



26 July 2007

Mr Len Cooper
Branch Secretary
CEPU Communications Division
T & S Branch (Vic)
1st Floor, 139 Queensberry Street
Carton South VIC 3053

Dear Mr Cooper

**Report on the Investigation into the Installation of Global Positioning
Devices in Employees' Vehicles by Telstra Corporation Limited**

Please find enclosed a copy of my report in relation to this investigation.

A copy of the report will also be provided to Telstra Corporation Limited, to
the employee complainants and to the Victorian Minister for Industrial
Relations.

If you have any queries please do not hesitate to contact Mr Joel Fetter of
my Office on 9651 - 7334.

Yours sincerely

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**OFFICE OF THE
WORKPLACE RIGHTS
ADVOCATE**

**WORKPLACE RIGHTS ADVOCATE ACT 2005 (VIC)
OFFICE OF THE WORKPLACE RIGHTS ADVOCATE**

**REPORT ON THE INVESTIGATION INTO THE
INSTALLATION OF GLOBAL POSITIONING DEVICES
IN EMPLOYEES' VEHICLES BY TELSTRA
CORPORATION LIMITED**

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WORKPLACE RIGHTS ADVOCATE ACT 2005 (VIC)
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GLOBAL POSITIONING DEVICES IN EMPLOYEES' VEHICLES BY
TELSTRA CORPORATION LIMITED**

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EXECUTIVE SUMMARY

This is a report into an investigation I have conducted pursuant to s 5(1)(d) of the *Workplace Rights Advocate Act 2005* (Vic) which empowers me "to investigate illegal, unfair or otherwise inappropriate industrial relations practices in Victoria." A summary of the relevant factual circumstances, the scope of the investigation and my findings is set out below.

The facts

1. The central facts upon which my investigation is based are well documented and can be summarised as follows:

- On 10 August 2006, Telstra gave its Victorian technicians four days' notice that it would commence fitting Global Positioning Devices (GPS devices) to the technicians' vehicles (which were owned by Telstra);
- The Communications, Electrical, Plumbing Union (CEPU) which has industrial coverage of the relevant technicians, advised its members that the *Surveillance Devices Act 1999* (Vic) ('SDA') gave them the right to refuse surveillance. As a consequence, many employees advised Telstra that they did not wish to be monitored while driving company vehicles.
- Telstra then varied its vehicle policy (an internal company policy) to make surveillance a condition of use of company vehicles. It then wrote to those employees who had refused to be monitored to advise them that if they refused to use vehicles fitted with GPS devices, their 'continued employment may become subject to review'.
- In response, some employees informed Telstra that they would consent to surveillance, but noted their consent was given 'under duress'. Telstra demanded they withdraw this caveat, and warned that if unconditional consent was not given, 'Telstra may take disciplinary action against you (up to and including the termination of your employment)'.

- Some employees still refused to give their consent. Telstra advised them (in unqualified terms) that they were acting in breach of their contracts of employment, the Telstra collective bargaining agreement, and Telstra policy. It gave the relevant employees 'one final opportunity to reconsider [their] position' before disciplinary action was taken against them.
- In the face of this warning, the relevant employees formally withdrew their objections to surveillance. The GPS devices were fitted to the vehicles by Telstra and have been switched on.
- Some of the employees have reported to the CEPU that they have felt highly stressed about the way this process was handled.

THE INVESTIGATION

2. My investigation was initiated by a complaint from the CEPU and from a number of the technicians affected which essentially raised the same concerns as those raised by the CEPU. The complaints raised a number of concerns about the possibility that Telstra had engaged in unlawful, unfair or inappropriate industrial relations practices.
3. In particular, concerns were raised in my mind about possible breaches of the following laws:
 - The SDA, which makes it a criminal offence to install, use or maintain a tracking device without the express or implied consent of the person being tracked;
 - The *Privacy Act 1988* (Cth), which regulates the collection, use and disclosure of certain 'personal information', including employees' private data;
 - The *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth), which requires Telstra to protect employees' health and safety at work, including their mental health;

- The *Trade Practices Act 1975* (Cth), the *Fair Trading Act 1999* (Vic) and the common law in relation to misleading and/or deceptive conduct;
4. I wrote to Telstra advising that I had determined to investigate the matter and setting out the allegations made in the complaints and my own concerns as they related to a range of issues.
 5. I received a short reply from Telstra requesting further particulars of the investigation and assuring me that Telstra complied with all statutory obligations and ensured that it dealt fairly with its employees.
 6. I again wrote to Telstra advising, inter alia, that I considered the grounds of the investigation were sufficiently particularised. I again invited Telstra to respond to the allegations and my concerns.
 7. Telstra subsequently provided me, through its lawyers, with what was described as some initial responses to the allegations and my concerns. Amongst other things, Telstra asserted its legal right as an employer to install GPS devices in its vehicles. It denied any wrongdoing or unfairness.
 8. I later wrote to Telstra and asked it to further elaborate on the legal arguments it had advanced in support of its position. Telstra declined to respond to this request.
 9. I also provided Telstra with the opportunity to comment on my report prior to it being finalised.

CONCLUSIONS

10. On the basis of the material provided by the complainants, research conducted by my Office and having considered Telstra's response, my findings on each issue are as follows:
 - **Surveillance:** I have serious concerns that some employees did not genuinely consent to the installation of the GPS devices, and so am concerned that Telstra may have breached the SDA. As this is a

criminal matter, I propose to refer it to Victoria police for further investigation;

- **Privacy:** I am concerned that the GPS devices will record data on employees' whereabouts during non-work time, (which is arguably unlawful), and that data collected on employee movements during working time may not be handled appropriately (which is potentially unfair). I recommend that Telstra amend its privacy principles to ensure that they are both fair and in accordance with the applicable law.
- **Stress:** I am concerned that the way in which Telstra introduced the GPS devices may have caused some employees high levels of stress, and that the continuous monitoring of employees may cause further stress. As such, Telstra's conduct may be in breach of its obligations under occupational health and safety legislation. I propose to refer this matter to Comcare for further investigation.
- **Misleading conduct:** I find that it was unfair and inappropriate for Telstra to have represented to employees, in an unqualified fashion, that they were legally obliged to accept surveillance, when the legal position was, in my view, attended by both doubt and uncertainty.

BACKGROUND

Introduction

1. This is a report into an investigation I have conducted pursuant to section 5(1)(d) of the *Workplace Rights Advocate Act 2005* (Vic) ("the WRA Act") ("the investigation"). Relevantly, s 5 of the WRA Act provides:

"(1) The WRA has the following functions:

...

(d) to investigate illegal, unfair or otherwise inappropriate industrial relations practices in Victoria;

..."

2. The investigation relates to the introduction of Global Positioning System ('GPS') devices in vehicles driven by Communication Technicians employed by Telstra Corporation Ltd ('Telstra') in Victoria (referred to in this report as "the employees"). The vehicles are owned by Telstra.
3. The investigation was initiated as a result of a complaint received by my Office from the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, P & T Branch (Vic) ("the CEPU"). After the investigation was initiated I received complaints from a number of the employees. These complaints essentially raised the same allegations as those made by the CEPU. The CEPU complaint and those made by the individual employees are collectively referred to in this report as "the complaints". The substance of the complaints is dealt with in more detail later in this report.
4. Set out below is a chronology of relevant events. This chronology is based on information received from the CEPU and from Telstra and on publicly available information sourced by my Office as part of the investigation.

