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The University of Notre Dame Australia
School of Law

**SOCIAL MEDIA IN THE WORKPLACE: LEGAL
CHALLENGES FOR EMPLOYERS AND EMPLOYEES**

Jacques Clarence Duvenhage
LLB, LLM (University of Pretoria)

A thesis submitted in fulfilment of the requirements of the
Degree of Master of Laws by Research

2017

DECLARATION

This thesis does not, to the best of my knowledge, contain previously published or written material by another person except where due reference is made in the text, or any material previously submitted for a degree in any higher degree institution.

Jacques Duvenhage

Date

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I am forever grateful to God for giving me the opportunity to write this thesis. His goodness has been portrayed by Proverbs 3:5-6: ‘Trust in the Lord with all your heart, and lean not on your own understanding. In all your ways acknowledge Him, and He shall direct your path’.

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TABLE OF CONTENTS

	Page
DECLARATION.....	i
ACKNOWLEDGEMENTS.....	ii
LIST OF ABBREVIATED TERMS	v
ABSTRACT	vi
CHAPTER 1 INTRODUCTION AND BACKGROUND TO THE RESEARCH PROBLEM	1
1.1 INTRODUCTION	1
1.2 BACKGROUND TO THE PROBLEM	2
1.3 RESEARCH QUESTIONS	7
1.4 RESEARCH AIMS	7
1.5 RESEARCH CONTEXT.....	8
1.6 RESEARCH METHODOLOGY	9
1.7 STRUCTURE OF THE THESIS	9
1.8 CONCLUSION	11
CHAPTER 2 SOCIAL MEDIA AND THE WORKPLACE.....	12
2.1 INTRODUCTION	12
2.2 DEVELOPMENT OF SOCIAL MEDIA	13
2.2.1 Advantages and Disadvantages of Social Media in the Workplace	17
2.3 SOCIAL MEDIA IN THE WORKPLACE.....	20
2.3.1 The Meaning of ‘Workplace’	21
2.4 THE EMPLOYER–EMPLOYEE RELATIONSHIP.....	25
2.4.1 The Development of the Employment Relationship.....	26
2.4.2 The Employment Contract.....	31
2.4.3 Employment Contract Duties.....	42
2.4.4 Employee Duties.....	48
2.4.5 Employer Duties	55
2.4.6 Discipline of Employees using Social Media Within and Beyond the Workplace.....	66
2.5 CONCLUSION	70
CHAPTER 3 LEGAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA IN THE WORKPLACE.....	73
3.1 INTRODUCTION	73

3.2	PRIVACY AND SOCIAL MEDIA IN THE WORKPLACE.....	75
3.2.1	Defining Privacy	76
3.2.2	Privacy Law in Australia	77
3.2.3	Privacy, Social Media and Employment.....	88
3.2.4	Privacy and Confidentiality	99
3.3	DEFAMATION.....	105
3.3.1	Defamation Action.....	110
3.3.2	Defences.....	124
3.4	CYBERBULLYING.....	130
3.4.1	What is Workplace Bullying?.....	131
3.4.2	Vicarious Liability of the Employer Through Cyberbullying Posts...	139
3.5	CONCLUSION	141
	CHAPTER 4 CONTROL AND MANAGEMENT OF SOCIAL MEDIA IN THE WORKPLACE	145
4.1	INTRODUCTION	145
4.2	WORKPLACE SURVEILLANCE	146
4.2.1	Legal Framework of Workplace Surveillance	150
4.2.2	Workplace Surveillance and Employment Contracts	157
4.2.3	Key Issues Concerning Workplace Surveillance.....	162
4.3	SOCIAL MEDIA AND WORKPLACE POLICIES.....	176
4.3.1	Workplace Policies	178
4.3.2	Relationship Between Workplace Policies and Employment Contracts	182
4.4	CONCLUSION	190
	CHAPTER 5 OVERVIEW, CONCLUSIONS AND RECOMMENDATIONS.....	193
5.1	INTRODUCTION	193
5.2	OVERVIEW OF THESIS AND SUMMARY OF KEY ISSUES	193
5.3	KEY RECOMMENDATIONS	200
5.4	FURTHER RESEARCH	201
5.5	CONCLUDING REMARKS	202
	APPENDIX 1 MODEL WORKPLACE SOCIAL MEDIA POLICY	203
	BIBLIOGRAPHY	210

LIST OF ABBREVIATED TERMS

ALRC	Australian Law Reform Commission
APP	Australian Privacy Principles
BOYD	Bring Your Own Device
FWA	<i>Fair Work Act 2009</i> (Cth)
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
ILO	International Labour Organisation

ABSTRACT

Social media has become prevalent through platforms like Facebook, Twitter and LinkedIn and has essentially changed the way people communicate. At first, social media networks were used for private purposes; however, businesses have started using social media as a way to improve and advertise their products online. Therefore, social media presents many benefits such as lower costs for advertising and convenience for customers to view and share products online. However, the advent of social media in the business environment also creates challenges within the workplace that can have a negative effect on the employer–employee relationship. This is especially significant when social media is used inappropriately within and beyond the workplace. Therefore, the aim of this research is to address the legal challenges created by social media in the workplace, and whether employers have a contractual right to control and/or manage employees using social media beyond the workplace.

The use of social media in the workplace complicates the employment relationship because of the various legal issues it creates. Therefore, the aim of this thesis is to highlight these legal issues within the workplace environment and how the use of social media affects the employment relationship when used within and beyond the workplace. Hence, this thesis will determine the meaning of a ‘workplace’ and how this may present legal issues relating to the use of social media outside of working hours. This discussion is coupled with the duties within an employment contract and whether social media has any impact on these duties within the employment relationship when determining the use of social media outside of working hours. Moreover, this thesis will examine the key legal issues arising out of the use of social media in the workplace, which include privacy and defamation as well as cyberbullying. These are key issues in relation to the ubiquitous nature of social media in the workplace.

Focusing on these legal issues, this thesis will address the means by which employers can control and monitor the use of social media by employees within and outside the workplace through existing workplace surveillance legislation and workplace policies. However, the implementation of social media workplace policies to regulate off-duty

conduct of employees may create some concern in relation to a breach of privacy. Therefore, this thesis considers the impact of privacy principles within workplace surveillance and to what extent an employer can regulate the use of social media by an employee beyond the workplace.

This thesis concludes with key recommendations on the possible control and monitoring of social media within and beyond the workplace. The concluding remarks find that by introducing the integration of employment contracts and social media workplace policies, together with the implied duties under the contract, it is acceptable for employers to manage social media beyond the workplace. Secondly, this thesis found that educating and training employees on the possible risks social media in the workplace can have and keeping the workplace policies up to date, may reduce the legal challenges of social media beyond the workplace. Lastly, this thesis proposed that existing workplace surveillance legislation be amended to include specific control and monitoring of social media within and beyond the workplace.

CHAPTER 1

INTRODUCTION AND BACKGROUND TO THE RESEARCH PROBLEM

1.1 INTRODUCTION

Social media is a global phenomenon and one of the most exciting technological developments in modern times. In 2016, it was estimated that 2.34 billion people are active on social media worldwide and that this will increase with time.¹ As the name suggests, social media is about people connecting with each other within an online platform as a social means of communication. Further, as noted by Elefant, social media is ‘a catch phrase that describes technology that facilitates interactive information, user-created content and collaboration’.² However, it is not only a social platform used by individuals for personal and social purposes. It is also now used extensively by businesses and corporations to advertise, promote and conduct business.³ Therefore, social media has become well entrenched in the workplace environment. Whether for personal or business purposes, there is no doubt that social media has many advantages. However, the use of social media in the workplace also has its legal challenges and can have a negative impact on the employer–employee relationship when it is misused, whether intentionally or unintentionally.

The primary purpose of this research is therefore to examine the use of social media beyond the workplace and the implications for the employer–employee relationship. This thesis will therefore focus on the extent to which employers can monitor, control and manage employee’s use of social media, not only within working hours, but also beyond the workplace. A key question addressed is: ‘To what extent and on what legal basis can an employer regulate or monitor the use of social media by an employee within and outside the workplace?’. In addressing this question, this thesis argues for

¹Statista, *Number of Social Media Users Worldwide From 2010 to 2020* (2016)

<<https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/>>.

²Carolyn Elefant, ‘The Power of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media’ (2011) 32 *Energy Law Journal* 1, 4.

³Jessica Ireton, ‘Social Media: What Control Do Employers Have Over Employee Social Media Activity in the Workplace?’ (2014) 14 *Houston Business and Tax Law Journal* 144, 145.

the effective and purposeful use of social media policies, one of the most important workplace policies, as an essential tool for managing the use of social media in the workplace. By way of introduction to the thesis, this chapter sets out the background to the research problem, the research questions and research aims. It explains in brief the research methodology and framework, and provides an outline of the thesis structure.

1.2 BACKGROUND TO THE PROBLEM

During the past decade, the social media phenomenon has grown significantly with people using social media such as Facebook, LinkedIn and Twitter regularly and on a daily basis.⁴ Increasingly, social media has also come to play a major role in the workplace as a means of communication and conducting business.⁵ As Holland states ‘social media was originally designed for friends to keep in touch but it has morphed into one of the most powerful communication tools, both inside and outside the workplace’.⁶ To this end, social media has fundamentally changed how the workplace operates and how employers and employees interact with each other. McDonald and Thompson for instance note that ‘social media has become a pervasive feature of the contemporary employment relationship, fundamentally altering the reach, speed and permanency of work-related conduct and expectations’.⁷ Moreover, while social media has many benefits, there are legal risks and challenges associated with its use in the workplace. This is further observed by Siow who remarks that the ‘trend of cases coming before the Fair Work Commission indicates that employers (and the law) are increasingly grappling with the impact of social media in their workplace’.⁸ A number of these cases, which are discussed in this thesis, also indicate that employers need to

⁴Emily Langer, ‘What’s Trending? Social Media and its Effects on Organizational Communication’ (2014) 17 *UW-L Journal of Undergraduate Research* 1.

⁵Michael Silverman, Elmira Bakhshalian and Laura Hillman, ‘Social Media and Employee Voice: The Current Landscape’ (CIPD Research Report, March 2013) 8 – 9
<https://www.cipd.co.uk/Images/social-media-and-employee-voice_2013-current-landscape-sop_tcm18-10327.pdf>.

⁶ Peter Holland, ‘Is Social Media the New Employee Voice?’ *Business Insights* (online), 28 January 2016 <<https://business.monash.edu/business-insights/is-social-media-the-new-employee-voice>>.

⁷Paula McDonald and Paul Thompson, ‘Social Media(tion) and the Reshaping of Public/Private Boundaries in Employment Relations’ (2016) 18 *International Journal of Management Reviews* 69, 69.

