

## Paid Parental leave extended to fathers and partners

**The Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012 expands the Paid Parental Leave scheme to provide for Dad and Partner Pay — a payment which gives fathers and partners two weeks paid leave to ‘... stay at home for two weeks’ with a baby born or adopted after 1 January 2013.**

The payment known as Dad and Partner Pay Dad is paid at the national minimum wage for each week day during the person's two weeks leave.

The objects of the paid parental leave scheme (as stated in the Bill) are to:

- (1) *signal that taking time out of the paid workforce to care for a child is part of the usual course of life and work for both parents; and*
- (2) *promote equality between men and women and balance between work and family life*

It is not known at this stage how the Australian Government will monitor the movements of fathers and partners during these two weeks to ensure that they are actually at home with mother and child but I am sure they are working on it.

[\[More\]](#)

## Annual Wage Review 2012

Fair Work Australia has varied its modern awards to incorporate the Annual Wage Review decision increasing minimum wages by 2.9 percent. Employers were required should have now passed on the increases to employees. If you haven't implemented the decision the national minimum wage order contains:

- The national minimum wage (NMW) of **\$606.40 per week** or **\$15.96 per hour**,
- Two special national minimum wages for award/agreement free employees with disability: for employees with disability whose productivity is not affected, a minimum wage of \$606.40 per week or \$15.96 per hour based on a 38 hour week, and for employees whose productivity is affected, an assessment under the supported wage system, subject to a minimum payment fixed under the supported wage system,

- Wages provisions for award/agreement free junior employees based on the percentages for juniors in the Miscellaneous Award 2010 applied to the national minimum wage,
- The apprentice wage provisions and the NTWS in the Miscellaneous Award 2010 for award/agreement free employees to whom training arrangements apply, incorporated by reference and a provision that adult apprentices should not receive less than the national minimum wage, and
- A casual loading of 23 per cent for award/agreement free employees.

Unless otherwise agreed, the increases may be absorbed into over-award payments made to employees provided in either enterprise agreements or individual employment contracts.

The updated modern award wages are available through the [Fair Work Ombudsman](#). Subscribers to [Employee Relations Online](#) can access the updated modern awards through that service. Please [contact](#) Paul Maguire to discuss the implications for your business if you are unsure.

## Diversity reporting requirements set to change

The Equal Opportunity for Women in the Workplace Amendment Bill 2012, recently passed in the House of Representatives, will set higher standards for many more employers if it becomes law and more reporting.

The Bill requires all employers of over 100 employees to report against 'gender equality indicators'. Debate on a number of aspects of the Bill is expected in the Senate.

The Bill was passed by the House of Representatives on 18 June 2012 and is now awaiting consideration by the Senate.

[\[More\]](#)

## Inquiry into workplace bullying

The House of Representatives Standing Committee on Education and Employment is inquiring into workplace bullying.

The terms of reference for the inquiry focus on:

- the prevalence of workplace bullying in Australia and the experience of victims of workplace bullying;
- the role of workplace cultures in preventing and responding to bullying and the capacity for

workplace-based policies and procedures to influence the incidence and seriousness of workplace bullying;

- the adequacy of existing education and support services to prevent and respond to workplace bullying and whether there are further opportunities to raise awareness of workplace bullying such as community forums;
- whether the scope to improve coordination between governments, regulators, health service providers and other stakeholders to address and prevent workplace bullying;
- whether there are regulatory, administrative or cross-jurisdictional and international legal and policy gaps that should be addressed in the interests of enhancing protection against and providing an early response to workplace bullying, including through appropriate complaint mechanisms;
- whether the existing regulatory frameworks provide a sufficient deterrent against workplace bullying;
- the most appropriate ways of ensuring bullying culture or behaviours are not transferred from one workplace to another; and
- possible improvements to the national evidence base on workplace bullying

The Committee is currently travelling throughout Australia holding public meetings to hear from interested persons on the matter.

[\[More\]](#)

## Equal Remuneration Order

Fair Work Australia has issued the formal order to implement its decision earlier in the year to increase the minimum wages in the [Social Community Home Care and Disability Services Industry Award 2010](#).

