

## MEDIA RELEASE

### Employers struggle to get to grips with email privacy rules

***Employers more confused than ever as line between employees' personal and work lives becomes increasingly blurred***

31 January 2011 – Despite email being in existence in the workplace now for almost 20 years, there is still widespread confusion among employers around their rights in relation to their employees' emails, according to Harmers Workplace Lawyers.

Greg Robertson, General Counsel at Harmers Workplace Lawyers, said employers often were still in the dark when it came to knowing whether they were infringing on their employees' privacy when accessing or reading employees' emails sent through the company's email system.

"Employers – and employees, for that matter – often seem to forget the email system belongs to the employer. Strictly speaking then, the employer is entitled to look at the emails that come in and go out as long as the employer complies with relevant legislation," he said. "Conversely, employees often mistakenly believe that as they have a 'personal' work email address, they have a right to privacy over whatever is communicated on it."

Mr Robertson said employers were well within their rights to occasionally view their employees' emails, especially if a staff member is on leave and where correspondence contains information required by the business. Similarly, where an employee has left the employ of the business, the employer has every right to have that employee's emails redirected to the relevant department or person until the email address has been deactivated.

Accessing emails from an employee's own personal and private email account, like Hotmail or Gmail, would of course be an invasion of privacy, even though the company machinery and internet provider has been used (in which case the employer has a right to curtail if they wished).

"While there are obviously exceptions as to when and how an employer can access a staff member's work email, employers need to exercise caution when conducting actual surveillance of an employee's email," he said.

He said it was in this scenario where employers could land up exceeding allowable limits without having the necessary workplace privacy guidelines or necessary approvals in place. "In this case, employers run the risk of breaching privacy and surveillance legislation and subsequently being penalised," Mr Robertson said.

In New South Wales, for example, this surveillance is governed by the *Workplace Surveillance Act 2005* that imposes on employers a requirement to provide

employees with at least 14 days' written notice before undertaking such surveillance. "If an employer obtains evidence of wrong doing via surveillance, without following the requirements in the legislation, they may be unable to use this evidence in a court of law," Mr Robertson warned.

He said reasons why an employer might legitimately want to examine an employee's work emails would be around suspected inappropriate use of the company's email system, like disseminating pornography, conducting fraud or breaching confidentiality. More controversial uses of surveillance would be to measure performance or behaviour.

Mr Robertson said the new legal battleground in the area of email privacy is likely to arise from the increased use of employer-provided electronic devices like Blackberry and iPhones, which have further blurred the separation of work and personal life. In these cases, an employee might feasibly have set up the device so that both work and private email accounts are accessed from the same device. As the device is the property of the employer, that device too could easily be monitored and will no doubt give rise to arguments about privacy and the rights of the employer to access all of the messages on the employer's equipment. The Office of the Australian Information Commissioner has Guidelines on preserving privacy on mobile phones but their very sensible suggestion of wiping all personal data from a phone when returning a phone will often be impractical when an employer demands immediate return of what is after all the employer's smart phone.

"To ensure all employees understand exactly what their rights and duties are in relation to their use of email at work, employers should have a written policy that clearly sets out acceptable use of the company's email, as well as when surveillance of their emails could be carried out," Mr Robertson concluded.

#### **Advice for businesses:**

- Ensure a proper policy that covers both privacy and surveillance issues is in place and that all employees are made aware of that policy. Make sure that the policy is kept up to date with advancing technology, for example, that it covers emails on smart phones supplied by the employer.
- Remind employees of that policy on a regular basis. Best practice would be to require employees to acknowledge the policy each time they log in to the computer system.
- Ensure that the privacy legislation is understood and followed. While there are exceptions for employee records, many personal emails potentially contain information about other people, which could fall outside that exemption.
- Ensure compliance with any relevant legislation about surveillance: have a policy in place, have copies available, alert employees to the surveillance (or obtain a warrant).
- Consider the effect on morale and on ongoing industrial relations before instituting surveillance for productivity reasons. It can be controversial and sometimes counterproductive.

Ends

**Note to editors:**

***About Harmers Workplace Lawyers***

*Harmers Workplace Lawyers was established in 1996 as a boutique employment law firm. Since then it has become one of Australia's leading employment and industrial law firms, with offices in Sydney, Melbourne and Brisbane. The firm has been awarded Australasian Legal Business's 'employment specialist firm of the year' for the past five years running.*

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