⁸Veronica Siow, ‘The Impact of Social Media in the Workplace: An Employer's Perspective’ (2013) 32(4) *Communications Law Bulletin* 12, 12.

be ‘proactive and address social media use by employees through an effective social media policy’.⁹

Therefore, the primary aim of this research is to examine the use of social media in the workplace and beyond and the key legal issues confronting employers and employees. Central to this is the management and control of social media in the workplace and beyond through effective social media policies. Hence, a core aspect of this thesis is in the first instance to provide some background context on the nature of social media, the meaning of a workplace and its relevance for the employer–employee relationship given the fact that social media is accessed any time and any place and is ubiquitous in the workplace. Understanding the definition of ‘workplace’ is particularly relevant when considering the management and control of social media outside the traditional workplace environment. As technology and social media can be used anywhere, any place and any time, the traditional divide between private and public spheres of life and the workplace have become increasingly blurred. The divide is apparent in the changing nature of the term ‘workplace’ and whether the employment relationship continues outside the usual ‘cubicle or office’.¹⁰ Therefore, with the constant change in technology, as well as the broader scope of what a ‘workplace’ entails, it is fair to state that a ‘workplace’ can be any place and employees do not have to be bound to a physical space such as an office. Even an employee’s home can classify as a ‘workplace’ when dealing with technology provided by the employer. This aspect is addressed in Chapter 2.

A further discussion to the above-mentioned aspect in Chapter 2 relates to the use of social media and its impact on the employment contract. The implied terms and duties of employers and employees in an employment contract play a significant role when social media is used within the workplace and beyond. These implied terms and duties will need to address the changing nature of the employment relationship in regard to social media and its uses. These duties will further consider whether the control and monitoring of social media outside the workplace is limited to an employer’s duty towards his or her business and other employees.

⁹HLS Legal, *Social Media is a Workplace Phenomenon* (2017)
<<http://hlslegal.com.au/news/article/social-media-is-a-workplace-phenomenon>>.

¹⁰Ibid.

Notwithstanding the many advantages of social media, its use in the workplace does raise various legal issues. This thesis will therefore address only three key issues, namely the use of social media in relation to privacy, defamation and cyberbullying. These legal issues will be examined in the context of the employer–employee relationship and the implications for the management and control of social media in the workplace and beyond. These key issues are dealt with in Chapter 3.

The first social media issue concerning the employment relationship relates to privacy. Social media is a platform designed to share ideas and information and with this privacy issues can be identified. Specifically, in the context of employment law, privacy and social media present certain legal changes with respect to the employer–employee relationship. However, there are limited avenues for privacy protection especially in relation to the conduct of individuals in a private capacity. The *Privacy Act 1988* (Cth) as amended provides some protection on the use and disclosure of personal information of an individual.¹¹ However, privacy legislation affords limited protection in terms of social media in the workplace and Australian courts have not yet accepted any form of unjustified invasion of privacy of an individual.¹² In regard to privacy and the workplace, both employers and employees have an interest in protecting their privacy. Therefore, when social media plays a role in accessing information it can affect the employer–employee relationship, especially when private information is accessed outside the workplace. Therefore, this part of the thesis will examine the accessing of private information via social media pre-, during and post-employment and whether confidential information can play a role in the management and control of social media by an employer.

The second legal issue concerns the use of social media by employers or employees, but especially the use of social media by employees, that may give rise to claims for defamation. As noted, social media is global, easily accessible and instant. It can therefore influence the reputation of individuals and businesses in a negative or a

¹¹See also Robert Slattery and Marilyn Krawitz, ‘Mark Zuckerberg, the Cookie Monster – Australian Privacy Law and Internet Cookies’ (2014) 16(1) *Flinders Law Journal* 1.

¹²See, eg, *Grosse v Purvis* [2003] QDC 151; *Sally Fitzgerald v Dianna Smith T/A Escape Hair Design* [2010] FWA 7358 (24 September 2010).

positive way.¹³ Although social media has many advantages and can be used in many positive ways, on the flip side it can also harm employees and employers, whether intentionally or unintentionally. When using social media, the way of communication is electronic and therefore published material will be available to the public. At times, ‘the public outpouring of malice by means of social media is an antisocial phenomenon of these times’.¹⁴ Therefore, the use of social media in the workplace to harm an employer’s business reputation or a co-worker’s reputation may be action by an employee subject to dismissal.

The challenge with defamation and social media in the workplace environment is to identify the defamatory published information and who posted the information. This has significant drawbacks for a business’s reputation, which can result in an employee being dismissed because of their behaviour on the social media site. This is demonstrated in the recent case *Malcolm Pearson v Linfox Australia Pty Ltd*,¹⁵ where the employee’s employment was terminated owing to comments the employee had posted on social media about his employer. As a result, the termination was seen as fair because the employer had implemented a form of social media policy against the use of social media in the workplace, which was ultimately breached by the employee. On the flip side, an employer needs to be careful when dismissing employees because of the information published on social media. This is because an employee may have a defence of truth or opinion for the published material. These defences are put in place to protect the employee from being dismissed because of the published information on social media.

The last issue relates to the effect of cyberbullying.¹⁶ Cyberbullying in the workplace is a critical legal issue, especially when social media is used as a means to perform an act of bullying on a co-worker or employer.¹⁷ A workplace-related cyberbullying

¹³Deborah Lupton, ‘Feeling Better Connected: Academics’ Use of Social Media’ (Canberra: News & Media Research Centre, University of Canberra, June 2014) 26 <<http://www.canberra.edu.au/about-uc/faculties/arts-design/attachments2/pdf/n-and-mrc/Feeling-Better-Connected-report-final.pdf>>.

¹⁴Patrick George (ed) et al, *Social Media and the Law* (LexisNexis Australia, 2014) 137. See also Duxton Stewart, *Social Media and the Law* (Routledge, 2013) 23-50.

¹⁵[2014] FWC 446. See also *Glen Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 (19 December 2011).

¹⁶One example is the case of *Cairns v Modi* [2012] EWHC 756 (QB) that led to the first social media case involving defamation.

¹⁷John Weber, *Should Companies Monitor Their Employees' Social Media? The Wall Street Journal*, 22 October 2014 <<http://www.wsj.com/articles/should-companies-monitor-their-employees-social->

matter was illustrated in the case of a young female, Brodie Panlock, who took her own life when co-workers continued bullying her in and outside the workplace.¹⁸ Therefore, the communication and conduct between co-workers is not confined to the workplace and therefore issues such as cyberbullying can occur, which present a threat to workplace safety. It may be difficult to categorise and control cyberbullying that occurs outside of working hours, but the law recognises the need for employers to manage conduct beyond the workplace.¹⁹

Therefore, having examined these key legal issues, the thesis moves on in Chapter 4 to address the final research aim concerning the right of the employer to monitor and control employees' use of social media within and beyond the workplace, and the importance of social media policies in protecting the employer–employee relationship.²⁰ A central, and somewhat controversial, aspect of monitoring and controlling technology and social media in the workplace is the use of surveillance technologies. This part of the thesis will therefore discuss the legislative framework of workplace surveillance and its place in monitoring social media with a view to managing the employer–employee relationship while simultaneously recognising the role of social media in the workplace. The second part of Chapter 4 then discusses the importance of developing and implementing social media workplace policies that will facilitate the effective management and control of the use of social media within and outside the workplace where relevant and permissible in order to ensure harmonious workplace relations.

media-1399648685>; See also *Richard O'Connor v Outdoor Creations* [2011] FWA 3081 (24 May 2011).

¹⁸ Department of Justice and Regulation, Government of Victoria, *Bullying-Brodie's Law* (25 November 2014) <<http://www.justice.vic.gov.au/home/safer+communities/crime+prevention/bullying+-+brodies+law>>. See also Geoff Wilkinson, 'Brodie's Law Means Workplace and Cyber Bullies Face 10 Years in Jail', *The Herald Sun* (online), 5 April 2011 <<http://www.heraldsun.com.au/news/workplace-and-cyber-bullies-face-up-to-10-years-jail-under-anti-harassment-brodie-panlock-laws/story-e6frf7jo-1226033612374>>.

¹⁹ Bettina West, Mary Foster, Avner Levin, Jocelyn Edmison and Daniela Robibero, 'Cyberbullying at Work: In Search of Effective Guidance' (2014) 3 *Laws* 598, 601. See also Sue Lannin, 'Cyberbullying: Government Crackdown to Target Social Media Sites', *ABC News* (online), 3 December 2014 <<http://www.abc.net.au/news/2014-12-03/government-plans-cyberbullying-crackdown/5935560>>.

²⁰ Employees have a general duty of disclosure and duty of care toward their employers. Equally, employers have a duty to provide work, act reasonably as well as a duty of care towards their employees. Chris Schlag, 'The NLRB's Social Media Guidelines a Lose-Lose: Why the NLRB's Stance on Social Media Fails to Fully Address Employer's Concerns and Dilutes Employee Protections' (2010 – 2013) *Cornell HR Review* 2.

1.3 RESEARCH QUESTIONS

Against this background to the research problem, the following questions will be addressed:

- (1) What is social media?
- (2) What constitutes a 'workplace'?
- (3) What legal challenges arise for employers and employees when using social media within and beyond the workplace?
- (4) To what extent can employers control and manage the conduct of employees in relation to technology and social media within and outside the workplace and working hours?
- (5) What role does workplace surveillance play in managing and controlling the use of social media in and beyond the workplace?
- (6) How can employment contracts and social media workplace policies be adapted and implemented in order to monitor conduct within and outside the workplace?

1.4 RESEARCH AIMS

In order to address the research questions, the research aims are to:

- (1) Explain what social media is.
- (2) Discuss the meaning of 'workplace'.
- (3) Examine the duties within the employment contract in relation to the use of social media.
- (4) Discuss the relevant legal challenges faced by employers in the misuse of social media by an employee outside the workplace.
- (5) Analyse the employment laws in Australia that are in place to monitor social media in the workplace.
- (6) Examine the use of workplace surveillance, employment contracts and social media workplace policies as tools to control and monitor the use social media within and outside the workplace.

1.5 RESEARCH CONTEXT

This research problem is examined within the framework of employment law. Therefore, general employment law principles and guidelines will be used to consider the research questions and aims of this thesis relating to social media in the workplace and the implications for the employer–employee relationship. Employment law deals with the fundamental principles of law that regulate the relationship between an employer and employee within and beyond the workplace. As explained by Edward and Robinson, employment law ‘is defined more broadly as the negotiated relationships between employers and employees’.²¹ Likewise, the International Labour Organisation (‘ILO’) identifies an employment relationship within employment law as ‘the legal link between employers and employees. It exists when a person performs work or services under certain conditions in return for remuneration’.²² Therefore, this thesis will draw on constructive principles of employment law to examine the use of social media in the workplace and the employer–employee relationship.

