Equal Opportunity Act 1995* (Vic) s 104.

288 *Equal Opportunity Act 1995* (Vic) s 114.

289 *Equal Opportunity Act 1995* (Vic) s 117.

discrimination would be impairment²⁹⁰ and this would be sufficient for a complaint to the EOC and possible remedial orders from VCAT.²⁹¹

AT THE END OF THE EMPLOYMENT RELATIONSHIP

4.98 In some of the case studies in Chapter 3, affected workers may have a remedy for an unfair dismissal or unlawful termination of employment following an invasion of their privacy. A remedy may also be available for ‘constructive dismissal’, when workers are forced to resign because of the way they have been treated or, possibly, when they have been demoted.

REMEDIES UNDER THE *WORKPLACE RELATIONS ACT 1996*

Unfair Dismissal

4.99 The WRA provides remedies to workers for an unjust, harsh and unreasonable termination of an employment relationship.²⁹² The employer must have a valid reason for the dismissal and must have treated the worker fairly with respect to the dismissal.

4.100 Francine, the insurance manager in Case Study 7, who refused to undergo the psychological fitness test, may be able to apply to the AIRC for an order that her dismissal was unjust, harsh and unreasonable. It is likely that the Commission would order that her dismissal was unfair because there was no valid reason given for her dismissal and there was no ‘procedural fairness’ with respect to the decision to dismiss her.²⁹³ However, if Francine’s employment is not covered by an award and her income is greater than \$81,500 she will be unable to apply for an order of unfair dismissal.²⁹⁴ As we have noted above,²⁹⁵ some other categories of workers do

290 ‘Impairment’ is defined to mean: (a) total or partial loss of a bodily function; (b) the presence in the body of organisms that may cause disease; (c) total or partial loss of a part of the body; (d) malfunction of a part of the body, including a mental or psychological disease or disorder and a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder; (e) malformation or disfigurement of a part of the body: *Equal Opportunity Act 1995* (Vic) s 4.

291 VCAT may make an order for compensation to be paid to Wilma or may make an order requiring Wilma’s employer ‘to do anything specified in the order with a view to redressing any loss, damage, or injury suffered’ by Wilma as a result of the discrimination: *Equal Opportunity Act 1995* (Vic) s 136(a).

292 See above paras 4.38–46.

293 *Workplace Relations Act 1996* (Cth) s 170CG(3).

294 See above para 4.40 for a discussion of the categories of workers who are not covered by the unfair dismissal provisions of the *Workplace Relations Act 1996* (Cth).

295 See para 4.40.

not have access to unfair dismissal remedies. These include some casual employees and fixed term employees. Shaun and Alex in Case Study 5 might also seek a remedy for unfair dismissal because they have not been given the opportunity to tell their side of the story prior to their sacking.

4.101 Alfred, in Case Study 16, may also have an action for unfair dismissal against Seth. Seth did not give Alfred any opportunity to explain the nature of his back problem. Even if he had, Seth does not appear to have a valid reason for terminating Alfred's employment.²⁹⁶ If the Commission finds the dismissal is unfair it can order the worker's reinstatement or can order the payment of an amount in lieu of reinstatement.²⁹⁷

Unlawful Termination

4.102 Sacked workers may also have a remedy for 'unlawful termination' under the WRA. A termination is unlawful if it is based on the grounds set out in the WRA,²⁹⁸ which gives effect to provisions prohibiting discrimination in various international conventions.²⁹⁹ Alfred in Case Study 16 may have been discriminated against because of his physical disability. An exception to the requirements of the WRA is where the 'reason for terminating employment...is based on the inherent requirements of the particular position concerned'.³⁰⁰ He would be able to bring an action in the Federal Court for unlawful termination.

Constructive Dismissal

4.103 Constructive dismissal may occur when a worker resigns because the employer's conduct has made it impossible to continue, for example by preventing

296 Sacking Alfred because of his back problem may also amount to discrimination under the *Equal Opportunity Act 1995* (Vic). Alternatively, Alfred may be able to seek a remedy on the grounds of unlawful termination.

297 *Workplace Relations Act 1996* (Cth) s 170CH.

298 *Workplace Relations Act 1996* (Cth) s 170CK. Alfred, in Case Study 16, may also be able to bring an action for unlawful discrimination on the grounds that he was sacked for having a bad back which can be seen as either an injury or a physical disability.

299 The relevant Conventions are the Convention Concerning Discrimination in Respect of Employment and Occupation and the Family Responsibilities Convention.

300 *Workplace Relations Act 1996* (Cth) s 170CK(3). The 'inherent requirements' exception has been used by employers in the past, particularly where safety issues are central to the dismissal. See, for example, *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 where it was decided that the mandatory retirement of airline pilots at age 60 was not unlawful. This defence is unlikely to succeed for Seth, however, as Alfred had been working well in the job for several years.

him or her from carrying out their duties, or when the conditions of a worker's employment change for the worse, such as where the worker is demoted.³⁰¹ If Catherine, in Case Study 3, decides to resign on the basis of the denial of the increment, her resignation could amount to a constructive dismissal. The change to Wilma's duties in Case Study 14 could also amount to constructive dismissal. It is also arguable that the email restriction imposed on Clayton in Case Study 11 could amount to constructive dismissal if, as a result of his employer's actions, he can no longer carry out the duties that were part of his contract of employment. In theory these workers could apply to the AIRC for an unfair dismissal order,³⁰² but in practice they may be reluctant to take legal action. Clayton could perhaps bring a civil action for breach of contract against his employer on the basis that the school had made it impossible for him to perform his contract, but he is unlikely to do so because of the legal costs involved.³⁰³

ANTI-DISCRIMINATION LEGISLATION

4.104 Workers whose employment is terminated as a result of discrimination may also have remedies under the EOA. For example, Alfred in Case Study 16 could make a complaint on the basis that he has been dismissed because of his impairment. Section 170HB of the WRA, however, states that an application to the AIRC under s 170CE of the Act (which includes unfair dismissal and unlawful termination) must not be made if proceedings for a remedy for the termination have already been commenced under another provision of the Act, under another Federal law or under a State or Territory law. Therefore, Alfred could not bring an action under the WRA if he has already commenced an action under the EOA. The section does not, however, prevent him from commencing an action under the EOA after the AIRC has determined his application under the WRA.