Chronology of events

5. Telstra employs approximately 17,000 field-based employees. The employees, who are the subject of this report, work in the field and have traditionally been provided with company vehicles. There are approximately 7,000 such operational vehicles in Australia, at least 2,000 of which are based in Victoria. Presently, a manual despatch system is used to co-ordinate the movements of the technical fleet.
6. The use of vehicles by the employees has been governed by the Telstra 'Operational Motor Vehicle Policy' ("the OMV Policy"). It seems that the OMV Policy has been in existence since at least December 1989, following a recommendation of Commissioner Griffin of the Australian Industrial Relations Commission ("the AIRC"). In its original form the OMV Policy dealt with both ordinary commercial (or 'commuter') use, as well as part-private use of vehicles. The great majority of the employees are encompassed within the commuter use category. Before being issued with company vehicles under the OMV Policy, employees are required to sign a '*Commuter Use Approval Form*' by which they agree to '*abide by*' the OMV Policy.
7. The original form of the OMV Policy provided that Telstra had the '*absolute right to vary or amend the terms and conditions of the provision of the Vehicle at any time, subject to one month's notice being given to the Employee*', or to withdraw the vehicle with one month's notice. An employee given a commuter vehicle was required to sign a '*Commuter use agreement*' whereby they agreed '*to be bound by the terms and conditions*' of the OMV Policy.
8. It appears that the original OMV Policy was superseded by a later version, adopted on or about 12 January 1999. This version retained Telstra's right to withdraw the vehicle upon one month's notice, but did not expressly confer upon Telstra a right to vary the conditions of the use of the vehicles.

9. On 6 September 2005, the *Telstra Enterprise Agreement 2005-2008* ("the *Telstra EA*") was certified by the AIRC. Clause 18.3.1 provides as follows:

"A field based employee in the CFW [Customer Field Workforce] may be supplied with a Telstra vehicle to enable them to do their job. If an employee is supplied with a Telstra vehicle they will be required to sign a Commuter Use Approval document concerning the vehicle's use, care and maintenance.

Note 1: If an employee currently has a Telstra vehicle under the Part Private Use Arrangement that existed before 1 March 1999, these arrangements continue to apply. Part Private Use is not available to other employees.

Note 2: An extract of the Operational Vehicles Policy setting out the business rules for Commuter Use Category Vehicle usage will be tendered as an exhibit in the proceedings for the certification of this Agreement. An employee supplied with a Telstra vehicle is required to commence and cease work at a customer's premises in accordance with this clause."

10. It appears that the version of the OMV Policy referred to in the above clause is a further version of the 1999 OMV Policy, which was issued on 25 October 2000.
11. On 1 July 2005, Mr Sol Trujillo commenced in the position of Chief Executive Officer of Telstra. He initiated a review of Telstra's operations and, on 15 November 2005, announced a strategy to transform the company into a 'New Telstra'. This strategy involves cutting costs '*by reducing complexity, making business systems more efficient and simplifying operations*' according to '*a "one factory" approach to operations, which is guided by four principles: do it once, do it right for the customer, do it in an integrated way and do it at the lowest possible unit cost*'. Telstra is undergoing '*a cultural transformation, with big investments in training our people and reforming the way we do business.*'¹

¹ Telstra, 'The New Telstra, On the Move: A Progress Report on Telstra's Transformation' <www.telstra.com.au/abouttelstra/corp/docs/report_1yeartransformationprogress.pdf> at 1-2

12. As part of the 'New Telstra' agenda, Telstra has developed a 'CT of the Future Program'. One of the components of this program is the installation of GPS devices in operational vehicles. A trial installation of GPS devices in 100 vehicles in Brisbane was conducted in early 2006. According to the CEPU, Telstra has already spent about \$100 million to date on the purchase, installation and testing of the GPS devices.
13. The GPS devices are to be operated under a 'service and subscription' agreement with an American company, @road Inc.² It appears that (at least for an initial period) the data from the GPS devices will be processed by that company in the United States.
14. On 31 July 2006, Telstra met with representatives of the CEPU to discuss the rollout of the GPS devices in Victoria. The CEPU stated its objection to the devices, principally on privacy grounds, but also expressing concern about the occupational health and safety implications of the electromagnetic radiation emitted by the GPS devices. Notwithstanding these objections, Telstra indicated that it was intent on implementing its policy.
15. On 10 August 2006, Telstra wrote to the employees informing them that GPS devices were to be installed in operational vehicles. The letter stated:

"As part of Telstra's efforts to improve employee safety and customer service, Telstra vehicles are being fitted with Global Positioning System location monitoring technology.

Monitoring of the location of Telstra vehicles will take effect on an ongoing and continuous basis from the 14th August 2006. Notices will be placed on relevant vehicles advising staff where location monitoring is undertaken.

Information on the real time location of Telstra vehicles is being gathered to:

- *improve the safety and security of employees and Telstra vehicles;*

² See @road Press Releases 22 September 2006, 11 October 2006, 26 October 2006 <www.road.com>.

- *improve customer scheduling;*
- *better understand staff travel times; and*
- *ensure that use of Telstra vehicles is in accordance with law, Telstra policy and current Enterprise Agreement provisions.*

The information obtained from the location monitoring system will be handled and analysed by authorised Telstra personnel only. Telstra will not otherwise share that information with any other organisation or person without the consent of the employee in question, unless required or authorised to do so by law or in situations where life or safety is threatened.

This information will be retained so long as it is necessary to fulfil Telstra's legal and business requirements. Telstra will take reasonable steps to protect that information from unauthorised access, modification, use and disclosure. You may request access to the information which Telstra holds about a vehicle's location during your use of it, by contacting your manager.

Telstra vehicles that are fitted with location monitoring technology will have stickers fitted advising the driver and any other occupants of the vehicle of the presence of the technology".

16. The CEPU received information from a number of their members who alleged that their managers were engaging in threatening, bullying or harassing behaviour in seeking to procure their consent to the installation of the GPS devices. The CEPU formed the view that the *Surveillance Devices Act 1999 (Vic)* ("the SDA") required the employees to consent to the installation of GPS devices, and that the employees were entitled to refuse their consent.
17. On 16 August 2006, the CEPU issued a 'Special Signal' alert to its members advising them to inform their manager in writing if they did not consent to the installation of GPS devices in their vehicles. A number of the employees wrote to their respective managers advising that they did not consent to the installation of GPS devices in their vehicles.
18. On 17 August 2006, Telstra wrote to the CEPU in response to the 'Special Signal'. The letter stated, in part, that the CEPU had been fully informed about the GPS strategy since April 2006; that Telstra was

"satisfied that it is complying with its obligations" and that it intended to "continue the installation process".