This research examines the common law employment relationship between an employer and employee and how this relationship has changed with the introduction of social media in the workplace. The common law duties, in particular of good faith, duty of care and mutual trust and confidence, between the employer and employee are also fundamental to the existence of the employment relationship.²³ In this regard, the use of social media will indicate how these duties can be negatively impacted when either the employer or employee misuse social media in the workplace.

In addition to the common law, the thesis will draw on statutory law. In this regard, the field of employment law in Australia is complex owing to the myriad of legislation that exists and the complex and often confusing relationship between Commonwealth (federal) and State and Territory legislation. Although in terms of the constitutional

²¹Kyle Edwards and Sarah Robinson, *Labour and Employment Law: A Career Guide* (Bernard Koteen Office of Public Interest Advising Harvard Law School, 2012), 4
<<http://hls.harvard.edu/content/uploads/2008/06/laboremployment2012.pdf>>

²²International Labour Organisation, *Employment Relationship* (2016)
<http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm>.

²³ Although the law of equity may also apply to employment law matters (see e.g. Chapter 3 in relation to a breach of confidentiality), this thesis focuses primarily on common law contractual duties as well as legislation applicable to the employment contract, as being the most relevant for the purpose of the issues raised concerning social media.

division of powers between the Commonwealth and the States, industrial relations has been a residual power of the States, over the years the Commonwealth has entered the field of employment law and industrial relations through the use of various constitutional heads of power such as the corporations power to pass the *Fair Work Act 2009* (Cth), as one example.²⁴ This thesis does not aim to cover the breadth of Commonwealth, State and Territory employment laws, but refers to key statutes where relevant and appropriate. Moreover, within the context of examining social media in the workplace in relation to privacy, defamation and workplace surveillance, this thesis will also include discussion on the relevant legislation.

1.6 RESEARCH METHODOLOGY

This research is literature based using various case law, legislation, scholarly books and journal articles in various fields of law, but particularly employment law.²⁵ The research methodology for this thesis is explained by McCrudden as the ‘primacy of critical reasoning based around authoritative texts’.²⁶ Furthermore, this thesis engages with legal principles and a combination of rules and procedures that link with a particular area of law, specifically employment law, and the challenges faced within this area. Particularly, this thesis will draw on a range of primary and secondary sources in order to analyse the historical and current law relating to the legal issues addressed in this thesis and the limitations it presents.²⁷

1.7 STRUCTURE OF THE THESIS

Chapter 1 provides the introduction to this research where the problem to the statement as well as the background to the problem has been discussed. This chapter also presents

²⁴ For a discussion on the federal nature of the Australian legal system and the division of powers in relation to employment law see Andrew Stewart, *Stewart’s Guide to Employment Law* (The Federation Press, 5th ed, 2015).

²⁵ See, eg, Paul Chynoweth, ‘Legal Research’ in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008); Dennis Pearce, Enid Campbell and Don Harding, ‘Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission 1987’ in Terry Hutchinson, *Researching and Writing in Law* (Reuters Thomson, 3rd ed, 2010); Mark Van Hoecke (ed), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011).

²⁶ Christopher McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 *Law Quarterly Review* 632, 648.

²⁷ See, eg, Susan Bartie, ‘The Lingering Core of Legal Scholarship’ (2010) 30 (3) *Legal Studies* 345; Terry Hutchinson, ‘The Transnational Lawyer: GATS, Globalisation and the Effects on Legal Education’ (2006) *Australian and New Zealand Journal of Legal Education* 93.

the research questions and aims in order to address the necessary legal issues arising from the use of social media in the workplace

Chapter 2 provides an overview of the nature and development of social media as an introduction to social media in the workplace. The chapter then focuses on the meaning of workplace, the employer–employee relationship, and in particular the express and implied duties of an employer and employee in an employment contract and how the terms of a contract may form the basis of the management and control of social media within and beyond the workplace.

Chapter 3 examines legal challenges and consequences regarding the use of social media in the workplace and how this can affect the employer–employee relationship. The three issues that are dealt with are privacy, defamation and cyberbullying. This chapter will firstly deal with privacy and confidentiality concerns pre-, during and post-employment. Secondly, it will look at scenarios where defamation cases have been decided within the framework of social media being misused in the workplace. Lastly it will examine the law on bullying in the workplace and how social media extends to cyberbullying, which can have serious consequences for employees.

Chapter 4 considers how employers may monitor and control the use of social media by employees within the workplace and whether employers have the right to monitor employees outside the workplace by using different workplace surveillance devices. Workplace surveillance will also be considered against privacy principles and whether workplace surveillance policies will add to the protection of employee’s privacy within and beyond the workplace. Furthermore, this chapter will discuss the role of social media policies and consider the incorporation of social media policies in the employment contract. This chapter will therefore examine current workplace policies that monitor such conduct and will also consider improvements in social media workplace policies when considering control of employees outside of the workplace.

Chapter 5 provides a summary of the thesis and sets out the conclusions, key findings and recommendations.

1.8 CONCLUSION

This chapter dealt with the problem to this research and the legal issues the use of social media in the workplace creates. The following chapter will examine the development and use of social media in the workplace and how the meaning of a ‘workplace’ may affect the use of social media outside of working hours. Furthermore, Chapter 2 will consider the meaning of the employer–employee relationship and how social media affects the employment contract beyond the traditional employment relationship. It will further deal with the terms of an employment contract and how these terms will be incorporated alongside a social media policy in relation to misconduct of an employee outside the workplace.

CHAPTER 2

SOCIAL MEDIA AND THE WORKPLACE

2.1 INTRODUCTION

Social media has been in use since the 1970s and has developed exponentially through the use of different platforms.¹ Following the invention of blogging in the 1990s, social media exploded into popularity with platforms such as Facebook, Twitter, LinkedIn, YouTube, Yelp and numerous other forms.² Although social media has, as the name suggests, emerged as a means of connecting people in social situations, for example, Facebook, it has increasingly become an indispensable tool for business and an integral part of the workplace.

The development of technology and the use of social media in the workplace have provided businesses with the opportunity to promote their services and communicate with their clients as well as their employees using a wide range of non-traditional forms of communication that have a far greater reach.³ The following was acknowledged by Business Review Australia: ‘As social media continues to evolve and change, businesses are now adapting and embracing these changes with open arms. Companies are no longer relying solely on flashy ad campaigns or well-constructed press releases to communicate with customers. The rules have changed. Businesses must decide if

¹Carli Garsow, *Social Media has had a Monumental Effect on our Lives* (2014)

<<http://digmagonline.com/2010/opinion/social-media-has-had-a-monumental-effect-on-our-lives/>>.

Different types of social media platforms that have been created since 197 include America Online (AOL), Friendster, MySpace, Facebook, LinkedIn, Twitter and many more. These social media sites grew in popularity not only in private use but also within businesses. For example, in 2011 a survey showed that 65 million tweets were sent each day by private users and businesses and it grew to a total of 500 million tweets a day: Raymmar Tirado, *A History of Social Media and the Future of Politics* Raymmar (30 April 2014) <<http://raymmar.com/history-social-media-future-politics/>>.

²Phillipa Collin, Kitty Rahilly, Ingrid Richardson and Amanda Third, *The Benefits of Social Networking Services: A Literature Review* (Cooperative Research Centre for Young People, Technology and Wellbeing, 2011)

<http://www.uws.edu.au/__data/assets/pdf_file/0003/476337/The-Benefits-of-Social-Networking-Services.pdf>.

³Stephen Allred, *Employment Law: A Guide for North Carolina Public Employers* (The Institute of Government Press, 1999) 5.

they want to reveal their human side and forge new relationships with customers, or stay stagnant and “old school””.⁴

However, social media can present both challenges and opportunities for employers and employees when making use of social media in the workplace. As stated in Chapter 1, one of the main aims of this thesis is to examine the use and control of social media in the workplace generally from a legal perspective. Moreover, this thesis focuses specifically on the control and management of employees by employer’s outside of the traditional workplace and working hours. This control and management will extend to the monitoring of the use of social media by an employee whether on an employer-sponsored device or personal device.⁵

The aim of this chapter is therefore to first provide an introductory overview of the development and nature of social media followed by the advancement of social media in the workplace. In terms of the workplace environment, this chapter will also examine social media in regard to the employer–employment relationship as essential background context for the discussions to follow in Chapter 3 on specific legal issues arising in the workplace and in Chapter 4 dealing with the monitoring and control of employees especially outside the workplace.

2.2 DEVELOPMENT OF SOCIAL MEDIA

In order to determine how social media and different social media platforms impact on the work environment, it is useful to first consider what social media entails and how it has developed. This part will consider the terms ‘social media’ and ‘social networking’ as related but distinct terms.

In respect to social media, Clarke refers to social media as a ‘collective term for a range of services that support users in exchanging content and pointers to content, but in ways that are advantageous to the service-provider’.⁶ Furthermore, it also refers to

⁴Robert Spence, *Social Media for Business just got Interesting* (7 May 2013) Business Review Australia <<http://www.businessreviewaustralia.com/marketing/774/Social-Media-for-Business-Just-Got-Interesting>>.

⁵*Little v Credit Corp Group Ltd t/a as Credit Corp Group* [2013] FWC 9642 (10 December 2013), [67].

⁶Roger Clarke, ‘Privacy and Social Media: An Analytical Framework’ (2015) 23 *Journal of Law, Information and Science* 169, 169.

‘websites and applications that enable users to create and share content or to participate in social networking’.⁷

Similarly, Davis refers to social media as ‘forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content (such as videos)’.⁸ Social media can include blogs, microblogs, social networks, media sharing and virtual worlds and this can all be accessed through personal devices such as mobile phones, iPads and computers.⁹

Social networking, on the other hand, is the use of online social media to connect with people. It can be defined as ‘the exchange of information or services among individuals, groups, or institutions; specifically: the cultivation of productive relationships for employment or business’.¹⁰ Furthermore, Power notes that social networking ‘is a term used to describe web-based media that is used for social interaction’.¹¹ Therefore, although social media and social networking are often used interchangeably, they are distinguishable with social media largely referring to a range of online applications or platforms, and social networking the purposeful and deliberate act of using these media to establish networks of people and communication. Thus, a business who has decided to use social media as a communication platform may use various platforms such as Facebook, Twitter or Instagram in order to interact and communicate with their customers and the wider business community¹² and to form networks of relationships. Therefore, social media and social networking are not restricted to personal use but have also come to be used as powerful communication and marketing tools for businesses.

⁷Patrick George (ed) et al, *Social Media and the Law* (LexisNexis Australia, 2014) 2. See also *Griffiths v Rose* [2011] FCA 30.

⁸Sarah Davis, ‘Social Media Activity & the Workplace: Updating the Status of Social Media’ (2013) 39 *Ohio Northern University Law Review* 359, 360. See also Timothy Arnold-Moore, ‘Legal Pitfalls in Cyberspace: Defamation on Computer Networks’ (1994) 5(2) *Journal of Law and Information Science* 165, 166.