301 See above n 158.

302 See above, para 4.99–101.

303 Wilma, in Case Study 14, may also be able to apply to the AIRC for an unfair dismissal order in respect of her constructive dismissal, on the basis that her employer did not have a valid reason for the change to her employment and she was not given the opportunity to explain that her condition did not affect her ability to work.

GAPS IN PROTECTION OFFERED BY WORKPLACE LAWS

SCOPE OF PROTECTION PROVIDED BY INDUSTRIAL INSTRUMENTS

4.105 Although workplace relations laws provide some privacy protection to workers, this may not be adequate because:

- awards can only cover allowable matters which do not include matters relating to privacy;
- so far, certified agreements have been infrequently used to deal with workplace privacy issues, except perhaps drug and alcohol testing procedures;
- workers may be unable to obtain an employer's agreement to the inclusion of clauses protecting privacy in AWAs and in contracts of employment, because of their lack of bargaining power; and
- there are no direct privacy safeguards in the WRA.

4.106 WRA provisions relating to unfair dismissal exclude some categories of workers (for example independent contractors, some casual employees and highly paid workers). In any case, provisions relating to unfair and unlawful dismissal will only assist those workers whose employment has been terminated or who have been constructively dismissed as the result of privacy invasions.

4.107 The EOA and the OHSA protect workers who have experienced discrimination or danger, but are not primarily concerned with privacy.

AUTONOMY AND DIGNITY

4.108 The remedies discussed above are only available in circumstances where the worker has suffered some form of substantive detriment (that is, they have experienced discrimination, lost their jobs, or suffered a loss in pay or a demotion). There are few remedies available for workers who have 'only' suffered damage to their autonomy and dignity (see definition of privacy in Chapter 2). For example, Chris in Case Study 9 and John in Case Study 10 have both had their personal space violated. Depending on the intrusiveness of the searches, Chris' dignity may suffer every time he is searched. In addition, depending on how frequently Tracey searches John's office, John could suffer psychological consequences from the searches. However, unless the violation of their sense of self manifested itself in

stress, which might enable them to claim workers' compensation,³⁰⁴ there is currently no remedy available for the workers affected by these practices.

4.109 As we have already seen, not all categories of workers can rely on WRA provisions which may give some incidental privacy protection. If we consider privacy to necessarily be connected with a person's autonomy and dignity, then all workers should be entitled to a minimum level of privacy protection, regardless of the characterisation of their employment relationship.

CONSENT

4.110 In many of the case studies discussed above, workers have little power to object to practices which affect their privacy. They may be required to agree to these practices to obtain or keep a job. Their consent may not be fully voluntary in the sense of a consent given freely without fear of reprisal from the employer. Current remedies for invasions of privacy do not take into account the circumstances in which workers have consented to the practices involved.

4.111 Basing the introduction of practices affecting privacy on the presence of an individual's consent ignores the social effect of practices such as searching, testing or surveillance of workers. Workplace legislation does not provide any minimum standards for privacy protection of workers. It gives no recognition to the social value of privacy.

304 See para 4.54 above for a discussion of stress and the *Occupational Health and Safety Act 1985* (Vic).

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QUESTIONS

37. We have identified significant gaps in the protection offered by workplace laws. Awards cannot contain clauses protecting privacy. Other industrial instruments (certified agreements and AWAs) rarely include privacy-protective clauses and the provisions in the WRA itself generally only assist workers whose employment has been terminated. Do the gaps that we have identified in the workplace laws need to be filled?
38. Are there any gaps that we have missed?
39. If existing workplace laws can be used to protect aspects of workers' privacy, such as through clauses in certified agreements and AWAs, why is it that this has not occurred?

FILLING THE GAPS

4.112 There are a number of ways in which the gaps, in both the workplace and the privacy laws, may be filled. Some ways of doing this can be seen as relatively informal, others can be seen as much more formal. The different ways can be grouped under the categories of 'education' and 'regulation'.

EDUCATION

4.113 The main purpose of any education would be to sensitise workers and employers to the importance of the protection of workers' privacy and the impact that the legal obligations on employers may have on workers' privacy. The government, industry associations or trade unions, could, separately or jointly, undertake such programs of education. Any such program should include greater discussion about what 'privacy' is and what it can mean to different people and groups within the community.

4.114 One concrete result of such programs could be an increase in use of negotiated workplace policies that highlight the particular needs of individual workplaces with respect to both workers and employers. Another concrete change could be an increase in the use of privacy-protective clauses in certified agreements. Both of these results could be brought about through trade unions and employers being more actively involved in workplace privacy issues.

REGULATION

4.115 Regulation of these issues could take a number of forms. One avenue would be for the Federal Parliament to amend the WRA to ensure that privacy-protective clauses are included in awards, AWAs and certified agreements in the same manner that anti-discrimination clauses may be included in such agreements. Another option would be for the Victorian Parliament to legislate specifically in relation to workers' privacy. An advantage of this approach is that it could ensure that all workers are protected equally, as the Victorian Parliament would not be caught by the limitations of the WRA. Another advantage could be a clearer and more expansive definition or description of the notion of 'privacy' itself. There are, however, a number of legal concerns raised by the prospect of legislative change in this State. These concerns are discussed in the next chapter.

