UNFAIR DISMISSAL RELATING TO THE USE OF SOCIAL MEDIA – AN ANALYSIS OF CASE HISTORY

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ABSTRACT

Social media is playing an increasing part in society and in a person's life. Employment contracts are a personal form of agreement that govern a large part of a person's life. Naturally, these two parts of a person's life often intersect and not always for the better.

This paper seeks to highlight the nature of social media and employment contracts, provide analysis of recent case history involving social media and unfair dismissal through specific issues such as privacy and freedom of communication

I INTRODUCTION

'The special feature of an employment relationship is that it is a personal relationship between employer and employee'.[1]

When a personal relationship comes to an end, there can be a lack of clarity regarding the reasons for the end of the relationship. Studies of marriage breakdowns (another type of personal relationship) have consistently found that communication breakdowns and incompatibility are the two major causes affecting the marriage relationship.[2] In employment relationships, there can be similar communication breakdowns; in particular regarding lack of communicating in relation to changes in policy or the existence of policy itself.[3] There can also be incompatibility where the employer and employee appear to have divergent views on company direction,

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1 Sappideen et al, *Macken's Law of Employment* (Thomson Reuters, 7th ed, 2011), 27 [2.130]. Patrick Parkinson, *Australian Family Law in Context Commentary and Materials* (Thomson Reuters 4th ed 2009), 48 [2.70].

3 *Akmeemana v Murray* [2009] NSWSC 979 [53]-[54].

leading to the publication of statements that are detrimental to the company.[4] In these circumstances, the mutual trust and confidence between employer and employee is vital for the employment relationship to continue. However, the implied term of mutual trust and confidence in employment contracts recognised by the Federal Court of Australia[5] has been recently overturned by The High Court.[6]

A *Social Media*

The use of social media in Australia is increasing[7] with key applications such as Facebook and Twitter enabling people to stay in touch more easily, discuss and debate issues online as well as share their personal experiences through media such as photos and videos.[8] Inevitably, individuals in social groups discuss or share issues from the workplace. The discussion or items shared can, depending upon who else shares this information, have a detrimental effect on the employer or other employees.[9] In traditional forms of socialising, first hand interaction can occur in places such as the pub, but the audience in relation to first hand interaction is more limited than with social media. A 'chat' on Facebook may be seen by some as being similar to a 'pub conversation' but Facebook, as online media, can give 'the conversation a wider audience than a "pub conversation"'.[10] Social media enables non-journalists to do 'the things that only journalists used to do: witnessing, reporting, capturing, writing' and disseminating.[11]

B *Employee Use of Social Media*

While social media provides an easier method for non-journalists to communicate with a broader range of people, it also provides an easier means for employers or other employees to view this information. Where an employee is publishing information to the detriment of their employer, an employer may then take disciplinary action, which may result in the dismissal of the employee. When an employee is dismissed from employment, it can often lead to a claim of unfair dismissal under the *Fair Work Act 2009* (Cth).[12] This can come as a surprise to the

4 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [4]; *Banerji v Bowles* [2013] FCCA 1052 [18].

5 *Barker v Commonwealth Bank of Australia* [2012] FCA 942, [330]; See also Joellen Riley, 'Siblings But Not Twins: Making Sense of "Mutual Trust" and "Good Faith" In Employment Contracts' (2012) 36(2) *Melbourne University Law Review* 521.

6 *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

7 Marketing.com.au, *Australian Social Media Statistics 2012 vs 2013* (22 August 2013) Marketing.com.au <http://marketing.com.au/australian-social-media-statistics-2012-vs-2013/>.

8 B Fitzgerald et al, *Internet and E-Commerce Law* (Thomson Reuters, 2011) 39 [1.250].

9 See the case analysis in chapter four.

10 *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 [26].

11 John Kelly, *Red Kayaks and Hidden Gold: the rise, challenges and value of citizen journalism* (2009) 1 <https://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Red_Kayaks___Hidden_Gold.pdf>.

12 *Fair Work Act 2009* (Cth) pt 3-2.

employee that their personal expression, authored on their own private time, can lead to end of their employment relationship.[13]

C *This paper*

The following chapters address the nature of social media and employment contracts, an analysis of recent case history and then considering specific issues such as privacy and freedom of communication.

The chapters on privacy and freedom of communication are based on an examination of Australian statute and case law. They aim to articulate relevant principles and key jurisprudence that is likely to be considered by courts and tribunals in dealing with disputes about the employment relationship and social media. They are also based on discussion in professional literature and the mass media.

The latter is important because social media related employment disputes in Australia are new.[14] We do not have a comprehensive and coherent body of case law and extensive scholarly commentary. As work by figures such as Joellen Riley notes, there is considerable disagreement about particular issues.[15]

This paper may be useful, because it explores matters that are likely to be important as more employees embrace social media as their own publishers, as employers become more aware of their employees' online activities and the effect this can have on their business. Furthermore, whether existing legal principles or precedents are suitable for dealing with disagreements in a world where, through social media, people want both greater privacy and freedom of communication.

D *Structure*

The structure of this paper is as follows.

This chapter has set-out the aim of the paper, provided an overview of the approach and noted the literature base.

E *Chapter Two – Social Media*

This chapter will explain what social media is in general terms and the key online sites where an individual may publish information. Furthermore, social media will be examined with respect to how it is used, why it is different from traditional media and what does its future hold.

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13 See *Banerji v Bowles* [2013] FCCA 1052 in chapter four.

14 See *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 [20]-[21].

15 See Joellen Riley, 'Uneasy or Accommodating Bedfellows? Common Law and Statute in Employment Regulation' (Research Paper No. 13/82, *Sydney University*, 25 September 2013).

F *Chapter Three – Employment Contracts in Australia*

Changes in the last 20 years have seen a concentration of the law around employment contracts within the federal sphere of control,[16] culminating in the *Fair Work Act 2009*.[17] Chapter three explains how implied terms within employment contracts may impact on decisions to dismiss employees. The aspects of employment contracts relating to unfair dismissal and the implied term of mutual trust and confidence will be examined specifically.

G *Chapter Four – Analysis of Unfair Dismissal Cases Involving Social Media*

In chapter four, an analysis of cases relating to unfair dismissal, where the use of social media has been a part of the grounds in the dismissal demonstrates similarities and differences between judicial treatments. To assist in this process, three common key points of analysis, the use of social media, privacy issues and freedom of expression, will be used to assist the process.

H *Chapter Five – Privacy*

Chapter five will discuss the importance of privacy, particularly in relation to employment, with reference to the case analysis of chapter four. The United Kingdom (UK) and the United States of America (USA) approaches to employment privacy will be compared.

I *Chapter Six – Freedom of Expression*

Chapter six will examine freedom of expression, particularly freedom of political expression, and how it relates to employment by reference to the cases highlighted in chapter four. A comparison with the UK and USA will be conducted.

J *Chapter Seven - Conclusion*

This chapter contains the conclusion in relation to unfair dismissal cases in Australia where social media was a factor in the dismissal.

16 Sappideen et al, above n 1, 2 [1.20].
17 *Fair Work Act 2009* (Cth).

II SOCIAL MEDIA

A *What is Social Media?*

Social media has been described as 'the online media used for social networking, especially sites which facilitate emailing, blogging, etc'.[18] Social media is also 'mobile and web-based ... via which individuals and communities share, co-create, discuss, and modify user-generated content'.[19] The key element in social media is that individuals interact with each other to form electronic communities in a similar dynamic as communities which have traditionally been formed by individuals around a pub, community centre or religious building on a 'face to face', i.e. physical, basis.

Facebook, Twitter, Instagram and blogging tools are all social media. Facebook is a tool whose aim is to 'give people the power to share and make the world more open and connected'.[20] Each Facebook account 'has a "wall", where members can post thoughts as well as discussion that allow organised, long-lasting conversations amongst many members'.[21] Twitter is a 'real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting'[22] where individuals can follow what other people are saying as well as let their own followers know what they are saying. Tumblr is a tool which lets individuals share music, photos, videos quotes with their followers; it is not dissimilar to Twitter.[23] Instagram is a 'fun and quirky way to share your life with friends through a series of pictures'[24] and has similarities to Tumblr. Pinterest[25] is also a blog. Blogging is where an individual posts comment to a site for which they manage the access. One internet site which helps individuals set up a blog is 'Blog.com'.[26] Blogging sites attract less interest than Facebook or Twitter.[27] Since the advent of social media, many people have been interested in measuring users' attitudes towards privacy. [28]

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18 Susan Butler (Ed), *Macquarie Concise Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2010) 1192.

19 Jan H. Kietzmann et al, 'Social media? Get serious! Understanding the functional building blocks of social media' (2011) 54 *Business Horizons* 241.

20 Facebook, <https://www.facebook.com/facebook>.

21 David Kirkpatrick, *The Facebook Effect* (Simon & Schuster Paperbacks, 1st ed, 2011) 3.

22 Twitter, *About* <https://twitter.com/about>.

23 Tumblr <http://www.tumblr.com/about>.

24 Instagram, *FAQ* <http://instagram.com/about/faq/#>.

25 Pinterest, *Pinterest* <https://www.pinterest.com/>.

26 Blog.com, *What's your story?* <http://blog.com/features/>.

27 socialmedia today, *101 Vital Social Media and Digital Marketing Statistics* (6 August 2013) <http://socialmediatoday.com/tompick/1647801/101-vital-social-media-and-digital-marketing-statistics-rest-2013>.

28 Danah boyd and Eszter Hargittai, *Facebook privacy settings: Who cares?* (2 August 2010) 15(8) First Monday <http://firstmonday.org/ojs/index.php/fm/article/view/3086/2589>.

B *How is social media used?*

Social media enables people to 'create, access and contribute in a variety of forms, including text communications, photos, videos and sound recordings'.[29] Social media, in the past five years, has dramatically increased the number of people who can publish positive and negative stories about a company or other organisation.[30] Social media enables non-journalists to do 'the things that only journalists used to do: witnessing, reporting, capturing, writing' and disseminating.[31] Facebook 'turns individuals into the authority'[32] over who gets to publish their information. 'The advent of the internet and social media has seen the rise of "citizen journalists"'.[33] Though it is always possible that the 'citizen journalist' is deliberately spreading misinformation, as reported recently in Iran.[34] Ethical and philosophical principles may be the differentiating factor between journalists and 'citizen journalists in the digital era.[35]

A key aspect of social media is that 'social media is built for two-way conversation'.[36] This means that a 'chat' on Facebook can be seen as 'a pub conversation' but Facebook as online media can give 'the conversation a wider audience than a "pub conversation"'.[37]

C *How is Social Media used in Australia?*

Within Australian the number of households connected to the internet has risen from 47% in 1999 to 79% in 2011.[38] Comparatively, in 2007-08 there were 87% of businesses in Australia connected to the internet whereas, in 2013, almost all business with greater than 200 people are connected to the internet.[39] This represents a vast

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29 Fitzgerald et al, above n 8, 39 [1.250].

30 Nichole Kelly, *How to Measure Social Media* (QUE Publishing, 1st ed, 2012) 57.

31 John Kelly, above n 11 1.

32 Kirkpatrick, above n 21, 15.

33 Patrick Keyzer, 'Who Should Speak for the Courts and How? The Courts and the Media Today' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 7.

34 Evgeny Morozov, *Iran: Downside to the "Twitter Revolution"* (2009) 13 <http://www.evgenymorozov.com/morozov_twitter_dissent.pdf>.

35 David Domingo and Ari Heinonen, 'Weblogs and Journalism A Typology to Explore the Blurring Boundaries' (2008) 29 *Nordicom* 3, 13.

36 Nichole Kelly, above n 30, 16.

37 *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 [26].

38 Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions* (Commonwealth of Australia, 2009) 5 – Chart 1; Australian Bureau of Statistics, '*8146.0 - Household Use of Information Technology, Australia, 2010-11*' (15 December 2011) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8146.02010-11?OpenDocument>.