⁹Dorothy Bollinger, ‘Social Media and Employment Law: A Practitioner’s Primer’ (2011) 20 *Temple Political & Civil Rights Law Review* 323, 323-324.

¹⁰Merriam-Webster Dictionary, ‘Social Networking’ <<http://www.merriam-webster.com/dictionary/social%20network>>. See also Karen McIntyre, ‘The Evolution of Social Media from 1969 to 2013: A Change in Competition and a Trend Toward Complementary, Niche Sites’ (2014) 3(2) *Journal of Social Media in Society* 5.

¹¹Charles Power, *Social Media and the Law: Managing the Legal Risks for your Business* (Portner Press, 2015) 4.

¹²Fauzia Burke, ‘Social Media v Social Networking’, *The Huffington Post* (online), 2 December 2009 <http://www.huffingtonpost.com/fauzia-burke/social-media-vs-social-ne_b_4017305.html>.

Social networking however is not an entirely new construct. It began prior to social media using telephones instead of computers. A telephone network called 'phone phreaking' began in the 1950s, which entailed a process of hacking phones electronically to introduce items called 'blogs and podcasts'.^{13 14}

In the course of the 1960s, the first form of email was invented, which made it possible for persons to communicate with each other via the computer.¹⁵ This led to the first use of websites and applications that introduced the communication system called Bulletin Board System in 1978, which was seen as an electronic message centre and an older version of the World Wide Web.¹⁶ During 1997, sites such as AOL and Sixdegrees.com were launched and provided platforms for people to connect and friend each other.¹⁷ This was seen as the first online communication platform that moved away from personal face-to-face communication. These platforms made it possible for individuals as well as businesses to communicate on new networking platforms.

With the subsequent development in technology, modern social media platforms were created to connect people all over the world. These platforms include Friendster, which was launched in 2002 and made headlines with the 'circle of friends' technique by which 'friends' are added to the virtual network of friends,¹⁸ and Myspace, which was launched in 2003. MySpace was one of the favourite platforms at that time, until Facebook was created in 2004 that captured the limelight.¹⁹ Facebook was created by Mark Zuckerberg, who studied at Harvard University, with the intention of connecting

¹³Brett Borders, *A Brief History of Social Media* (2009)

<<http://socialmediarockstar.com/history-of-social-media>>. For a detailed discussion on social networking prior to the 1960s see Vladimir Rimskii, 'The Influence of the Internet on Active Social Involvement and the Formation

And Development of Identities' (2011) 52(1) *Russian Social Science Review* 79-101.

¹⁴See also Mike Stelzner, *Social Media vs. Social Networking: What's the difference?* (2009)

<<http://www.examiner.com/networking-innational/social-media-vs-social-networking-what-s-the-difference>>.

¹⁵Karen McIntyre, 'The Evolution of Social Media from 1969 to 2013: A Change in Competition and a Trend Toward Complementary, Niche Sites' (2014) 3(2) *Journal of Social Media in Society* 5.

¹⁶BBS, <<http://www.bbscorner.com/>>. See also Danah Boyd and Nicole Ellison, 'Social Network Sites: Definition, History, and Scholarship' (2008) 13 *Journal of Computer-Mediated Communication* 210-230.

¹⁷Digital Trends, *The History of Social Networking* (14 May 2016)

<<http://www.digitaltrends.com/features/the-history-of-social-networking/>>.

¹⁸Ibid.

¹⁹The latest social media platforms include SlideShare, Periscope, Vines and Snapchat.

the university students with each other.²⁰ It is reported that within 24 hours some 1200 students had already created a profile.²¹ The Facebook phenomenon rapidly extended to other universities and educational institutions and beyond. Within two years, Facebook had gained international popularity²² and is the leading social media platform to date,²³ closely followed by YouTube and Twitter.

Another successful social media platform is LinkedIn, which was launched in 2003 and took a more professional approach to connect people in a business context and to advertise businesses and employment opportunities.²⁴ LinkedIn makes it possible for professionals to create their professional profiles and upload their curriculum vitae and professional experience in order to connect with other professionals online.²⁵ Finally, Twitter was launched in 2006 and enables anyone who accesses it to write short comments or statements of 140 characters called 'tweets'.²⁶ Twitter is also one of the most popular social media sites for both personal and business use today and common usage in the workplace.²⁷

As different social media platforms have developed, they have moved beyond the personal and social to now being widely used for professional and business purposes. However, the use of social media in the business environment or workplace creates both opportunities and downfalls which needs to be addressed.

²⁰Sarah Phillips, 'A Brief History of Facebook', *The Guardian* (online), 25 July 2007 <<https://www.theguardian.com/technology/2007/jul/25/media.newmedia>>.

²¹Ibid. See also Ben Mezrich, 'Friends and Foes: The Creation of Facebook' (2009) 392 *The Economist* 69.

²²Ibid. There was also a movie called 'The Social Network' on how Facebook was created within the University atmosphere <<http://www.imdb.com/title/tt1285016/>>.

²³Cooper Smith, 'Facebook is Leading the Way in Social Commerce', *Business Insider Australia* (online), 15 July 2015 <<http://www.businessinsider.com.au/social-commerce-2015-report-2015-7?r=US&IR=T>>.

²⁴Ibid. See also LinkedIn, *About LinkedIn* (2014) <<http://press.linkedin.com/about>>.

²⁵Ewan Watt, *What is LinkedIn?* (2015) <<http://www.roi.com.au/blog/social-media/what-is-linkedin/>>.

²⁶Jane Douglas, 'All of a Twitter?' (2012) 26 *Online Currents* 305. See also Nicholas Carlson, 'The Real History of Twitter', *Business Insider Australia*, April 2011 <<http://www.businessinsider.com.au/how-twitter-was-founded-2011-4>>.

²⁷See in general George Carter, 'Trending on Twitter: How Twitter Can Help #lawlibrarians' (2013) 17 *AALL Spectrum* 7, 7; Phillip Gragg and Christine Sellers, 'Twitter' (2010) 102(2) *Law Library Journal* 325, 325; Aviva Cuyler, 'Social Networking: Leveraging Twitter, LinkedIn and Facebook' (2011) 22(3) *Connecticut Lawyer* 26-29.

2.2.1 Advantages and Disadvantages of Social Media in the Workplace

As noted, social media has become an integral part of business and the workplace and while there may be many advantages to using social media, there are also disadvantages that may affect the business and the employer–employee relationship.²⁸

2.2.1.1 Advantages

According to Watson, businesses make use of social media in order to promote their products and services and to take advantage of the benefits social media present to businesses.²⁹ Firstly, most of the social networking sites are free and Weinberg notes that this is a cost-effective way for businesses to advertise and communicate with customers.³⁰ Secondly, the use of social media in business indicates that specific customers can be targeted. Furthermore, Hill, Provost and Volinsky observe that the use of social media is more productive in advertising products or services than through traditional word of mouth advertising because of the speed and efficiency with which information can be conveyed to vast numbers of people across the globe.³¹

The use of social media in business can also be used to enhance customer service, which increases the prospects of customers reviewing products and services of the business.³² According to Power, ‘social media allows your customers to contact you in real-time, giving you an opportunity to add value by providing immediate customer service and support’.³³

From this discussion, it is evident that value is being added to businesses by using social media as it is transparent in the online information provided to customers and

²⁸See in general Christiena van der Bank and Marjone van der Bank, ‘The Impact of Social Media: Advantages or Disadvantages’ (2015) 4(2) *African Journal of Hospitality, Tourism and Leisure* 1.

²⁹Richard Watson, Leyland Pitt, Pierre Berthon and George Zinkhan, ‘U-Commerce: Expanding the Universe of Marketing’ (2002) 30(4) *Journal of Academy of Marketing Science* 333, 334.

³⁰Tamar Weinberg, *The New Community Rules: Marketing on the Social Web* (O’Reilly Media, 2009) 524-525.

³¹Shawndra Hill, Foster Provost and Chris Volinsky, ‘Network-Based Marketing: Identifying Likely Adopters via Consumer Networks’ (2006) 21(2) *Journal of Statistical Science* 256, 257-258.

³²Australian Business, *Pros and Cons of Social Media* (5 July 2016) <<http://www.business.gov.au/business-topics/business-planning/social-media/Pages/pros-and-cons-of-social-media.aspx>>.

³³Charles Power, *Social Media & The Law* (Portner Press, 2014) 5.

suppliers of the business.³⁴ However, the use of social media, as discussed, can lead to difficulties and does have its disadvantages that could negatively impact on a business. As noted by Del Bosque, social media provides businesses with many benefits; however, they have to grapple with the ‘real drawbacks’ and legal pitfalls of social media in the workplace, discussed in Chapter 3.³⁵

2.2.1.2 Disadvantages

Agreeing with Gommans, there are a number of disadvantages when using social media in the workplace.³⁶ Businesses need to frequently monitor the use of social media sites for potential damaging remarks and comments made by customers or employees that could harm the reputation of the business or employer.³⁷ Moreover, where employees are given permission to use social media in the workplace, they can share photos, videos and opinions on these sites, which could lead to defamation if inappropriately used.³⁸ Hence, inappropriate use of social media by employees could negatively impact on the reputation of the business and ultimately on the employment relationship as well as the relationship with current and future customers. Likewise, Hennig-Thurau observes that harmful posts which are defamatory should be regularly monitored by employers, which once again, as mentioned, leads to social media being an investment in time, which not all employers have.³⁹ Given the serious legal issues this raises, defamation is discussed Chapter 3 along with privacy.

The use of social media in a business to widely convey information about the business and its people can inadvertently or deliberately raise thorny issues concerning privacy and confidentiality. Whether it is a breach of privacy between employer and employee or information of the customer, businesses need to take control and manage the use of

³⁴See, eg, Cathy Hart, Neil Doherty and Fiona Ellis Chadwick, ‘Retailer Adoption of the Internet – Implications for Retail Marketing’ (2000) 34(8) *European Journal of Marketing* 654.

³⁵Darcy Del Bosque, ‘Will You be My Friend? Social Networking in the Workplace’ (2013) 114 *New Library World* 428, 436.

³⁶Marcel Gommans, Krish Krishnan and Katrin Scheffold, ‘From Brand Loyalty to E-Loyalty: A Conceptual Framework’ (2001) 3(1) *Journal of Economic and Social Research* 43, 49-50.

³⁷See, eg, Darren Barefoot and Julie Szabo, *Friends with Benefits: A Social Media Marketing Handbook* (No Starch Press, 2010).

³⁸Gommans et al, above n 36.