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QUESTION

40. Are education and regulation the main ways of filling the gaps? Are there any other ways that this could be done?

Chapter 5

Principles and Possible Approaches to Reform

INTRODUCTION

5.1 In Chapter 2 we suggested that the purpose of workplace privacy reform should be to protect individual autonomy and dignity and to take account of the impact of practices affecting privacy on society as a whole. This chapter proposes some broad principles which will need to be considered in proposing reforms which meet these objectives. We also discuss a range of approaches which could be used to protect workers' privacy. The chapter does not make detailed proposals to deal with particular types of privacy infringement, but is intended to provide the basis for development of such proposals in the future.

SOME BROAD PRINCIPLES

5.2 At a later stage of our work we will need to consider how to respond to particular workplace practices which impact on workers' privacy. It is important that this response be underpinned by coherent principles. This section proposes some principles that will need to be taken into account in making concrete proposals for law reform.³⁰⁵ In particular, we propose that such reforms should reflect the following principles.

Balancing interests provide an appropriate balance between the interests of employers, employees and third parties who may be affected.

Minimum standards provide a minimum standard of privacy protection to all employees.

Proportionality: reflect the requirement that any privacy infringement be proportional to any benefits gained from the infringement.

Transparency: ensure that measures affecting privacy are transparent to workers.

305 Some of these principles are taken from John D R Craig, *Privacy and Employment Law* (1999) 143–70.

Flexibility: be sufficiently flexible to take account of the diversity of workplaces and of different types of employment relationships.

Certainty: provide certainty to employers and employees about their rights and obligations.

5.3 We discuss each of these principles in more detail below.

Balancing Interests

5.4 The first principle recognises that the interests of both employers and employees must be considered in designing a workplace privacy regime. In certain situations, an employer's interests, for example an interest in apprehending a particular employee who is suspected of pilfering, may require the adoption of a privacy-infringing measure, such as the covert installation of a video-surveillance device. It may also be necessary for an employer to take steps which affect an employee's privacy to meet other obligations, for example, obligations to protect worker safety, or to provide a workplace free from discrimination. However, in our view there should be a clear justification for such measures and the measure adopted should not exceed what is strictly necessary to protect the employer's interest.

5.5 The first principle also requires consideration of the interests of third parties. These include workers other than the worker who is directly affected, such as other workers in the same industry who may be affected by the diminution of privacy protection in one particular workplace. They could also include non-workers, for example visitors to the workplace or people receiving services from workers.

Minimum Standards

5.6 The second principle proposes that a minimum standard of privacy protection should apply to all workers. This minimum standard would not be capable of being 'bargained away'. The International Labour Office (ILO) Code of Practice for the protection of workers' data provides that 'workers may not waive their privacy rights'.³⁰⁶ This is not to say, however, that there is a total, inalienable

³⁰⁶ International Labour Office, *Protection of Workers' Personal Data* (1997), Principle 5.13. Other commentators have discussed the protection of workers in terms of non-waivable rights. See for example, Charles Fried, 'Individual and Collective Rights in Work Relations' (1984) 51 *University of Chicago Law Review* 1012.

right to privacy that needs to be defended.³⁰⁷ We are not yet at the stage of proposing what this minimum standard should cover and we will need to consider the areas of privacy to which this principle should extend. The notion that some aspects of privacy cannot be traded-off even through the explicit agreement of the parties concerned is consistent with the law of employment, which already provides employees with some minimum rights.³⁰⁸ For example the Australian Industrial Relations Commission (AIRC) may include anti-discrimination clauses in awards without the need for the clauses to be subject to arbitration.³⁰⁹

Proportionality

5.7 The principle of proportionality has been described as providing that ‘any intrusion into an employee’s privacy at work should be in proportion to the benefits of the monitoring to a reasonable employer, which, in turn, should be related to the risks which the monitoring is intended to reduce’.³¹⁰ This principle, therefore, requires a balancing of the purpose and the effect of any privacy infringement.³¹¹

307 The International Labour Office commentary on Principle 5.13 states that it is ‘recognised that privacy rights are not absolute and are balanced with competing public interests according to national law’: *ibid*, 29.

308 However, there is some protection afforded in certain situations where an employee contracts out of specific benefits. For example, if there is an agreement between an employer and an employee for remuneration at a lower-than-award rate, the right to be paid at the award rate creates a ‘statutory debt’: *Workplace Relations Act 1996* (Cth) s 179. The employee can recover the outstanding amount even though he or she has agreed to the lower rate: Macken et al, above n 55, 290.

309 *Workplace Relations Act 1996* (Cth) s 89A(8). In addition, the AIRC can refuse to certify an agreement if there are provisions in it that would be discriminatory (s 170LU(5)); and employers must ensure that AWAs include anti-discrimination provisions, if they do not, the agreement will be considered to include them (s 170VG(1)). Another example of minimum rights in the WRA is the provisions for minimum terms and conditions for Victorian employees: s 500, Schedule 1A.

310 Office of the Privacy Commissioner for Personal Data, Hong Kong, *Draft Code of Practice on Monitoring and Personal Data Privacy at Work*, 2002, § 1.2.3.1. Not all codes of practice explicitly state the principles that underpin the code. For example, the United Kingdom Draft Code of Practice, *The Use of Personal Data in Employer/Employee Relationships* does not include a discussion of specific principles: <www.dataprotection.gov.uk/dpr/dpdoc.nsf> (30 July 2002). The UK *Data Protection Act 1998* does, however, include ‘data protection principles’ which are similar in style and content to Australian statutory privacy principles.

311 In the United States, courts traditionally consider privacy infringements in the context of a principle of proportionality: see for example, *United State v Espinoza*, 256 F 3d 718 (2001). One judge in the High Court of Australia has also alluded to proportionality in the context of privacy: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, 334 (Callinan J).

