

# Setting **Standards** Building **Trust**

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## Employment Laws – “the laws have changed, have you?”

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## Tom has over 30 years' legal and business experience including:

- > working for local and major national Law Firms;
- > being the majority owner and executive director of his former mid-tier Law firm;
- > being a National Operations Manager for a financial advisory IT platform provider;
- > being the WA Legal Technology Group Manager for a National Law Firm;
- > qualified as a Microsoft-certified Project Manager;
- > owning and managing an IT Consultancy Business; and
- > being a Director and In-House Counsel for a Public Company.



Tom is also a regular publisher of articles and is one of Australia's leading presenters of legal seminars to and for various professional bodies, associations and government authorities on a wide range of business law and professional development-training topics including:

WA Department of Commerce	Institute of Public Accountants	CPA Australia
Chartered Accountants Australia & NZ (CAANZ)	Governance Institute of Australia	Mortgage & Finance Association of Australia (MFAA)
Law Society of WA	National Electrical & Communications Assoc (WA)	City Insolvency Discussion Group
Innovation Centre of WA	Australian Hotels Association (WA)	Forum for Directors of Indigenous Organisations (FDIO)
LegalWise CLE	Small Business Development Corporation	Australian Computer Society
The Tax Institute	Australian Institute of Conveyancers (WA)	Institute of Certified Bookkeepers
Western Suburbs Business Association	Business Foundations Inc	WA Business Assist
WA Reckon Partners	Australian Digital Transformation Association	Australian Institute of Business Brokers (AIBB)

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# Employment agreements versus “policies”

- Staff Conduct Policy
- Information Technology and Social Media Policy
- Social Functions Policy
- Drug and Alcohol Policy
- Flexible Working Policy
- Right to Disconnect Policy
- Work Health and Safety Policy
- Staff Uniform Policy
- Equal Employment Opportunity and Workplace Behaviour (Bullying and Harassment) Policy
- Anti-Bribery, Fraud and Corruption Prevention Policy
- Grievance Policy
- Australian Indigenous Peoples Policy



# a. Work, Health & Safety (WHS) laws

New WHS laws  
for Western  
Australia.

SafetyDocs  
by SafetyCulture



- The major, new *Work Health and Safety Act 2020 (WA)* came into effect on 31 March 2022.

Some of the key aspects are:

- WHS due diligence obligations for 'officers',
- new offences( including industrial manslaughter) and significantly increased penalties
  - prohibition against insurance and indemnity arrangements for such penalties; and
- a statutory, paramount duty of health and safety.
- Applies beyond traditional 'employers' and expand such to apply "*a person conducting a business or undertaking*"( PCBU).
- PCBUs include but are not limited to: a sole trader, each partner a company, unincorporated associations and a government department or public authority.

# Work, Health & Safety (WHS) laws cont'd

New WHS laws  
for Western  
Australia.

SafetyDocs  
by SafetyCulture



- 'Notifiable incidents' include death, serious injury or illness and dangerous incidents.
- 'Reportable incidents' are effectively any incident that falls short of a notifiable incident or that which could have caused serious harm to a person, plant or structure.
- The requirement to notify the regulator (Work Safe WA) exists for both types of incidents and no longer invites a subjective assessment.

# Work, Health & Safety (WHS) laws cont'd

## Recent WA prosecutions:

- A PCBU that failed to act on a safety consultant's recommendation to eliminate a hazardous shortcut on a machine has been fined \$595,000.
- An employer has been fined for failing to comply with safety clauses requiring the effective supervision of inexperienced workers, while Safe Work Australia has published a WHS profile of the nursing workforce, to help PCBUs better manage the risks in the sector.
- A PCBU has been fined nearly \$200,000 over a worker's paraplegic injuries, which could have been prevented through the simple acts of consulting an online WHS Code and providing proper tools.
- A project manager has narrowly escaped jail for fraudulently undertaking a highly hazardous task.
- A judge in a worker's compensation case in the District Court has examined what does and does not constitute a "substantial" deviation from a work journey, in confirming a worker is entitled to weekly benefits for an injury she sustained just moments after buying a dress from Kmart.