³⁹Thorsten Hennig-Thurau, Kevin Gwinner, Gianfranco Walsh and Dwayne Gremler, ‘Electronic Word-of-Mouth via Consumer-Opinion Platforms: What Motivates Consumers to Articulate Themselves on the Internet?’ (2004) 18(1) *Journal of Interactive Marketing* 35, 50.

personal information of employees and their customers.⁴⁰ Just as social media networking companies such as Facebook and Twitter have their own policies dealing with the use of personal information, businesses using social media as a communication and marketing tool also need to also have social media policies in place in order to protect the business from unwanted behaviour.⁴¹ The development and implementation of social media policies is dealt with in Chapter 4.

Factors such as cost-effectiveness, social communication and customer-specific activities indicate the advantage social media plays in the workplace and for a business in general. On the other hand, barriers such as time-management and the need to regularly monitor the use of social media by employees through social media policies and dealing with legal pitfalls can be seen as a disadvantage to the employer or business. Nonetheless, social media is here to stay and thus it is not a question of avoiding social media or banishing it from the workplace, but when embracing the use of social media in the workplace it is necessary to be cognisant of the potential impact on the employer–employee relations and the potential legal pitfalls. Therefore, although much is written on social media and how social media can be used by businesses to promote and develop their business, the focus of this thesis is on social media and the employment relationship and the legal basis for managing and controlling the use of social media within and beyond the workplace in order to effectively manage legal issues, in particular those associated with privacy, defamation and cyberbullying as three of the most challenging and emerging issues.

In this thesis, it is argued that the use and misuse, whether intentionally or unintentionally, of social media in the workplace can have a significant impact on the employer–employee relationship. The aim of this chapter is to examine how the use of social media impacts on this relationship and the associated duties within the employment relationship within and beyond the workplace. According to a report published in 2012, around 75 per cent of employees access their social media accounts on a daily basis during working hours.⁴² This is a significantly high number and

⁴⁰Melissa Steinman and Mikhia Hawkins, ‘When Marketing Through Social Media, Legal Risks Can Go Viral’ (2010) 22(8) *Intellectual Property & Technology Law Journal* 1, 5.

⁴¹*Ibid.* See also Simeon Edosomwan et al, ‘The History of Social Media and its Impact on Business’ (2011) 16(3) *Journal of Applied Management and Entrepreneurship* 1.

⁴²Spencer Hamer, ‘Creating an Effective Workplace Social Media Policy’ (2013) 10 *HR Focus* 1.

indicates that businesses should be prepared when social media consequences arise either within working hours or outside.

With the myriad of different social media platforms accessible at anytime and anywhere, in order to understand how social media affects the workplace and impacts on the employer–employee relationship it is appropriate to discuss the definition of a workplace and how social media can affect the workplace environment.

2.3 SOCIAL MEDIA IN THE WORKPLACE

As noted social media has become entrenched and widely used in the workplace through social media platforms such as Facebook, Twitter and LinkedIn. The rapid increase of social media in the workplace is largely as a result of it being cost-effective and easy to access.⁴³ One of the primary reasons for the successful growth and use of social media is that it can be accessed from anywhere in the world, using devices such as iPads, laptops, iPhones and even now the new Apple watches.⁴⁴ This has benefits as noted above but also has implications within the workplace context. Social media is not bound by place or time, and has no barriers. To this end, social media has further blurred the lines between private and public spaces and has cut across traditional workplace boundaries.⁴⁵ Therefore, although social media platforms are used for personal and social purposes, they are also used both formally and informally in the workplace for work-related purposes, blurring the lines between the personal and professional, and the home and work. This gives rise to legal issues concerning the appropriate use of social media in the workplace, and the extent to which employers monitor and control social media use beyond the workplace given the borderless environment, which is the main focus of the thesis. However, before examining the legal issues in Chapter 3 and monitoring and control of social media through workplace policies in Chapter 4, this section examines the nature and meaning of the workplace.

⁴³Corey Dennis, ‘Legal Implications of Employee Social Media Use’ (2011) *Massachusetts Law Review* 380, 380.

⁴⁴See Nick Vernon, *The Apple Watch – Time for Employers to think about Social Media in the Workplace* (27 March 2015) ShooSmiths <<http://www.shoosmiths.co.uk/client-resources/legal-updates/the-apple-watch-employers-social-media-in-workplace-9521.aspx>>.

⁴⁵See in general Daniel Ornstein, ‘Social Media Usage in the Workplace around the World – Developing Law and Practices’ (2012) 13(2) *Business Law International* 195.

This section will firstly consider the definition of a workplace and whether this definition extends to employers monitoring conduct of their employees beyond the workplace. This is followed by a discussion on the employer and employee relationship and the nexus between social media use and duties arising from this relationship and the employment contract. The inappropriate use of social media by an employee, even outside the workplace, may lead to a breach of the employment contract that could affect the employment relationship. This discussion will then provide the legal basis for the management, control and monitoring of social media in the workplace, but also how this may extend to controlling employee conduct outside the workplace.

2.3.1 The Meaning of ‘Workplace’

A primary question addressed in this thesis is the extent to which an employer can monitor and control the use of social media within and outside the workplace. In order to answer this primary question, the following section will consider the legal definition of a ‘workplace’ and the implications for control and monitoring of social media platforms beyond the traditional notions of a workplace.

Workplace is not generally defined in employment legislation; however, the *Work Health and Safety Act 2011 (Cth)*⁴⁶ is one important piece of legislation that does provide a definition of ‘workplace’:⁴⁷

- (1) A workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.
- (2) In this section, place includes:
 - (a) a vehicle, vessel, aircraft or other mobile structure; and
 - (b) any waters and any installation on land, on the bed of any waters or floating on any waters.

⁴⁶See also Patricia Monemvasitis, *The New Fair Work Act Definition of Workplace Bullying* (28 May 2014) Carroll & O’Dea Lawyers <http://www.codea.com.au/Publication-1653-not-for-profit-may-2014-newsletter.aspx?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original>.

⁴⁷*Work Health and Safety Act 2011 (Cth)* s 8.

From this definition, it is clear that a ‘workplace’ can be anywhere the employee carries out work and can include an office, motor vehicle and even at their own home. The expansive definition of workplace is illustrated in the Fair Work Commission (‘FWC’) decision in *Sharon Bowker & Others v DP World Melbourne Limited T/A DP World; Maritime Union of Australia*,⁴⁸ in which it was held that ‘the phrase “at work” describes an activity or state of affairs under which an individual is substantively connected to their employment or engagement. Being “at work” is plainly broader than being at a purely physical “workplace”’. It further held that ‘that use of social media affecting work colleagues, in or outside the workplace, is conduct which is exposed to employer direction and over which employers are expected to have policies and exercise control’.⁴⁹ The FWC therefore recognises that in certain circumstances employers can exercise control over employees who use social media within and beyond the workplace. However, the question arises to what extent should this control be exercised outside of the workplace through policies and employment contracts? As in Chapter 4 of the thesis, the control and monitoring of employees and the use of social media through policies is an important and relevant management strategy that can help reduce litigation

Taking into account the above mentioned definition of ‘workplace’, it makes accommodation for activities outside of the traditional workplace where the activity is one that is carried out within ‘the course of employment’ and for which the employer can be held liable.⁵⁰ This is relevant for the purpose of this thesis where employees engage in conduct that involves the use, and inappropriate use, of social media that occurs ‘in the course of employment’ whether within the traditional workplace or outside the workplace, even if ostensibly outside working hours.

The extended construction of the workplace definition and the term ‘in the course of employment’ can be illustrated with reference to *Ziebarth v Simon Blackwood (Workers’ Compensation Regulator)*, in which the Queensland Industrial Relations

⁴⁸[2014] FWCFB 9227 (19 December 2014), [40]. In this case, the Fair Work Commission had to consider the phrase ‘at work’ within the meaning of bullying.

⁴⁹Ibid [42]. Also, refer to the Explanatory Memorandum to the Work Health and Safety Bill 2011, which explains the phrase ‘while the workers are at work.’

⁵⁰See also *Comcare v PVYW* (2013) 250 CLR 246 for an in-depth discussion on what is seen as ‘in connection with employment.’

Commission successfully granted a fleet services manager at a transport company compensation for an injury sustained at his home.⁵¹ This was an appeal from the Workers' Compensation Regulator to the Queensland Industrial Relations Commission for an injury sustained by Robert Ziebarth, the appellant. On 21 March 2013, around 10pm, the appellant had been in his shower at home when he slipped and injured his back while trying to answer a call from his employer.⁵² The appellant's employer, Blenners Transport, told the appellant that he was on-call that evening and he had to answer his phone in case there was a major breakdown with one of the transport vehicles. Therefore, the appellant felt obligated to answer his phone accordingly.⁵³ The issue in this case was whether the injury arose in the course of employment and therefore a 'workplace'. The Commission considered whether the injury arose in the course of employment through the following two tests: 'What was the activity being engaged in at the time of the injury?' and 'Did the employer induce or encourage the employee to engage in that activity?'.⁵⁴

The above discussion on the definitions of 'workplace' and 'in the course of employment', clearly makes provision for scenarios where social media is used in a similar fashion. In the event an employee is inappropriately using social media beyond the workplace, but where there is still a connection with his or her employment, it is possible for the employer to take reasonable steps in managing this behaviour. This is subject to the contract between the employer and employee and the necessary actions that may be taken when social media is inappropriately used by an employee beyond the workplace.

On the other hand, the challenge for employers is whether they have the right to control and manage an employee's use of social media outside of working hours when they are not in the course of employment. However, the appropriate incorporation of social media policies may assist in this regard. Therefore, the application of social media policies and employment contracts when dealing with inappropriate social media use by employees outside of working hours, will be further detailed in Chapter 4.

⁵¹*Ziebarth v Simon Blackwood (Workers' Compensation Regulator)* [2015] QIRC 121.

⁵²*Ibid* [3].

⁵³*Ibid* [8].

⁵⁴*Ibid* [31]. See also *Campbell v Australian Leisure & Hospitality Group Pty Ltd & Anor* [2015] ICQ 16 [20].

After considering these two questions, the Commission held that the injury was sustained in the course of employment, therefore considering this scenario within a ‘workplace’ and stated that:⁵⁵

I am satisfied on the evidence before the commission that the [worker] has established a causal relationship between his employment and his [back injury]. The proximity of time between the fall in the bathroom and the onset of the pain, in the absence of any competing causal incident leads me to conclude, on the balance of probabilities, that the [worker’s] employment was a significant contributing factor to his injury.