39 Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions* (Commonwealth of Australia, 2009) 5 – Chart 2; Australian Bureau of Statistics, '*8129.0 - Business Use of Information Technology, 2011-12*' (22 August 2013)

potential for business to move a substantial part of their business onto the internet. The Australian Government wants Australia, by 2020, to be among the world's leading digital economies.[40] With respect to sales of goods or services online, Australia is in the top five countries worldwide, with approximately one-half to one-third of all businesses conducting at least part of their business online.[41]

In Australia, Facebook and YouTube have become the favourite social media sites.[42] There has been approximately a 14 per cent increase in social media usage from July 2012 to July 2013.[43] With the growing ease of usage even some more conservative professions, such as the legal profession, are engaging with social media. For example, in 2009, the first approval of Twitter to communicate information from a trial was made.[44] In the ACT, the Supreme Court has allowed substituted service by posting notice on a respondent's Facebook profile.[45]

D *Why is Social Media Different than Traditional Media?*

There are many examples of instances where the impact of social media has been felt more quickly and more extensively than more traditional means of communication. On 6 July 2009, a YouTube posting was made, which highlighted a musician's guitar being broken while being transported by an airline. In relation to this particular posting, 'within three days it had been watched half a million times; by mid-August it had reached five million'.[46] The article noted that this type of posting has the potential to 'kill a product or damage a company's share price'.[47]

What differentiates social media from previous types of media, such as newspapers or television, is that it is the non-professional, the individual at home, who can publish this material. When Oscar Morales started his anti FARC[48] Facebook page, 4000

<http://www.abs.gov.au/ausstats/abs@.nsf/Products/17515D80D0A58BEDCA257BCE001231EF?opendocument>.

40 Department of Broadband, Communications and the Digital Economy, *#au20 National Digital Economy Strategy* (Commonwealth of Australia, 2011) 2.

41 OECD iLibrary, *OECD Science, Technology and Industry Scoreboard 2011* <http://www.oecd-ilibrary.org/sites/sti_scoreboard-2011-en/06/10/index.html;jsessionid=v04de9q27yt1.delta?contentType=&itemId=/content/chapter/sti_scoreboard-2011-64-en&containerItemId=/content/serial/20725345&accessItemIds=/content/book/sti_scoreboard-2011-en&mimeType=text/html>.

42 David Cowling, *Social Media Statistics Australia – August 2013* (1 September 2013) <http://www.socialmedianews.com.au/social-media-statistics-australia-august-2013/>.

43 Marketing.com.au, *Australian Social Media Statistics 2012 vs 2013* (22 August 2013) <http://marketing.com.au/australian-social-media-statistics-2012-vs-2013/>.

44 *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24, 24.

45 *MKM Capital Pty Ltd v Corbo and Poyser* (unreported, Supreme Court of the Australian Capital Territory, Harper M, 12 December 2008).

46 Tim Webber, 'Why companies watch your every Facebook, YouTube, Twitter move' (3 October 2010) *BBC* (online) <http://www.bbc.co.uk/news/business-11450923>.

47 Ibid.

48 Revolutionary Armed Forces of Columbia - The Free Dictionary <http://www.thefreedictionary.com/FARC>.

users[49] had joined within one day. This indicates how quickly one individual can grow a social media site on an idea,[50] without using traditional media or journalists. Similarly, in Australia, certain issues have particularly resonated with other social media users and allowed the issue to take on a life of its own, such as when Jane Burney posted negative comments on Cole's Facebook site regarding their discounted milk price.[51] There is a view that social networking based activism can lead to the easy option of clicking 'like' for a protest group, feeling good and moving onto the next article.[52] In this sense, interested readers might be more appropriately termed 'slactivists' rather than 'activists'.[53]

On Facebook, 'many users willingly fill out extensive details about their career, relationships, interests and personal history'[54] and provide opinions, photographs, videos and other content. Authoring online is very different from traditional media, such as newspapers, where it is the journalist who determines the content and where an editor (potentially advised by a legal practitioner) acts as gatekeeper in dealing with issues of defamation, ethno-religious vilification, national security and trade practices. While comments in traditional media can be detrimental, the 'citizen journalist', who is not held back by a legal team or editors, combined with the speed and coverage of social media can make negative comments posted in social media more detrimental to a company's product than traditional media.[55]

A recent poll, conducted by legal firm DLA Piper,[56] suggested that people felt social media sites should be treated more casually than formally published writing. While 69 per cent of respondents felt special legal guidelines were required for social media outlets, the number was lower where the poll respondent was younger.

E *What is the Future of Social Media?*

There is evidence that 'digital technologies provide the entry points for young activists to explore democratic alternatives'.[57] 'One can find Facebook-fuelled activism and protest in every country and community where the service has caught

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49 Andrew Williams, *Oscar Morales: "How I used Facebook to protest against FARC"* (8 February 2010) <http://metro.co.uk/2010/02/08/oscar-morales-how-i-used-facebook-to-protest-against-farc-85760/>.

50 Kirkpatrick, above n 21, 3.

51 Kate Legge, 'Power to the People' (1 September 2012) *The Australian* <http://www.theaustralian.com.au/news/features/power-to-the-people/story-e6frg8h6-1226458943177#>.

52 Anne Li, 'Is this Activism?' (21 November 2013) *North by Northwestern* (online) <http://www.northbynorthwestern.com/story/is-this-activism/>.

53 Ibid.

54 Kirkpatrick, above n 21, 201.

55 Nichole Kelly, above n 30, 57.

56 DLA Piper, *Shifting Landscapes – The Online Challenge to Traditional Business Models* (DLA Piper 2011) 7.

57 Frank Edwards, Philip N Howard and Mary Joyce, 'Digital Activism & Non-Violent Conflict' Digital Activism Research Project (November 2013) <http://digital-activism.org/download/1270/> 7.

on'.[58] Chief Justice Judge of Britain stated that, 'using Twitter', to explain what is going on in the courts is fundamental to the principle of open justice.[59] A University of California paper, titled 'Fostering Political Engagement: A Study of Online Social Networking Groups and Offline Participation', found that 'membership in online political groups via the Facebook platform encourages offline political participation'.[60] The future of social media may also hold a replacement for pub conversation for those too poor to go out.[61] However, as noted above, 'slacktivism', may not lead to a very deep discussion.

The creator of LinkedIn, Reid Hoffman, 'believed that social networking was likely to divide into two categories – personal and business'.[62] Mark Zuckerberg, the creator of Facebook appeared to have a different view, stating 'the days of you having a different image for your work friends or co-workers and for the other people you know are probably coming to an end pretty quickly'.[63] The freedom of information regime in Australia enables anonymous requests to be made, as a name is not a requirement for a request,[64] though a recent report has recommended this capability be removed.[65] This capability indicates that some internet users prefer not to use any specific online identity. This can be the case where data breaches lead to a 'decline in trust of the personal data ecosystem'.[66] A lack of trust will not encourage individuals to use one identity.

F *Dangers of Facebook*

There is a view that 'the law does not distinguish between old and new media'.[67] In this sense, the speed of publication and reach of social media may present some difficulties to individual authors who do not have the ethical and legal training of professional journalists. However, it has been argued that the internet is 'merely the

58 Kirkpatrick, above n 21, 6.

59 Patrick Keyzer, 'Who Should Speak for the Courts and How? The Courts and the Media Today' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 6.

60 Jessica T Feezell, Meredith Conroy and Mario Guerrero, *Facebook is... Fostering Political Engagement: A Study of Online Social Networking Groups and Offline Participation* (August 2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451456> 13 cited in David Kirkpatrick, *The Facebook Effect* (Simon & Schuster Paperbacks, 1st ed, 2011) 292-293.

61 David Butler, *Twitter is the new beer pub* (30 November 2008) Examiner <http://www.examiner.com/article/twitter-is-the-new-beer-pub>.

62 Kirkpatrick, above n 21, 72.

63 Ibid 199.

64 *Freedom of Information Act 1982* (Cth) s 15(2).

65 Allan Hawke, Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, 1 July 2013 9.

66 World Economic Forum, *Rethinking Personal Data: Strengthening Trust* (May 2012), 9 <http://www3.weforum.org/docs/WEF_IT_RethinkingPersonalData_Report_2012.pdf>.

67 Prue Innes, 'Suppression Orders: The More Things Change, the More they Stay the Same' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 82.

latest of many technologies that had enhanced the speed of information'.[68] In the USA, a 2009 poll 'found that 35 per cent of companies had rejected applicants because of the information they found on social networks'[69] but higher figures have been reported from other sources.[70] James Grimmel noted the tension between the desire for reliable control over one's information and the desire for social interaction.[71]

In one example, an employee asked his boss for a day off to attend an unexpected family matter but instead attended a party. A picture of the employee at the party, in a tutu, was posted on Facebook. The office became aware of the employee's deception at this point.[72] It is likely that it was not the employee's expectation, when he asked their boss for the day off, that the real reason for the request would become apparent on Facebook. This is not to suggest that these events did not happen before social media, but it is social media that provides the rapid dissemination of personal news to others such that 'by the time the mainstream media pick up a story, it has likely already been written about extensively online'.[73]

Jon Favreau, former speechwriter to the President of the USA, was 'publicly embarrassed when a blog published a photo that showed him at a party with his hands on a life-sized cardboard cutout of Hilary Clinton'.[74] President Obama stated to school children that they should be careful about what they put on Facebook and YouTube as mistakes you make while young might be used against you later on.[75] Information stored in electronic form and placed on social media sites is significantly more accessible than information kept in non-electronic form within your house or office. While Facebook has privacy controls, 'only about 25 per cent of Facebook users use these controls … many of them finding them maddeningly difficult to use'.[76]

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68 *Lewis v King* [2004] EWCA Civ 1329 [31] cited in Patrick George, *Defamation Law in Australia* (LexisNexis Butterworths, 2nd ed, 2012) 53 [2.23].

69 Kirkpatrick, above n 21, 204-205.

70 Mary Lorenz, *Nearly Half of Employers Use Social Networking Sites to Screen Job Candidates* (20 August 2009) <http://thehiringsite.careerbuilder.com/2009/08/20/nearly-half-of-employers-use-social-networking-sites-to-screen-job-candidates/>; Kashmir Holl, *What Prospective Employers Hope To See In Your Facebook Account: Creativity, Well-Roundedness, & "Chastity"* <http://www.forbes.com/sites/kashmirhill/2011/10/03/what-prospective-employers-hope-to-see-in-your-facebook-account-creativity-well-roundedness-chastity/>.

71 Kirkpatrick, above n 21, 212.

72 Ibid 204.

73 Daniel J Solove, 'The Slow Demise of Defamation and the Privacy Torts' (11 October 2010) *Huffington Post* (online) <http://www.huffingtonpost.com/daniel-j-solove/the-slow-demise-of-defama_b_758570.html>.

74 Kirkpatrick, above n 21, 204.

75 Ibid 205.

76 Ibid 208.

G *Social Media and Privacy*

The world we live in now is 'a world where almost everything about your business is public information. Not only that, the world is now hyperconnected in a way that makes discoverability and conversation about you a trivial exercise'.[77] However, despite the 'hyperconnections', privacy is still important, as noted by users of the photo sharing tool Instagram, who 'have pointed out, their privacy, or the perception of it, is more important than any service'.[78] However, as noted above, the usage of key social media tools is growing despite perceived privacy concerns.

Facebook claims that an individual's privacy is maintained by using controls within Facebook to 'authoritatively determine who you would, and would not, like to see your information'.[79] Facebook considers that 'if you have doubts about who you are communicating with online, your privacy is at risk'.[80]. Even if people do have doubts, people are still 'exposing the intimate minutiae of their lives on sites like Facebook and Twitter'.[81] The only way a person may ensure complete privacy online is for the person to remove their material from the online environment.[82] Another way of handling 'sensitive' information is illustrated by Chuck Hagel, a consultant at Deloitte Consulting, who stated that he would note he had two daughters on Facebook but not criticise them on Facebook.[83] Mr Hagel's opinion demonstrates the view that the best way to maintain your privacy on Facebook is to not post the information on Facebook.