## b. Pay Secrecy Laws



These laws commenced on 7 December 2022.

- 'Pay secrecy clauses' contractually prohibited employees from discussing salary and remuneration with one another, this is in addition to common law requirements of employee confidentiality.
- However, since 6 June 2023, it is illegal for an employer to prohibit an employee from sharing (or not sharing) information about their pay, bonuses, incentives and any other employment conditions.
  - Accordingly, they are *prohibited to be included* in any new contract employment contracts from that date.
- Recent cases or prosecutions:
- None, so far. Maximum penalty for a violation deemed a serious contravention is \$825,000 and may also face prosecution by the Fair Work Ombudsman.

## c. Flexible Working Arrangements

Latest changes became law on 6 June 2023.

- Types of flexibility that may be requested by an employee ( in writing, and with reasons for such):
  - changes to standard hours of work such as start and finish times;
  - part-time work;
  - working compressed hours or days;
  - splitting shifts;
  - job sharing; and
  - the ability to work remotely.
- This applies only for employees who have worked for the same employer for *at least 12 months* (includes full-time, part-time and even casuals, in certain circumstances)



# Flexible Working Arrangements cont'd

- FWAs apply only for employees who have worked for the same employer for *at least 12 months* (includes full-time, part-time and even casuals, in certain circumstances)
- General eligibility criteria:
  - are the parent, or have responsibility for the care, of a child who is school aged or younger
  - are a carer
  - are a person with disability
  - are 55 or older
  - are pregnant
  - are experiencing or provide care or support to an immediate family or household member who is experiencing family and domestic violence\*



\*Note: since 1 August 2023, all employees are now entitled to 10 days of *paid family and domestic violence leave* each year (and then resets, not like sick/carer's leave).

## Recent case

- Applicant employee's flexible working application dispute against employer was dismissed. *Court ordered that employer may lawfully and reasonably require employee to work at the office on the days that is permitted to work from home.*

## d. Privacy Laws

What is “personal information”?

- This includes: who we are, what we do and what we believe.
  - Names, addresses, phone numbers, email addresses, photos, bank account details, tax file numbers, super fund information, drivers licence details and academic records are a few examples.
- Personal information can also be *sensitive* in nature, for example, information about a person's health, sexuality, religious beliefs, criminal record, professional or trade union memberships.
  - This kind of personal information is known as 'sensitive personal information'.



# Privacy Laws cont'd

- All employers/business owners should understand Privacy Act and the relevant Australian Privacy Principles (APPs) to which they then should have,
  - especially if they deal with any 'personal information' (whether for employees, customers/ clients, or any other individuals providing their personal information , e.g. , visitors to website job applications etc)
  - a relevant, contemporary **Privacy Policy**
- The handling of employee records by a private sector employer is exempt from the Privacy Act , if it is directly related to their current or former employment relationship.
  - *The Privacy Act only applies if the information is used for a purpose not directly related for the employment relationship*
- **Workplace Privacy:** the Fair Work Act requires all employers to keep certain personal information about employees in their employee records.



# Privacy Laws cont'd



## Cases

- In a ruling by the Privacy Commissioner it was held that an employment services company which was a professional recruiter for employees, and was paid by the employee if the employee was successful in obtaining employment, was bound by the Principles and had breached them by collecting credit card details of applicants for employment - *OPC v Employment Service Company (2005) PrvCmrA 13*.
- In *ALI and ALJ (Privacy) [2024] AICmr 131*, an employer was found to have breached its obligations under the Privacy Act 1988 (Cth) (Privacy Act) concerning personal information of an employee. The employee suffered a medical emergency in the employer's carpark and was taken by ambulance to hospital. Several employees observed the incident, some of whom attempted CPR.