[\[More\]](#)

## Nurses pursue low paid bargaining order

General medical and specialist practices have been the subject of a national campaign by the Australian Nursing Federation to obtain public hospital level wages for nurses employed in the private health sector.

The campaign is being conducted through a provision of the Fair Work Act known as '*Low paid authorisations*'. In such cases, Fair Work Australia may order that a particular group of employees are low paid and then it issue a bargaining order requiring employers to participate in bargaining. That in effect means that the obligation to bargain in good faith becomes enforceable, where it would not otherwise be in relation to a multi-enterprise agreement.

Several employer representatives including the AMA have been quite vigorous in the argument that the application will fail at the most fundamental issue, i.e. nurses are not low paid by any criteria. The employer bodies are fighting the claim at Fair Work Australia.

Commissioner Cribb will hear the ANF evidence in full before deciding whether to issue a '*Low paid authorisation*' order. If you are not currently represented then please [contact us](#) for advice.

## TIP OF THE MONTH: Watching the employees – Surveillance methods in the workplace

What are the options available for monitoring employees at work and what legal issues does surveillance raise? The following article by Sarah Ralph of Norton Rose Australia published recently in CCH explains the legal background.

### Are employers looking at all of the implications?

Surveillance of employees by their employers is not a new workplace issue; however it is an area where technology developments and advances have continued to enhance employers' ability to monitor employee conduct in the workplace.

Employers have a variety of surveillance options, including the use of GPS systems in company vehicles, the monitoring of email and internet use and video camera surveillance and phone recording.

While employers will always rely on witness evidence (for example, when investigating employee misconduct or disciplinary issues), there appear to be more examples in court and tribunal proceedings of employers seeking to rely on some form of surveillance material as part of their case.

Looking beyond the philosophical arguments of whether employers should have the right to carry out surveillance in the workplace, it is important for employers to consider the broader implications of this electronic invasion, including the legal risks in introducing or relying on surveillance systems.

### Workplace surveillance laws

There appears to be a growing acceptance from employers, employees, unions and institutions such as Fair Work Australia (FWA) that workplace surveillance is a legitimate and often necessary business requirement. For example, it is generally accepted that vehicle GPS systems are necessary as security or safety measures, in order to ensure that a vehicle can be located immediately if required.

However, as is often the case, the law appears to have fallen behind technology in regulating electronic surveillance. Further, while there are a number of federal

and state Acts which deal with surveillance, only a few have specific application to the workplace.

One example is in New South Wales, where the *Workplace Surveillance Act 2005* (WS Act) was enacted to specifically govern the use of surveillance systems in the workplace. The WS Act regulates both the overt and covert use of camera, computer and tracking surveillance devices. There are also specific prohibitions on the use of surveillance of employees in bathrooms, change rooms and toilets.

Another example is the *Workplace Privacy Act 2011* (WP Act), which came into effect on 24 August 2011. The WP Act is similar to the WS Act as it sets out notification and consultation requirements for overt surveillance, and regulation for covert surveillance.

Other states are yet to implement modern workplace surveillance legislation. In Victoria, the *Surveillance Devices Act 1999* (SD Act) regulates the use of listening devices, tracking devices and data surveillance devices. While the SD Act was amended in 2007 to limit surveillance in private workplace areas (bathrooms, change rooms and toilets), it is illustrative of how older legislation does little to regulate modern workplace surveillance.

For example, in *Gervasoni v Rand Transport (1986) Pty Ltd* (2010), Fair Work Australia found at first instance that an electronic device which was capable of reporting the geographical position of a vehicle was not an “electronic tracking device” for the purpose of the SD Act, as the “primary purpose” of the system was to monitor the environment in which cold-stored goods were being transported. For this reason, the employer was not required to notify the employee that it was installed. This finding was not challenged on appeal.