Therefore, the injury was sustained in the workplace because firstly, the employment contract stated that the employee should be available at all times; secondly, he was in possession of a work phone, which was required by the employee to carry out the tasks in the course of employment; and lastly, the employee was induced to engage in this activity.⁵⁶

In light of the above mentioned, an employee’s workspace can range from being in the office to working outside or on the road and this provides for the definition of ‘workplace’ to be very flexible and broad and not necessarily confined to a physical office space.⁵⁷ With the development of technology and taking into account social media in the workplace, it allows employees and employers to work outside of the normal working hours and to attend meetings via video or conference calls, emails and various online portals.⁵⁸ It is clear from the discussion of ‘workplace’ that the employment of an employee is not limited to working hours at an office and therefore social media can impact on the employer–employee relationship during and after working hours. Moreover, the wide meaning of workplace has implications for monitoring and controlling the use of social media beyond the workplace, even though it is not necessarily at the office. The monitoring of the employee’s use of social media within and outside of the workplace will be discussed in Chapter 4, which considers

⁵⁵Ibid [47]. See also *Goodman Fielder v WorkCover Queensland* (2004) 175 QGIG 871, 872.

⁵⁶Kate Denning, *Back Injury Answering Work Mobile Arose ‘in the course of employment’* (July 2015) Denning Insurance Law <<http://denninginsurancelaw.com.au/tag/workers-compensation-regulator/>>.

⁵⁷See James Harter, ‘Should Employers Ban Email after Work Hours?’ *Harvard Business Review* (August 2014) <<https://hbr.org/2014/08/should-employers-ban-email-after-work-hours/>>.

⁵⁸Ibid.

in greater detail the control and management of social media outside the workplace through workplace policies.

The boundaries between private and work-related use of social media is blurred and the challenges it presents in the workplace can affect the workplace environment. Hence, what is considered as conduct at work and conduct outside of work bring about the question of whether an employee's conduct outside of work can still be considered the 'workplace' and therefore part of their employment.⁵⁹ This was the question addressed by the Industrial Relations Commission in *Ziebarth v Simon Blackwood (Workers' Compensation Regulator)*.⁶⁰ However, with social media being ubiquitous at times, it can affect the employer–employee relationship. It is therefore appropriate to discuss the employee–employer relationship in order to understand how social media can affect this relationship and what employers can do to manage the use of social media platforms in the workplace and beyond.

2.4 THE EMPLOYER–EMPLOYEE RELATIONSHIP

The development of technology, in particular social media, has changed how people interact with each other privately and within businesses.⁶¹ In the workplace setting, as mentioned, employers are using social media that can be valuable to a business.⁶² As a result, social media can be beneficial to businesses with regards to marketing and public relations, but the inappropriate use of social media can also be detrimental to the employer–employee relationship and hence the need for effective management and control within the workplace.⁶³ In order to provide the legal context and framework

⁵⁹In May 2015 a reporter for SBS was dismissed for his rude and unreasonable comments made on social media. The case is now being challenged – Markus Mannheim, 'Ex-SBS Journalist Scott McIntyre Free to Challenge Anzac Day Twitter Sacking', *The Canberra Times* (online), 1 January 2015 <<http://www.canberratimes.com.au/national/public-service/scott-mcintyre-free-to-challenge-anzac-day-twitter-sacking-after-tribunal-criticises-sbs-20151001-gjzhyu.html>>.

⁶⁰[2015] QIRC 121.

⁶¹See also Gray Plant Mooty, *A Legal Guide to the Use of Social Media in the Workplace* (2013) <http://www.gpmlaw.com/portalsresource/A_Legal_Guide_to_the_Use_of_SOCIAL_MEDIA_IN_TH E_WORKPLACE.pdf>.

⁶²See in general the International Labour Organisation, *Country Studies on the Social Impact of Globalization: Final Report* (Working Party on the Social Dimensions of the Liberalization of International Trade, Doc GB.276/WP/SDL/1, 276th Session, Geneva, November 1999) 2 <<http://www.ilo.org/public/english/wcsdg/docs/synthesis.pdf>>.

⁶³See Tracey High and Christina Anderson, *Social Media and the Employer-Employee Relationship* Sullivan & Cromwell <http://www.sullcrom.com/files/upload/Social_Media_and_the_Employer-Employee_Relationship.pdf>; Patricia Abril, Avner Levin and Alissa del Riego, 'Blurred Boundaries:

for examining the question of monitoring and controlling the use of social media within and outside the workplace, this section provides an overview of the legal nature and development of the employer–employee relationship. This discussion will further be highlighted with reference to relevant express and implied rights and duties in the traditional employment contract.

Although this chapter focuses on the common law contract of employment as the primary basis for the employment relationship, and the rights and duties that form the legal basis for the management and control of employee conduct, the employment relationship is regulated by various statutory instruments that include employment legislation such as the *Fair Work Act 2009* (Cth) and industrial awards and agreements.⁶⁴ In this regard, the field of employment law is very extensive and some parts of the law beyond the scope of this thesis. However, reference is made to such instruments in the thesis where relevant, for instance, when dealing with the discipline and dismissal of employees for misuse of social media within the workplace and beyond.

2.4.1 The Development of the Employment Relationship

The employment relationship signifies a legal concept that according to the ILO refers to ‘the relationship between a person called an employee (frequently referred to as a worker) and an employer for whom the employee performs work under certain conditions in return for remuneration’.⁶⁵ This description indicates that the employer–employee relationship is not only based on legal rights and duties, but is also considered an economic relationship because of the employee trading their services and the employer paying the employee a salary for those services. This in turn will help the employer turn a profit, which makes it economical.⁶⁶ Furthermore, the

Social Media Privacy and the Twenty-First-Century Employee’ (2012) 49(1) *American Business Law Journal* 63-124.

⁶⁴ For a discussion on industrial awards and agreements see Andrew Stewart, *Stewart’s Guide to Employment Law* (The Federation Press, 5th ed, 2015) and Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford, 2nd ed, 2011) 152. See also James J Macken et al, *Law of Employment* (Lawbook Co, 5th ed, 2002).

⁶⁵ International Labour Office, ‘The Employment Relationship’ (Paper presented at International Labour Conference, 95th Session, 2006) 3 < <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf>>.

⁶⁶ See Carol Fox, William Howard and Marilyn Pittard, *Industrial Relations in Australia: Development, Law and Operation* (Longman, 1995) 3; Ronald Duska, *Contemporary Reflections on Business Ethics* (Springer, 2007) 175.

employer–employee relationship can also be seen as a social one.⁶⁷ The social dimension of the employment relationship is clearly evident in and at the very heart of social networking and how social media is used for personal and professional activities in the workplace.

In terms of the legal nature of the employment, Blackstone, described it as ‘a contractual relationship that bound the parties to a continuing relationship’.⁶⁸ This is a fundamental premise because the ‘starting point for the analysis of legal obligations arising in the context of working relations must always be the terms of any contractual arrangement’.⁶⁹ In this case, express and implied contractual duties are imposed on an employment relationship in order to prohibit any inconsistency that can harm the trust between an employer and employee.⁷⁰ The employer–employee relationship is therefore based on contractual law.⁷¹ In this regard, one of the aims of this thesis is to examine the duties of the employer and employee and how these duties in the employment relationship may be affected by the use of social media in the workplace.

By way of a brief introductory comment, the following section will explore the historical development of the employment relationship, from which key concepts such as trust and obedience derive, and hence the employment contract.

⁶⁷Marilyn Pittard and Richard Naughton, *Australian Labour Law* (LexisNexis, 2010) 4. It is stated that ‘by terminating the contract of employment, the employer deprives individual workers of their major source of income. The dismissal may also deprive workers of membership of the most significant community in their life and jeopardise their status in society more generally’ – Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (Clarendon Press, 1992) 1-2.

⁶⁸Clyde Summers, ‘The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will’ (1984) 52(6) *Fordham Law Review* 1082, 1082. See also John Howe and Richard Mitchell, ‘The Evolution of the Contract of Employment in Australia: A Discussion’ (1999) 12 *Australian Journal of Labour Law* 113; Simon Deakin, ‘The Evolution of the Contract of Employment, 1900–1950’ in Noel Whiteside and Robert Salais (eds), *Governance, Industry and Labour Markets in Britain and France* (Routledge, 1998) 212.

⁶⁹Hugh Collins et al, *Labour Law: Text and Materials* (Hart Publishers, 2nd ed, 2005) 70.

⁷⁰See Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) 88-92.

⁷¹Nicola Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Ashgate, 2013) 20. An example of this is the case of *Yewens v Noakes* (1880) 6 QBD 530, 532 where it was held that ‘a servant is a person subject to the command of his master as to the manner in which he shall do his work’. This common law definition of an employee also relates to the statutory employee definition that an employee is subject to the control of the employer.

2.4.1.1 *The Master–Servant Relationship*

The employment relationship stems from the medieval era within the household itself, for example, the master, his wife and children and then his servants.⁷² This was known as the master–servant relationship, which meant that all the needs of the servant must be met by the master and whereby the servant will obey the master in everything.⁷³ In Australia, the master–servant relationship was inherited from the United Kingdom.⁷⁴ Selznick notes that:⁷⁵

The old law of master and servant looked to the household as a model and saw in its just governance the foundation of orderly society. The household model made sense in an overwhelmingly agricultural economy where hired labour, largely permanent, supplemented the work of family members and all were subject to the authority and tutelage of the father manager. The workman lived as a member of the household and often remained for life with the same master. It was against this background that the law of master and servant developed.⁷⁶

Under English common law, there was a clear divide between master and servant.⁷⁷ The relationship was described by Bacon as ‘superiority and power which it creates on the one hand, and duty, subjection, and as it were, allegiance, on the other, in which masters had authority to enforce obedience to their orders, from those whose duty it is to obey them’.⁷⁸ This suggests that duties such as obedience, fidelity, good faith and

⁷²Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford, 2nd Ed, 2011) 152. See also James J Macken et al, *Law of Employment* (Lawbook Co, 5th Ed, 2002) 3; Richard Carlson, ‘Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying’ (2001) 22(1) *Berkeley Journal of Employment and Labour Law* 295.

⁷³Warren Freedman, *Internal Company Investigations and the Employment Relationship* (Greenwood Publishing, 1994) 15. See also William Blackstone, *Commentaries on the Laws of England: Of Master and Servant* <<http://lonang.com/library/reference/blackstone-commentaries-law-england/bla-114/>>: ‘The great relations in private life are that of master and servant, which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent on him... The first sort of servants therefore, acknowledged by the laws of England, are menial servants; so called from being intro moenia, or domestics. The contract between them and their masters arises upon the hiring.’

⁷⁴Ibid. See also John Howe and Richard Mitchell, ‘The Evolution of the Contract of Employment in Australia: A Discussion’ (1992) 12 *Australian Journal of Labour Law* 113.

⁷⁵Philip Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969) 122.

⁷⁶See also Mary Gardiner, ‘His Master’s Voice? Work Choices as a Return to Master and Servant Concepts’ (2009) 31 *Sydney Law Review* 53.

⁷⁷See in general Timothy Walker, *Introduction to American Law* (Little Brown & Co, 1837) 261; *Byrne v Australian Airlines Ltd* (1994) 120 ALR 274, 334; Evelyn Atkinson, ‘Out of the Household: Master-Servant Relations and Employer Liability Law’ (2013) 25(2) *Yale Journal Law and the Humanities* 205.