19. On 18 August 2006, Telstra again met with officials of the CEPU to discuss the GPS issue. The CEPU alleged that Telstra had misled employees about the security and privacy of data, had failed to inform the employees of their right to refuse to consent to surveillance, and raised complaints that local managers were bullying employees into giving their consent. In light of these concerns, Telstra agreed to freeze the installation of the GPS devices for 14 days.
20. Further discussions were held between Telstra and the CEPU on 8 September 2006. Again, the CEPU raised concerns, amongst other things, about bullying, privacy and surveillance.
21. At around this time, Telstra unilaterally varied the OMV Policy to include a clause entitled '*Installation of additional equipment, vehicle features or operational equipment*'. As the title suggests, this new clause purports to allow Telstra to fit new equipment to operational vehicles, including '*location monitoring devices*'. Telstra asked the employees to sign new vehicle use approval forms based on this revised policy. A large number of the employees refused to do so.
22. On 18 September 2006, Telstra wrote to the employees who had refused their consent to the installation of the GPS devices and advised them that '*Telstra has no choice but to provide you notice that it will recover its vehicle in accordance with the Operational Vehicle Policy in 1 month's time*'. Further, the letter warned that:

*"under the Telstra EA and your contract of employment you are required to accept the use of an operational vehicle in order for you to do your job. As such, if you choose not to use a vehicle once a GPS device has been fitted, **your continued employment may become subject to review at that time**". [emphasis added]*

23. Over the course of the following month, on the advice of the CEPU, a number of the employees replied to this letter, consenting to the installation of the GPS devices, but stating that their consent was provided '*under duress*'.
24. On 17 October 2006, Telstra responded in writing, refusing to accept the conditional offers of consent. The letter rejected the existence of any '*legitimate basis upon which to withhold consent*' and warned that employees' agreement to the vehicle use policy:

*"must be unconditional. Failure to provide agreement without qualification is unacceptable and a breach of these requirements. You should understand that unless your agreement is provided unconditionally **Telstra may take disciplinary action against you (up to and including the termination of your employment)**"* [emphasis added].

Telstra invited the employees, who stated that their consent was provided '*under duress*', to '*reconsider*' their position and '*rescind* [their] *refusal to consent*' by signing, on an unconditional basis, a declaration that the employee consents to the '*installation, use and maintenance of GPS location monitoring technology in Telstra's operational vehicles*', and by signing a new vehicle use approval form based on the revised OMV Policy.

25. A number of the employees continued to refuse to sign the declaration and the new approval form. On 27 October 2006, Telstra wrote to those employees and advised them that their actions were '*unacceptable*' and amounted to wilful breach of their employment obligations '*under the Telstra EA, your contract of employment and Telstra Policy to accept a vehicle provided to you to do your job*', refusal of duty, as well as a breach of '*Telstra Values*' and '*Guidelines for Expected Behaviour*'. The letter provided '**one final opportunity to reconsider your position**' [original formatting], and warned that if employees refused to complete the approval form the next day, '*Telstra would have no choice but to take action against you under the PICM [discipline] policy*'.

26. It seems that the majority of the employees have now signed the approval form. I am informed that the GPS devices have now been installed and switched on.

THE INVESTIGATION

The complaints

27. As previously stated, the investigation was initiated following the receipt of a complaint from officials of the CEPU, both orally and in writing, in September 2006. The CEPU made the following allegations:
1. that the employees were coerced by Telstra into agreeing to have the GPS devices installed in their vehicles;
 2. that the GPS devices were unsafe;
 3. that the employees' privacy had been breached by Telstra; and
 4. that Telstra has misled the employees as to their legal rights.
28. After commencing the investigation and writing to Telstra (see below), I received complaints from a number of the employees. Because these complaints essentially make the same allegations as those made by the CEPU, I do not need to consider them separately and I do not rely upon them for the purposes of this report.

Correspondence subsequent to the complaint

29. On 6 October 2006, I wrote to Mr Trujillo, the Chief Executive Officer of Telstra, and advised him that I was investigating the matter. I informed him that my concerns related to the following issues:

"1. consent was allegedly not sought from Telstra employees in Victoria during the initial installation of GPS Devices in Telstra vehicles. Rather, it would appear that employees were directed to take certain actions without information being provided to them as to their rights pursuant to Victorian legislation and I am here referring to the Surveillance Devices Act 1999 (Vic) and the Occupational Health and Safety Act 2004 (Vic).

2. *following the refusal of a number of employees to consent to the installation of the GPS Devices in their vehicles Telstra has:*
 - (a) *indicated that any employee who does not provide consent will be taken off road;*
 - (b) *indicated to employees that it is intending to, or alternatively providing formal notice that it will, terminate the Operational Vehicle Policy associated with the use of vehicles by the relevant employees;*
 - (c) *stated in letters to the relevant employees that "under the Telstra EA and your contract of employment you are required to accept the use of an operational vehicle in order for you to do your job. As such, if you choose not to use a vehicle once a GPS device has been fitted, your continued employment may become subject to review at that time.*

I am concerned that these actions on the part of Telstra:

- (i) *may constitute an attempt by Telstra to coerce and/or place unfair pressure on employees to provide consent in circumstances where they have, to date, refused consent;*
 - (ii) *are taking place in a context where Victorian employees are acting in accordance with their rights under Victorian law;*
 - (iii) *to the extent that they refer to the Telstra EA and contracts of employment they may be misleading as neither the Telstra EA, nor the contracts of employment appear to impose obligations on employees which would conflict with their rights under Victorian legislation.*
- 3 *that occupational health and safety standards may not have been met in the proposed installation of the GPS Devices, nor was consultation adequate, timely and complete about occupational health and safety ("OH&S") concerns raised by the CEPU and employees including allegations that radioactive warning stickers are routinely removed from the GPS Devices during installation.*
- 4 *that certain OH&S matters of significant concern have not been addressed in Telstra's correspondence with the CEPU and the relevant employees – for example, whether specific absorption ratios associated with the GPS Devices are in accordance with Australian standards, whether antenna placement has been considered for OH&S standards, and whether the use of GPS Devices in service stations is regarded as safe.*

5 *Telstra's correspondence with the CEPU and the relevant employees seemingly fails to deal adequately with who will have access to the data collected from the GPS Devices, in what circumstances the data will be accessed, where the data is to be stored, what range of purposes the data will be used for, whether employees of Telstra would be subject to remedies in the event that the data was improperly used, and whether employees would have rights to access the data stored in the system.*

6 *that Telstra may have misled the CEPU and the relevant employees as to what the purpose of the GPS Devices are to be, why they are being installed and what benefits are being provided to employees in relation to the use of GPS Devices".*

30. I sought Telstra's response by 18 October 2006.

31. On 18 October 2006, I received a short reply from Mr Stephen Webb (General Manager, Workplace Relations) containing a request for further particulars of the investigation. The letter also contained the following assurance: *"Let me assure you that Telstra complies with all its statutory obligations and ensures that it deals fairly with its employees. This includes providing a range of internal grievance procedures in the event that employees are dissatisfied with decisions made by Telstra managers".*

32. On 26 October 2006, I responded to Mr Webb. I stated that I considered that the grounds of the investigation were sufficiently particularised and invited Telstra to respond by 1 November 2006. I warned Telstra that if it failed to respond, adverse inferences in relation to the investigation may be drawn against it in the report that I would prepare.

