

First print



New South Wales

Workplace Video Surveillance Bill 1998

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to regulate covert video surveillance of employees in the workplace by their employers.

The Bill makes it an offence to carry out covert video surveillance of an employee in the workplace unless such surveillance is authorised by an authority issued by a Magistrate. Covert video surveillance of an employee in a toilet facility or shower or other bathing facility or to monitor work performance will not be authorised in any circumstances.

An authority may be issued only if a Magistrate is satisfied that reasonable grounds to suspect that one or more employees are involved in unlawful activities in a workplace exist and justify issue of the authority. The Magistrate must also have had regard to whether the proposed video surveillance would unduly intrude on the privacy of an employee or any

other person. Surveillance is to be carried out in accordance with the conditions to which the authority is subject. These include conditions requiring surveillance to be conducted by licensed security operators, limiting access to, and use of, any recordings made and imposing requirements in relation to the destruction of recordings and the reports to be made following surveillance.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 sets out the circumstances in which video surveillance of an employee by an employer will be treated as *covert video surveillance* for the purposes of the proposed Act.

Clause 5 provides that the proposed Act binds the Crown.

Clause 6 makes it clear that notes in the text of the proposed Act do not form part of the Act.

Part 2 Video surveillance offences

Clause 7 (1) makes it an offence for an employer (or a related corporation of the employer) to carry out, or cause to be carried out, covert video surveillance of an employee in the workplace unless the surveillance is solely for the purpose of the employer establishing whether or not the employee is involved in any unlawful activity in the workplace and is authorised by a covert surveillance authority. **Clause 7 (2)** makes it clear that the new offence does not prevent video surveillance by law enforcement agencies and certain other bodies. **Clause 7 (3)** and **(4)** makes it clear that it will not be an offence to carry out surveillance solely for security purposes but limits the evidentiary use to which a recording obtained by such surveillance may be put.

Clause 8 makes it an offence to use a recording obtained by covert video surveillance authorised by a covert surveillance authority for a purpose that is irrelevant to the purpose for which the authority was issued.

Part 3 Covert surveillance authorities

Clause 9 describes things that are authorised to be done by a covert surveillance authority. The authority conferred is subject to any conditions imposed by or under the proposed Act. These include the condition that the conduct of the surveillance be overseen by nominated licensed security operators. The licensed security operators must hold a Class 1 licence issued under the *Security (Protection) Industry Act 1985* (or a licence of a corresponding kind issued under an Act that replaces that Act). A covert surveillance authority will not authorise the carrying out, or causing to be carried out, of covert video surveillance of an employee in any toilet facility or shower or other bathing facility in the workplace or to monitor work performance.

Clause 10 enables an employer or an employer's representative to apply to a Magistrate for the issue of a covert surveillance authority and specifies the information that must be set out in the application. The information includes a statement of the grounds for suspecting that the employee or employees concerned are involved in unlawful activity.

Clause 11 makes it an offence to give false or misleading information in an application for a covert surveillance authority.

Clause 12 enables a Magistrate to decide, subject to Part 3 and the regulations, how to deal with applications. However, it makes it clear that applications must be dealt with in camera.

Clause 13 prevents a Magistrate from issuing a covert surveillance authority unless the Magistrate is satisfied that the application for the authority shows that reasonable grounds exist to justify its issue.

Clause 14 requires a Magistrate to have regard to whether covert video surveillance of the employee or employees concerned or any other person might unduly intrude on their privacy before issuing a covert surveillance authority.

Clause 15 requires a covert surveillance authority to be in a form prescribed by the regulations and sets out the matters that must be specified in the authority.

Clause 16 provides for a covert surveillance authority to remain in force for a period specified in the authority (not exceeding 30 days or such other period as may be prescribed by the regulations).

Clause 17 sets out the conditions to which covert surveillance authorities issued to employers are subject. These include requirements concerning access to recordings, supplying employees affected by surveillance with information concerning the surveillance and erasure and destruction of recordings not required for evidentiary purposes.