To maintain privacy on social media a person could post anonymously or use a fictitious identity. Mark Zuckerberg, the designer of Facebook, opposed users having more than one profile or identity, such as where an individual could have a work profile and a social profile.[84] However, privacy issues typically arise on Facebook 'when the comfortable compartments into which people have segregated various aspects of their lives start to intersect'.[85] It has been reported that Facebook itself assess that 8.7 per cent of its users were not real.[86]

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77 Stephen Collins, *The conversation has rules* (21 April 2009) The Drum, <http://www.abc.net.au/unleashed/30632.html>.

78 Bronwen Clune, *Instagram purchase reopens web's privacy dilemma* (11 April 2012) The Drum, <http://www.abc.net.au/unleashed/bronwen-clune-3943764.html>.

79 Kirkpatrick above n 21, 13.

80 Ibid.

81 Daniel J Solove, 'Introduction: Privacy Self Management and the Consent Dilemma' (2013) 126 *Harvard Law Review* 1880, 1895.

82 Sherry D Sanders, 'Privacy is Dead: The Birth of Social Media Background Checks' (12 March 2012) 39 *Southern University Law Review* 243, 265.

83 Kirkpatrick, above n 21, 203.

84 Ibid 199.

85 Ibid 200.

86 Mark Sweney, 'Facebook quarterly report reveals 83m profiles are fake' (3 August 2012) *The Guardian* (online) <http://www.theguardian.com/technology/2012/aug/02/facebook-83m-profiles-bogus-fake>.

With the proliferation of tracking technology,[87] a person may not want to use one identity or their own identity. Almost all choices made by an online user can be tracked, whereas articles or advertisements that a reader looks at in traditional media, like newspapers, or whether that person sees the messaging on a billboard is more difficult to determine.[88] An individual's understanding of the ease in which they might be tracked might also encourage them to use different identities.

One ethical issue that arises in social media is whether the mainstream media should publish 'photographs taken from a person's Facebook page, or comments that a person has made, supposedly to friends, on tribute pages on Facebook or Twitter.[89] Additionally, in this situation copyright issues arise, depending upon whether the material has been published more than 70 years ago (from an Australian point of view). Once it is published, 'Facebook the company will always be able to see our data'.[90] This may be of particular concern to those individuals who want complete control over their data. Regardless of whether a person is using new or old forms of media, 'with the freedom to publish comes the responsibility not to abuse it by, among other things, unwarranted invasion of individual's privacy'.[91] However, privacy law in Australia is not strong, with three recent enquiries into privacy law recommending 'the enactment of a statutory cause of action' for serious privacy breaches.[92] This will be discussed in chapter five.

III EMPLOYMENT CONTRACTS IN AUSTRALIA

This chapter explains the definition of an employee, the nature of an employment contract and the implications of that contract. Further analysis will examine the *Fair Work Act*[93] (FWA) and the protections it affords employees.

A *What is an Employee?*

There is no statutory definition of 'employment' to help distinguish between independent contractors and employees.[94] The definition of an 'employee' has been

87 Solove, above n 81, 1880.
88 Nichole Kelly, above n 30, 4-5.
89 Roger Patching, 'The News of the World Scandal and the Australian Privacy Debate' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 130.
90 Kirkpatrick, above n 21, 324.
91 Roger Patching, 'The News of the World Scandal and the Australian Privacy Debate' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 131.
92 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013) 40 [6].
93 *Fair Work Act 2009* (Cth).
94 Andrew Stewart, *Stewart's Guide to Employment Law*, (The Federation Press, 3rd ed, 2011) 47.

contentious in Australia with various tests applied. In *Hollis v Vabu Pty Ltd*[95] *(Vabu)* the High Court determined that a range of factors should be taken into consideration to determine whether a worker was an employee or independent contractor.

B *Why Is This an Issue for Employers?*

The English courts developed a principle of vicarious liability under common law where an employer was only responsible for acts done by their employees, not independent contractors.[96] The High Court confirmed that this same concept exists in Australia where an accident involving a recent repair to a fridge was found to be the independent contractor's liability and not that of the owner/employer of the business where the fridge was situated.[97] Generally, an employer is liable for the actions of their employees but not independent contractors.[98] In the world of social media, the identity of the author of a communication can be difficult to determine.[99] For employers trying to protect their reputation, it is vital that they are able to establish whether a person commenting adversely in relation to their business is, in fact, an employee of the business.[100] It is important for an employer to be able to establish this linkage if they wish to be able to determine who might be legally liable and, therefore, the relative merits of legal action. In making these decisions about legal liability it is important for the employer to determine if the person making the adverse comments is an employee or an independent contractor.

C *What are Employment Contracts?*

The employment relationship is a special one of trust and confidence.[101] In fact, without trust and confidence there is no contract of employment.[102]An employment contract is a specific type of 'contract of employment between an employer and an employee'.[103] An employment contract is where 'the general principles of the law of contract apply in considering the respective rights and obligations of employee and employer under a contract of service'.[104]

Under common law, a valid contract requires certain requirements to be met[105] similar to other forms of contract. To ensure a valid contract has been constituted, the parties must be clear as to the certainty in meaning of the language used so that, if necessary,

95 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 [19].
96 Stewart, above n 94, 44.
97 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.
98 *Hollis v Vabu Pty Ltd (t/as Crisis Couriers)* (2001) 207 CLR 21 [94].
99 George, above n 68, 228 [13.3].
100 See *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 in Chapter 4.
101 Sappideen et al, above n 1, 28.
102 *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104 [127].
103 *Oxford Australian Law Dictionary* (Oxford University Press, 1st ed, 2010) 211.
104 *Consolidated Press Ltd v Thompson* (1952) 52 SR (NSW) 75 (Street CJ).
105 Stewart, above n 94, 81.

the contractual intention can be attributed by a court to the parties.[106] However, as noted below, courts can imply terms to make a contract functional, such as ensuring an employee is paid a reasonable sum of money.[107]

D *Express & Implied Terms*

Have the essential terms required to make the contract commercially workable been met?[108] The contract may not include all the terms in writing, with some terms agreed orally, such as a promise regarding redundancy payments[109] or expecting to report to a higher level manager.[110] Express terms will be interpreted by a court in the manner that a reasonable person would interpret them.[111] With respect to employment contracts, the court has determined that, in looking at the employee/employer relationship, the whole picture should be considered.[112] Express terms, no matter how clear and unambiguous in a contract, must give way to statutory requirements.[113]

An implied term is a term that can be implied into a contract, rather than appearing expressly. The implication can be driven by the law, where the implication does not depend upon the actual intention of the parties, or by fact, custom or circumstance, where the implication is based upon the actual circumstances of the parties.[114]

Any implied terms can be 'excluded by the express terms of the contract or it may be excluded because it would operate inconsistently with the express terms of the contract'.[115] The court has considered that a breach of an implied term is inconsistent with an employer's express power of termination as a written term in a contract.[116] The breach must also be a serious breach as 'it is only a serious breach that could give rise to a breach of the implied term'.[117]

E *The Implied Term of Mutual Trust & Confidence*

In 'straightforward contractual terms there is ample authority for the implication of a term in a contract of employment that the employer will not, without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee'.[118]

106 *G Scammell & Nephew Ltd v Ouston* [1941] AC 251; [1941] 1 All ER 1.
107 *Midya v Sagrani* (1999) NSWCA 187 [4].
108 *Trollope & Colls Ltd v Atomic Power Constructions Ltd* [1963] 1 WLR 333.
109 *McRae v Watson Wyatt Australia Pty Ltd* [2008] FMCA 1568 [32].
110 *Bruce v AWB* (2000) FCA 594 [10].
111 *Toll v Alphapharm* (2004) HCA 52, [40].
112 *Hollis v Vabu* (2001) 207 CLR 21 [24].
113 *Zafiriou v Saint-Gobain Administration Pty Ltd* [2013] VSC 377 [234].
114 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 137 (Lord Wright).
115 *Barker v Commonwealth Bank of Australia* [2012] FCA 942 [329].
116 Ibid [330].
117 Ibid [331].
118 *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 [141].

Where an employee has their employment terminated unlawfully, then the employer 'by its treatment of the' employee 'leading up to the unlawful termination of' their 'employment, breached an implied duty of mutual trust and confidence'.[119] Australian courts have found that to impose changes that would be against 'the purposes of the contract of employment' would be unfair on the employee and breach an implied term regarding acting unfairly and capriciously towards employees.[120]

Certain courts have determined that an implied term exists but, unless 'the breach has constituted a repudiation of the contract', the employee will not be able to claim damages.[121] Breach of an implied term is not applicable at termination or beyond but only leading up to termination, such as an employer's conduct in an investigation leading up to termination.[122]

Until recently Australian courts stated that they 'cannot say that the existence of such an implied term is not arguable'.[123] The High Court had suggested an implied term existed but was not required to rule on it.[124] However, The High Court has recently ruled that the implied term of mutual trust and confidence cannot be implied into all employment contracts.[125]

F *Advantages for Employees*

An employer cannot 'single out an employee without reasonable and proper cause'[126] and not allow them access to benefits available to others. In one particular case, one particular employee was offered a new contract on inferior terms than those offered to other employees in the same circumstances.[127]

An employer must ensure that if they modify policy, which relates to the employment contracts of their employees, then the changes must be agreed as per standard contract law.[128]

G *Advantages for Employers*

Where an employer expects trust and protection of confidence from an employee, and either trust or confidence is broken by the employee, then the employer will have an

119 *Burazin v The Blacktown City Guardian* [1996] IRCA 371.
120 *Akmeemana v Murray* [2009] NSWSC 979; BC200908870 [53].
121 *Cameron v Asciano Services Pty Ltd* [2011] VSC 36 [67].
122 *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104 [138].
123 *Heptonstall v Gaskin and Ors (No 2)* [2005] NSWSC 30 [23]; See also Riley, 'Siblings But Not Twins: Making Sense of "Mutual Trust" and "Good Faith" In Employment Contracts', above 5 14 522.
124 *Koehler v Cerebos (Aust) Ltd* (2005) 222 CLR 44, 54-55.
125 *Commonwealth Bank of Australia v Barker* [2014] HCA 32.
126 *Transco Plc v O'Brien* [2002] EWCA Civ 379 [10].
127 Ibid [18].
128 *Akmeemana v Murray* [2009] NSWSC 979.

easier time satisfying the requirements of unfair dismissal laws. Some examples of dismissal include: where an employee at a brewery does not follow a responsible drinking policy and is dismissed;[129] a factory work trading abuse with another employee[130] or a truck driver excessively speeding.[131] The aspect of mutual trust places responsibility into the hands of the employee as well

An employee has a duty not to compete with their employer.[132] Competition by the employee would clearly impact on trust within the work environment. An employer must be able to trust their employees to not sell firm secrets, or set up alternate, competing businesses.[133] Employees are required to cooperate with their employer[134] as part of their employment contracts

In chapter four, I will be discussing social media cases that have resulted in an employee's dismissal. In modern dismissal cases there are a number of factors that must be considered before a dismissal can be legally upheld.