33. On 1 November 2006, Telstra provided a detailed response through its solicitors, Freehills. On the issue of employee consent to surveillance, the letter stated:

"... it is a requirement of employment under our client's employees' contracts of employment and the Telstra Enterprise Agreement 2005-2008 (Telstra EA) that employees accept the terms of use of a vehicle provided by our client for the purpose of performing this customer work.

Our client's employees are well aware of the requirements for the provision and use of our client's operational vehicles. Under clause 18 of the Telstra EA and our client's Operational Vehicle Policy, employees must consent to the terms and conditions upon which those vehicles are provided. Some of these terms and conditions include limitations on personal use, signage and other features on vehicles while driving those vehicles and how to drive them (speeds, manner, alcohol content etc). GPS is simply another feature to be installed in these vehicles in order to assist our client to meet its legitimate business and customer needs. Our client requires its employees to agree to the addition of those features in order to have access to a Telstra-provided vehicle.

As to the issue of the process of obtaining that consent, prior to the commencement of the initiative, our client provided all relevant employees with a notice in a manner consistent with the requirements of its industrial instruments and the Surveillance Devices Act 1999 (Vic). As an additional measure, our client also applied the notification requirements of the Workplace Surveillance Act 2005 (NSW) nationally. No employee has been required to drive a vehicle fitted with an operational GPS device without first providing their unconditional consent”.

34. In relation to the allegation that Telstra had applied coercion or unfair pressure on the employees in order to secure their consent to the installation of GPS devices in their vehicles, the letter stated:

“Coercion and unfair pressure are legal conclusions and our client rejects them. The circumstances in which our client is installing GPS and securing the consent of its employees do not in any way fall within either of these categories”.

35. In relation to the occupational health and safety issue, the letter stated that Comcare (the federal occupational health and safety regulator) was 'conducting a similar investigation in relation to the OHS aspects of our client's program'. The letter further stated that Telstra 'had appropriately taken all reasonably practicable steps to ensure the device and the way it is used were safe' and that 'testing by an independent RF [radio frequency] expert has also been undertaken which has validated the safety of the devices in accordance with Australian standards'.

36. In relation to the privacy issue, the letter stated that 'all data collected from the GPS devices would be regulated by Telstra's Privacy

Principles' and that it had 'continually answered and re-iterated its position that...use of the data is restricted to further the purposes of its business and customer needs, employee safety and asset protection consistently with its "CT of the Future Program".

37. In relation to the allegation of misleading employees, the letter stated:

" As to allegations of misleading conduct, clause 18 of the Telstra EA is clear in requiring employees to sign a vehicle use agreement in order to use Telstra vehicles. As part of a Federal industrial instrument, this requirement displaces any relevant operation of the Surveillance Devices Act in any event.

...

Telstra has been nothing but upfront with its employees and the CEPU with respect to the purposes of the initiative. In particular, all employees have been made aware of what GPS is, what is occurring, how it forms a part of Telstra's overall 'CT of the Future' program which itself forms part of a broader transformation of the company more generally, why it is being installed and what the benefits are (both for Telstra and its own employees). Allegations that it has misled employees are without foundation and again cause our client to seek information that forms the basis of these concerns and/or conclusions".

38. On 13 November 2006, I responded to Telstra via its solicitors. I again requested that Telstra provide me with any documents which it wished me to consider as part of the investigation.

39. On the issue of consent to the installation of GPS devices, I invited Telstra to elaborate on:

(a) *how, precisely, the employees' contracts of employment, the Telstra Enterprise Agreement 2005-2008 ('TEA'), or the former Operational Vehicle Policy ('OVP') can be said to require the employees to consent to the installation of GPS devices;*

(b) *how Telstra was entitled to vary the OVP (particularly in light of clause 18 of the TEA), and how such variation might bind existing employees; and*

(c) *how any consent obtained through a variation of the OVP is valid for the purposes of the Surveillance Devices Act;*

- (d) *how, precisely, clause 18 of the TEA can be said to oust the Surveillance Devices Act; and*
- (e) *how, in any event, variation of the OVP is fair and appropriate in the circumstances.*

40. In relation to the occupational health and safety issue, my letter stated:

" It is apparent that there is a conflict of evidence between your client and the CEPU with respect to the question of the safety of the GPS devices. In the absence of expert evidence to separate the competing claims I do not propose to make any findings about the inherent safety or otherwise of the devices. I do remain, however, concerned about the appropriateness of your client seeking to install these devices at a time when concerns over their safety have evidently not been resolved to the satisfaction of employees and their representatives. I again invite your client to provide me with further information as to how employees' safety concerns are being addressed in an appropriate and fair way".

41. Finally, in relation to the privacy issue, my letter stated:

" I also remain concerned about the use to which the GPS devices will be put and, in particular, whether they will have the effect of inappropriately derogating from the privacy of employees. I am pleased that some of these issues have been addressed in point five of your letter, and request that you provide my Office with a copy of the Privacy Principles mentioned there, as well as with a copy of the Workplace Surveillance Policy (in both its current form and with proposed amendments). I also invite your client to advise me as to how these policies are fair and appropriate in relation to the employees' privacy while at work and while using the vehicles on an authorised private basis".

42. I requested a response by the close of business on Monday 20 November 2006. No response was received by that time. Accordingly, on 23 November 2006 my Office contacted the solicitors for Telstra. My Office was informed that Telstra would file its response on Monday 27 November 2006, and my staff indicated that I would be prepared to consider a submission received by that date. However, late on 27 November the solicitors for Telstra advised my Office by letter that *'Telstra has considered its position further and does not wish to respond at this stage.'*

43. On 29 June 2007, I sent a draft copy of this report to Telstra for their comment. On 9 July 2007, Telstra's solicitors responded as follows:

" Upon review, the draft report raises no new matters or issues warranting a further response.

It is sufficient to note that our client disagrees with large parts of your reasoning, disagrees with the conclusions drawn in the draft report in relation to any 'illegal, unfair or otherwise inappropriate industrial relations practices', and reserves its rights more generally in relation to the report."

APPLICABLE LAW

44. The matters raised in this case involve complex issues of law. The statutory provisions relevant to the consideration of these issues are set out, at length, below.
45. I note the implication contained in the letter from Freehills dated 1 November 2006, that I am not empowered to draw 'legal conclusions' or make findings that unlawful conduct has occurred. I reject this contention. Section 5(1)(d) of the WRA Act specifically empowers me to investigate 'illegal' industrial relations practices in Victoria. In order to do so, it is inevitable that I must form an opinion about what the relevant law is, and whether the facts of a particular case fall within the scope of the law. Of course, any findings I might make are not binding (unlike, for example, a court's findings), and neither is my analysis of the law binding upon any court or other decision-maker.
46. In any event, in certain cases it may not be necessary for me to make specific findings of illegality in respect of the relevant industrial relations practices. Where a competent agency exists responsible for the enforcement of the law, it may be appropriate for me to refer the matter to them for further investigation and possible prosecution in circumstances where I form the view that the relevant industrial relations practices may be illegal.

47. Bearing these comments in mind, I now turn to consider the relevant law in relation to the issues of surveillance, privacy, occupational health and safety and misleading conduct.