⁷⁸Matthew Bacon, *A New Abridgement of the Law* (Luke White, 6th ed, 1793) 121.

cooperation were mainly based on the personal ‘subordination’ of employees instead of the employee and employer having equal status.⁷⁹ McCallum further explains that ‘under master–servant laws, servants were required to obey their masters at all times’.⁸⁰ Therefore, the master’s control over the servants included discipline.⁸¹ As a result, the relationship changed from the employer being ‘in control’ to ‘the right to control’.⁸²

From the 17th century, the government started introducing the notion of equality into the employment relationship, which meant that some kind of agreement could be established between master and servant.⁸³ Therefore, the current employment contract is based on ‘freedom to contract’.⁸⁴ According to Sappideen et al, the law of master and servant in Australia adopted the English contract law system whereby contracts of service were slowly implemented between an employer and servant to professional employees.⁸⁵ Therefore, the master–servant laws established the dominance of the ‘master’ whereas employment contracts, under common law, provide lawful control by an employer within the workplace. Likewise, Fox notes that the modern employment contract ‘reserving full authority of direction and control to the employer’.⁸⁶ However, the employment contract, under common law, developed to provide freedom to contract on a more equal basis between employer and employee.⁸⁷ With the change in common law from a master–servant status to one of contract between and employer and employee in Australia, the courts in *Rose v Telstra*

⁷⁹Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford University Press, 2005) 66.

⁸⁰Ronald McCallum, *Employer Controls Over Private Life* (University of New South Wales Press, 2000) 30.

⁸¹*R v Keite* (1697) 91 ER 989, 992.

⁸²Ken Phillips, ‘Beyond Loyalty: Alternatives to Employment’ (1997) *Non-Agenda* 393, 393.

⁸³Mary Gardiner, ‘His Master’s Voice? Work Choices as a Return to Master and Servant Concepts’ (2009) 31 *Sydney Law Review* 53, 63. See also Roger Meiners et al, *The Legal Environment of Business* (Cengage Learning, 2014) 388.

⁸⁴Patrick Atiyah, *An Introduction to the Law of Contract* (Oxford, 5th ed, 1995) 7. The court in *Blackadder v Ramsay Butchering Services Pty Ltd* (2005) 221 CLR 539, [32] stated that: ‘The satisfaction of employment, the feeling of self-worth that it can generate and the maintenance of the skills to which their exercise would contribute are part and parcel of the employment contract.’

⁸⁵Carol Sappideen, Paul O’Grady, Joellen Riley and Geoff Warburton, *Macken’s Law of Employment* (Thomson Reuters, 7th ed, 2011) 24-25.

⁸⁶Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (Faber, London 1971) 188.

⁸⁷See, eg, Steven Anderman, ‘Termination of Employment: Whose Property Rights?’ in Catherine Barnard, Simon Deakin and Gillian Morris (eds), *The Future of Labour Law* (Hart Publishing, 2004) 105.

*Corporation Ltd*⁸⁸ and *Byrne v Australian Airlines*⁸⁹ held that an employee is allowed a ‘private life’ and an employer is not in a position to disrupt an employee’s private life without the necessary basis for it.⁹⁰ Therefore, the modern employment contract makes provision for express and implied terms in order to deal with situations where an employer has control over the actions of an employee. This is relevant to the key aim of this thesis of whether an employer is in a position to control and monitor the use of social media by an employee within and beyond the workplace without breaching the employee’s privacy. Privacy, as mentioned in Chapter 1, is a significant issue when social media is used within the workplace and will be explored further in Chapter 3.

In light of this discussion, the following section will examine the nature of the general employment contract and the various duties within the contract of employment. It will further consider whether an employer can discipline an employee for misconduct or breach of an express or implied term in the employment contract outside the workplace relating to the inappropriate use of social media when the courts have recognised that an employee is allowed a ‘private life’.⁹¹ The question is whether there are exceptions to when an employer has a reasonable interest in disciplining an employee for misusing social media platforms beyond the workplace and which has an effect on the employment relationship.⁹²

⁸⁸*Rose v Telstra Corporation Limited* 1444/98 N Print Q9292 [1998] AIRC 1592 (4 December 1998).

⁸⁹[1995] 185 CLR 410.

⁹⁰Ibid 436. See also Philip Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969) in Marilyn Pittard and Richard Naughton, *Australian Labour and Employment Law* (LexisNexis, 2015), 97: ‘In the classic view, the law of master and servant is a branch of the law of persons. Writing in the middle of the eighteenth century, Blackstone spoke of master and servant as one of the three most important relations of private life, together with marriage and parenthood. Even the late nineteenth century treatises include master and servant in the law of persons or, more narrowly, in the law of domestic relations...The law of master and servant was rooted in a society in which everyone was presumed to belong somewhere, and the great parameters of belonging were kinship, locality, religion, occupation and social class. In all spheres of life, including spiritual communion, subordination to legitimate authority was thought to be a natural, inevitable, and even welcome accompaniment of moral grace and practical virtue... Work was carried out in the house of the master or in a small shop nearby. The workman lived as a member of the household and often remained for life with the same master. It was against this background that the law of master and servant developed.’

⁹¹See discussion below in *Rose v Telstra Corporation Limited* 1444/98 N Print Q9292 [1998] AIRC 1592; (4 December 1998) and *Byrne v Australian Airlines* [1995] 185 CLR 410.

⁹²Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 2010) 409-12.

2.4.2 The Employment Contract

The execution of work and service in an employment relationship is observed by van der Waarden as ‘involving a contractual relationship’ and ‘it involves some adjustment of contractual concepts that contemplate purely commercial purchases and sales’.⁹³ However, an employment contract does not only purport to a worker’s service but also forms part of the employee’s identity, according to Owens and Riley.⁹⁴ Therefore, an employee’s wellbeing, self-worth and personal circumstances form part of the employment relationship and hence the employment contract.⁹⁵ As a result, the change and development of the growth of technology and the entrenched use of social media in the workplace, which has blurred the boundaries between work and social/personal activities has presented new challenges for the employment relationship. It also has implications for how modern-day employment contracts should be drafted to accommodate issues such as privacy, defamation and cyberbullying.⁹⁶

In view of the above mentioned, Stewart remarks that there are two important roles within the employment relationship: ‘(i) it provides the basic contractual framework for determining the rights and duties that subsist between employer and employee, offering each party remedies in the event that the contract is breached; and (ii) the extent that the content of the contract is not filled in by the parties ... it supplies its own “default” norms in the form of terms implied by law’.⁹⁷ Therefore, owing to the modern employer–employee relationship, rights and obligations are contained within an employment contract, which clearly establishes the parties to the contract and their duties and obligations towards each other, either explicitly or implicitly.⁹⁸

⁹³Natalie van der Waarden, *Understanding Employment Law: Concepts and Cases* (LexisNexis, 3rd ed, 2014) 4.

⁹⁴Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 17.

⁹⁵*Ibid.*

⁹⁶Giuseppe Casale (ed), *The Employment Relationship: A Comparative Overview* (Hart Publishing, 2011) 2.

⁹⁷Andrew Stewart, ‘Discipline at the Workplace’ (1992) 5 *Corporate and Business Law Journal* 257, 258.

⁹⁸See Michael Doherty, ‘When the Working Day is Through: The End of Work as Identity?’ (2009) 23(1) *Work, Employment and Society* 84; Simon Deakin and Frank Wilkinson, *The Law of the Labour Market – Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005); Otto Kahn-Freund, *Labour and the Law* (Stevens, 1977).

In this regard, Lord Diplock explained that:⁹⁹

The basic principle which the law of contract seeks to enforce is that a person who makes a promise to another ought to keep his promise. This basic principle is subject to an historical exception that English law does not give the promisee a remedy for the failure by a promisor to perform his promise unless either the promise was made in a particular form, e.g., under seal, or the promisee in return promises to do something for the promisor which he would not otherwise be obliged to do, i.e., gives consideration for the promise.

Therefore, as a general contract law principle, the employment contract must fulfil certain elements of a normal contract.¹⁰⁰ Firstly, the employer will make an offer and the employee will accept this offer. There is no statutory requirement that employment contracts need to be in writing and therefore the courts can sometimes conclude that an agreement exists between the parties.¹⁰¹ Secondly, an agreement will only be seen as a contract if there is an intention to enter into this contract, written or oral, by both parties.¹⁰² Lastly, there must be consideration for the agreement (in the form of a promise) whereby the employer will pay the wages of the employee if that employee performs their work accordingly.¹⁰³ When both parties have all three requirements present, an employment contract will be formed between employer and employee. However, this is not the only factor to take into account when considering the relationship between the employer and employee.¹⁰⁴ On the one hand, the employment contract needs to fulfil the above mentioned contractual elements. However, on the other hand, the employment contract should also include express and implied terms. These express and implied duties form part of the employment contract as determined by courts and the common law.

⁹⁹*Moschi v Lep Air Services Ltd* [1973] AC 331, 346-347. See in general Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005) 49; Otto Khan-Freund, 'Blackstone's Neglected Child: The Contract of Employment' (1977) 93 *Law Quarterly Review* 508.

¹⁰⁰Brian Willey, *Employment Law in Context. An Introduction for HR Professionals* (Pearson, 2009) 43.

¹⁰¹This was the case in *Walker v Salomon Smith Barney Securities* (2003) FCA 1099.

¹⁰²Ornstein, above n 45, 153. See, eg, the case of *Redeemer Baptist School v Glossop* (2006) NSWSC 1201 (16 November 2006) where there was no legal intention to enter into a contract. A fine line needs to be drawn between when an employee has a legal intention to enter into a contract and when not.

¹⁰³See, eg, *Soaring v Harris* (1996) 13 NSWCCR 92 where some work which is performed is done for non-monetary benefits.

¹⁰⁴Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Law and the Work Choices Legacy* (The Federation Press, 2009).

The parties to a contract, who are legally bound by the contract, are the employer and employee. Therefore, in considering contractual obligations, liabilities and consequences for breaches, as well as the regulation of the employment relationship, it is relevant and necessary to identify the status of the parties. It is not the case that in every relationship or situation the person concerned will be an employee.

2.4.2.1 Definition of Employer

An employer can simply be defined as ‘a person who engages another to work under a contract of employment’.¹⁰⁵ The ordinary meaning of employer can be explained as ‘a person or company that pays people to work for them’.¹⁰⁶ In terms of the *Fair Work Act* the statute does not define employer but in certain sections refers to the ‘ordinary meaning’ of employer (for example) and in other parts the statute refers more specifically to ‘national system employers’.

