Excerpt from speech by the Hon Bob Debus, Attorney-General for NSW

Communications Law Centre/Freehills Professional Seminar on E-Mail Surveillance in the workplace

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Outside the cloistered world of the New South Wales parliament, e-mail which ten years ago was almost unknown to the majority of people in Australia, has of course taken its place alongside the telephone as one of the most important and popular forms of communication.

E-mail has irrevocably changed the nature of human interaction. A message sent from Australia to a person's "Hotmail" address will find that person whether they log on in Timbuktu or Outer Mongolia.

But e-mail's most important application has been in relation to business. By that I mean business in its broadest sense, to include all forms of activity that people may undertake to earn a living.

It has permitted documents or information to be moved cheaply and quickly across an office or across the world.

This mobility is coupled with a second advantage over other forms of media such as the phone. E-mail provides a permanent record of the fact that a communication took place and the content of that communication.

Clearly a permanent record of all communication is attractive in relation to business as it provides a clear record of any undertakings or agreements and can prevent misunderstandings or disputes.

Problems caused by e-mail

However, both the mobility and permanence of e-mail carry with them problems. The same mobility which allows a document to be sent to a client also permits a rogue employee to send it to a competitor, the press, or to their home. The permanence of the record that helps to prevent

disputes can be a disadvantage when sensitive personal information is communicated or when damaging material such as defamatory statements are sent.

Employers have responded in a number of ways to these problems ranging from the draconian to the laissez faire.

One employer response which has emerged involves a range of security practices involving surveillance – often covert surveillance - of all employee e-mail.

Secret or covert e-mail surveillance has been the basis of numerous complaints. While some employers argue that this is necessary to protect their legitimate interests, employees expect that their private correspondence, like their private telephone calls or private conversations, should not be unnecessarily subject to surveillance.

It would be both unreasonable and impractical to prevent employees using e-mail for non-employment purposes as the distinction between employment and non employment purposes can be blurred at best. For example, what is the status of a comment in a business e-mail asking a work colleague about his or her recent holiday? Most accept that it is reasonable for people to speak about non-employment related matters at work so it is hard to see why employees should not be permitted to communicate similar information via e-mail.

Given these competing considerations, a sophisticated approach is needed to strike the right balance between an employee's right to privacy and an employer's right to protect their business interests.

So what is the Government proposing to do about this matter?

The Law Reform Commission's Report

In 1996, my predecessor, Jeff Shaw, commissioned a NSW Law Reform Commission review into Surveillance, in response to growing concerns surrounding the increasing use of surveillance in NSW.

The Commissions Interim Report will be released in the near future and the intricacies of the Cabinet process will of course dictate the nature and extent of the legislative response of the Government. Within the constraints imposed by these various processes, I am, however, in a position to indicate the broad directions for reform which will be set out in the Commission's Interim Report.

The Law Reform Commission will be advocating a comprehensive regulatory approach to surveillance through a new *Surveillance Act.* The Commission's recommendations will represent a departure from the device-specific approach taken in the past in relation to legislation such as the *Listening Devices Act*.

The proposed scheme offers the benefit of clarification and simplification of a somewhat grey area of the law. The Law Reform Commission proposes a framework which protects the right of the individual not to be subjected to arbitrary surveillance, while permitting legitimate uses of surveillance technology. The overall scheme is similar to that which was pioneered in the *Workplace Video Surveillance Act 1998.*

In regulating surveillance there is a clear distinction between overt and covert surveillance. The Commission defines "overt surveillance" as surveillance which occurs in circumstances where there is adequate notice of the surveillance. Examples of notice would be such things as signs and clearly visible equipment such as cameras.

In the case of covert surveillance, where the subject of the surveillance is unaware that it is taking place, the Law Reform Commission considers that, apart from a very limited number of cases, covert surveillance should require prior approval from a court or similar body.

Clearly there will be cases where permission will be sought to conduct covert surveillance of e-mail in, for example, employment and for law enforcement purposes. Given the focus of today's forum, I will focus upon the regime for covert surveillance in the workplace. And I need to restate here, again, that this is the Commissions proposed scheme as I understand it to be. While it has much to recommend it intellectually, it is

of course the case that further analysis in my own Department and at a Cabinet level will have to ensue before adoption of the scheme legislatively can be brought to finality.