H *Unfair Dismissal*

The *Fair Work Act 2009* (Cth)'s (FWA) objective is to establish a framework for dealing with unfair dismissal that balances the needs of the business and the needs of employees.[135] The FWA also seeks to provide remedies, where a dismissal is unfair, with an emphasis on reinstatement.[136] The FWA seeks to ensure there is a 'fair go all round'[137]. The FWA notes that this phrase emanates from the *Re Loty*[138] case. To be protected from unfair dismissal, a person must be a national system employee who has completed a minimum period of employment[139] and is covered by either a modern award, an enterprise agreement or, alternatively, the employee's earnings are less than the high income threshold.[140]

There are four criteria that the Fair Work Commission (FWC) use to determine whether a person has been unfairly dismissed.[141] Firstly, has the person's employment with their employer been terminated on the employer's initiative?[142] Secondly, was the dismissal harsh, unjust or unreasonable?[143] Thirdly, if a business is a 'Small Business', and the Minister has created a Small Business Fair Dismissal Code, [144] has the dismissal been consistent with that code?[145] Fourthly, was the dismissal a case of a

129 *Button v J Boag and Son Brewing Pty Ltd* [2010] FWA 148.
130 *Petru Ghirocian v J Blackwood & Sons Ltd t/as Total Fasteners - re Termination of employment* [2009] AIRC 979.
131 *Glenn Gervasoni v Rand Transport* (1986) Pty Ltd [2009] FWA 1269.
132 *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] ch.169.
133 *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64.
134 *Secretary of State for Employment v ASLEF (No 2)* [1972] 2 QB 455 (CA).
135 *Fair Work Act 2009* (Cth) s 381(1)(a).
136 Ibid s 381(1)(c).
137 Ibid s 381(2).
138 R*e Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.
139 *Fair Work Act 2009* (Cth) s 382(a).
140 Ibid s 382(b).

genuine redundancy?[146] The onus is on the employer to establish there was a need for a genuine redundancy.[147]

I *Harsh, Unjust or Unreasonable*

There are several conditions that the Fair Work Commission must take into account in determining whether a dismissal was harsh, unjust or unreasonable.[148] Firstly, was there a valid reason for the dismissal related to the person's capacity or conduct?[149] If so, was the person notified of the reason[150] and given the opportunity to respond?[151] The reason cannot be 'capricious, fanciful, spiteful or prejudiced'[152] with the ultimate decision being 'sound, defensible or well-founded'.[153]

To be summarily dismissed, an employee's conduct must be sufficiently serious to justify dismissal.[154] Where conduct involves a breach of company policy then the employer must be able to establish that the policy existed, was reasonable and the employee was aware of its contents.[155] It does not matter if the conduct is occurring outside of the workplace as long as there is a demonstrated impact on the workplace.[156] It is also relevant to consider the relationship between the size of the employer's enterprise and the procedures followed in effecting the dismissal[157], together with any other matters that the Fair Work Commission considers relevant.[158]

In this type of case, other factors that are likely to be considered are, firstly, whether there was an unreasonable refusal to allow the employee dismissed to have a support person present.[159] However, there is not a positive duty on the part of the employer to offer an employee a support person.[160] Secondly, if the dismissal was due to the employee's unsatisfactory performance.[161] Thirdly, whether the absence of dedicated

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141 Ibid s 385.
142 Ibid s 386(1)(a); *Mohazub v Dick Smith Electronics Pty Ltd (no 2)* (1995) 62 IR 200, 205.
143 *Fair Work Act 2009* (Cth) s 386(1)(b).
144 Ibid s 388(1).
145 Ibid s 386(1)(c).
146 Ibid s 386(1)(d).
147 *Kenefick v Australian Submarine Corporation Pty Ltd (no 2)* (1996) 65 IR 366, 370.
148 *Fair Work Act 2009* (Cth) s387.
149 Ibid s 387(a).
150 Ibid s 387(b).
151 Ibid s 387(c).
152 *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
153 *Annetta v Ansett Australia Ltd* (2000) 98 IR 233, [10].
154 *Byrne v Australian Airlines* (1995) 185 CLR 410, 465-466.
155 *Bostik (Australia) Pty Ltd v Georgevski (No 1)* (1992) 36 FCR 20.
156 *Hussein v Westpac Banking Corporation* (1995) 59 IR 103.
157 *Fair Work Act 2009* (Cth) s 387(f).
158 Ibid s 387(h).
159 Ibid s 387(d).
160 Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1542].
161 *Fair Work Act 2009* (Cth) s 387(e).

human resource management specialist in the enterprise would be likely to impact on the procedures followed in the dismissal.[162]

J *Conclusion*

Within Australia, The High Court has found that the implied term of mutual trust and confidence cannot be implied into all employment contracts.[163] Fortunately, case analysis indicates that mutual trust and confidence has not been a major factor in unfair dismissal cases involving social media. However, it may be that mutual trust and confidence in an employment contract is at the core of the behaviour necessary to continue the personal relationship that is the employment relationship. Phillipa Weeks argued that the easiest way to establish mutual trust and confidence as a term in an employment law contract is 'to prescribe a statutory solution'.[164] This may now be the only way to establish mutual trust and confidence as a term in an employment law contract.

IV ANALYSIS OF UNFAIR DISMISSAL CASES INVOLVING SOCIAL MEDIA

A *Overview*

Australian courts and tribunals have recently ruled on a number of unfair dismissal applications where there has been a link between the use of social media and alleged unfair dismissal. Chapter three noted that, when determining if a dismissal has been unfair, the courts must consider if a dismissal has occurred[165] and if so, whether it was 'harsh, unjust or unreasonable'.[166] There are several key aspects of each case that will assist in understanding the role social media played in the dismissal. Firstly, one of the key aspects is the use the employee made of social media, whether the employer had a social media policy and the manner in which employees are informed the policy exists. Secondly, whether the privacy of the employee or others has been an issue in the case. Lastly, to what degree has the employer sought to curtail the employee's freedom of expression through dismissal.

B *Stutsel v Linfox Pty Ltd [2011] FWA 8444*

An employee of Linfox Australia was dismissed for posting comments on his Facebook page which were alleged to be racially discriminatory against one manager

162 Ibid s 387(g).
163 *Commonwealth Bank of Australia v Barker* [2014] HCA 32.
164 Phillipa Weeks 'Employment Law – a Test of Coherence Between Statute and Common Law' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press 2005) 194 cited in Riley, 'Uneasy or accommodating bedfellows? Common law and statute in employment regulation', above n 25 21.
165 *Fair Work Act 2009* (Cth) s 386(1)(a).
166 Ibid s 387.

and sexually discriminatory against another.[167] Fair Work Australia considered whether comments on the employee's Facebook page constituted a valid reason to terminate an employee and, if so, whether the manner of dismissal was harsh, unjust or unreasonable.[168]

1 *Use of Social Media*

The employer argued that the induction training that the applicant participated in[169] provided policy guidance on not harassing, or discriminating against, other employees.[170] The Commissioner of Fair Work Australia remarked that, 'In the current electronic age, this is not sufficient and many large companies have published detailed social media policies and taken pains to acquaint their employees with those policies'.[171]

2 *Privacy Settings*

The Commissioner noted that 'The Applicant's Facebook page was not a web blog, intended to be on public display. It was not a public forum'.[172] This would not appear to be technically correct as some web blogs, like WordPress, provide privacy settings to restrict who can view your blog[173] whereas Facebook enables options for group pages to be open to anyone.[174] The tribunal accepted that the applicant was not aware of his Facebook privacy settings and the fact that 'comments posted on his page could only be viewed by himself and those persons he had accepted as Facebook friends.[175] The Commissioner's view in this instance appears at odds with other rulings where the prevailing view was that information online would be disseminated, regardless of privacy settings or posted out of hours.[176]

3 *Freedom of Expression*

The applicant had about 170 friends on Facebook of which many were Linfox employees.[177] The Commissioner stated that the remarks, which were alleged as racially discriminatory, were 'expression of his private views ... within his right to free speech'.[178] The Commissioner found that the applicant did not make the sexually offending comments about another employee, as these were made by the applicant

167 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [38], [71].
168 Ibid [89].
169 Ibid [29].
170 Ibid [28].
171 Ibid [87].
172 Ibid [79].
173 Workpress.com, *Support* < http://en.support.wordpress.com/settings/privacy-settings/>.
174 Facebook, *Groups* <https://www.facebook.com/about/groups>.
175 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [78].
176 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [51]; *O'Keefe v Williams Muir's Pty Ltd* [2011] FWA 5311 [43].
177 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [77].
178 Ibid [79].

friends on Facebook.[179] The Commissioner explained that the postings had 'the favour of a conversation in a pub or cafe, although conducted in an electronic format'.[180] The Commissioner determined that it was not clear who the offensive comments on the Facebook page were about, especially if the viewer was not familiar with Linfox.[181]

The Commissioner highlights the differentiation in treatment between the applicant, whose employment was terminated, and the employees who made the sexually offensive comments on the applicant's Facebook page where no action taken against them.[182] Under the FWA the tribunal can take into account 'other factors'[183] such as 'the comparative treatment of other employees in a like position'.[184] This implies an employer cannot unfairly dismiss one person for expressing their opinions on Facebook while taking no action against others in similar circumstances.

It is important to note that some of the discussion pertained to union activities[185] and this type of discussion is protected by law[186] as lawful participation in an industrial association.[187]

4 *Summary*

The commissioner drew attention to a comment by the applicant on his Facebook page that said '"Law of Probability - The probability of being watched is directly proportional to the stupidity of your act." Here is wisdom.'[188] This may also be a reference to the fact that on the internet it might be much harder to remain unseen, as noted by Barack Obama in chapter two.[189]

The Commissioner ruled the applicant be reinstated as the dismissal had been 'harsh, unjust and unreasonable'.[190] The full bench of the Fair Work Commission upheld the decision of the Commissioner upon appeal.[191] The key issues, confirmed on appeal, were that 'when the statements and comments posted on the Facebook page were objectively considered in their proper context they were not of such a serious or extreme nature as would justify dismissal for serious misconduct'.[192] In upholding the

179 Ibid [83].
180 Ibid [81].
181 Ibid [81].
182 Ibid [93].
183 *Fair Work Act 2009* (Cth) s 387(h).
184 *Alkememade v Serco Gas Services (Vic) Pty Ltd* [1999] AIRC 45 (21 January 1999) [6] cited in Sappideen, et al, above n 1, 454 [12.190].
185 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [82].
186 *Fair Work Act 2009* (Cth) s 346.
187 Ibid s 347.
188 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [95].
189 Kirkpatrick, above n 21, 205.
190 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [100].
191 *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 [43].
192 Ibid [35].

original decision,[193] the full bench had particular regard to 'nature of the comments made, the limited understanding of the employee as to the privacy of Facebook communications'.[194]

C *Dover-Ray v Real Insurance Pty Ltd [2010] FWA 8544*

The applicant was dismissed, in part, for publishing information on MySpace that had the potential to damage the reputation of Real Insurance, their employer.[195] The entry on a MySpace page included 'alongside a photograph of herself and her name'.[196]

1 *Use of Social Media*

The commissioner felt that even if the blog entries were limited to the applicant's friends then 'it could reasonably be expected that a document of such controversy would be circulated within the workplace'.[197]

2 *Privacy Settings*

The blog set up by the applicant was 'publicly accessible through a Google search'.[198] The applicant provided contradictory evidence as to whether the blog entry was intended to be private or public.[199] The Commissioner stated that the issue is not 'whether the blog intended to be public or not' but that the applicant's MySpace account 'friends" included other employees of Real'.[200] The tribunal considered that it was enough that the applicant's friends included other employees of the employer despite not naming the employer.[201] This would appear to be a different view from the Commissioner than the latter case of *Stutsel v Linfox*.[202]

3 *Freedom of Expression*

The Commissioner noted that the applicant did not remove the blog entry (as an expression of contrition after a heat of the moment) when requested to by the defendant,[203] though this could have been due to the applicant's 'purported belief that the site was available only to her "friends"'.[204] The applicant believed this was the

193 *Fair Work Act 2009* (Cth) s 347.
194 *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 [43].
195 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [4].
196 Ibid [22].
197 Ibid [51].
198 Ibid [50].
199 Ibid [50].
200 Ibid [51].
201 Ibid [53].
202 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [78].
203 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [57].
204 Ibid [60].

best way to advise others, who may be in similar situations, of the applicant's plight.[205]

The comments on the blog were the applicant's opinions[206] and 'an attack on the integrity of the management of Real'.[207] The Commissioner discounted the applicant's argument that the blog entry could have been from any point in their life and that therefore it was not possible to confirm who the applicant was addressing.[208]

4 *Summary*

The Commissioner concluded that 'on balance, the termination of Ms Dover-Ray's employment was not harsh, unjust or unreasonable'[209] and, amongst other reasons, the publishing of the offending blog entry and refusing to modify or delete it was a valid reason for termination.[210] The Commissioner stated that they did not need to consider a valid reason for termination test relating to any relationship damage to the 'mutual trust and confidence between the employer and employee and to act with good faith towards her employer'[211]

D *O'Keefe v Williams Muir's Pty Ltd [2011] FWA 5311*

The applicant was dismissed for serious misconduct relating to posting threatening comments on their Facebook page.[212] The respondent took the applicants comments on Facebook as their resignation from the company.[213]

1 *Use of Social Media*

Reference was made to the employer's 'employee handbook' about the appropriate way to interact with employees.[214] There appeared to be no specific social media policy but the Deputy President of Fair Work Australia considered 'common sense would dictate that one could not write and therefore publish insulting and threatening comments about another employee in the manner in which this occurred'.[215] The employee had signed an acknowledgment that he had read the employee handbook.[216] The case is distinguished from the *Stutsel v Linfox* case, where the absence of a social media policy allowed the applicant to make a successful claim for unfair dismissal.[217]

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205 Ibid [50].
206 Ibid [58].
207 Ibid [54].
208 Ibid [52].
209 Ibid [110].
210 Ibid [79].
211 Ibid [61].
212 *O'Keefe v Williams Muir's Pty Ltd* [2011] FWA 5311 [6]-[7], [9].
213 Ibid [17].
214 Ibid [39]-[41].
215 Ibid [42].
216 Ibid [57].
217 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [87].