Clause 18 makes it an offence to contravene a condition of a covert surveillance authority.

Clause 19 provides for variation or cancellation of a covert surveillance authority.

Clause 20 limits the circumstances in which a further application for an authority can be made if an application for an authority is refused.

Clause 21 requires certain records to be kept regarding the issue, variation and cancellation of covert surveillance authorities and enables regulations to be made in respect of the keeping and inspection of such records and other matters relating to such records. It also requires a Magistrate to take all reasonable steps to preserve the confidentiality of such records and maintain the privacy of the persons concerned.

Clause 22 provides that a covert surveillance authority is not invalidated by any defect other than a defect that affects the substance of the authority in a material particular.

Clause 23 requires the holder of a covert surveillance authority to report to the Magistrate who issued the authority on the results of the surveillance within 30 days after expiry of the authority.

Clause 24 makes it clear that functions under the proposed Act are conferred on individual Magistrates, not on Magistrates constituting Local Courts.

Part 4 Miscellaneous

Clause 25 provides for an application to be made to a judicial member of the Industrial Relations Commission for issue, variation or cancellation of a covert surveillance authority by a person aggrieved by a decision of a Magistrate concerning the issue, variation or cancellation of such an authority. Part 3 applies to and in respect of the issue, variation and cancellation of a covert surveillance authority issued, varied or cancelled by a judicial member in the same way as it applies to such an authority issued, varied or cancelled by a Magistrate.

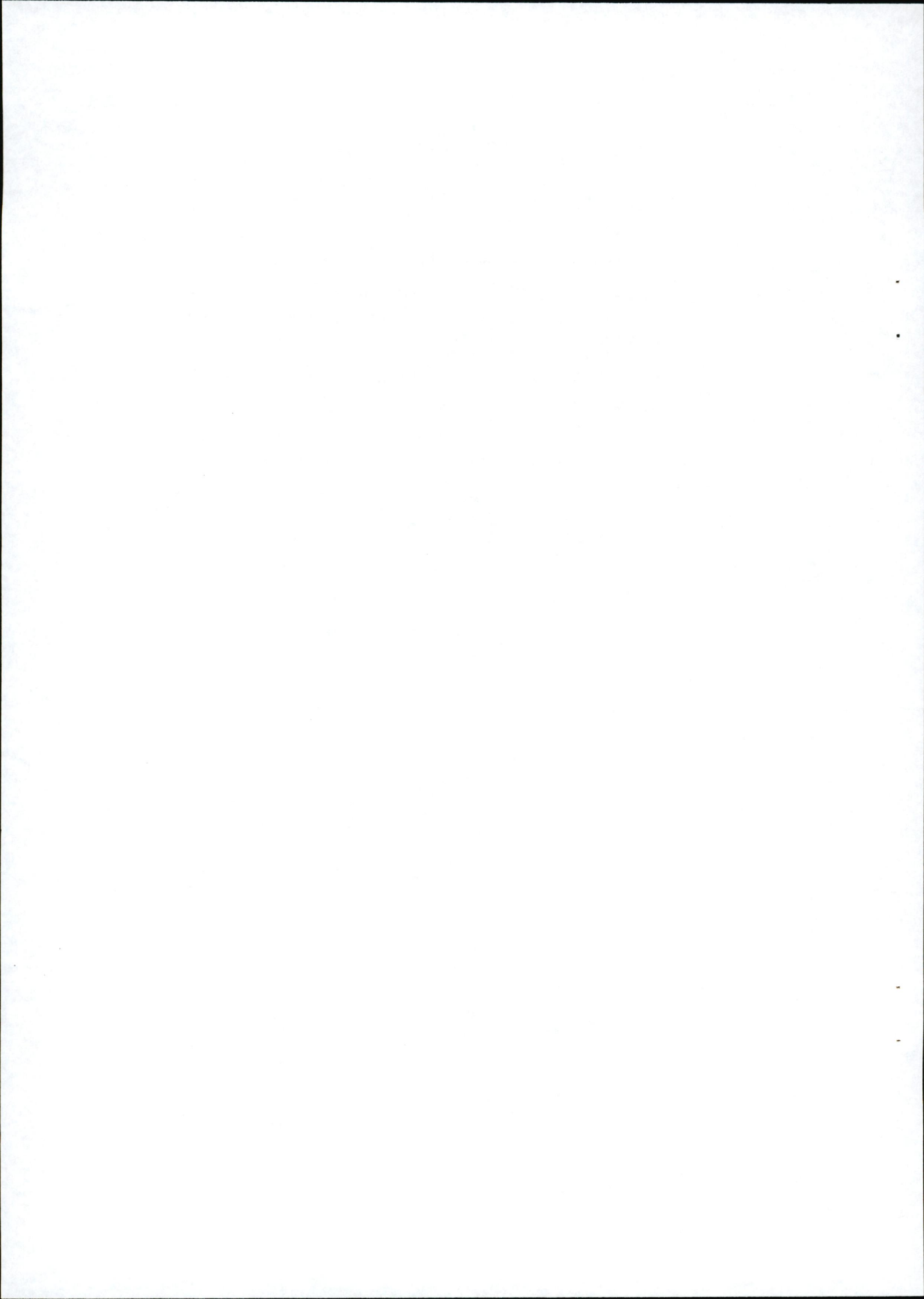
Clause 26 requires the Minister administering the proposed Act to make an annual report to Parliament in respect of covert surveillance authorities issued during the year.