Transparency

5.8 Transparency, in this sense, represents ‘openness’ and clarity in the undertaking of privacy-related workplace practices. The principle requires that there be communication between employers and employees with respect to any measures that affect workers’ privacy. Under this principle, employers should inform workers of privacy-related practices and should inform them of the reasons for these practices. The application of this principle could also extend to consultation with unions over the causes and effects of any practices that could be considered to affect workers’ privacy.³¹²

Flexibility

5.9 The fifth principle recognises that law reforms which protect workers’ privacy must be sufficiently flexible to take account of the differing circumstances existing within workplaces and the wide range of types of employment relationships. We will need to consider how to reconcile the need to provide minimum standards of privacy protection with the fact that measures which may be appropriate for some types of work may be inappropriate in different circumstances. For example, safety precautions may make it appropriate to require airline pilots or operators of heavy machinery to undertake drug and alcohol testing, but the imposition of these tests on clerical workers may be unjustified.

5.10 Workplace privacy laws will also need to be sufficiently flexible to take account of the major shifts in employment relationships, which have occurred over recent years.³¹³ Our terms of reference require us to consider privacy protection of outworkers, independent contractors and volunteers. We will also consider the position of casual workers. Workers employed as trainees, on fixed-term contracts and some workers employed as casuals cannot rely on the *Workplace Relations Act*

312 As an example, the Hong Kong Draft Code provides that an employer be ‘obliged to develop, implement and disseminate a written policy in relation to any monitoring practices that it may introduce’: *ibid* § 1.2.3.2.

313 For example, the Australian Bureau of Statistics has released figures that suggest that ‘casualisation’ of the Australian labour market is progressing rapidly. It was noted that from 1990–2000, the ‘proportion of employees with an entitlement to either paid sick leave or paid holiday leave declined fairly steadily from 81% to 73%’: *Australian Social Trends 2002: Work—Paid Work: Employment Arrangements* <www.abs.gov.au> (12 July 2002). It should be noted that casual employment can be characterised as an employment relationship that does not include entitlement to paid sick leave or holiday leave.

1996 (WRA) unfair dismissal provisions.³¹⁴ The negotiating power of these categories of workers is often weaker than that of the 'permanent, full-time employee'.³¹⁵ Their lack of bargaining power is recognised to some extent by the WRA, which provides that in the case of Australian workplace agreements (AWAs) the Employment Advocate must, when performing her or his functions, 'have particular regard to...the needs of workers in a disadvantaged bargaining position (for example: women, people from a non-English speaking background, young people, apprentices, trainees and outworkers)'.³¹⁶

5.11 Outworkers, for example those involved in data entry occupations or in the textile and clothing industry, often face a different disadvantage. The physical dispersion through the community of these workers makes it difficult for them to cooperate and pool their negotiating power.³¹⁷ As a result, the negotiating power of outworkers may be weaker than that of other employees. They may also face significant privacy problems because they work at home, and their home may be visited by their employer for the purposes of the delivery, collection or inspection of goods.

5.12 In the case of independent contractors, the level of competition between contractors may result in them being pressured to consent to measures which affect their privacy. The WRA recognises that these contractors may sometimes be in need of legal protection from unfair contracts,³¹⁸ and one form of unfairness may be the privacy-infringing nature of some agreements.

314 Creighton and Stewart, above n 55, [11.51–2].

315 This is not to suggest that the 'permanent, full-time employees' necessarily negotiate from a position of strength, but that the negotiating strength of the non-standard employees is often less than that of the 'permanent, full-time employee'.

316 *Workplace Relations Act 1996* (Cth) s 83BB(2). The Act also specifies that the provisions of certified agreements should be explained to workers in an appropriate manner, 'having regard to the person's particular circumstances and needs': s 170LT(1). Women and people from non-English speaking backgrounds are suggested as examples in that section.

317 We are not suggesting that outworkers are completely without protection under the *Workplace Relations Act 1996* (Cth). References to outworkers are limited, in the Act, to s 83BB(2) (highlighted in n 316) referring to one of the 20 allowable matters for the negotiation of awards. The 'matter' is limited to the 'pay and conditions of outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises': s 89A(2)(t).

318 *Workplace Relations Act 1996* (Cth) s 127A-C.

5.13 The position of volunteers also needs to be considered in any proposed reforms in this area. Volunteers, due to the lack of remuneration for services or labour rendered, are not usually considered to be employees. But if privacy is seen as a social value or a basic right, there is no reason to limit the protection of privacy to paid workers.

Certainty

5.14 Finally, workplace privacy reforms must provide both workers and employers with certainty about the legality or otherwise of particular employment practices. Workers require certainty in order to protect their privacy. Employers require certainty to ensure that they do not unintentionally breach their obligations. Both employers and employees need to understand which practices are legitimate, which practices are never permitted and which practices can be negotiated by employers and employees.

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QUESTIONS

41. We have identified some broad principles that should underpin workplace privacy reform. These principles are:

- to provide an appropriate balance between the interests of employers, employees and third parties who may be affected;
- to provide a minimum standard of privacy protection to all employees;
- to reflect the requirement that any privacy infringement must be proportional to any benefits gained from the infringement;
- to ensure that measures affecting privacy are transparent to workers;
- to be sufficiently flexible to take account of the diversity of workplaces and of different types of employment relationships; and
- to provide certainty to employers and employees about their rights and obligations.

Do the proposed principles provide an appropriate basis for the protection of workplace privacy? Are there any other principles which should be taken into account in considering workplace privacy reforms?

42. Which, if any, aspects of workers' privacy should be covered by minimum standards and should not be subject to bargaining?

43. How should workplace privacy reforms take account of differing circumstances existing in differing workplaces?

44. Should the same minimum privacy standards apply to all types of employment relationships or should different standards apply to part-time or casual employees or outworkers?