Continued over 



# Privacy Laws cont'd

## Cases cont'd

*ALI and ALJ (Privacy) [2024] AICmr 131,*

- A colleague subsequently contacted the employee's husband, requesting an update on her condition. In response, the husband provided a short update. Using the information received, the manager emailed all staff, informing them of the injured employee's condition, naming the hospital and providing an update on her health.
- The employee subsequently returned to work and complained to the employer's Privacy Officer about the all-staff email. The complaint could not be resolved, so the employee resigned and lodged a complaint with the OAIC, claiming that her employer had interfered with her privacy by disclosing personal information in the email for a purpose for which it was not collected.
- Having regard to the evidence and the parties' arguments, the OAIC determined that the employee record exemption did not apply to the employer's conduct of sending an email specifically naming the complainant and providing an update regarding her health status to all staff, and the OAIC determined that the employer had breached APP 6 by sending this email.
- ***The employer was required to pay damages for non-economic loss and to reimburse the complainant for reasonably incurred expenses arising out of the employer's interference with her privacy.***

## e. Right to Disconnect **Laws**



These rights became law from 26 August 2024 (for non-small business employers^).

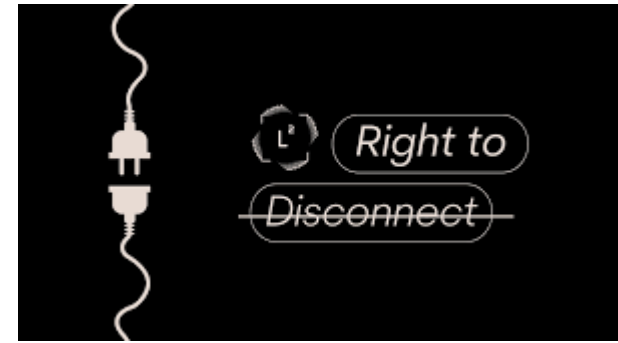
- Under the 'general protection laws' of the *Fair Work Act*, employees now have the right to refuse to monitor, read or respond to contact\* (or attempted contact) outside their working hours, unless doing so is unreasonable\*\*.

\*"Contact" can include emails, calls, text, social media messaging etc.

- This includes contact by an employer or even a third party (e.g. a contractor, customer/client, members of the public etc)
- \*\*'Reasonable' bases/reasons for such contact:
  - The reason for the contact or attempted contact (including where contact, or attempted contact is required by law)
  - How the contact or attempted contact is made and the level of disruption the contact, or attempted contact causes the employee
  - The extent to which the employee is compensated (including non-monetary compensation):
    - To remain available to perform work during the period in which contact or attempted contact is made; or
    - For working additional hours outside of the employee's ordinary hours of work
  - The nature of the employee's role and the employee's level of responsibility
  - The employee's personal circumstances (including family or caring responsibilities)
  - Any other relevant factor.

- ^These laws will also apply to 'small business employers' and their employees from 26 August 2025.

# Right to Disconnect **Laws cont'd**



## Recent Case

- This relates to a very recent claim in a Queensland teacher's unfair dismissal action against her former employer.
- In a statement of claim filed in the Qld Federal Court, the teacher claims she was, in part, fired because she utilised her Right to Disconnect and did not respond to communications from the school during school holidays.
- It is alleged she was 'targeted' by her employer because she had made extensive complaints about child safety at the school, and against someone who was reviewing the school and its staff.
- After taking leave due to stress, the teacher was sent misconduct allegations during school holidays, with the school requiring her to respond during that time.
- The teacher objected to doing so outside of her work hours, citing the Right to Disconnect.

***It's the first time that this new right has been included in a public legal action and could potentially serve to set a precedent in relation to the scope of the Right to Disconnect and what constitutes "unreasonable" communications.***

## f. Workplace Surveillance **Laws**

The *Surveillance Devices Act 1998 (WA)* deals with listening, optical and tracking devices.

- **Listening devices** are generally *prohibited* in workplace except in limited situations such as investigating serious misconduct, or ensuring work health and safety.
- **Optical surveillance** devices are permitted with certain restrictions:
  - No covert surveillance in private areas,
  - Transparency is key and focus on legitimate purpose.
  - Unwarranted tracking is a privacy breach.
- **Tracking devices** such as GPS trackers to keep tabs on employee locations again unwarranted tracking *is a privacy breach* and should only be for transparent and justified purposes e.g. delivery drivers, field service personnel, etc.