Clause 27 provides for the liability of directors for offences committed by corporations.

Clause 28 empowers the Governor to make regulations.

Clause 29 provides for the proceedings for offences against the proposed Act or regulations to be dealt with summarily.

Clause 30 provides for a review of the operation of the proposed Act to be conducted by the Minister after 5 years from the date of assent.





New South Wales

Workplace Video Surveillance Bill 1998

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New South Wales

Workplace Video Surveillance Bill 1998

No. , 1998

A Bill for

An Act to regulate covert video surveillance of employees in the workplace;
and for other purposes.

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Workplace Video Surveillance Act 1998*.

2 Commencement

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This Act commences on a day or days to be appointed by proclamation.

3 Definitions

In this Act:

covert surveillance authority means an authority issued under Part 3. 10

covert video surveillance—see section 4.

detrimental action means action causing, comprising or involving any of the following:

- (a) discrimination, disadvantage or adverse treatment in relation to employment, 15
- (b) dismissal from, or prejudice in, employment,
- (c) a disciplinary proceeding.

employee means an individual who works under a contract of employment or apprenticeship. 20

employer means a corporation which, or an individual who, employs persons under contracts of employment or apprenticeship.

employer's representative means a person authorised by an employer to act on behalf of the employer for the purposes of this Act. 25

exercise a function includes perform a duty.

function includes a power, authority or duty.

law enforcement agency means any of the following:

- (a) the Police Service, 30

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- (b) a police force or police service of another State or a Territory of the Commonwealth,
 - (c) the Australian Federal Police,
 - (d) the Police Integrity Commission,
 - (e) the Independent Commission Against Corruption, 5
 - (f) the New South Wales Crime Commission,
 - (g) the National Crime Authority,
 - (h) the Department of Corrective Services,
 - (i) any other authority or person responsible for the enforcement of the criminal laws of the Commonwealth or of the State, 10
 - (j) a person or body prescribed for the purposes of this definition by the regulations.