2 *Privacy Settings*

The applicant indicated that he had set his Facebook privacy settings to the 'maximum', to only enable a select group of seventy friends to view his comments.[218] While his employer was not mentioned by name on the site, there were about 11 co-workers who were the applicant's friends.[219] However, the respondent alleged that the applicant advised that the target of the comments was the operations manager of the respondent firm[220] and this was confirmed in the applicant's own evidence.[221] The applicant stated that the comments were not intended to be seen by the operations manager.[222] The Deputy President considered that the applicant would be aware that other co-workers could see the comments and the threatening comments would get to the operations manager[223] and 'it would be difficult to accept that the applicant was unaware of the consequences of his actions'.[224]

3 *Freedom of Expression*

The fact that the comments were posted out of hours was found, by the Deputy President, to make no material difference.[225] The case is similar to *Dover-Ray v Real Insurance Pty Ltd*[226] with both cases reflecting a different view as to the legal status of privacy settings online than was the case in *Stutsel v Linfox*.[227]

4 *Summary*

The Deputy President considered the applicant's Facebook entry as threatening towards another employee. This constituted a serious breach of conduct and therefore was a valid reason for termination.[228] The Deputy President noted that the 'separation between home and work is now less pronounced than it once used to be'.[229] This perhaps echoed Mark Zuckerberg's thoughts about a single identity back in chapter three.

The application was dismissed.[230]

218 *O'Keefe v Williams Muir's Pty Ltd* [2011] FWA 5311 [16].
219 Ibid [16].
220 Ibid [8].
221 Ibid [48], [53].
222 Ibid [35].
223 Ibid [38].
224 Ibid [39].
225 Ibid [43].
226 Dover-Ray v Real Insurance Pty Ltd [2010] FWA 8544 [51]
227 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [78].
228 *O'Keefe v Williams Muir's Pty Ltd* [2011] FWA 5311 [51].
229 Ibid [43].
230 Ibid [59].

E *Fitzgerald v Dianna Smith [2010] FWA 7358*

The applicant was dismissed for alleged misconduct, which, in part, was due to comments posted on the applicant's Facebook page.[231] This case briefly covers whether comments on Facebook might have damaged the employer and the impact of personal friends who are also clients of the employer.

1 *Use of Social Media*

The applicant posted a message on her Facebook page which stated 'Xmas "bonus" alongside a job warning, followed by no holiday pay!!! Whoooooo! The Hairdressing Industry rocks man!!! AWSOME!!! [sic]'.[232] The comment was removed by the applicant within a month of being posted.[233] This message would appear to be of a less serious nature than those posted in the other cases referenced above.

The respondent submitted that the applicant 'misrepresented the employer with her comments on Facebook'.[234] The Commissioner pointed out that what was once discussed over coffee with friends is now posted on websites.[235] This comment echoes the pub comment in *Stutsel v Linfox*.[236]

2 *Privacy Settings*

The applicant only posted her comment to her Facebook friends.[237] Even if other people had seen the comments they 'could not have known which hairdresser it specifically referred to'.[238] Despite the restriction to only friends, the respondent became aware of the comments via a third party.[239] Posting on websites which 'can be seen by an uncontrollable number of people is no longer a private matter but a public comment'.[240] The Commissioner did consider the postings could affect the respondents 'trust and confidence' in the applicant but the respondent did not act immediately on this and therefore in this case 'trust and confidence' was not a factor.[241]

231 *Fitzgerald v Dianna Smith* [2010] FWA 7358 [3].
232 Ibid [21].
233 Ibid [21].
234 Ibid [35].
235 Ibid [50].
236 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [81].
237 *Fitzgerald v Dianna Smith* [2010] FWA 7358 [21].
238 Ibid [31].
239 Ibid [49].
240 Ibid [50].
241 Ibid [57].

3 *Freedom of Expression*

The applicant submitted she was only communicating with her friends on Facebook.[242] The Commissioner stated that the comments did not affect either the hair industry or, due to the lack of identification, the particular salon.[243] While the Commissioner did consider the comments silly,[244] the Commissioner made the point that some of the friends on Facebook who were clients of the respondent were personal friends.[245] The Commissioner was perhaps making the point that, in this sense, the postings were akin to a conversation by friends over coffee or at the pub.

4 *Summary*

The Commissioner stated 'It is well accepted that behaviour outside working hours may have an impact on employment 'to the extent that it can be said to breach an express term of [an employee's] contract of employment'[246]. 'It would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences'.[247] However, the Commissioner did not consider the 'comments on the Facebook page in these circumstances provide a valid reason for dismissal'.[248]

F *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend [2011] FWA 3496*.

A fellow employee had posted a photo on Facebook depicting the applicant making use of work materials inappropriately at their place of work.[249] It was alleged that the work materials had been stolen and therefore this constituted serious misconduct[250] though the tribunal found this claim was not made out.[251]

1 *Use of Social Media*

The respondent claimed that the photo had damaged her business, though the photo had not been posted on Facebook by the applicant.[252] The Commissioner found no

242 Ibid [31].
243 Ibid [54].
244 Ibid [56].
245 Ibid [55].
246 *Rose v Telstra Corporation Ltd* (1998) 45 AILR 3-966 cited in *Fitzgerald v Dianna Smith* [2010] FWA 7358 [51].
247 *Fitzgerald v Dianna Smith* [2010] FWA 7358 [52].
248 Ibid [66].
249 *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend* [2011] FWA 3496 [17].
250 Ibid [36].
251 Ibid [40].
252 Ibid [41].

direct evidence to indicate there had been damage to the business.[253] The respondent had received the photo anonymously.[254]

2 *Privacy Settings*

Privacy did not appear to be an issue in the case other than supporting the contention above that material online will find a way to others not initially privy to it.[255] This is a similar view to *Fitzgerald v Dianna Smith*[256] where material online would not be kept private.

3 *Freedom of Expression*

There were no direct freedom of expression issues.

4 *Summary*

The case highlights how social media items from a person's 'private life' can be used in their employment space, especially where the material is directly connected. The applicant was successful in seeking compensation for unfair dismissal.[257]

G *Banerji v Bowles [2013] FCCA 1052*

The applicant sought an injunction against a review of possible breach of the Australian Public Service (APS) Code of Conduct.[258] One of the reasons given for the breach was that the applicant had breached APS values and the Department of Immigration and Citizenship's (the department) policies by posting comments on twitter.[259] The other reason did not relate to social media use.[260] The applicant was a public servant employed as a Public Services Officer.[261]

1 *Use of Social Media*

While the breach of the APS code of conduct does not mention social media, the department determined the conduct in using social media 'demonstrated a failure to behave with honesty and integrity in the course of her APS employment and in a way

253 Ibid [42].
254 Ibid [36].
255 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [51].
256 *Fitzgerald v Dianna Smith* [2010] FWA 7358 [50].
257 *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend* [2011] FWA 3496 [88].
258 *Banerji v Bowles* [2013] FCCA 1052 [28].
259 Ibid [36].
260 Ibid [36].
261 Ibid [16].

that upholds the APS values and the integrity and good reputation of the APS'.[262] The applicant used Twitter to make regular social comment in relation to her employer.[263]

The department had also published the 'Guidelines on Use of Social Media by DIAC Employees'[264] which the applicant was bound by. The guidelines were reinforced by a factsheet highlighting that it was inappropriate to make unofficial public comment on government or other political party policy or criticise the department such that it disrupted the workplace.[265] This case is distinct from *Stutsel v Linfox*[266] where specific social media guidelines were not provided.

2 *Privacy Settings*

The applicant used an anonymous alias 'LaLegale'.[267] It would appear from the case that the identity of 'LaLegale' was not at issue. The applicant did not attempt to make her comments private as she believed she had a right to express her political opinions.[268]

The applicant contended that the department had been engaged in 'covert surveillance of an employee's social media account'.[269] There is particular legislation regarding covert surveillance but the applicant did not make out an issue which the court could address.[270]

3 *Freedom of Expression*

The applicant expressed her views on Twitter to deride and criticise the government, ministers, opposition members and employees of her department.[271] The applicant alleged that none of the comments sent through Twitter were directed at individuals on a personal basis.[272]

The applicant contended that 'her right of political expression is a constitutionally protected right which operates, in any event and without restriction'.[273] The applicant asked the court to declare that '*any finding of a breach of the APS Code of Conduct for expressing a political opinion contravenes the implied constitutional freedom of political communication*'[274] and that such implied freedom is not curtailed by

262 Ibid [36].
263 Ibid [18].
264 Ibid [78].
265 Ibid [79].
266 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [89].
267 Ibid [18].
268 Ibid [3].
269 Ibid [45].
270 Ibid [45].
271 Ibid [18].
272 Ibid [49].
273 Ibid [3].
274 Ibid [39].

legislative or executive power.[275] The applicant submitted that the department intended to terminate her employment contract for expressing political views on Twitter.[276] The applicant also alleged that the allegation of breaching the APS code of conduct was retaliation for using Twitter.[277]

The applicant appeared to be confused as to her employer was. The applicant stated that she is effectively an employee of the people of Australia but the Judge clearly states the legal reality is that she is an employee of the department.[278]

In essence, the Court stated that the applicant felt, despite the APS code of conduct, departmental social media guidelines and fact sheet, that the applicant had a constitutional right to make political comment.[279] The Court notes that the High Court of Australia has stated the right to political expression is not unfettered or unbridled.[280] Furthermore, that if there was such a right, as the applicant contends, it would not enable someone to breach their employment contract.[281] The Court referred to the judgment of Crennan and Kiefel JJ in *Attorney-General for South Australia v Corporation of the City of Adelaide*[282], in which it was found that the right asserted by the applicant is not a personal right but one that acts to restrict legislative power 'to support the constitutional imperative of the maintenance of representative government'.[283] The Court also noted that in the same case Heydon J stated[284] that Australia did not have a legal artefact providing for the express right of freedom of expression as in the United States of America and Germany.[285]

The court determined that there is no unfettered right to political expression, as asserted by the applicant.[286]

4 *Summary*

This case is important in highlighting an employee's right, in a private capacity, to write whatever they like on social media, is not unfettered.[287] The applicant alleged a 'loss of trust and confidence the employer'[288] but did not purse this avenue in court. The unresolved issue from this case is under what circumstances is the right of an

275 Ibid [39].
276 Ibid [53].
277 Ibid [43].
278 Ibid [55]-[56].
279 Ibid [98].
280 Ibid [102].
281 Ibid [102].
282 *Attorney-General for South Australia v Corporation of the City of Adelaide* [2013] HCA 3 [166].
283 *Banerji v Bowles* [2013] FCCA 1052 [102].
284 *Attorney-General for South Australia v Corporation of the City of Adelaide* [2013] HCA 3 [151]-[152].
285 *Banerji v Bowles* [2013] FCCA 1052 [103].
286 Ibid [102].
287 Ibid [104].
288 Ibid [47].

employee, particularly an APS employee, to political expression, greater than the terms and conditions of their employment. This will be explored in chapter six.

H *Conclusion*

There would appear to be a lack of consistency between the cases explored above in relation to the relative importance of privacy settings when individuals are commenting online. The latter case of *Stutsel v Linfox* indicates that if the employee believes they have set their privacy settings so that only a limited number of friends can view the content, even if the settings are not actually at maximum privacy, that this will be looked upon favourably in any unfair dismissal case. The rationale is that it is really just a modern way of having a pub or café conversation amongst friends. However, earlier cases indicated that once comments are placed online, irrespective of privacy settings, that it was the nature of the content that was more important with the underlying assumption that it would not remain private. Chapter five will explore the relation between privacy, social media and unfair dismissal in more detail.