# Workplace Surveillance **Laws cont'd**



## Is It Legal To Record Someone In A Workplace Setting?

- That depends on the context and your role in the conversation:
  - If you are a party to the conversation (e.g. a staff meeting or performance review), you *may* be able to lawfully record it, especially if you're protecting your legal interests.
  - If you are not a participant (e.g. secretly recording colleagues), this would likely be unlawful.
- Employers and employees should both be aware of workplace surveillance policies and their obligations under relevant privacy and workplace laws. Covert recordings in the workplace can also lead to disciplinary action, even if not prosecuted under criminal law.
- Best practices for 'remote' employee monitoring –
  - transparency and communication (i.e. prohibition of covert surveillance), consent and privacy,
  - legitimate purpose (freedom from warranted monitoring - i.e. must have proper justification and employee knowledge of such, data protection obligations), and
  - regular policy reviews.

# Workplace Surveillance **Laws cont'd**

## Key Offences and Maximum Penalties

- Using a Listening Device to Record a Private Conversation
  - *Penalty: Up to \$5,000 fine or 12 months' imprisonment for an individual.*
- Installing or Using a Surveillance Device Without Proper Authority
  - This includes placing a hidden camera or microphone in someone's home, office, or vehicle.
  - *Penalty: Similar to the above - fines and/or imprisonment.*
- Disclosing or Publishing a Private Recording Made Illegally
  - Even if you weren't the one who made the recording, disclosing or sharing it may still be an offence.
  - *Penalty: Fines and possible imprisonment, depending on the circumstances.*





# Psychosocial Hazards cont'd

## Recent case

- WorkSafe is currently prosecuting the WA Department of Justice, for allegedly failing to ensure a safe work environment at Bunbury Regional Prison.
  - This failure reportedly led to serious psychological harm to a former female prison officer, stemming from bullying, harassment—including sexual harassment—and victimisation.
- The first mention of the case took place on November 7 2024 at Bunbury Magistrates Court, and it is now before the courts.
- *If found guilty, the Department could face a maximum penalty of \$3.5 million!*

**This marks the first instance where WorkSafe WA has initiated prosecution under the existing legislation concerning psychosocial matters.**



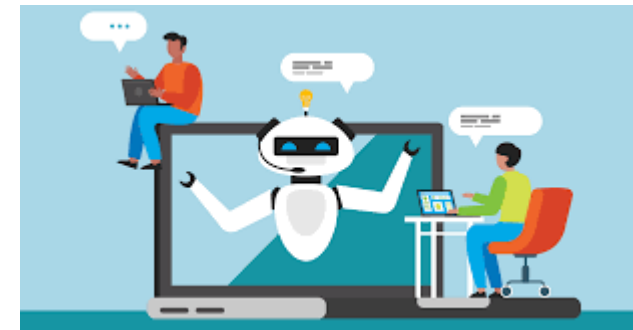
GOVERNMENT OF  
WESTERN AUSTRALIA

Department of **Justice**

# h. Artificial Intelligence (AI) in the Workplace

There are no specific Australian statutes or regulations regulating AI in the workplace, presently.

- However, employers must ensure that their AI systems, if any, do not result in discriminatory outcomes which could lead to legal liability reputational damage.
- Consider also Federal government's "AI Ethics Principles"  
<https://www.industry.gov.au/publications/australias-artificial-intelligence-ethics-principles/australias-ai-ethics-principles>
- See real, recent professional incident "*Warning for unauthorised Surveillance, Privacy and Confidentiality, Waiver of Legal Privilege and Unauthorised Compliance coming from use of AI technology!*"



# Artificial Intelligence (AI) in the Workplace cont'd

## Recent case

- In *Suzie Cheikho v Insurance Australia Group Services Limited* [2023] FWC 1792, an employee's employment was terminated after computer surveillance revealed very low keystroke activity over a certain time period.
- **Deputy President Roberts in the Fair Work Commission accepted the computer surveillance evidence and held that this was a valid reason to terminate the employment.**

## However:

- the beneficial insight workplace surveillance provides into employee conduct and performance,
- must be weighed against the perception that 'big brother is watching',
- which could 'impact on workers' occupational health and safety, leading to overwork, stress and burnout.'