APPROACHES TO REFORM

5.15 In Chapter 4 we discussed the piecemeal nature of workplace privacy protection under the current law. The Commission's inquiry will make recommendations about whether law reform is necessary to provide more comprehensive privacy protection for workers. At this stage it would be premature to propose legislative changes to deal with particular workplace practices. However, this section considers a range of law reform approaches which the Commission will need to consider in the course of the project. These include:

- maintaining the status quo;
- prohibiting some practices which affect privacy; or
- regulating activities relevant to workplace privacy.

Each of these approaches is briefly discussed below.

Maintaining the Status Quo

5.16 In Chapter 4 we identified the areas of law which already provide some limited privacy protection for workers. For example, employers who wish to undertake body searches of employees must obtain the employees' consent or risk being sued for assault. In some areas it could be claimed that the current law provides adequate protection for workers and that no further changes are necessary.

5.17 Maintenance of the status quo could be combined with strategies designed to improve workplace privacy protection and to ensure that existing laws are recognised and enforced. For example, employers and employees could be encouraged to agree on voluntary guidelines which recognise the interests of employees in workplace privacy. (This approach is sometimes described as 'self-regulation'.) Alternatively, or in addition, educational programs could be instituted to raise awareness of worker privacy issues.

5.18 Maintenance of the status quo could also be combined with strategies intended to encourage the inclusion of privacy-protective provisions in individual contracts, AWAs or certified agreements. Leaving privacy protection to negotiation between employers and employees provides a flexible means of recognising the diversity of workplaces and the types of privacy issues which arise within them. However, many would argue that this approach does not adequately protect employees who lack the bargaining power to object to practices which severely

affect their privacy, autonomy and dignity. Another argument against this approach is that it ignores the effect that agreements in particular workplaces may have on the community as a whole. For example, the acceptance of regular body searches for the purposes of detecting drugs in a particular workplace may help to create a social climate in which such searches are regarded as acceptable, and people throughout the community are subjected to social pressure to submit to them.

5.19 To maintain the status quo is, in effect, to let the 'market' regulate the protection of workers' privacy. It could be argued that, in this 'market', the 'law of supply and demand' benefits employers who have better worker privacy policies, as they will be able to attract and retain the workers best suited to the workplace.³¹⁹ However, it is also arguable that the labour market is not a 'perfect market'. A pure 'market forces' regulatory approach, therefore, may not be sufficient because of potential imbalances of negotiating power and shortages of jobs in certain sectors.³²⁰

Prohibiting Some Practices

5.20 Another approach may be to prohibit some activities which affect privacy altogether. This would be similar to the approach taken under the *Surveillance Devices Act 1999* (Vic), which prohibits the use, installation or maintenance of various devices to record private activities. Another example could be a total or partial prohibition on the use of polygraphs (lie-detectors) in the workplace. Prohibition of some activities would be a means of providing minimum privacy protection standards and it would recognise the social harm arising from some forms of privacy infringement. If this approach were adopted it would be necessary to determine the penalties for breach of the prohibition. Criminal penalties (for example, fine or imprisonment) could be imposed, as is the case under the *Surveillance Devices Act 1999*. In addition, or as an alternative, injured workers could have a right to take action against their employer.

319 For a discussion of the protection of privacy as having a positive economic value, see Richard S Murphy, 'Property Rights in Personal Information: An Economic Defence of Privacy' (1996) 84 *Georgetown Law Journal* 2381.

320 For a detailed discussion of market-based regulation in practice, see Organisation for Economic Co-operation and Development, *Putting Markets to Work: The Design and Use of Marketable Permits and Obligations*, Occasional Paper 19 (1997).

A Regulatory Approach

5.21 Alternatively, workplace privacy could be the subject of regulation. There is now a vast literature on regulatory approaches.³²¹ The Commission has not yet undertaken detailed work on this. However, the three well-known regulatory models are:

- minimum standards;
- co-regulation; and
- best-practice.

These are discussed in more detail below.

MINIMUM STANDARDS

5.22 The minimum standards model of regulation operates by imposing specific standards which must be met by the relevant organisation or individual. The standards may be detailed and technical, for example the standard for workplace surveillance could specify the areas in the workplace where surveillance cameras could be installed and specify the type of notices which must be posted to advise workers that surveillance is occurring. This model focuses on compliance with a set of specifications. Emission standards under the *Environment Protection (Vehicle Emissions) Regulations 1992* (Vic) are an example. A common criticism of the minimum compliance approach is that it encourages a minimum compliance mentality, which means that organisations and individuals do nothing beyond the bare minimum required.³²²

321 For a much more detailed discussion of the variety of regulatory systems that can be put in place, see Ian Ayres and John Braithwaite, *Responsive Regulation—Transcending the Deregulation Debate* (1992); Organisation for Economic Co-operation and Development, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance* (2000); and Office of Regulation Reform, *Regulatory Alternatives*: <[www.dsd.vic.gov.au/Web/ORR/ORR.nsf/ImageLookup/PDF/\\$file/alternat.pdf](http://www.dsd.vic.gov.au/Web/ORR/ORR.nsf/ImageLookup/PDF/$file/alternat.pdf)> (2 October 2002). The Office of Regulation Reform is located within the Victorian Department of Innovation, Industry and Regional Development.

322 The 'minimum standards' approach can be seen as one that focuses on the inputs of the practices that are to be regulated. Another form of this inputs approach is 'compliance-oriented regulation'. For a discussion of this form of regulation, see Organisation for Economic Co-operation and Development, *ibid.*

CO-REGULATION

5.23 Co-regulation involves the regulatory role being ‘shared between government and an industry body or occupational representative’.³²³ The co-operation could result in an industry-specific set of practices which would contribute to the policy objective of the government. Industry involvement may contribute to compliance. In addition, the industry input into the process would take advantage of the practical knowledge of those in the industry. In the event of a breach of the code, enforcement could be undertaken by either a governmental or cooperative body. The Australian Stock Exchange (ASX) is an example of co-regulation in that a non-governmental organisation, the ASX, regulates an industry in a manner that conforms with legislation.