licensed security operator means a person holding a Class 1 licence issued under the *Security (Protection) Industry Act 1985* or a licence of a corresponding kind issued under any Act that replaces that Act. 15

nominated licensed security operator means a licensed security operator or operators nominated in the application for a covert surveillance authority in accordance with section 10 (3). 20

related corporation, in relation to an employer that is a corporation means a corporation that is, with respect to the employer, a related body corporate within the meaning of the *Corporations Law*.

video surveillance means surveillance by a closed-circuit television system or other electronic system for visual monitoring of activities on premises or in any other place. 25

work means work as an employee.

workplace means premises, or any other place, where persons work, or any part of such premises or place. 30

4 Covert video surveillance

- (1) For the purposes of this Act, video surveillance of an employee by an employer in the workplace is covert video surveillance unless:

- (a) the employee has been notified in writing of the intended video surveillance at least 14 days (or, if the employer has obtained the agreement of the employee to a lesser period of notice, that period) before the intended surveillance, and
 - (b) cameras used for the video surveillance of any part of the workplace (or camera casings or other equipment that would generally indicate the presence of a camera) are clearly visible in that part of the workplace, and 5
 - (c) signs notify people that they may be under video surveillance in the workplace, and are clearly visible at each entrance to that part of the workplace in which surveillance is taking place. 10
- (2) Despite subsection (1), video surveillance of an employee in the workplace is not covert video surveillance if the employee has agreed to the use of video surveillance generally of the premises or place constituting the workplace for a purpose other than surveillance of the activities of employees in the workplace and video surveillance is carried out in accordance with that agreement. 15
- (3) For the purposes of this section: 20
- (a) employees at a workplace are taken to have agreed to intended use of video surveillance by their employer if a body representing a substantial number of the employees has agreed on their behalf, and
 - (b) an employee who is first employed at a workplace less than 14 days before the intended use of video surveillance at the workplace is taken to have agreed to a lesser period of notice of the intended surveillance if the employee is notified in writing of it before commencing work. 25
- 5 Act to bind Crown** 30
- This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.
- 6 Notes in text**
- Notes included in this Act do not form part of this Act. 35

Part 2 Video surveillance offences

7 Offences relating to covert video surveillance

(1) An employer must not carry out, or cause to be carried out, covert video surveillance of an employee of the employer (or of a related corporation of the employer) in the workplace unless: 5

- (a) it is carried out, or caused to be carried out, solely for the purpose of establishing whether or not the employee is involved in any unlawful activity in the workplace, and
- (b) it is authorised by a covert surveillance authority.

Maximum penalty: 20 penalty units. 10

Note. Section 9 makes it clear that a covert surveillance authority does not authorise covert video surveillance for the purpose of monitoring an employee's work performance or to carry out surveillance of an employee in any toilet facility or shower or other bathing facility. An employer who carries out or causes to be carried out any such surveillance will be guilty of an offence. 15

(2) Nothing in this section makes it an offence:

- (a) for a member or officer of a law enforcement agency to carry out, or cause to be carried out, video surveillance in the exercise of a function conferred or imposed on the member or officer by or under any other Act or law, or 20
- (b) for a person to carry out, or cause to be carried out, video surveillance in a correctional centre or in any other place where a person is in lawful custody, or
- (c) for a person to carry out, or cause to be carried out, video surveillance for the purpose of monitoring operations carried out in a casino in accordance with the *Casino Control Act 1992*, or 25
- (d) for a person to carry out, or cause to be carried out, video surveillance of any legal proceedings or proceedings before a law enforcement agency in the exercise of a function conferred or imposed on the person by or under any other Act or law. 30