(\*Commonwealth of Australia, Select Committee on Adopting Artificial Intelligence, Senate, 26 November 2024, 76).



g. Non-compete/restraints of trade vs. protective covenants vs. intellectual property (IP) and confidential info/data

- Note: they are there are all quite different in their respective legal and practical applications, let's break them down:
  - **Non-compete/restraints of trade** -these are inherently 'against public policy' for pure employees unless it protects "an employer's legitimate interests".
    - Note: different if the employee is also say a working Director or business, or equity owner.
    - These provisions must be very carefully, and reasonably, calibrated in each individual circumstances as to scope, jurisdiction and duration. Usually in a cascading format as to the latter 2 aspects
  - Extended notice and 'Gardening leave'.



# Non-compete/restraints of trade vs. protective covenants vs. intellectual property (IP) and confidential info/data cont'd

## Protective Covenants ('Antipoaching') –

- These are much more enforceable and reasonable.
- Legitimately prevents (ex)employees from soliciting clients, customers, existing staff or contractors, interfering with suppliers, or other business relationships.



(iii) will not:

- (A) solicit, canvass, induce or encourage (or attempt to do so) any person or entity who is an employee or agent of the Employer to leave the employment of the Employer;
- (B) solicit, canvass, approach (or attempt to do so) any person or entity who was during the term of the Employee's employment a client or patron of the Employer, with a view to establishing a relationship with or obtaining the custom of that person or entity in a business which carries on the business or a similar related nature to the Employer; or
- (C) interfere or attempt to interfere, directly or indirectly, with the relationship between the Employer and its Clients, employees or suppliers in the conduct of the Employer's business,

without the Employer's prior written consent (which will be held in the Employer's absolute discretion).

# Non-compete/restraints of trade vs. protective covenants vs. intellectual property (IP) and confidential info/data cont'd

## Intellectual property (IP)

- Intellectual Property” includes but is not limited to all trademarks, patents, copyright, designs, marks, processes, know-how, specifications, statements, formulae, trade secrets and data or other like property or rights (whether registered, registrable or unregistered)
- Everything created is owned by the employer.
- *“All right and title to any Intellectual Property (including any improvements and advancements to any Intellectual Property) made, developed, created, formed, established, manufactured, derived, attained, modified, or improved by the Employee in the normal course of the Duties or that is any way associated with the Duties is and remains the property of the Employer”.*



# Non-compete/**restraints of trade** vs. **protective covenants** vs. intellectual property (IP) and **confidential info/data cont'd**

## **Confidential information/ business data**

- “Confidential Information” means all information acquired or created by the Employer relating to the Employer’s business or Intellectual Property that is not in the public domain (or, if in the public domain, is not in the public domain by reason of a breach of this Agreement), including but not limited to:
  - (i) information about the Employer’s products or services, processes, systems, equipment, dealings (including in relation to the Employee), transactions, policies, finances, organisation or personnel, or about those of the Clients or anyone associated with the Employer;
  - (ii) any information regarding the Employer’s business methods, business policies, related suppliers, procedures, techniques, research or development, precedents, projects or results, sales information of any kind, financial information of any kind, intellectual knowledge, Intellectual Property, know-how, trade secrets, Client lists or other Client information, sales strategy, tactics or methods, marketing research strategy, information pertaining
- Whilst an (ex)employee may of course ‘keep’ any additional skills, know-how or knowledge they may acquire and retain in the course of their employment. **employees do owe their employer common-law duties** of fidelity, confidentiality and good faith (as well as duty of care & skill, and obeying & cooperating with their employer)
- This is in addition to any *contractually/expressly-agreed* duties or obligations such as Confidentiality, Non-disclosure and Non-disparagement etc.



# *Thank You!*

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