BEST PRACTICE

5.24 Under the best practice model, the emphasis is not on compliance with detailed specifications but on the outcome which the regulation is intended to achieve. For example, under occupational health and safety laws, regulation is aimed at achieving a ‘safe workplace’. Detailed standards for practices are not imposed.³²⁴ Instead, compliance is measured by determining whether the organisation or individual in question has achieved the relevant goal.³²⁵

5.25 A best practice model for workers’ privacy would require employers to show how they were protecting workers’ privacy. The regulatory model that underlies the *Privacy Act 1988* (Cth) is consistent with this ‘best practice model’, which may also be described as ‘light touch regulation’.³²⁶ The Act encourages the development of privacy codes by individual organisations. However it also maintains a minimum standard of protection by requiring that such codes comply

323 Office of Regulation Reform, above n 321, 17.

324 The ‘minimum standard’ and the ‘best-practice’ models of regulation are discussed in the workplace context in Neil Gunningham, ‘From Compliance to Best Practice in Occupational Health and Safety: The Roles of Specification, Performance and Systems-based Standards’ (1996) 9 *Australian Journal of Labour Law* 221.

325 For a discussion of this approach in a different context see John Braithwaite, Toni Makkai, Valerie Braithwaite and Diane Gibson, *Raising the Standard—Resident Centred Nursing Home Regulation in Australia*, Aged and Community Care Service Development and Evaluation Report Number 10 (1993) 9.

326 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000* (2000) 1.1.

with the National Privacy Principles. These Principles also contain some prohibitions relating to the collection and use of information.³²⁷

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QUESTIONS

45. If it is clear that new laws should be made to protect workers' privacy, there are two broad approaches to be considered: prohibition and regulation. Some practices should perhaps be prohibited, attracting penalties for breach of this prohibition. Workplace privacy in general could be subject to regulation, the three major approaches to which are minimum standards, co-regulation and best practice. Which of these approaches is appropriate for the protection of workers' privacy?
46. Are there other approaches more appropriate to the protection of workers' privacy that the Commission should consider?

ENFORCEMENT MECHANISMS

5.26 If workplace privacy is protected by regulation it will be necessary to consider how the regulatory regime is enforced. There are a number of possible mechanisms that could be applied to deal with infringements of workers' privacy. These include:

- criminal penalties;
- civil remedies, that is, treating the infringement as equivalent to a tort; or
- a system for resolving complaints, which might provide monetary or other remedies.

5.27 Imposition of criminal penalties would emphasise the social interest in protecting workplace privacy. Prosecutions could expose and punish employers who engaged in practices that affect workers' privacy. However this approach might provide little practical benefit to employees. The effectiveness of criminal sanctions would depend on the vigour with which breaches were investigated and

³²⁷ For example National Privacy Principle 1.1 states that an 'organisation must not collect personal information unless the information is necessary for one or more of its functions or activities'.

prosecuted.³²⁸ A modified version of this approach could emphasise the promotion of privacy in the workplace rather than the punishment of offending employers. For example, there could be provision for the issue of compliance notices under the Act, for a first offence, rather than relying solely on criminal prosecution. Prosecution would occur only where the breach was very serious or the employer was a repeat offender.

5.28 Imposing civil penalties for privacy infringements would require the employee whose privacy has been affected to institute proceedings against the transgressor. Court proceedings can be costly and time-consuming and would, in many instances, not be appropriate where the two parties are in an employment relationship.³²⁹

5.29 A complaints-based enforcement mechanism could operate in the same manner as the protection of privacy under legislation such as the *Privacy Act 1988* (Cth) and the *Information Privacy Act 2000* (Vic).³³⁰ Under these enactments, if an employer infringes one or more of the principles that are aimed at protecting privacy, then the employee has the opportunity to complain. The processing of the complaint is undertaken by the Privacy Commissioner. If this model is adopted then the relevant complaints body could direct that conciliation take place, or could have power to order the employer to change the offending practice. The Commissioner could also have the power to require the employer to compensate the employee for loss.³³¹

328 Note that some invasions of privacy can already be prosecuted. Section 9 of the *Summary Offences Act 1966* (Vic) makes it an offence to enter onto private property without the express or implied consent of the owner or occupier or of someone on behalf of the owner or occupier of the property.

329 An alternative would be to provide that privacy infringements were actionable in the lower courts. This would represent cost savings, however, it would also suggest, symbolically, that the protection of privacy is not a substantial legal concern.

330 Anti-discrimination legislation such as the *Equal Opportunity Act 1995* (Vic) also operates under a complaints-based enforcement mechanism. One concern that is raised by the regulation of privacy is the question of the impact of the separation of privacy from other infringements on a person's sense of self. Despite the links made in Chapter 4 between discrimination and privacy, it is also arguable that discrimination is a different form of harm than an invasion of a person's privacy and that the two infringements should be treated differently.

331 Under the *Information Privacy Act 2000* (Vic) the Victorian Privacy Commissioner may only refer a complaint to the Victorian Civil and Administrative Tribunal (VCAT) if the complainant requires the Commissioner to do so: s 37(3). The VCAT, however, may make an order that the organisation responsible for the privacy invasion pay compensation, not exceeding \$100 000, to the complainant: s 43(1).

5.30 An important feature of the *Privacy Act 1988* (Cth) is that the Federal Privacy Commissioner can investigate matters on her or his own initiative. The Victorian Privacy Commissioner has similar powers.³³² This means that even in situations where individuals have been unable to complain because of fear of the consequences, or where the individual is not aware of the complaints process, there is the possibility that the privacy infringing act may be brought to an end. If a similar model was used for the protection of worker privacy, the compulsion could be enforced by a court order or by the Victorian Civil and Administrative Tribunal.