Surveillance

48. The use of GPS devices in Victoria is affected by the SDA. Section 8 of the SDA provides:

“Regulation of installation, use and maintenance of tracking devices

(1) Subject to sub-section (2), a person must not knowingly install, use or maintain a tracking device to determine the geographical location of a person or an object—

(a) in the case of a device to determine the location of a person, without the express or implied consent of that person; or

(b) in the case of a device to determine the location of an object, without the express or implied consent of a person in lawful possession or having lawful control of that object”.

49. The maximum penalty for breach of this section is a fine of \$128,916 in the case of a corporation. For a natural person it is 2 years' imprisonment and/or a fine of \$25,783.20.

Privacy

50. Section 16A(2) of the *Privacy Act 1988* (Cth) (“the Privacy Act”) provides that an organisation ‘*must not do an act, or engage in a practice, that breaches a National Privacy Principle*’. Telstra is an organisation which is bound by the National Privacy Principles (‘the NPPs’). The relevant NPPs are as follows:

“1 Collection

1.1 *An organisation must not collect personal information unless the information is necessary for one or more of its functions or activities.*

1.2 *An organisation must collect personal information only by lawful and fair means and not in an unreasonably intrusive way.*

- 1.3 *At or before the time (or, if that is not practicable, as soon as practicable after) an organisation collects personal information about an individual from the individual, the organisation must take reasonable steps to ensure that the individual is aware of:*
- (a) the identity of the organisation and how to contact it; and*
 - (b) the fact that he or she is able to gain access to the information; and*
 - (c) the purposes for which the information is collected; and*
 - (d) the organisations (or the types of organisations) to which the organisation usually discloses information of that kind; and*
 - (e) any law that requires the particular information to be collected; and*
 - (f) the main consequences (if any) for the individual if all or part of the information is not provided.*
- 1.4 *If it is reasonable and practicable to do so, an organisation must collect personal information about an individual only from that individual.*
- 1.5 *If an organisation collects personal information about an individual from someone else, it must take reasonable steps to ensure that the individual is or has been made aware of the matters listed in subclause 1.3 except to the extent that making the individual aware of the matters would pose a serious threat to the life or health of any individual.*

2 Use and disclosure

- 2.1 *An organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection unless:*
- (a) both of the following apply:*
 - (i) the secondary purpose is related to the primary purpose of collection and, if the personal information is sensitive information, directly related to the primary purpose of collection;*
 - (ii) the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose; or*
 - (b) the individual has consented to the use or disclosure; ...*

4 Data security

- 4.1 *An organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.*
- 4.2 *An organisation must take reasonable steps to destroy or permanently de-identify personal information if it is no longer needed for any purpose for which the information may be used or disclosed under National Privacy Principle 2.*

9 Transborder data flows

An organisation in Australia or an external Territory may transfer personal information about an individual to someone (other than the organisation or the individual) who is in a foreign country only if:

- (a) the organisation reasonably believes that the recipient of the information is subject to a law, binding scheme or contract which effectively upholds principles for fair handling of the information that are substantially similar to the National Privacy Principles; or*
- (b) the individual consents to the transfer; or*
- (c) the transfer is necessary for the performance of a contract between the individual and the organisation, or for the implementation of pre-contractual measures taken in response to the individual's request; or*
- (d) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the individual between the organisation and a third party; or*
- (e) all of the following apply:*
 - (i) the transfer is for the benefit of the individual;*
 - (ii) it is impracticable to obtain the consent of the individual to that transfer;*
 - (iii) if it were practicable to obtain such consent, the individual would be likely to give it; or*
- (f) the organisation has taken reasonable steps to ensure that the information which it has transferred will not be held, used or disclosed by the recipient of the information inconsistently with the National Privacy Principles.*

51. 'Personal information' is defined in section 6(1) as follows:

***"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 individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

52. It should be noted that there is an 'employee records' exemption in the Privacy Act. Section 7B(3) provides:

Employee records

- (3) *An act done, or practice engaged in, by an organisation that is or was an employer of an individual, is exempt for the purposes of [the Act] if the act or practice is directly related to:*
- (a) *a current or former employment relationship between the employer and the individual; and*
 - (b) *an employee record held by the organisation and relating to the individual.*

53. Section 6(1) defines an 'employee record' as follows:

***"employee record"**, in relation to an employee, means a record of personal information relating to the employment of the employee. Examples of personal information relating to the employment of the employee are health information about the employee and personal information about all or any of the following:*

- (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 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;*

(k) *the employee's taxation, banking or superannuation affairs*".

54. A person whose privacy has been interfered with can apply to the Privacy Commissioner for a determination (section 52) and thereafter to a court, which may make any orders it thinks fit (section 55A).

Occupational health and safety

55. Section 16 of the *Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth)* ("the OH&S Act") provides:

"(1) *An employer must take all reasonably practicable steps to protect the health and safety at work of the employer's employees.*

(2) *Without limiting the generality of subsection (1), an employer breaches that subsection if the employer fails to take all reasonably practicable steps:*

(a) *to provide and maintain a working environment (including plant and systems of work):*

(i) *that is safe for the employer's employees and without risk to their health; and*

(ii) *that provides adequate facilities for their welfare at work; and*

...

(c) *to ensure the safety at work of, and the absence of risks at work to the health of, the employees in connection with the use, handling, storage or transport of plant or of substances; and*

...

(e) *to provide to the employees, in appropriate languages, the information, instruction, training and supervision necessary to enable them to perform their work in a manner that is safe and without risk to their health*".

56. Section 77 provides that proceedings for a breach of the OH&S Act may be instituted by Comcare or by an investigator appointed by the Parliamentary Services Commissioner.

57. Finally, s 76 protects employees from victimisation on occupational health and safety grounds. The section reads as follows:

“Employer not to dismiss etc. employees on certain grounds

(1) *An employer must not:*

(a) *dismiss an employee; or*

(b) *do an act that results in an employee being injured in his or her employment; or*

(c) *prejudicially alter the employee’s position (whether by the deduction or withholding of remuneration or by any other means); or*

(d) *threaten to take action, in relation to the employee, that is referred to in paragraph (a), (b) or (c);*
because the employee:

(e) *has complained or proposes to complain about a matter concerning the health, safety or welfare of employees at work; ...”*

58. The penalty for a breach of this section is \$27,500. (See schedule 2, clause 4).

Misleading conduct

59. The common law and statute law provide remedies for a wide range of deliberate and inadvertent forms of misleading conduct.