The *Banerji v Bowles* case highlights the conflict between the implied constitutional right of freedom of political expression and terms of a contract of employment, specifically the implied term of mutual trust and confidence between employer and employee. Chapter six will examine the implied right of freedom of political expression and highlight where, in terms of an employment contract, an employee will be able to express their views without facing dismissal.

V PRIVACY

A *What is Privacy?*

Privacy is a form of protection of person and property where property can include the intangible as well as the tangible.[289] Privacy is a broad concept and 'is an important element of the fundamental freedoms of individuals which underpin their ability to form and maintain meaningful and satisfying relationships with others'.[290] In identifying the link between a breach of privacy as a breach of private affairs, rather than public affairs, Gleeson CJ stated 'There is no bright line which can be drawn between what is private and what is not'.[291] Internationally, privacy is protected as a human right by the *International Covenant on Civil and Political Rights* which states

289 S Warren, L Brandeis. '*The Right to Privacy*' (1890) 4 *Harvard Law Review* 193, 193.

290 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013) 14.

291 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [41]-[42].

'no one shall be subjected to arbitrary or unlawful interference with his privacy'[292]. However, in Australia there is no general right to privacy under law.[293]

At a federal level, privacy is enshrined in legislation which specifically seeks to preserve information privacy[294], seeks to consider privacy when considering the statutory release of information[295] or the right to sexual privacy.[296] At a state or territory level there is privacy protection provided by Human Rights legislation in Victoria[297] and the Australian Capital Territory.[298]

While not exactly the same as privacy, the law of confidence, which has its roots in equity, also can protect, at least to some extent, an individual's privacy. The equitable doctrine of confidence provides a cause of action to 'protect valuable information from misuse and exploitation by others'.[299] In *Coco v A N Clark*[300] the court set out three elements to demonstrate a breach of confidence. These elements are that the information must have the necessary quality of confidence about it, must clearly have been imparted in confidence and that there has been no unauthorised use of that information.[301]

B *Key Aspects of Privacy Law in the UK and US*

The United Kingdom passed the legislation[302] which enshrined privacy rights contained within the *European Convention on Human Rights*[303] as domestic law. As part of this legislation, courts or tribunals within the United Kingdom must take into account judgments by the European Human Rights Tribunal in cases with a connection to a right protected by the Convention.[304] However, 'the House of Lords held that English law does not recognise any general principle of "invasion of privacy"'.[305] In *Campbell v MGM*[306] the House of Lords recognised a cause of action

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292 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.
293 Fitzgerald, above n 8 911 [10.160].
294 *Privacy Act 1988* (Cth) Preamble.
295 *Freedom of Information Act 1982* (Cth) s 47F.
296 *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4.
297 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).
298 *Human Rights Act 2004* (ACT) s 12(a).
299 SJ Barkenhall Thomas, V J Vann, *Equity* (LexisNexis Butterworths, 2nd, 2011) 202 [8.1].
300 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.
301 Ibid 47.
302 *Human Rights Act 1998* (UK).
303 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8.
304 *Human Rights Act 1998* (UK) s (2)(1)(a).
305 *Wainright v Home Office* [2003] UKHL 53 [30] in Mark Warby and Nicole Moreham (eds) *Tugendhat and Christie The Law of Privacy and the Media* (Oxford University Press, 2nd ed, 2011) 37 [1.92].
306 *Campbell v MGN Ltd* [2004] UKHL 2 AC 457.

for misuse of personal information as a better name for, what was formerly called, a breach of confidence.[307]

In *A v B*[308] the court provided guidelines for future privacy cases, suggesting that protection of privacy will be provided by the action for breach of confidence rather than any requirement for the specific development of a tort of breach of privacy.[309] Furthermore, the circumstances of the parties' relationship are important in determining 'whether a duty of confidence does exist which courts can protect'.[310] However, a pessimistic view is that the 'pragmatic extension of the law of confidence will be inadequate to protect privacy as a result of the inherent limitations of the action'.[311] Individuals do have the right to provide information to one person but protect that information being published to others. This was the case in *Douglas v Hello! Ltd*[312] where wedding photographs were provided to a magazine company but no others, with guests asked not to provide any photos to other magazine companies.

In the United States of America (US), privacy is protected 'by means of a patchwork quilt made up of common law, federal legislation, the US Constitution, state law, and certain state constitutions'.[313] This can lead to gaps in the protection of privacy and 'the US Constitution with its supporting body of jurisprudence does not provide adequate privacy protection, especially in light of continuing technological development'.[314] However, there is an argument that there is a constitutional right to privacy. The courts have 'held that the constitutionally protected "zone of privacy" not only protected an individual's "independence in making certain kinds of important decisions" but also encompassed the "individual interest in avoiding disclosure of personal matters"'.[315]

Matthew Lindquist drew a parallel between expectations of privacy in relation to material held in a brief case compared with information held in the virtual world.[316] However, Lindquist believes that the statutory framework for protection of online privacy is poor,[317] with change to privacy law a low political priority.[318] Paul Ohm

307 Ibid [14].
308 *A v B* [2002] EWCA Civ 337.
309 Ibid [11(vi)].
310 Ibid [11(ix)].
311 Basil Markesinis et al, 'Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)' (2004) 52 *American Journal of Comparative Law* 133, 145.
312 *Douglas v Hello! Ltd* [2005] EWCA Civ 595 [257].
313 Avner Levin, Mary Jo Nicholson 'Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground' (2005) 2:2 *University of Ottawa Law and Technology Journal* 357, 360.
314 Ibid 367.
315 Deya Bhattacharya *Law of Tort Right of Privacy: Constitutional Issues and Judicial Responses in USA and India, Particularly in Cyber Age* 10 < http://ssrn.com/abstract=1440665>.
316 Matthew Sundquist 'Online Privacy Protection: Protecting Privacy, the Social Contract, and the Rule of Law in the Virtual World' (2012) 25 *Regent University Law Review* 153, 166.
317 Ibid 167-168.
318 Ibid 169.

stated that every US privacy statue and regulation embraces the assumption that anonymization protects privacy[319] but without 'robust anonymization' there is an imbalance in privacy laws.[320] Where the US Government is accused of breaching privacy, courts must balance the importance of government interests against those of the person whose privacy rights are being breached.[321]

It would appear that the United Kingdom offers better privacy protection than the US, although neither possesses a complete cause of action for breach of privacy.

C *Do Individuals Require Privacy?*

The Office of the Privacy Commissioner found, through studies, that privacy is 'an issue of increasing resonance with the community'.[322] People should be protected from intrusions into their private lives which are uninvited and unwanted.[323]. An information technology (IT) 'heavyweight', Scott McNealy, once famously said, 'you have zero privacy anyway', in relation to consumer privacy.[324] This, perhaps, highlights how the IT industry views the protection of a consumer's privacy. In a similar vein, Michael Froomkin wrote, 'the rapid deployment of privacy-destroying technologies by governments and businesses threatens to make informational privacy obsolete'.[325]

Have people's views changed since Brandeis wrote, that of the need for privacy protection there can 'be no doubt'?[326] Rauhofer argues that people use risk management to trade off information about themselves for other assets, for example, a person may trade off his or her privacy in exchange for increased national security.[327] The real issue, is perhaps one of competing rights.

D *Balance of Rights*

The Australian Law Reform Commission (ALRC) has noted that 'privacy of an individual is not an absolute value which necessarily takes precedence over other

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319 Paul Ohm 'Broken Promises of Privacy Responding to the Surprising Failure of Anonymization' (2010) 57 *UCLA Law Review* 1701, 1740.

320 Ibid.

321 Willow Jacobson and Shannon Tufts 'To Post or Not to Post: Employee Rights and Social Media' (paper presented at American Political Science Association Annual Conference, Seattle WA, 1-4 September 2011,) 7-8.

322 M Hummerston, 'Emerging Issues in Privacy' (Paper presented at SOCAP Swinburne Consumer Affairs Course, Melbourne, 2 October 2007) 2.

323 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice Privacy*, Report No 108 (2008) vol 1, 2535 [74.117].

324 Polly Sprenger, *Wired Sun on Privacy: "Get Over It"* (21 January 1999) WIRED <http://www.wired.com/politics/law/news/1999/01/17538>.

325 Michael Froomkin, 'The Death of Privacy?'52 *Stanford Law Review* 1461, 1461.

326 Warren, above n 289, 196.

327 Judith Rauhofer 'Privacy is dead, get over it! Information privacy and the dream of a risk-free society' (2008) 17:3 *Information & Communications Technology Law* 185, 186.

values of public interest'.[328] The ALRC stated that some of these values are 'freedom of speech, including the freedom of the media and freedom of artistic and creative expression'.[329] Markisinis notes that 'it is obviously often the business of the law to sort out clashes between competing values and interests'[330]. However, Lindsay, in his case note on *ABC v Lenah Game Meats* (*Lenah*), [331] viewed that the 'paramount legal mechanism for balancing interests or rights, such as privacy and freedom of expression, is a bill of rights'[332] which would still require a court to interpret such a bill. Gummow and Hayne JJ in *Lenah* stated that, in US law, protection of privacy may violate the first amendment regarding freedom of speech[333] and US law favours free speech, and therefore privacy gives way.[334] Another balancing act in the US is between security and privacy, where a balance must be struck between absolute security (where nothing is private) and absolute liberty (where the individual is free to choose what is or is not private).[335] Arguably, social media users may have already determined the balance, tipping it towards expression rather than privacy, due to factors such as 'lack of self-control, false belief that we are immune from harm, or a desire for immediate gratification'.[336]

E *Privacy in Social Media*

An individual posting comments on a social networking site is not protected by privacy legislation in Australia.[337] Where information has been posted by an organisation, the *Privacy Act*[338] can apply if the organisation is based in Australia.[339] However, successful legal action has been taken on other grounds, such as

328 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013) 14.

329 Ibid.

330 Markesinis et al, above n 311, 156.

331 *ABC v Lenah Game Meats* (2001) 208 CLR 199.

332 David Lindsay *Casenote: Protection of Privacy under the General Law Following ABC v Lenah Game Meats Pty Ltd: Where to Now?* [2002] Australasian Legal Information Institute <http://www2.austlii.edu.au/~graham/CyberLRes/2002/1/ >.

333 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [118].

334 Ibid [119].

335 J Waldron, 'Security and Liberty: The Image of Balance' (2003) 11(2) *The Journal of Political Philosophy* 191.

336 Alessandro Acquisti, Privacy in Electronic Commerce and the Economics of Immediate Gratification, in EC'04: Proceedings of the 5th ACM Conference on Electronic Commerce 21, 24 (2004) cited in Matthew Sundquist 'Online Privacy Protection: Protecting Privacy, the Social Contract, and the Rule of Law in the Virtual World' (2012) 25 *Regent University Law Review* 153, 162-163.

337 Office of the Australian Information Commissioner, Australian Government, *Do I have rights under the Privacy Act when I use social networking sites?* <http://www.oaic.gov.au/privacy/privacy-topics/internet-communications-and-other-technologies/do-i-have-rights-under-the-privacy-act-when-i-use-social-networking-sites>.

338 *Privacy Act 1988* (Cth) schs 1.