5.31 In any discussion of enforcement mechanisms, it is necessary to bear in mind the importance of maintaining the relationship between an employer and worker. In some circumstances, the worker whose privacy has been infringed may want to continue working with the employer, as long the practice to which the worker objects is stopped. In other circumstances, the worker may feel that it would be emotionally and psychologically impossible to return to work given the effect of the infringement of her or his privacy. Any enforcement mechanism must therefore take account of the broader workplace context.

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QUESTIONS

47. There are a number of mechanisms that could be applied in enforcing a regulatory regime regarding workers' privacy, including criminal penalties, civil remedies and a complaints procedure. Are there other enforcement measures which the Commission should consider?
48. What is the most effective means of ensuring compliance with workplace privacy laws?

³³² *Privacy Act 1988* (Cth) s 40(2). The Victorian Privacy Commissioner may serve a compliance notice if it appears to the Commissioner that an organisation has engaged in a practice that contravened an Information Privacy Principle and either the contravention is serious or flagrant or the practice is of a kind that the organisation has engaged in on at least five separate occasions in the previous two years: *Information Privacy Act 2000* (Vic) s 44. The Victorian Privacy Commissioner also has the power to obtain information and documents relevant to a decision to serve a compliance notice (s 45) and to examine witnesses (s 46).

FEDERAL/STATE LEGISLATIVE RELATIONS

5.32 The coverage of the WRA and the wide legislative powers of the Commonwealth may present difficulties with respect to any reforms the Commission may propose. Under our federal system of government, as described in the Commonwealth Constitution, the state and the federal parliaments each have areas in which they can make laws.³³³ The regulation of the workplace lies at the intersection of these areas. Constitutional issues need to be addressed in order to maximise the effectiveness of any reforms that may be enacted.

5.33 The Constitution lists a number of ‘heads of power’ that allow Federal Parliament to enact legislation ‘for the peace, order and good government of the Commonwealth’.³³⁴ Every piece of valid legislation enacted by the Parliament must fall under at least one of these heads of power. An example of this is the WRA itself. The WRA is based on a number of constitutional heads of power,³³⁵ including those relating to industrial relations,³³⁶ trade and commerce,³³⁷ corporations,³³⁸ external affairs³³⁹ and referral by states.³⁴⁰

5.34 The referral of legislative power by states is of particular relevance to workplace privacy in Victoria as the Victorian Parliament has referred some of its industrial relations powers to the Commonwealth.³⁴¹ This was done through the

333 The individual States also have their own Constitution. State Constitutions give the State legislature the power to make laws. For example, s 16 of the *Constitution Act 1975* (Vic) reads: ‘The Parliament shall have power to make laws in and for Victoria in all cases whatsoever’.

334 Section 51.

335 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (2nd ed 1998) 715.

336 Section 51(xxxv). The full ‘head of power’ reads ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’. In other words, in most instances, the Constitution does not give the Federal Parliament the power to make laws with respect to industrial disputes unless there is a degree of ‘interstateness’ to the dispute, that is, it has to involve more than one State.

337 Section 51(i).

338 Section 51(xx).

339 Section 51(xxix). This power is used in order to give effect to the international instruments that Australia has ratified.

340 Section 51(xxxvii).

341 It should be noted that any decision to repeal or modify the referral of powers would require significant discussions between the Federal and Victorian governments. In addition, any rescission of the referral of powers by the Victorian Parliament must be preceded by written notice to the Federal Parliament: *Independent Report of the Victorian Industrial Relations Taskforce* (2000) 67. There is no reason to consider

Commonwealth Powers (Industrial Relations) Act 1996 (Vic) (CPIRA).³⁴² The CPIRA includes a number of specific matters that have been referred³⁴³ and a number of matters that have explicitly not been referred.³⁴⁴

5.35 The referral of power does not, however, mean that the Victorian Parliament has lost its ability to legislate over referred matters.³⁴⁵ The referral of power to the Commonwealth only gives the Federal Parliament concurrent, rather than exclusive, power to legislate with respect to the referred matter. However, if the Victorian Parliament does enact legislation in an area where the Federal Parliament has already legislated there may be an inconsistency between the two

that even a full repeal of the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) is not possible. One commentator has argued that there are 'twin cogent reasons of public policy' for the interpretation that an Act of referral may be repealed. These are that a 'State Parliament should not have the power to bind permanently a future Parliament, and second, that the future of co-operative federalism would be severely hampered if states were forced to consider referring powers on an 'once and for all' basis without discretion subsequently to change state policy in new political and economic environments': Stuart Kollmorgen, 'Towards a Unitary National System of Industrial Relations? *Commonwealth Powers (Industrial Relations) Act 1996* (Vic); *Workplace Relations and other Legislation Amendment Act (No 2) 1996* (Cth)' (1997) 10 *Australian Journal of Labour Law* 158, 164.

342 For a discussion of the referral of powers see Kollmorgen, *ibid*.

343 *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) s 4. These matters include conciliation and arbitration for the prevention and settlement of industrial disputes within the limits of the State; agreements about matters pertaining to the relationship between an employer or employers in the State and an employee or employees in the State; minimum terms and conditions of employment for employees in the State; the termination, or proposed termination, of the employment of an employee, other than a law enforcement officer; the freedom of association, namely the rights of employees, employers and independent contractors in the State to join an industrial association of their choice, or not to join such an association; the setting and adjusting of minimum wages for employees in the State; and the matter of attempting to settle, conciliate or arbitrate, or exercising any other power in relation to, an industrial matter or industrial dispute, being an industrial matter or industrial dispute that arose before the commencement of Part 3 [of the Act] and in relation to which the Employee Relations Commission of Victoria [no longer operating] exercised, or could have exercised, powers.

344 *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) s 5. These matters include those relating to the Victorian public sector, workers' compensation; superannuation; occupational health and safety; long service leave and equal opportunity and common rules in the State for an industry. There are also a number of matters that might be excluded by implication. These include categories of workers such as 'independent contractors' and volunteers. This is on the basis that such workers do not usually come under the definition of 'employee': see above n 105.