60. First of all, statute law provides a cause of action in respect of conduct that is *‘misleading or deceptive or is likely to mislead or deceive’*. Importantly, the statutory causes of action available, for example, under the Trade Practices Act 1975 (Cth) (“the TPA”) and the Fair Trading Act 1999 (Vic) (“the FTA”) are not restricted to conduct that is intended to mislead or deceive. The TPA and the FTA are remedial Statutes and have broad application. Telstra would clearly fall within the scope of the TPA and FTA.³ The statutory causes of action are confined to conduct which occurs *‘in trade or commerce’*, although there is a specific offence of engaging in misleading conduct in relation to the offering of employment.⁴ However, an employer’s dealings with existing employees may well be *‘in trade and commerce’* if it can be regarded as *‘part of the total activities in trade or commerce’* of the

³ *Trade Practices Act 1975 (Cth) s 52(1); Fair Trading Act 1999 (Vic) s 9(1).*

⁴ *Trade Practices Act 1975 (Cth) ss 53B, 75AZE; Fair Trading Act 1999 (Vic) s 13.*

business or can be characterised as 'intrinsically commercial conduct', such as hiring senior staff or negotiating conditions of employment with existing staff.⁵

61. In the areas where statute does not apply, though, the common law provides some relief for misleading conduct. The tort of deceit provides a remedy where the victim suffers loss because the wrongdoer has made false statements (whether deliberate lies or reckless statements).⁶ The torts of 'intimidation' and 'causing loss by unlawful means' provide a remedy where the wrongdoer intimidates the victim by the threat or commission of unlawful acts so that the victim is induced to act to his or her own detriment, as intended by the wrongdoer.⁷ The tort of negligence may provide a remedy where the victim has suffered loss because he or she relied on statements made by the wrongdoer in circumstances where the other person had a duty to take reasonable care in making those statements.⁸
62. Finally, the common law also provides a remedy for losses suffered because of the 'unconscionable conduct' of another. Statute law also provides a remedy for unconscionable conduct which occurs 'in trade or commerce'.⁹ 'Unconscionable conduct' refers to a situation where the wrongdoer unfairly takes advantage of the victim's disadvantage (a factor such as ignorance, inexperience, or financial need which affects their ability to judge or protect their own interests) in a transaction.¹⁰ Unconscionable conduct can therefore include conduct which is objectively misleading, or conduct which is subjectively misleading to the victim because of their special disability or disadvantage.

⁵ *Barto v GPR Management Services Pty Ltd* (1991) 33 FCR 389. See also *Chaplin v Birdogan* (1998) 146 FLR 243; *Stoelwinder v Southern Health Care Network* (2000) 177 ALR 501; *Walker v Salomon Smith Barney Securities Pty Ltd* (2003) 140 IR 433.

⁶ See *John McGrath Motors (Canberra) Pty Ltd v Applebee* (1964) 110 CLR 656.

⁷ See *Northern Territory v Mengel* (1995) 185 CLR 307.

⁸ *San Sebastian Pty Ltd v Minister Administering Environmental Planning & Assessment Act 1979 (NSW)* (1986) 162 CLR 340.

⁹ *Trade Practices Act 1975* (Cth) ss 5AA(1); *Fair Trading Act 1999* (Vic) s 7(1).

¹⁰ *Blomley v Ryan* (1956) 99 CLR 362.

ANALYSIS

1. *Surveillance*

(i) *Effect of the Surveillance Devices Act*

63. Section 8(1) of the SDA imposes a criminal prohibition on any person who knowingly installs a tracking device to determine the location of a person or object without the person's express or implied consent.
64. This provision is protective of the right of privacy. The right to privacy has been recognised as a fundamental human right at international law,¹¹ and is given legal protection in federal¹² and Victorian statute law,¹³ and by the common law.¹⁴ Similarly, the right to privacy at work has been recognised by international bodies such as the International Labour Organisation¹⁵ and has recently been the subject of an inquiry and report by the Victorian Law Reform Commission.¹⁶
65. It is a general principle that where the law requires a person's 'consent' for a particular purpose, that consent must be given voluntarily, in the sense that, at the very least, it is untainted by fraud or duress.¹⁷ Duress (sometimes referred to as coercion), in a legal sense, refers to illegitimate pressure (including pressure of an economic nature) which negates a person's freedom of choice.¹⁸ The application of duress means that a person has practically no choice but to act in a certain way.

¹¹ *Universal Declaration of Human Rights* (1948) art 12; *International Covenant on Civil and Political Rights* (1966) art 17.

¹² *Privacy Act 1988* (Cth); *Human Rights and Equal Opportunity Act 1986* (Cth) (which protects the rights contained in the *International Covenant on Civil and Political Rights*, amongst others).

¹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(1).

¹⁴ *Australian Broadcasting Corporation v Lenah Game Meats* (2002) 208 CLR 199.

¹⁵ See, eg, International Labour Office, *Protection of Workers' Personal Data: An ILO Code of Practice* (1997).

¹⁶ Victorian Law Reform Commission, *Workplace Privacy: Final Report* (2005). The Australian Law Reform Commission is also currently conducting an inquiry into privacy. See ALRC Issues Paper 31, *Review of Privacy* (2006).

¹⁷ VLRC report at 23.

¹⁸ See *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40 (CA), McHugh JA at 45.

66. In my view, the reference to 'consent' in s 8(1) of the SDA must be understood to be a reference to genuine consent. It is highly unlikely that consent could be a defence to a prosecution under the section in circumstances where the consent was given under duress, particularly where the duress is applied by the defendant. In such a case, the 'consent' of the person could not, in my view, be considered to be consent at all.
67. In my view, there is a serious question as to whether the 'consent' given by at least some of the employees may have been tainted by duress. On the material referred to earlier in this report it would appear that such employees were faced with an invidious choice of consenting to surveillance by means of the installation of the GPS devices in their vehicles or else being disciplined or potentially losing their job.¹⁹ Arguably, this is a form of economic pressure which may constitute duress. Many of the employees advised Telstra in writing that they felt '*under duress*'.²⁰ Although complaints of duress were later formally retracted by the employees as requested by Telstra, this retraction occurred in circumstances where the employees were threatened with disciplinary action including the possible termination of their employment.
68. Apart from the question of duress, in its strict legal sense, the circumstances under which consent is obtained may constitute unfair or otherwise inappropriate industrial relations practices. As previously stated, many employees were placed in the invidious position of either consenting to surveillance or being disciplined or potentially losing their job. In addition, it would appear that at least some of the employees were forced to make decisions about their consent in a very short time frame and in circumstances where Telstra was vigorously asserting the correctness of its legal position.

¹⁹ See paragraphs 22 to 25 above.

²⁰ See paragraph 23 above.

69. Telstra denies that it has coerced or placed undue pressure on the employees to consent to the installation of the GPS devices. Telstra relies on its view as to the relevant legal position, being one where it is a requirement of employment of the employees under their contracts of employment and the Telstra EA that they accept the terms of use of Telstra vehicles.
70. In my view, pressure was exerted by Telstra on the employees. The central question that arises in the context of duress, in the strict legal sense, and in relation to the matter of unfair or otherwise inappropriate industrial relations practices is whether this pressure was legitimate. Telstra essentially maintains that it was because the employees were legally required to consent to surveillance.
71. I am not convinced that the existence of a civil obligation to undergo surveillance (for instance, because of a contractual promise or because of the operation of a statutory provision) means that it is legitimate (in other words, not a form of duress for the purposes of the criminal law) for the person who is seeking to conduct surveillance to insist that the other person perform their civil obligation. In my view, it is arguable that the right to privacy generally, and the SDA specifically, implies that a person should be immune from the civil law consequences of the exercise of their right to refuse invasions of their privacy.
72. However, I do not need to decide this broader question, because in this case I do not accept Telstra's arguments that the employees were legally required to consent to surveillance. To explain why requires a detailed consideration of the legal arrangements governing the employment of the employees.