339 Office of the Australian Information Commissioner, Australian Government, *Do I have rights under the Privacy Act when I use social networking sites?* <http://www.oaic.gov.au/privacy/privacy-topics/internet-communications-and-other-technologies/do-i-have-rights-under-the-privacy-act-when-i-use-social-networking-sites>.

defamation, against organisations based outside Australia.[340] If an organisation, which has a presence in Australia, 'collects and stores this information from your page to use',[341] then depending upon the size of that organisation, it may be required to meet the Australian Privacy Principles.[342]

In 1890, Brandeis wrote that, 'numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops"'[343]. These thoughts seem to forecast the rise of 'citizen journalists'[344] through the internet and social media.[345] This is echoed in the *Dover Ray* case where, despite privacy protections, a social media comment 'could reasonably be expected … [to] be circulated within the workplace'.[346] There is an argument that online background checks have the propensity to kill privacy, as people's private lives are made available through social media.[347]

F *Privacy in Relation to Employment Law*

Employers and employees are both bound by a duty of confidence regarding private information.[348] 'The implied term of mutual trust and confidence might, in exceptional cases, provide some protection.[349] There is 'no authority according an employee a right of privacy in relation to activities or conduct at the workplace'[350] under common law. However, there are statutory protections in relation to workplace surveillance by employers which are 'generally left to State or Territory laws, which validly apply to national system employers.'[351] Outside of the work environment, in what is the employee's private life, there are the normal protections which any citizen enjoys against invasion of information privacy; see the current Australian Privacy Principles in the *Privacy Act 1988*.[352] However, the Australian Privacy Commissioner specifically warns that information on social networking sites is public and, therefore,

340 *Gutnick v Dow Jones & Company Inc* [2001] VSC 305 [6].

341 Office of the Australian Information Commissioner, Australian Government, *Are organisations allowed to use the personal information I post on social networking sites?* <http://www.oaic.gov.au/privacy/privacy-topics/internet-communications-and-other-technologies/are-organisations-allowed-to-use-the-personal-information-i-post-on-social-networking-sites>.

342 *Privacy Act 1988* (Cth) sch 1.

343 Warren, above n 289, 195.

344 See Chapter Two.

345 Patrick Keyzer, 'Who Should Speak for the Courts and How? The Courts and the Media Today' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 7.

346 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [51].

347 Sherry D Sanders, 'Privacy is Dead: The Birth of Social Media Background Checks' (12 March 2012) 39 *Southern University Law Review* 243, 243-244.

348 *Prout v British Gas* [1992] FSR 478 cited in Stewart, above n 94 251 [13.24].

349 *RDF Media Group plc v Clements* [2008] IRLR 207, [118], [125], [132] cited in Sappideen et al, above n 1, 207 5.780.

350 Sappideen et al, above n 1, 207 [5.780].

351 *Fair Work Act 2009* (Cth) s 27(2)(m) cited in Stewart, above n 94, 253 13.27.

352 *Privacy Act 1988* (Cth) sch 1.

'potential employers could look at your page and perhaps base their decisions on what they see there'.[353] It may be the individual's expression has voided their privacy.

In the cases outlined in chapter four, the courts do not raise the privacy of the employee's incriminating social media material as an issue. In one case, the applicant raises their concern over the 'covert surveillance of an employee's social media account'.[354] However, this was not pursued by the applicant, possibly due to the apparent contradiction between the applicant wishing to express herself while restricting certain individuals from her expression. Is there a need to protect an employee's personal space from surveillance by their employer?

G *Can Future Privacy Law in Australia Protect Employee's Private Lives?*

The Australian Legal Reform Commission (ALRC) has published an issues paper '*Serious Invasion of Privacy in the Digital Era*' to begin the consultation process for its enquiry regarding the introduction, among other terms of reference, of a statutory cause of action for serious invasions of privacy.[355] Some of the areas of concern relating to employment are, for example, where employers are using social media to view prospective employees prior to employment and requesting employees to provide access to their social media accounts.[356] The report asks question in relation to the introduction of a statutory cause of action for serious invasions of privacy, such as, what would be the requisite threshold level for 'seriousness'.[357] While the High Court, in the *Lenah* case, indicated that a tort of privacy might be available, [358] a suitable case has not come forward at High Court level for this development to occur. It seems more likely, with social media breaches of privacy, that defamation proceedings will take place in preference to arguments about the development of a new cause of action, as in the *Dow Jones and Company Inc v Gutnick*[359] case.

A number of the cases analysed in chapter four concern material that an employee places onto his or her private Facebook page. While it can be argued that conversations within this page are akin to a chat at the pub amongst friends, how many friends are required before it is no longer a private conversation. In the UK case *Smith v Trafford Housing Trust*,[360] the court recognised that the applicant's Facebook

353 Office of the Australian Information Commissioner, Australian Government, *Are organisations allowed to use the personal information I post on social networking sites?* <http://www.oaic.gov.au/privacy/privacy-topics/internet-communications-and-other-technologies/are-organisations-allowed-to-use-the-personal-information-i-post-on-social-networking-sites>.

354 *Banerji v Bowles* [2013] FCCA 1052 [45].

355 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013).

356 Ibid 51-52.

357 Ibid 16, 18-19.

358 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [107]-[108].

359 *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575.

360 *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).

page 'was not purely private, in the sense of being available only to his invitees'[361] in that friends of friends could view it. However, In *Lenah*, Chief Justice Gleeson stated that 'I would regard images and sounds of private activities, recorded by the methods employed in the present case, as confidential'.[362] However, whether material on a private area of Facebook would be considered confidential, and whether legislation would provide injunctive relief against this material being used in the termination of employment is difficult to determine.

The cases in chapter four, with one exception, are unlikely to have had any different outcomes, even with stronger privacy laws in Australia. The only exception is in the case of *O'Keefe v Williams Muir's Pty Ltd*, where the privacy settings were in place and, therefore, the termination of the employee on the basis of information published in their private Facebook account is likely to have been considered harsh, unjust or unreasonable.

H *Conclusion*

The legal theorist Hart espouses the separation of law and morals[363]. Such a separation would indicate that privacy law is not about 'sorting through the moral priorities of the community'. A different view is that privacy is about the protection of rights where 'society's legal order must impose moral duties and obligations on all persons in its territory and it must embody a reasonable consultation hierarchy which will protect human rights'.[364] In *Grosse v Purvis*[365] the decision by the court was not to protect the guilty or misguided, but to protect an innocent person from the violation of their privacy.

Internationally, the balance of rights, rather than the absence of rights, seems to be the most important issue. The US leans heavily toward freedom of expression as the more important right than the right to privacy. The status of freedom of expression in Australia is discussed in Chapter six. The UK acknowledges that both privacy and expression need to be balanced. Callinan J highlighted that in developing privacy law, it is for is for the Australian Parliament to 'to draw the borders between confidentiality and disclosure.*[366]* It is, perhaps, more likely the case that development of privacy law within Australia will be by the Australian Parliament.

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361 Ibid [76].
362 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [39].
363 HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 601.
364 John Rawls, 'The Law of Peoples' in M.D.A. Freeman (ed), *Introduction to Jurisprudence* (Thomson Reuters, 8th ed, 2008) 652.
365 *Grosse v Purvis* [2003] QDC 151.
366 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [275].

VI FREEDOM OF EXPRESSION

A *What is the Right to Freedom of Expression?*

The right to freedom of opinion and expression is contained in article 19 of the International Covenant on Civil and Political Rights (ICCPR).[367] However, there may be restrictions placed on this right where necessary in 'respect of the rights or reputations of others' and 'protection of national security or of public order, or of public health or morals'.[368] This convention came into force in Australia on 13 November 1980.[369] Australia does not recognise the ICCPR in domestic law[370] and, consequently, it is of most use as a persuasive source of argument in cases where legislation is ambiguous.[371]

Freedom of expression can be seen to encompass written and oral communication, including pictorial representation.[372] 'The right of freedom of expression protects people's freedom to communicate in public'.[373] The protection of freedom of expression can be viewed as one of the most significant features of a liberal democracy.[374] Under the common law in Australia 'everybody is free to do anything, subject only to the provisions of the law' where free speech is an assumption with established exceptions such as defamation.[375] The ICCPR also contains the right of an individual to protection of reputation.[376] There is a balance between 'society's interest in freedom of speech and the free exchange of information and ideas … and … an individual's interest in maintaining his or her reputation in society free from unwarranted slur or damage'.[377]

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367 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

368 Ibid art 19(3).

369 Department of Foreign Affairs and Trade, International, Australian Government, *Covenant on Civil and Political Rights* <http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/8B8C6AF11AFB4971CA256B6E0075FE1E>.

370 *Dietrich v The Queen* (1992) 177 CLR 292 [17] (Mason CJ and McHugh J).

371 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 [26] (Mason CJ and Deane J).

372 Neil F Douglas, 'Freedom of Expression under the Australia Constitution' (1993) 16(2) *University of New South Wales Law Journal* 315, 315; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2).

373 Joseph Raz, 'Free Expression and Personal Identification' (1991) 2 *Oxford Journal of Legal Studies* 303, 303.

374 Raymond Wacks, *Understanding Jurisprudence, An Introduction to Legal Theory* (Oxford University Press 3rd ed 2012) 254 [10.6].

375 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564-5.

376 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17(1).

377 *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575 [23].

B *Is this right recognised in Australia?*

While the 'drafters of the Commonwealth Constitution did include several provisions in the constitution which resemble rights there are 'different views as to how many of these rights-protective limitations there are in the Constitution.[378] Of these provisions which resemble rights, there is 'no provision guaranteeing freedom of expression'.[379] However, the High Court has identified that the *Constitution* contains implied rights such as 'implied in the Constitution, as an instrument of Federal Government, that neither the Commonwealth nor a State legislature is at liberty to direct its legislation toward the destruction of the normal activities of the Commonwealth or States'.[380] The High Court has overwhelmingly found that there was no implied right of freedom of communication in the *Constitution*.[381]

In 1992 the decisions in the cases *Australian Capital Television Pty Ltd v Commonwealth (No 2)*[382] (ACTV) and *Nationwide News Pty Ltd v Wills*[383] (*Nationwide*) were handed down by the High Court. In ACTV, the High Court determined that there was an implied right of political communication in relation to a law designed to limit political broadcasts. The court explained that 'Freedom of communication as an indispensable element in representative government'[384] at least 'in relation to public affairs and political discussion'.[385] In *Nationwide,* the High Court invalidated a law which prohibited criticism of the Industrial Relations Commission and therefore comment on public affairs rather than political comment.[386] In a similar ruling to ACTV, the High Court found in *Nationwide* that, 'to sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential'.[387]

C *Are there limits on the implied freedom of political communication?*

This freedom is 'not absolute', and in *Lange v Australian Broadcasting Corporation*[388] (Lange), defamation proceedings were brought against a national

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378 Jennifer Clarke, Patrick Keyzer, James Stellios, *Hanks Australian Constitutional Law* (LexisNexis Butterworths, 8th ed, 2009) 1159 [10.1.5].

379 Neil F Douglas, 'Freedom of Expression under the Australia Constitution' (1993) 16(2) *University of New South Wales Law Journal* 315, 319.

380 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

381 *Miller v TCN Nine Pty Ltd* (1986) 161 CLR 556 [11] (Gibbs CJ), [28] (Mason J), [33] (Brennan J), [13] (Deane J), [21] (Dawson J).

382 *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1977) 177 CLR 106.

383 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

384 *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1977) 177 CLR 106, [37] (Mason CJ).

385 Ibid [38] (Mason CJ).

386 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 [2]-[3], [27] (Mason CJ).

387 Ibid [18] (Brennan J).

388 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

broadcaster. This broadcaster defended itself on the basis of 'freedom of political communication'. To resolve this matter, a test was developed.[389] The test was used to determine whether the contested law was compatible with the maintenance of the Constitution and that the law was reasonably appropriate and adapted to that end.[390]. The test was modified by the majority of the High Court in *Coleman v Power*[391] to read:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government.[392]

Freedom of political communication is not complete legal freedom to say whatever is wished and, as noted above, even in respect of political expression there are complexities. The freedom of communication of political and public affairs is an implied right with respect to the legislation that prevents representative democracy rather than a general freedom.

D *What freedom of expression rights do the UK recognise?*

In the UK 'a right to free speech (or expression) was not generally recognized by the common law'.[393] As noted in chapter five, the United Kingdom passed Human Rights legislation in 1998.[394] This legislation, as well as enshrining privacy rights, also enshrined freedom of expression rights contained within the *European Convention on Human Rights*[395] as domestic law. There is scope under the Convention to restrict freedom of expression 'subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society'.[396] Therefore, in the UK, freedom of expression is not an absolute right.