- (3) Nothing in this section makes it an offence for an employer to carry out, or cause to be carried out, video surveillance of a workplace solely for the purpose of ensuring the security of the workplace or persons in the workplace where video surveillance of any employees is extrinsic to that purpose. 5
- (4) Evidence of any recording obtained by video surveillance of a workplace for the purpose referred to in subsection (3) that is unrelated to the security of the workplace or persons in the workplace is not to be admitted in evidence in any disciplinary or legal proceedings against an employee unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained. 10
- 8 Offence of using recording obtained by video surveillance for irrelevant purpose** 15
- (1) A person is guilty of an offence if the person uses a recording of the activities of an employee or any other person obtained as a consequence of covert video surveillance of the employee in the workplace authorised by a covert surveillance authority for an irrelevant purpose. 20
- Maximum penalty: 20 penalty units.
- (2) Nothing in this section makes it an offence for a member or officer of a law enforcement agency to use a recording referred to in subsection (1) for any purpose relating to the detection or investigation of an unlawful activity of a person other than an employee in the workplace. 25
- (3) In this section:
- irrelevant purpose* means a purpose that is not directly or indirectly related:
- (a) to establishing whether or not an employee is involved in unlawful activity in the workplace in accordance with the authority conferred by a covert surveillance authority, or 30
- (b) to taking disciplinary action or legal proceedings against an employee as a consequence of any alleged unlawful activity in the workplace so established, or 35

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- (c) to establishing security arrangements or taking other measures to prevent or minimise the opportunity for unlawful activity of a kind identified by the recording to occur in the workplace, or
 - (d) to taking any other action authorised or required by or under this Act. 5

Part 3 Covert surveillance authorities

9 Authority conferred by covert surveillance authority

- (1) A covert surveillance authority that is issued to an employer or employer's representative authorises the covert video surveillance generally of any of the employer's employees for the purpose of establishing whether or not one or more particular employees are involved in any unlawful activity in the workplace. 5
- (2) The authority conferred is subject to the following:
- (a) the condition that the nominated licensed security operator oversees the conduct of the covert video surveillance authorised by the authority, 10
- (b) any other conditions imposed on the authority by or under this Act.
- (3) A covert surveillance authority does not authorise the carrying out, or causing to be carried out, of covert video surveillance of any employee of an employer: 15
- (a) for the purpose of monitoring in the workplace the employee's work performance, or
- (b) in any change room or toilet facility or shower or other bathing facility in the workplace. 20

10 Application for covert surveillance authority

- (1) An employer or employer's representative may apply to a Magistrate for the issue of an authority authorising covert video surveillance generally of any of the employer's employees for the purpose of establishing whether one or more particular employees are involved in any unlawful activity in the workplace. 25
- (2) The application for the authority must include the following information: 30
- (a) the grounds the employer or employer's representative has for suspecting that a particular employee is or employees are involved in unlawful activity,

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- (b) whether other managerial or investigative procedures have been undertaken to detect the unlawful activity and what had been the outcome,
- (c) who and what will regularly or ordinarily be in view of the cameras, 5
- (d) the dates and times during which the covert video surveillance is proposed to be conducted,
- (e) in the case of an application made by an employer's representative, verification acceptable to the Magistrate of the employer's authority for the person to act as an employer's representative for the purposes of the covert video surveillance operation. 10
- (3) An application for an authority must also nominate each licensed security operator who will oversee the conduct of the covert video surveillance operation. 15
- (4) A Magistrate must not issue an authority unless the information given by the applicant in or in connection with the application is verified before the Magistrate on oath or affirmation or by affidavit.
- (5) A Magistrate may administer an oath or affirmation or take an affidavit for the purposes of an application for an authority. 20
- (6) The applicant must provide (either orally or in writing) such further information as the Magistrate requires concerning the grounds on which the authority is being sought.
- 11 False or misleading information in application** 25
- (1) A person must not, in or in connection with an application for a covert surveillance authority, give information to a Magistrate that the person knows is false or misleading in a material particular.
- Maximum penalty: 100 penalty units. 30
- (2) This section applies whether or not the information given is also verified on oath or affirmation or by affidavit.

