Chapter VIII

Establishing Boundaries: Employees, Employers and Workplace Monitoring

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Abstract

This chapter examines workplace monitoring in Australia. Competing interests between those of employees and employers are outlined. Recent decisions by courts and tribunals in Australia are considered. Information technology or acceptable use policies that are part of the contract of employed are identified as a means of establishing boundaries. The relevant reports of both the New South Wales Law Reform Commission and the Victorian Law Reform Commission are also discussed. The idea that Commonwealth legislation could be enacted to simplify the process of establishing boundaries is noted. This activity should be viewed more generally as strengthening the protection of privacy in Australian law. Management and workers both have responsibilities in establishing boundaries with regard to workplace monitoring. Effective communication between employers and employees is an essential part for creating a culture of respect and trust within an organization.
Introduction

The use of Internet technologies by business has enabled the activities of employees to be easily monitored. Employers justify their actions as a means of ensuring occupational health and safety by eliminating sexual, racial, and other forms of harassment. Ensuring that the company’s resources are appropriately used is a means of justifying the monitoring of employees online. Information security and the duty of management to protect the company’s intellectual property are additional matters. Workplace monitoring challenges the autonomy of employees. Privacy or the ability to control information about oneself is also involved (Katsh, 1995). There have been several recent decisions by Australian courts and tribunals regarding the boundaries that separate the competing interests of employees and employers with respect to workplace monitoring. Usually the matter is dealt with under “information technology” or “acceptable use policies”. These policies are incorporated as a term in the contract of employment. Difficulties can also arise concerning the ability of a union to use the corporation’s e-mail system to contact its members. The New South Wales Law Reform Commission has considered workplace monitoring, and the Victorian Law Reform Commission has recently released a discussion paper (New South Wales Law Reform Commission, 2001; Victorian Law Reform Commission, 2002). Rather than rely on the gradual development of the Common Law, enacting legislation should be considered. This would assist in establishing the boundaries between employees and employers.

Background

Management is under an obligation to provide a safe working environment. Employees are not to be harassed on the basis of sexual, racial, or other disturbing conduct. McCullagh has noted that management is responsible for the use of the corporation’s assets and that this extends to information security (Krebs, 2002; McCullagh, 2002). He has further noted that employers may be held liable for the actions of their employees in hacking or attacking another computer if they use the corporation’s network (Gamertsfelder, McMillan, Handelsmann & Hourigan, 2002). Consequently, employers have an interest in monitoring the activities of their employees so as to remove the likelihood of harm both to the business, other employees, and third parties. Appropriate safeguards need to be put in place. Brien and Brien in Netlaw (forthcoming 2004) provide a general discussion of privacy, including its origins and relevant legislation within the context of controlling behaviour across the Internet.
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