It appears that the courts tend to give greater protection to political expression as opposed to celebrity gossip.[397] In this sense the courts in the UK mirror those in the United States of America and Australia. *Mosley v News Group Newspapers Ltd*[398] involved a newspaper releasing intimate sexual encounters regarding the applicant.

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389 Patrick Keyzer, *Principles of Australian Constitutional Law* (LexisNexis Butterworths 3rd ed, 2010) 304 [18.14].

390 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

391 *Coleman v Power* (2004) 220 CLR 1.

392 Ibid [74] (McHugh J), [196] Gummow and Hayne JJ), [210] (Kirby J).

393 Eric Barendt, 'Freedom of Expression in the United Kingdom Under the Human Rights Act 1998' (2009) 84(3) *Indiana Law Journal* 851, 851.

394 *Human Rights Act 1998* (UK).

395 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 10.

396 Ibid art 10(2).

397 Eric Barendt, 'Freedom of Expression in the United Kingdom Under the Human Rights Act 1998' (2009) 84(3) *Indiana Law Journal* 851, 857.

398 *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

While the court found in favour of the applicant, the court stressed that this did not imply that 'serious investigative journalism into crime or wrongdoing, where the public interest is more genuinely engaged' would be inhibited.[399] The UK would appear to have greater rights in relation to freedom of expression than Australia.

E *What freedom of expression rights do the US recognise?*

The US has various rights enshrined in its constitution. The first amendment to the US Constitution provides for certain freedoms, such as 'freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.[400] The US Supreme Court devised a test to determine exactly what falls within the notion of freedom of speech. This test involves looking at whether an 'intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.[401] This is a broader test than applied in Australia, where freedom of communication is not as broad. However, freedom of speech is not an absolute right in the US, with incitement to legal action and obscenity able to be banned by the government.[402] As with Australia, interpretation of the law falls to the courts, with judges a key element in protecting free speech.[403]

To highlight the importance of freedom of expression in the US, compared to the right to privacy, recent cases have decided in favour freedom of expression over privacy. One case, in particular, involved a law to restrict pharmaceutical data information from public display without the patients consent. Drug manufacturers believed the law restricted freedom of expression and the court agreed that liberty was more important than privacy.[404]

F *What is the right to Freedom of Political Expression in relation to Social Media?*

In Australia the *Dow Jones and Company Inc v Gutnick*[405] case highlights the different jurisdictional issues with publishing on social media as opposed to traditional media, such as print media. The respondent in this case had originally taken action against the applicant for defamation through an online journal. Despite the base of operations for the applicant being located in the US, the respondent was

399 Ibid [234].
400 *United States Constitution* amend I.
401 Spence v California 418 US 405, 410-11 cited in Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 134.
402 Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 135
403 Robert M O'Neil, 'Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill Rights Really Matter?' (1994) 22 *Federal Law Review* 1, 6.
404 *Sorrell v IMS Health* 564 US 1 (2011) 1.
405 *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575.

able to convince the court that his base of operations was Australia. The advantage for the respondent in doing so was that Australia has greater restrictions on freedom of expression in relation to defamation. This case demonstrates that jurisdiction shopping may be easier in cases involving social media rather than traditional media. Therefore, the medium that social media uses is important in the outcome of legal action.

The Office of the Australian Information Commissioner provides advice on what a person can do if there is a posting on a social media site that they do not like. The Commissioner states that 'You can also contact the social networking site and ask them to remove the information. Most social networking sites have a grievance procedure in place, and are interested in keeping their sites friendly and their users happy'.[406] Outside of a defamation action and freedom of expression with respect to politics, the action recommended by the Commissioner is, arguably, the best an Australian citizen can hope for. Both the UK and US, as highlighted above, offer a higher level of protection.

In chapter two, it was noted that Facebook was being used to assist in creating web pages of political expression such as the anti FARC Facebook site. In *Bland v Roberts*[407] a US court held that 'liking a candidate on Facebook does not constitute protected speech', which meant the employee could be fired for such an action, as the expression was not protected by the US first amendment.[408] However, there have also been cases in the US where Courts have ruled to the contrary.[409] Courts in the US have appeared to struggle with new media types being used for communication. This difficulty has included cable television through to compact discs.[410] This highlights that the medium used will present legal issues and content cannot always be treated as medium neutral.

In Australia, a fundamental question is whether social media is like a chat at the pub amongst friends or does it enable each user to be their own publisher and therefore provide a greater and/or easier reach for 'ordinary people'. A recent government report noted that some submissions such as

Telstra and News Limited contended that the online environment, with its relatively low barriers to entry compared to traditional media, has created a vast diversity of

406 Office of the Australian Information Commissioner, Australian Government, *What can I do if someone posts information about me on a social networking site that I want removed?* <http://www.oaic.gov.au/privacy/privacy-topics/internet-communications-and-other-technologies/what-can-i-do-if-someone-posts-information-about-me-on-a-social-networking-site-that-i-want-removed>.

407 *Bland v Roberts* 857 F. Supp. 2d 599 (E.D. Va. 2012).

408 Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 129-130.

409 Ibid 130.

410 Robert M O'Neil, 'Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill Rights Really Matter?' (1994) 22 *Federal Law Review* 1, 10.

voices, removing all justification for any ongoing regulation of media ownership other than general competition law.[411]

To counter this, the paper suggested that diversity could change and also that people were still getting their news 'from the same news gathering organisations'.[412] It may not be clear to what extent social media is a sole source of information, or an additional source of information, but people do use social media, as noted in chapter two.

G *How does the implied right of political expression apply to unfair dismissal cases and is social media increasing the incidence?*

In the US, the Supreme Court has developed a test in relation to the speech of those in public employment, where the employee is protected if the employee speaks as a private individual on a matter of public concern and the speech outweighs the government's interest in promoting the efficiency of public services.[413] One of the key factors in weighing a private citizen's speech with the role of a government employee is whether the person, who is the target of the employee's speech, has a relationship where the 'personal loyalty and confidence necessary to the proper functioning' is involved.[414] This echoes the implied term of 'mutual trust and confidence' in Australian employment contracts raised in chapter three, though the trust applies to the employer at a firm rather than just at a personal level. There were other factors raised in the case, such as 'whether the speech interferes with maintaining discipline and harmony in the workplace',[415] 'does the speech interfere with the employee's "daily duties" in the workplace'[416] or the 'normal operations of the workplace'[417] which form the 'state's administrative efficiency interest'.[418]

In Australia there does not appear to be a judicial test to balance freedom of expression, or even freedom of political communication, with employment. In the *Banerji* case, raised in chapter three, the court had determined that the implied right to political communication is not unfettered and, even if it were, it would not entitle

411 Australian Government, *Convergence Review*, March 2012, 5.

412 Ibid 6.

413 Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 139.

414 *Pickering v Board of Examiners* 391 US 570 (1968) cited in Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 139.

415 Ibid.

416 *Pickering v Board of Examiners* 391 US 572-573 (1968) cited in Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 139.

417 *Pickering v Board of Examiners* 391 US 573 (1968) cited in Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 139.

418 *Rankin v McPherson* 483 US 378, 388 (1987) cited in Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 139.

someone to breach their employment contract. There would also appear to be no issue with whether the comments were made anonymously and what effect anonymity would have. At issue is not what others think of the comments but that the comments were made in breach of the employment contract.

In the UK case *Smith v Trafford Housing Trust*,[419] the applicant was demoted with a consequential pay reduction for gross misconduct in posting two comments on his Facebook page disagreeing with gay marriage.[420] The applicant did identify his place of work on Facebook[421] though the judge did state a person would know his Facebook page contained personal rather than work comments.[422] The core issue in the case was whether the comments on his Facebook page were seen as work related. The judge found that they were not.[423] The Judge in this case determined that the applicant's Facebook page was a virtual meeting room where friends could catch up by choice.[424] This case seems to support both the private life of a person and their right to freedom of expression. It would appear unlikely, from the case analysis in chapter four, that an Australian court or tribunal would have viewed the use of Facebook the same way.

H *Conclusion*

The US exhibits a strong affinity for freedom of expression, though there are still limits, and is not an absolute right. The UK has enacted European rights into their domestic law so that the right to expression is much stronger. Australia has a weaker version of the right to freedom of expression through the implied right to political communication. However, in all cases there must still be a balance with other rights such as privacy or protection of reputation.

Australia may be playing 'catch-up' in relation to the right of expression and either a UK or US-style right would have assisted in the *Banerji* and *Dover-Ray* cases. In the short term, the US test for freedom of speech by public servants would appear to be a readily adaptable test for the Australian environment. Justice Brandeis in the US stated, 'if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence'.[425]

419 *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).
420 Ibid [1], [4]-[5].
421 Ibid [31].
422 Ibid [57].
423 Ibid [72]-[75].
424 Ibid [76].
425 *Whitney v California* 274 US 357, 378 (1927).

VII CONCLUSION

The use of social media is increasing in Australia, both within business and personal lives. While there is some debate as to whether people will separate their business and private online identities, information is significantly more accessible when it is held electronically. In this sense, irrespective of whether a person has, and uses, either their personal or business identity to publish material on a social media site, the material has the potential to reach an audience substantially larger than what may have been intended. A number of the cases analysed support this contention.

Social media users often try to achieve a balance between protecting the privacy of their information while, at the same time, wanting to use that information in social interaction. While more effective restrictions can occur in a 'pub conversation' the ramifications of information being held electronically is greater both from a distribution and perpetuity sense when online, as reflected in the case analysis.

Social media related employment disputes in Australia are relatively new. Employers are likely to become more aware over time that material published by their employees, in relation to employment issues, might have a detrimental impact on the employer's business. In effect, by publishing this information, the employee may harm the mutual trust and confidence of the employment relationship. As in any personal relationship, such an injury is likely to mark the end of that relationship. The cases analysed to date do not necessarily indicate a coherent approach to unfair dismissal action in Australia, with little reference made by the Courts to mutual trust and confidence as a significant factor leading up to the dismissal decision.

In similar cases, the US appears to weigh the right to freedom of expression more highly than the privacy of an individual. The UK has enacted European rights into their domestic law which include rights to both privacy and freedom of expression, which seems to provide a relatively balanced approach. In Australia there is no general right of privacy and only a limited right of freedom of expression within the more general right to freedom of political expression. The UK model seems to provide quite a balanced approach to managing individual rights of privacy and freedom of expression and, in my opinion, this model could be usefully adopted into Australian law.

Australian unfair dismissal cases seem to be decided less on the basis of privacy or even freedom of expression issues, despite people apparently wanting both greater privacy and freedom of expression, and more determined solely in relation to the interpretation of the employment contract. In this sense, the implied term of mutual trust and confidence may play a greater role in these types of decisions in the future. However, it seems likely that for this to occur, statutory change would be required to

ensure that mutual trust and confidence is included as an implied term in employment contracts.

Australia could adopt the test used in the USA to determine if a public servant exercising free speech should face disciplinary action. However, in light of the *Banerji* case, I would argue that it is not just the trust and confidence aspects of the personal relationship between the employee and their direct manager that is important, but also the mutual trust and confidence between the employee and their department or the government as a whole. In the *Banerji* case, the applicant had made derogatory comments about the government as a whole and, in particular, the policies of the department in which she worked. It is clear that such comments have the potential to damage the employment relationship between the employee and the government as a whole, rather than just with the employee's individual manager, through a reduction in trust and confidence.

While stronger protection of privacy or the right to expression may help to determine 'who's right or wrong' in relation to an argument, employees would be well advised to keep in mind the underlying relationship with their employer. From a practical perspective, one factor may actually be more important than freedom of speech or privacy; that is, as stated by the judge in the *Stutsel v Linfox*, the '"Law of Probability - The probability of being watched is directly proportional to the stupidity of your act." Here is wisdom.'[426] In my view, there will be less cases of unfair dismissal relating to social media if employees start to take responsibility for their own actions in this domain and have a realistic awareness of the effect that their actions on social media can have on the relationship with their employer.

In conclusion, by including mutual trust and confidence as a statutory implied term in employment contracts, adopting the US test regarding public servants expressing political views and also legislatively adopting the UK model for the inclusion of privacy and freedom of expression considerations in Australian law should help provide a more consistent basis in unfair dismissal cases involving social media.

426 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [95].