12 How an application for a covert surveillance authority is to be dealt with

An application for a covert surveillance authority must be dealt with in camera but is otherwise to be dealt with, subject to this Part and the regulations, in such manner as is decided by the Magistrate to whom the application is made. 5

13 Reasonable grounds for issue of covert surveillance authority must exist

(1) A Magistrate must not issue a covert surveillance authority unless the Magistrate is satisfied that the application for the authority shows that reasonable grounds exist to justify its issue. 10

(2) When determining whether there are reasonable grounds to issue a covert surveillance authority authorising covert video surveillance of a recreation room, meal room or any other area at a workplace where employees are not directly engaged in work, a Magistrate must: 15

(a) have regard to the affected employees' heightened expectation of privacy when in such an area, and

(b) be satisfied that each licensed security operator nominated in the application for the authority is both competent and fit to oversee the conduct of the surveillance in such an area, and is capable of adequately accommodating in the conduct of the operation the employees' heightened expectation of privacy. 20

14 Privacy must be considered 25

A Magistrate must not issue a covert surveillance authority unless the Magistrate has had regard to whether covert video surveillance of the employee or employees concerned might unduly intrude on their privacy or the privacy of any other person. 30

15 Form of authority

(1) A covert surveillance authority is to be in the form prescribed by the regulations.

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- (2) The authority is to specify:
- (a) the purpose for which it authorises the carrying out of covert video surveillance, and
 - (b) each nominated licensed security operator who is to oversee the conduct of the covert video surveillance.

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16 Duration of authority

A covert surveillance authority, unless sooner cancelled, remains in force for the period (not exceeding 30 days or such other period as may be prescribed by the regulations) specified in the authority.

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17 Conditions of covert surveillance authority

- (1) A covert surveillance authority issued to an employer (or employer's representative) is subject to the following conditions:
- (a) except as provided by paragraph (b), the nominated licensed security operator and any of his or her supervisees must not give any other person access to any video recordings made as a consequence of the covert video surveillance, 15
 - (b) the nominated licensed security operator and any of his or her supervisees may supply the employer, or employer's representative, only with any portions of a video recording made as a consequence of the covert video surveillance that are relevant to establishing the involvement of any employee in an unlawful activity in the workplace in accordance with the authority conferred by the authority or for identifying or detecting any other unlawful activity in the workplace, 20
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 - (c) the nominated licensed security operator specified in the authority must erase or destroy (or cause a supervisee to erase or destroy) within 3 months of the expiry of the authority all parts of video recordings made as a consequence of the covert video surveillance that are not required for evidentiary purposes, 30

(d) if, as a consequence of the carrying out of covert video surveillance of an employee, the employer or employer's representative takes, or proposes to take, any detrimental action against the employee, the employer or the employer's representative must give the employee (and his or her lawyers, if any) access to the recording within a reasonable period after being requested to do so by the employee (or his or her lawyers), 5

(e) such other conditions as are prescribed by the regulations or specified in the authority. 10

(2) In this section:

supervisee, in relation to a nominated licensed security operator, means any person conducting covert video surveillance under the oversight of the nominated licensed security operator.

18 Contravention of condition of authority 15

A person who, being the holder of, or a licensed security operator nominated in, a covert surveillance authority, contravenes any condition of the covert surveillance authority, is guilty of an offence.

Maximum penalty: 50 penalty units. 20

19 Variation or cancellation of authority

(1) A Magistrate may at any time vary or cancel a covert surveillance authority (whether issued by that Magistrate or another Magistrate).

(2) A Magistrate may vary or cancel an authority on the Magistrate's own initiative or on application made by any employee, employer or other person affected by the authority. 25

(3) The Magistrate may deal with a variation or cancellation of an authority, subject to this Part and the regulations, in such manner as is decided by the Magistrate. 30

20 Further application for authority after refusal

If an application by a person for a covert surveillance authority is refused by the Magistrate, a further application in respect of the same surveillance cannot be made unless the further application provides additional relevant information.