345 The 'powers of a State Parliament are not diminished when an Act is passed to refer a matter under s 51(xxxvii)': *Graham v Paterson* (1950) 81 CLR 1, 19 (Latham CJ).

Acts.³⁴⁶ Such inconsistencies are dealt with in section 109 of the Commonwealth Constitution, which is discussed briefly below.

Tests of Inconsistency

5.36 Section 109 of the Commonwealth Constitution provides that if there is an inconsistency between a state and federal Act then the federal provision will prevail to the extent of that inconsistency. If the Victorian Government enacted legislation to protect workers' privacy, it would have to be carefully drafted to avoid any inconsistency with federal legislation, including the WRA and the *Privacy Act 1988* (Cth).³⁴⁷

5.37 There are a number of tests that the High Court has used to establish whether a State Act is inconsistent with a Commonwealth Act.³⁴⁸ The first test involves a direct inconsistency. That is, if it is impossible to comply with both laws then the laws are inconsistent.³⁴⁹ The second test is satisfied if one law confers a legal entitlement and the other law takes away that entitlement.³⁵⁰ These tests rely on looking at the effect of the laws concerned.

5.38 The third test is the 'covering the field' test. Unlike the first two tests, this test looks at the intention of the legislation. The factors that need examination for this test are:

- the 'field' covered by the Commonwealth law;
- whether the Commonwealth law is intended to cover the field; and
- whether the State law operates in the same field.

346 Since the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic), the Victorian Government has attempted to pass legislation in this area. The Fair Employment Bill 2000 was not passed in the Legislative Council and it has recently been announced that there will be a new Bill before Parliament setting a new minimum wage for Victoria: *The Age* (Melbourne), 20 July 2002, 4.

347 One example of a possible inconsistency evident in the protection of worker privacy currently is the disclosure of health information in employee records to potential employers: see above n 256.

348 The discussion of the tests contained in this section stems largely from Blackshield and Williams, above n 338, 302–10.

349 *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23.

350 *Colvin v Bradley Bothers Pty Ltd* (1943) 68 CLR 151.

5.39 Where a Commonwealth Act is intended to ‘cover the field’ and the State Act clearly operates in the same field, then there is an inconsistency.³⁵¹ What is less clear is whether there is an inconsistency in the situation where the State Parliament produces a law in one context that overlaps a Federal law in another context.³⁵² The High Court would consider the purposes of the Acts in question. It would be arguable that where the Acts have different purposes they operate in different fields.³⁵³ It would depend on the wording of the Acts.³⁵⁴ Proposals for changes to State laws will need to take account of these constitutional issues.

CONCLUSION

5.40 This chapter has sought to highlight areas that need to be considered prior to any discussion of specific proposals for the reform of workplace privacy. The protection of worker privacy, and privacy more generally, is a complex process within which many competing perspectives and interests are important. Respecting the privacy of workers and the interests of employers requires a comprehensive understanding of the relationship between the parties and the principles that are

351 For example, in the past it was decided that the *Racial Discrimination Act 1975* (Cth) was intended to cover the field. This ‘covering the field’ meant that the *Anti-Discrimination Act 1977* (NSW) was decided to be inconsistent with the Commonwealth Act because they covered the same area of law: *Viskauskas v Niland* (1983) 153 CLR 280. After this decision, a section was inserted into the *Racial Discrimination Act* stating that State Acts could operate concurrently with the Commonwealth Act: s 6A(1).

352 One of the leading decisions in the area, *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47, focused on the purposes of the two pieces of legislation. The legislation concerned was the *Broadcasting and Television Act 1942* (Cth) and the *Environmental Planning and Assessment Act 1979* (NSW). The Court decided that as the former Act was directed to the technical requirements of broadcasting and the purpose of the latter Act focused on the environment, there could be no inconsistency.

353 Having different purposes does not necessarily remove the possibility of inconsistency. For example, a State law that regulated land titles has been held to be inconsistent with a Commonwealth anti-discrimination law: *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373. Despite the purposes of the two Acts being distinct, the High Court decided there was a s 109 inconsistency.

354 One particular area of inconsistency that might arise as a result of any proposed reforms is highlighted in the WRA itself. Section 152(1) reads: ‘subject to this section, if a State law or a State award is inconsistent with, or deals with a matter dealt with in, an award, the latter prevails and the former, to the extent of the inconsistency or in relation to the matter dealt with, is invalid’. This has minimal effect on any proposed reforms as there is little content in the awards that relates to privacy. However, given the allowable award matters, it is possible that a Victorian law which regulated worker privacy may be held, by virtue of this WRA provision, to be inconsistent only with respect to outworkers.

fundamental to the relationship. The Commission, therefore, is interested in any comments or feedback on the issues presented in this chapter.

Other Publications

Disputes Between Co-owners: Discussion Paper (June 2001)

Privacy Law: Options for Reform—Information Paper (July 2001)

Sexual Offences: Law and Procedure—Discussion Paper (September 2001) (Outline also available)

Annual Report 2000–01 (October 2001)

Failure to Appear in Court in Response to Bail: Draft Recommendation Paper (January 2002)

Disputes Between Co-owners: Report (March 2002)

Criminal Liability for Workplace Death and Serious Injury in the Public Sector: Report (May 2002)

People with Intellectual Disabilities at Risk—A Legal Framework for Compulsory Care: Discussion Paper (June 2002)

What Should the Law Say About People with Intellectual Disabilities Who are at Risk of Hurting Themselves or Other People? Discussion Paper in Easy English (June 2002)

Defences to Homicide: Issues Paper (June 2002)

Who Kills Whom and Why: Looking Beyond Legal Categories by Associate Professor Jenny Morgan (June 2002)