The case of *Ponzio v Multiplex Limited* (2005) involved an alleged breach of the *Workplace Relations Act 1996* coercion provisions. The Building Industry Taskforce alleged that a contractor had been coerced by a principal to enter into an industrial agreement with the CFMEU. A key issue in this matter involved whether conversations recorded by one party on a telephone were admissible. The Federal Court held that a secretly taped conversation was admissible as evidence as it did not contravene the SD Act, because one of the parties to the conversation had intended to tape the conversation. This meant that it did not fall within the definition of “private conversation”, which requires “the parties” to the conversation to desire it to be private. While the secret taping could be seen as an invasion of the privacy and as involving underhand tactics, it could not be said to have breached the SD Act.

It is important to note that the lack of regulation in certain jurisdictions is not necessarily of a benefit to employers. Without legislative guidelines, employers inevitably rely on their own policies and procedures in carrying out workplace surveillance, with varying results.

## Can workplace surveillance constitute adverse action?

Regardless of whether workplace surveillance legislation exists in a particular jurisdiction, it is possible that an employer’s actions in carrying out workplace surveillance could invoke a breach of the expansive general protection provisions of the *Fair Work Act 2009* (FW Act).

As most employers are aware, the general protection provisions in the FW Act prohibit persons (in particular employers) taking certain adverse action against other persons (typically employees), because of that person’s protected attribute, such as a workplace right, industrial activity or discrimination grounds such as disability or gender.

The surveillance of an employee (either within or outside the workplace), even where compliant with any existing surveillance legislation, could potentially constitute adverse action, if it is held to “alter the position of the employee to the employee’s prejudice”. This expression has been given a broad meaning by the courts, to cover not only a legal injury but any “adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question”.

While an employer might argue that surveillance itself is benign (if no further action is taken), there is certainly an argument that the invasive nature of surveillance, particularly where it might monitor personal conversations or emails, could constitute an “adverse affection of” or “deterioration in” an employee’s right to privacy in the workplace. An employee might be concerned about certain conversations or activities being monitored by their employer.

Of course, establishing that certain conduct constitutes adverse action does not itself breach the general protection provisions in the Fair Work Act. However, an employer may be in breach if it is found that the surveillance was undertaken because of an employee’s particular attribute.

For example, the surveillance of union members, if undertaken because of their union membership, could be a breach of the general protection provisions, even if the employer had other legitimate reasons for such surveillance (such as concerns over misconduct or industrial action).

In order to rebut any such allegation, an employer would need to establish that the surveillance was undertaken wholly for another reason. Having regard to the reverse onus of proof under the adverse action provisions and the ability of the court to look at what it considers to be the real reason for certain conduct, this may be a difficult onus to discharge.

## Introduction of change and consultation

Employers should be aware that the introduction of workplace surveillance may constitute a “workplace change” that would require it to be dealt with under a consultation clause in an applicable modern award or enterprise agreement.

Schedule 2.3 of the *Fair Work Regulations 2009* (the Regulations) provides the model consultation term for enterprise agreements, which is reflected in many modern awards. Under this clause, the consultation process is enacted if:

1. The employer has made a definite decision to introduce a major change to production, program, organisation, structure or technology in relation to its enterprise, and
2. The change is likely to have a significant effect on employees at the enterprise.

The provision requires the employer to notify employees and any bargaining representatives of this proposed change, and consult with them regarding the change, including any measures to avert or mitigate any adverse effect on employees.

Whether the introduction of surveillance is likely to have a significant impact on employees will depend on the circumstances. The Model Consultation clause provides guidance on this point by defining “significant effect on employees” as including:

- (a) the termination of the employment of employees
- (b) major change to the composition, operation or size of the employer’s workforce or to the skills required of employees
- (c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure)
- (d) the alteration of hours of work
- (e) the need to retrain employees
- (f) the need to relocate employees to another workplace, or
- (g) the restructuring of jobs.

It is possible to envisage a situation where an employee or union claims that the introduction of surveillance resulted in the termination of employees.

It is important that employers are aware of whether the introduction of surveillance or new surveillance technology would trigger the consultation process, as there have been instances where the failure to consult with employees has resulted in an employer having substantial penalties ordered against it by a court.