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21 Records relating to covert surveillance authority

- (1) A Magistrate who issues, varies or cancels a covert surveillance authority is to cause a record to be made of all relevant particulars of the issue, variation or cancellation of the authority and the grounds on which the Magistrate has relied to justify the issue, variation or cancellation. 10
- (2) The Magistrate is to take all reasonable steps to preserve the confidentiality of information contained in such records and the privacy of any persons concerned. However, nothing in this subsection prevents the Magistrate from supplying any information to the Minister that is required for the purposes of a report under section 26. 15
- (3) The regulations may make provision for or with respect to:
 - (a) the keeping of records in connection with the issue of covert surveillance authorities, and 20
 - (b) the inspection of any such records, and
 - (c) any other matter in connection with any such records.

22 Defects in authority

A covert surveillance authority is not invalidated by any defect, other than a defect which affects the substance of the authority in a material particular.

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23 Report on use of authority

- (1) The employer or employer's representative to whom a covert surveillance authority is issued must furnish a report in writing to the Magistrate who issued the authority setting out briefly the result of the surveillance carried out. 30

- (2) The report is to be made within 30 days after the expiry of the authority.
- (3) If the Magistrate who issued a covert surveillance authority has died, has ceased to be a Magistrate or is absent, the report is to be furnished to another Magistrate.

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24 Functions under Act of Magistrates

The imposition of a function on a Magistrate under this Act is not a conferral of jurisdiction on Local Courts.

Part 4 Miscellaneous

25 Application to judicial member of Industrial Relations Commission

- (1) An applicant for a covert surveillance authority who is aggrieved by a decision of a Magistrate to refuse to issue or to vary or cancel a covert surveillance authority may make an application to a judicial member of the Industrial Relations Commission (a *judicial member*) to issue, vary or cancel the authority. 5
- (2) An employee affected by a covert surveillance authority who is aggrieved by a decision of a Magistrate to refuse to vary or cancel a covert surveillance authority may make an application to a judicial member to vary or cancel the authority. 10
- (3) The application must be made within 30 days after the decision is given or within such further period as the judicial member allows. 15
- (4) Part 3 (other than section 24) applies to or in respect of the issue, variation or cancellation of a covert surveillance authority by a judicial member to whom an application is made under this section in the same way as it applies to the issue, variation or cancellation of such an authority by a Magistrate. 20
- (5) An application to a Magistrate for the issue or for a variation or cancellation of an authority is taken (for the purposes only of an application under this section) to have been refused if it is not decided within the period of 30 days after the making of the application to the Magistrate. 25
- (6) The imposition of a function on a judicial member under this section is not a conferral of jurisdiction on the Industrial Relations Commission.

26 Annual report

- (1) The Minister must, as soon as practicable after 31 December in each year, prepare a report in respect of covert video surveillance operations during the year and table the report, or cause it to be tabled, in both Houses of Parliament as soon as practicable after it is prepared. 30

- (2) A report under this section:
 - (a) must include details of the number of covert surveillance authorities sought, and the number of such authorities issued, during the year to which it relates, and
 - (b) may report on such other matters relating to covert surveillance authorities and the use of covert video surveillance as the Minister considers appropriate. 5

27 Offences by corporations

- (1) If a corporation contravenes any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention. 10
- (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or convicted under that provision. 15
- (3) Nothing in this section affects the liability imposed on a corporation for an offence committed by the corporation under this Act or the regulations. 20

28 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act. 25
- (2) In particular, the regulations may make provision for or with respect to:
 - (a) the use, possession, storage and destruction of any video recording made in the course of covert video surveillance of the activities of an employee, and 30
 - (b) applications for the issue, variation and cancellation of covert surveillance authorities and how such applications are to be dealt with.
- (3) A regulation may create an offence punishable by a penalty not exceeding 5 penalty units. 35

29 Proceedings for offences

Proceedings for an offence against this Act or the regulations may be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

30 Review of Act

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- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

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