Under the scheme envisaged by the LRC, an employer who wishes to conduct covert surveillance of an employee's e-mail will require prior authorisation from an Industrial Magistrate or a Judicial Member of the Industrial Relations Commission.

An employer would only be entitled to obtain a covert surveillance authorisation where he or she could demonstrate that unlawful activity or serious misconduct is reasonably suspected.

The court would then weigh up a number of factors including the privacy of the employee or any third parties before permitting the covert surveillance to take place. It is envisaged that authorisations would only last for a limited period and that employers would be obliged to report back the results of the covert surveillance.

It will also be recommended that an employer conducting covert surveillance would also be obliged to keep records and to make those records available to the Privacy Commissioner or Ombudsman.

In accordance with accepted privacy principles, any information gathered through a covert surveillance authorisation should only be permitted to be used for the purposes explicitly stated in the authorisation.

It would need to be kept secure and the information should be destroyed when it is found to be no longer relevant.

Clearly, these requirements if enacted would preclude covert e-mail surveillance except in a limited number of circumstances where serious abuse was thought to be taking place. It would mean that people would generally need to be notified that surveillance of e-mail was occurring in order that the surveillance was overt rather than covert.

For *overt* surveillance, apart from the notice requirements, the Law Reform Commission has developed a number of privacy principles. These are:

1. overt surveillance should not be used in such a way that it breaches an individual's reasonable expectation of privacy;

2. overt surveillance must only be undertaken for an acceptable purpose (these are listed as protection of the person; protection of property; protection of the public interest; and protection of a legitimate interest).

3. surveillance must be conducted in a manner which is appropriate for purpose;

4. notice provisions shall identify the surveillance user;

5. surveillance users are accountable for their surveillance devices and the consequences of their use;

6. surveillance users must ensure that all aspects of their surveillance system are secure (eg security procedures for video and audio tapes, proper training and probity checks on staff, etc);

7. material obtained through surveillance to be used in a fair manner and only for the purpose obtained;

8. material obtained through surveillance to be destroyed within specified period.

These principles would clearly not preclude e-mail surveillance by employers but would require that it be carried out ethically and sensibly. It would require that employers wishing to take steps to protect their lawful interests should take account of employee privacy.

I would expect that most responsible users of overt surveillance would already subscribe to these standards set down by the Law Reform Commission.

Where breaches of the proposed legislation occur, the LRC is of the view that breaches of the overt surveillance principles should give rise to civil liability while a breach of the requirements in relation to covert surveillance would constitute a criminal offence.

Government Response to LRC

The Government, [in its 1999 paper, "Law Reform in NSW: A Fairer, Faster Justice System"] has made a commitment to "introduce a comprehensive scheme for the regulation of unwarranted and intrusive surveillance, following a review of the recommendations of the NSW Law Reform Commission".

This process is now underway. The Government as I have said, is currently reviewing the Report and as you will appreciate, it is a substantial document proposing a significant law reform proposal. The Government will therefore undertake any necessary consultation before finalising its response to the Report's recommendations.

However, I can say that I find the arguments of the Law Reform Commission in relation to the regulation of e-mail surveillance persuasive. Subject to the outcome of the present consultations, I hope to be in a position to announce a comprehensive package of legislative reforms in the relatively near future. Employees and employers, in my opinion, can only benefit from the clarity and certainty that such a regime, if well drafted and designed, can deliver.

Unions, employer groups and indeed specialist groups such as this will differ in their interpretation of the appropriate line to be drawn between employee privacy and the right of employers to be aware of activity conducted in the workplace. In the coming months I look forward to debating the details with all interested parties.

Probably in my case the key debates will take place in press conferences, in forums such as this and on the radio rather than in cyber space but that is regrettably the fate of an Attorney General grounded firmly in twentieth century technology.

Let me once again thank you for your hospitality this afternoon, wish you well in your twenty first century deliberations and wish me luck as I return to the seventeenth century world of the NSW parliament.