(ii) Contractual obligations

73. At a general level it is trite to state that employees are bound to observe their contracts of employment. These contracts may be written or unwritten. In either case, they consist of express terms and implied terms. Express terms are, as the name suggests, terms which the

parties have expressly agreed upon, such as rates of pay. Implied terms are terms which the parties did not explicitly agree to but which they are taken to have implicitly agreed to. One such implied term is the duty of the employee to obey the lawful and reasonable directions given by the employer about the way in which work is to be performed. Generally, employers give specific work directions orally, but commonly these directions are contained in written 'company policies' which constitute standing work directions to employees. Importantly, express terms of the contract override implied ones, so that an employee is not obliged to follow a work direction which is inconsistent with the express terms of the contract of employment: for example, a direction to perform a task which is outside the scope of the employees' duties expressly agreed upon.

74. In this case, Telstra has not provided me with any documentation which identifies the express terms of the employees' contracts. They certainly have not provided me with any evidence that there is an express term in the contract dealing with the issue of surveillance. In the event that Telstra seeks to rely on the terms generally implied into all contracts of employment, I do not consider that there is any such general requirement that the employees consent to surveillance which may otherwise be unlawful and arguably a breach of their privacy.
75. For similar reasons, I am not convinced that Telstra is permitted to develop 'company policies' so as to require employees to submit to surveillance. I do not consider that an employer could direct an employee to consent to surveillance as part of the 'duty to obey' work directions, any more than they could direct an employee to consent to be assaulted, or to waive any other legal protections they have. These directions do not go to work performance, but rather to the abrogation of an employee's human and legal rights.
76. Indeed, as a matter of law, it is arguable that the making of a policy which enables an employer to track an employee without the employee's genuine consent would constitute a breach of the SDA.

Because such a policy may not be 'lawful' it may not need to be observed as part of the employee's implied contractual duty of obedience.

77. In any case, there is an argument that Telstra has waived any right it might have to modify or amend the OMV Policy. As previously stated, the original version of the OMV Policy contained a clause advising the employee of Telstra's "absolute right to vary or amend the terms and conditions of the provision of the vehicle at any time subject to one month's notice being given to the employee". However, this clause has been omitted from the more recent versions of the OMV Policy and Commuter Use Approval Form. It is therefore arguable that Telstra has waived its right to unilaterally vary or amend the OMV Policy and if this be correct then an employee becomes bound by the OMV Policy as it stood at the time he or she signed a Commuter Use Approval Form.

78. I do not, however, need to decide this particular point because, as the discussion above makes clear, I do not consider that anything in the employees' contracts of employment obliges them to consent to undergo surveillance.

(iii) *Obligations under the Telstra EA*

79. In addition to their contracts of employment, the employees are also bound by the Telstra EA, as a matter of law. However, in my view there is nothing in the Telstra EA which gives Telstra any right to track its employees, or to develop policies which have that effect.

80. Clause 18 of the Telstra EA merely states that employees '*may be supplied with a Telstra vehicle to enable them to do their job*' and that employees driving vehicles '*will be required to sign a Commuter Use Approval document concerning the vehicles use, common care and maintenance*'. The clause is mostly descriptive, and it is difficult to say what rights and obligations it actually confers. Indeed, the first note to the clause seems to indicate that the provision has been included

merely as an acknowledgement that part-private use of Telstra vehicles has been discontinued.

81. Whatever the motive for the inclusion of the clause — and motive is usually irrelevant to the interpretation of these statutory instruments — I do not consider that the passing reference to the vehicles policy operates so as to make it a requirement, enforceable under the *Workplace Relations Act 1996* (Cth) (“the WR Act”), that employees submit to surveillance. Nor do I consider that this fleeting reference to the OMV Policy allows Telstra to amend the OMV Policy at will and to give those amendments the full force of a federal workplace agreement.
82. Indeed, if the clause has *any* legal effect, I would be inclined towards the view that the reference to the policy *restricts* Telstra’s ability to vary the OMV Policy. First of all, the description of the OMV Policy as dealing with the ‘*use, common care and maintenance*’ of vehicles may mean that Telstra cannot modify the OMV Policy in a way which would take its terms outside the description used in the Telstra EA. It may well be that a term dealing with GPS devices is not a term about the use, care or maintenance of the vehicle. As further support for the proposition that Telstra’s power to amend the OMV Policy is limited, the second note to the clause indicates that the OMV Policy, as it stood in 2005, had been tendered as an exhibit in the AIRC proceedings for the certification of the Telstra EA. This suggests that the Telstra EA incorporates or otherwise references only *that* version of the OMV Policy, so that Telstra cannot offer any other version to the employees. Thirdly, other references to Telstra policies in the Telstra EA refer to those policies ‘*as varied from time to time*’ (see clauses 18.3.7 and 22C). The fact that this formulation is not used in clause 18 again suggests that the Telstra EA ‘freezes’ the OMV Policy for the duration of the Telstra EA.
83. I also do not accept Telstra’s argument that clause 18 of the Telstra EA ousts the operation of the SDA. Section 170LZ(1) of the WR Act,

preserved in relation to the Telstra EA by Schedule 7 clause 2(1)(g) of the WR Act, provides that a certified agreement only prevails over '*terms and conditions of employment specified in a State law ... to the extent of any inconsistency*'. First of all, as already suggested, it is difficult to say just what 'rule', if any, is laid down in clause 18 of the Telstra EA, for the purposes of identifying any inconsistency with State law. Secondly, the applicable State law, being the SDA, does not impose a 'term and condition of employment' but rather contains a general prohibition on tracking people without their consent. As such, it is very doubtful that s 170LZ affords Telstra any comfort.

84. Even if these two objections can be overcome, it is not clear that anything in clause 18 is actually *inconsistent* with the operation of the SDA. On a narrow test, there is no inconsistency because the two provisions can be observed simultaneously. It would be a different case if the Telstra EA expressly gave Telstra a right to track employees, in circumstances where the SDA denied it. Nor is there inconsistency on any broader test. The two laws deal with completely different matters: the SDA deals with surveillance, while clause 18 of the Telstra EA deals with the use of company vehicles. In my view, there is no intention manifested in the Telstra EA to 'cover the field' in relation to surveillance, or even in relation to company vehicles. And, as I have already stated, I do not consider that Telstra can 'engineer' an inconsistency by modifying its OMV Policy to cover the issue of surveillance, which would then override the SDA. To allow this would be to let Telstra exercise an unfettered private legislative power, which would be repugnant to the idea of the rule of law.
85. I therefore do not accept that clause 18 of the Telstra EA gives the OMV Policy any force which it did not have under the general law, nor does it give Telstra any superior right to vary the OMV Policy.