## Reliance on surveillance material during litigation

Evidence obtained from surveillance systems will not always be accepted or treated favourably in litigation. This will depend in part upon the particular forum of the proceedings, and also whether the employer has notified employees that the surveillance is in place.

Surveillance material will generally need to be legally obtained in order to be admissible in a court.

Under s 138 of the *Evidence Act 1995* (Cth), a court has the discretion to exclude evidence that was obtained “improperly or in contravention of an Australian law”, unless “the desirability of admitting the evidence outweighs the undesirability of admitting evidence”. For example, evidence obtained in NSW through covert surveillance would not be admissible, if the relevant court authority had not been obtained under the WS Act.

Section 551 of the Fair Work Act confirms that courts are bound by rules of evidence and procedures for civil matters, when hearing proceedings relating to a contravention, or proposed contravention, of civil remedy provisions of the Fair Work Act — such as a breach of the adverse action provisions.

By comparison, s 591 of the Fair Work Act provides that Fair Work Australia is not bound by the rules of evidence and procedures in relation to a matter before it — such as an unfair dismissal hearing.

Notwithstanding this, the fact that surveillance material may be legally admissible will not necessarily preclude a finding by Fair Work Australia that the employer’s failure to disclose its use meant that the termination of an employee’s employment was harsh.

For example, in *Rand Transport (1986) Pty Ltd v Gervasoni* (2010), while the full bench found that the termination of the employee’s employment for tampering with the speed controls of the company vehicle and speeding was not harsh, unjust or unreasonable, it did note that the fact that the employee was not advised that the GPS system was in the vehicle weighed in favour of a conclusion that the termination was harsh.

It is also clear that relying on surveillance in isolation of other supporting evidence or without providing procedural fairness can result in an unsuccessful outcome in litigated matters, including unfair dismissal claims.

In *Sean Claypole v BlueScope Steel Limited* (2008) and *JKC v BlueScope Steel Limited* (2008) the Australian Industrial Relations Commission (AIRC) ruled that the dismissal of two employees for misrepresenting the extent of their medical condition was unfair. Mr Claypole and JKC (who were brothers) were both on restricted duties in accordance with certificates of capacity.



They were both captured on video surveillance during a weekend camping trip undertaking activities that were allegedly inconsistent with their restrictions. Both employees had their employment terminated for misconduct.

In the unfair dismissal claims, the AIRC found that the video surveillance footage, in the absence of evidence from the treating doctor, was not enough to prove that either employee had misrepresented the extent of their injuries to the treating doctor. The failure to consult with the treating doctor to corroborate the evidence that both employees had misrepresented their medical conditions resulted in the dismissals being unjust and unreasonable.

## Conclusions

Notwithstanding the lack of consistent regulation in this area, the recommended course of action is for employers to ensure that, as far as it is possible, workplace surveillance is transparent and that employees understand when and how the surveillance will operate. This is most appropriately done by way of a workplace policy and through workplace training. Most employers will already have policies in place regulating the monitoring of the internet. Other surveillance methods are not dissimilar in the rules that should be applied to ensure fairness to everyone and protect the employer's interests.

A transparent approach will minimise the risks of employees and/or unions seeking to challenge the introduction or use of workplace surveillance, and ensure that such material is given the relevant weight if it is to be used in future proceedings.

For specific advice [contact](#) Paul Maguire.

## Events Calendar



Paul Maguire will be participating on a Panel of Experts at the National Small Business Summit scheduled for 1-2 August 2012 in Melbourne. For further details go to the website [National Small Business Summit 2012](#)

## The 2012 NESA National Conference

Maguire Consulting will once again be exhibiting at the NESA National Conference at the Hilton Hotel Sydney 29-31 August 2012. Paul Maguire will also be presenting the results of the Australian Employment Services Remuneration Survey 2012.



[\[More\]](#)

## Short Courses 2012

Maguire Consulting is able to deliver a range of short day (one and half day) courses on a variety of topics relevant to the employment and management of staff. The courses may be delivered in-house for your team of managers or for all staff. See the [list of short courses currently available](#) in 2012.

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