2. **Privacy**

86. In my view, there is an issue as to the handling of data collected from the GPS devices.
87. Telstra has not provided me with information about what data will be collected. It is not clear whether the data will identify, or tend to identify, individual employees, for example by identifying the name of the driver or the vehicle registration number and so forth. If it does identify this information, the data will constitute 'personal information' to which the *Privacy Act* applies. For the purposes of this discussion I will assume, on the basis of the precautionary principle, that the data does constitute personal information.
88. It seems that the GPS devices are capable of capturing data during times when an employee is not at work ('private data') as well as during working time ('work data'). I have serious concerns that the GPS devices may collect private data as well as work data. This is of particular concern for employees who drive their vehicles on a 'part-private' basis.
89. In my view, Telstra may not have the legal right to collect private data. National Privacy Principle 1.1 provides:
- An organisation must not collect personal information unless the information is necessary for one or more of its functions or activities.*
90. I have serious doubts that the collection of private data can be said to be necessary for Telstra's functions, and so in my view Telstra may not have the right to collect such information. I do not consider that the 'employee records exemption' applies, because the data is not information which relates to a person's employment.
91. In relation to work data, Telstra has asserted through its solicitors that 'all data collected from the GPS devices would be regulated by Telstra's Privacy Principles'. However, this is not what Telstra's Privacy

Policy ("the Policy") (available on the internet) actually provides. Clause 1.12.2 states:

The Privacy Act exempts all employers from the need to comply with the NPPs with respect to Employee Records where the collection and/or handling of those records relates directly to a current or former employment relationship between the employer and its employees. Nonetheless, Telstra recognises that its Employees have an interest in maintaining their privacy. Telstra is committed to providing appropriate privacy protections covering its Employee Records.

92. The Policy does not define what 'appropriate' protections might be. In my view, given that work data may identify the whereabouts of an employee, such data is highly personal to the employee and so raises issues of autonomy, dignity and safety. For this reason, an 'appropriate' level of protection should involve strict compliance with the NPP's.
93. In particular, I note that National Privacy Principle 9 deals with transborder data flows. I am particularly concerned by the possibility that in this case the GPS data will be processed outside of Australia, where employee privacy may not be respected.
94. Finally, I remain concerned that a 'secondary purpose' for collecting work data is to monitor employee performance, and that work data might be used for disciplinary purposes. Telstra has not provided me with any assurances that this will not occur. Even if the NPP's are complied with, the use of work data for such purposes may still be unfair and inappropriate. Because this issue has not yet arisen there is no need for me to say anything more about it, at this stage.

3. **Occupational health and safety**

95. Telstra has advised that Comcare is currently investigating the safety of the GPS devices. In light of that investigation, I do not propose to say anything about the health risks of the GPS devices.

96. However, the safety of the GPS devices themselves is not the only occupational health and safety issue that concerns me.
97. First of all, I am advised by the CEPU that some of the employees have complained of high levels of stress as a result of the way in which Telstra has sought to introduce the GPS devices, including symptoms such as headaches, insomnia and depression.
98. Telstra has obligations under the OH&S Act to provide a safe working environment for the employees. This obviously includes an environment which is not injurious to the mental health of the employees. I have concerns that at least some of the employees' psychological welfare is being jeopardised by anxiety over the introduction of the GPS devices. I therefore intend to refer this particular matter to Comcare for further investigation.
99. Finally, I note that the practice of 'continuous surveillance' itself is stress-inducing. As the International Labour Organisation has stated:²¹
- "Continuous monitoring has proved to be a cause of constant anxiety which can lead to both physical illness and psychological distress. It should, therefore, be limited to cases in which the surveillance is necessary in order to deal with specific problems related to health and safety or to the protection of property."*
100. I will therefore ask Comcare to examine whether the use of continuous monitoring via the GPS devices is in breach of Telstra's OH&S obligations.

4. *Misleading conduct*

101. In this case, Telstra has been forthright in its representations to the employees about its legal right to act as it has. For the reasons set out earlier, I do not consider that the legal position as represented to the employees by Telstra was free of uncertainty or doubt. Certainly, it was

²¹ International Labour Office, *Protection of Workers' Personal Data: An ILO Code of Practice* (1997) 19.

not, in my view, one which should have been asserted without qualification. In the circumstances it is open to form the view that at least some of the employees may have relied on the Telstra representations. As such, it is arguable, in my view, that Telstra's actions in this respect may have constituted misleading conduct at law.

102. Further, in my view, it is generally unfair and inappropriate for an employer to assert a legal position, without qualification, to employees about its powers under various workplace instruments where that position may be attended by doubt or uncertainty. In my view, Telstra's unqualified assertions that:

(a) the employees were legally obliged to give their consent to the installation of GPS devices in their vehicles; and

(b) Telstra had the right to discipline any employee who refused such consent;

were, for the reasons set out earlier, attended by doubt and uncertainty.

103. I note that when I explicitly asked for clarification and elaboration from Telstra in respect of a number of the arguments that were central to its asserted legal position, Telstra declined to provide a response (see paragraphs 38 - 42).

104. In the circumstances, I have serious concerns that the manner in which Telstra represented its legal position to the employees constituted unfair or inappropriate industrial relations practices. In my view, it is strongly arguable that the forthright nature of Telstra's unqualified assertions as to its legal position put employees under extreme and unfair pressure to give their consent to the installation of the GPS devices. Such consent may not have been forthcoming at all, or at least not as quickly, if Telstra had qualified its legal position to reflect the doubt and uncertainty that, in my view, attended its stated legal

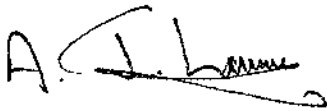
position, or had allowed employees more time to seek their own legal advice.

105. As previously stated, I have serious doubts as to whether Telstra is entitled, at common law or under the Telstra EA, to subject the employees to surveillance or to vary company policies so as to introduce GPS devices for the purpose of surveillance. In other words, I am not satisfied that employees are obliged, under their contracts of employment or the Telstra EA, to consent to being subject to surveillance by Telstra.
106. Further, even if Telstra had a legal right to require the employees to submit to surveillance, I have serious concerns that the way in which the right has been exercised was unfair and inappropriate. In my view, it is arguable that the way in which Telstra achieved the introduction of GPS devices in the vehicles of the employees was threatening and heavy-handed and failed to properly address the concerns raised by the employees.
107. In my view, the right to refuse to be tracked is an important aspect of the right to privacy, as recognised in the SDA, and should be afforded a great deal of respect. In this case, it is seriously arguable that Telstra has acted as if employee consent to surveillance was a mere formality, and has behaved as if the rights of the employees to privacy, autonomy and fair treatment were subordinate to Telstra's business interests.

REFERRALS AND RECOMMENDATIONS

108. For the reasons given above, I have serious concerns that the 'consent' given by certain of the employees to the installation of GPS devices in their vehicles is not genuine for the purposes of the SDA. Accordingly, I propose to refer the matter to Victoria Police for further investigation.

109. I also intend to refer the matters identified earlier in this report in relation to Occupational Health and Safety to Comcare for further investigation.
110. I recommend that Telstra amend its privacy principles to ensure that they apply to the data collected from the GPS devices, and clarify that the devices will not be used to monitor the employees during their private time.

A handwritten signature in black ink, appearing to read 'A. Lawrence', with a long horizontal flourish extending to the right.

Anthony Lawrence
Workplace Rights Advocate

26 July 2007