The meaning of ‘national system employer’ is defined as:¹⁰⁷

- (a) a constitutional corporation,¹⁰⁸ so far as it employs, or usually employs, an individual; or
- (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
- (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
- (d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or

¹⁰⁵Ray Finkelstein and David Hammer (General Editors), *LexisNexis Concise Australian Legal Dictionary* (LexisNexis, 2015) 219

¹⁰⁶ Oxford Dictionary, *Employer*

<<http://www.oxfordlearnersdictionaries.com/definition/english/employer>>.

¹⁰⁷*Fair Work Act 2009* (Cth) s 14.

¹⁰⁸ Defined in s 51(xx) of the Australian Constitution as ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’. For an explanation of a constitutional corporation see Sarah Joseph and Melissa Castan, *Federal Constitutional Law. A Contemporary View* (Lawbook Co, 4th ed, 2014).

- (iii) a waterside worker; or
- (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
- (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

It is clear from this definition who will include a national system employer. However, if a person does not fall within the ambit of the above-mentioned definition, they will generally be considered a state system employer. For example, under the *Industrial Relations Act 1979* (WA) an ‘employer’ is defined as:¹⁰⁹

- (a) persons, firms, companies and corporations; and
- (b) the Crown and any Minister of the Crown, or any public authority, employing one or more employees and also includes a labour hire agency or group training organisation that arranges for an employee (being a person who is a party to a contract of service with the agency or organisation) to do work for another person, even though the employee is working for the other person under an arrangement between the agency or organisation and the other person.

Hence, in addition to the ordinary meaning of employer in relation to contracts of employment, it is also necessary to consider any statutory meaning of employer for the purpose of applying federal or state legislation to a particular matter. To establish whether the employment contract includes a national system employer or state system employer is key in order to determine which legislation will apply to the employment contract.¹¹⁰ This has also been highlighted in Chapter 1.

¹⁰⁹*Industrial Relations Act 1979* (WA) s 7. See also definition of employer and employee in *Industrial Relations Act 1999* (Qld) ss 5, 6; *Industrial Relations Act 1996* (NSW) ss 4, 5; *Fair Work Act 1994* (SA) s 4 and *Industrial Relations Act 1984* (Tas) s 3. Note in the ACT, NT and Victoria the federal *Fair Work Act* applies. Independent industrial systems have not been established in the ACT and NT.

¹¹⁰For a discussion on a national system employer see Andrew Stewart, *Stewart’s Guide to Employment Law* (Federation Press, 5th ed, 2015); Ian Neil and David Chin, *The Modern Contract of Employment* (Thomson Reuters, 2012); Carolyn Sappideen et al, *Macken’s Law of Employment* (Thomson Reuters, 7th ed, 2011).

2.4.2.2 *Definition of Employee*

As is the case of employer, an ordinary meaning of employee is ‘a person who performs work under the control of another in exchange for payment of services that he or she provides’.¹¹¹ Central to this definition is the notion of control, the scope of which is found in common law principles, and express and implied terms of the contract. However, the basis of control of employees is also found in legislative instruments.

The *Fair Work Act* includes the common law (ordinary) definition for an employee.¹¹² It further defines an employee as ‘an individual so far as he or she is employed, or usually employed, by a national system employer, except on a vocational placement’.¹¹³ From these definitions, a national system employee is only generally categorised and not specifically defined. If the employer is a national system employer, it is easier to determine whether an employee is a national system employee because it will generally refer to a contract of service that includes an employment contract between an employer and employee.

In relation to a state system employee, the *Industrial Relations Act 1979* (WA), for example, defines an ‘employee’ as:¹¹⁴

- (a) any person employed by an employer to do work for hire or reward including an apprentice; or
- (b) any person whose usual status is that of an employee; or
- (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or
- (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,
but does not include any person engaged in domestic service in a private home unless –

¹¹¹ Ray Finkelstein and David Hammer, *LexisNexis Concise Australian Legal Dictionary* (LexisNexis, 2015) 218

¹¹²*Fair Work Act 2009* (Cth) s 15(1).

¹¹³*Ibid* s 13.

¹¹⁴*Industrial Relations Act 1979* (WA) s 7.

- (e) more than 6 boarders or lodgers are therein received for pay or reward; or
- (f) the person so engaged is employed by an employer, who is not the owner or occupier of the private home, but who provides that owner or occupier with the services of the person so engaged.

In regard to a state system employee, they are well defined within the legislation and provide specific protection to these specified employees.¹¹⁵ However, scenarios can arise where it is problematic to identify an employee who is not specifically protected under legislation. This causes concerns for the employment relationship as the employee may not be an actual employee but rather an independent contractor. This is an important aspect of the employment contract because an employer is only able to manage, control and monitor the conduct of an employee with whom the employer has an employment contract. In this case, for example, an employer will not be able to control and monitor the conduct of an independent contractor.¹¹⁶ Therefore, it is essential to distinguish between a ‘contract *for* service’ (a contractor relationship) and a ‘contract *of* service’ (the employment relationship), the latter being the focus of the thesis.

2.4.2.3 *Independent Contractors*

Apart from an employer and employee forming an employment contract, it is also beneficial to examine the relationship between an employer and independent contractor in order to see whether this relationship will extend to an employer controlling or monitoring the contractor. Furthermore, this will also indicate whether a contractor has the same express and implied terms in this particular contract compared to the traditional employment contract between an employer and employee. According to Marshall, there is a definite divide between a contract *of* service and a contract *for* service.¹¹⁷ Therefore, a contract of service refers to a traditional employer–employee relationship where an employee is under the obligation to fulfil their duties as stated by the employer, whereas a contract for service is related to an independent

¹¹⁵Ibid.

¹¹⁶See Jonathan Burnett, ‘Avoiding Difficult Questions: Vicarious Liability and Independent Contractors in *Sweeney v Boylan Nominees*’ (2007) 29 *Sydney Law Review* 164.

¹¹⁷Brenda Marshall, ‘Working It Out – Employee or Independent Contractor’ (2006) 12(2) *The National Legal Eagle* 1, 1.

contractor performing specifically agreed tasks for a specified price.¹¹⁸ Similarly, Windeyer J referred to this distinction as ‘the difference between a person who serves his employer in ... the employer’s business, and a person who carries on a trade or business of his own’.¹¹⁹

In relation to distinguishing between a contract of service and contract for service, the courts have applied various common law tests to identify whether it is an employee or independent contractor working for the employer.¹²⁰ The most important common law tests relevant for this thesis include the control test, in business/economic reality test and the multi-factor test.¹²¹

Firstly, the control test deals with the nature and degree of control the employer has over the employee. In the case of *Gould v Minister of National Insurance*,¹²² this was expressed by the court and held that ‘the degree of control exercised by the person employing the artiste ... means not only the amount of control but the nature of that control’.¹²³ Likewise in *Zuijs v Wirth Brothers Pty Ltd*,¹²⁴ the High Court observed that the control test is considered ‘lawful authority to command so far as there is scope for it’.¹²⁵ Therefore, the test is in fact about the right of an employer to exercise control over an employee.¹²⁶

Secondly, the business/economic reality test relates to whether a worker is considered economically dependent on the employer or whether the worker has their own business making a profit.¹²⁷ A good example of this test was applied in the case of *Abdalla v*

¹¹⁸*Ibid.*

¹¹⁹*Marshall v Whittaker’s Building Supply* (1963) 109 CLR 210, 217.

¹²⁰This thesis is not intended to expand on each of these common law tests and only a brief discussion will be given in this regard.

¹²¹See in general Vince Rogers and Shannon Chapman, ‘Independent Contractors: An Endangered Species?’ (2012) 64 *Keeping Good Companies* 614-617; Samina Weil, *Examination of the Test to Determine Worker Status: Independent Contractor or Employee?* (25 August 2015) Fisher Phillips <https://www.fisherphillips.com/Cross-Border-Employer/Australia-e28093-Examination-of-the-Test-to-Determine-Worker-Status-Independent-Contractor-or-Employee?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original>

¹²²[1951] 1 KB 731.

¹²³*Ibid* 734.

¹²⁴(1955) 93 CLR 561.

¹²⁵*Ibid* 572.

¹²⁶*Ibid.*

¹²⁷See, eg, *Stevenson Jordan and Harrison v MacDonald and Evans* [1952] 1 TLR 101, 111.

*Viewdaze Pty Ltd*¹²⁸ where a travel agent claimed to be unfairly dismissed. The travel agent in this case worked his own hours and was under insignificant control of the company.¹²⁹ The Australian Industrial Relations Commission held that the agent was an independent contractor because of the agent having his own business rather than representing the company.¹³⁰

Lastly, the multi-factor test plays a significant role in determining whether a worker is an employee or independent contractor. This was highlighted in the case of *Performing Right Society v Mitchell and Booker (Palais de Danse) Ltd*,¹³¹ where McCardie J held this test to be:¹³²

the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleging to be a servant. This circumstance is, of course, one only of several to be considered, but it is usually a vital importance.

Therefore, various other factors will be considered, besides control, in order to establish whether a worker is an employee or independent contractor. Comparably, a notable example of how the multi-factor test was applied is the case of *Hollis v Vabu Pty Ltd*.¹³³ The court in this case considered whether a bicycle courier who injured a pedestrian was found to be an employee. On appeal, the High Court found that the bicycle courier was an employee because he did not generate goodwill for himself and was obliged to work.¹³⁴ Therefore the court did not only consider the control of the employer over the worker but a multitude of other factors. The significance of this test is to determine whether a worker is an employee or independent contractor without referring to only one indicium. Therefore, this test allows the courts to consider a number of indicia and factors in order to make a final decision based on the employment relationship.¹³⁵

¹²⁸(2003) 122 IR 215.

¹²⁹Ibid 216-217.

¹³⁰Ibid [28]. See also *Market Investigations Ltd v Minister of Social Security* (1969) 2 WLR 1.

¹³¹[1924] 1 KB 762.

¹³²Ibid 767.

¹³³(2001) 207 CLR 21.

¹³⁴*Hollis v Vabu Pty Ltd* [2001] 207 CLR 21, 42 [48].

¹³⁵See also *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 [34] for a list of indicators regarding the multi-factor test.

Apart from the common law tests, the Fair Work Ombudsman further provides the following indicators in considering whether a person is an employee or independent contractor:¹³⁶

- (i) degree of control over work;
- (ii) expectation and hours of work;
- (iii) risk involved;
- (iv) superannuation payments;
- (v) method of payment;
- (vi) tax and leave entitlements.

If these categories fall outside the scope of performance of an employee, the relationship will not likely be one of employer–employee and the contract for services will be dealt with under the *Independent Contractors Act 2006* (Cth). However, Dawson J in *Stevens v Brodribb Sawmilling Company Pty Ltd*¹³⁷ cautioned against these factors and stated that ‘any attempt to list the relevant matters, however incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant’.¹³⁸ Therefore, employers need to carefully consider whether the person is an employee or independent contract, not only based on these factors.

A further difference between contract of service and contract for service was made in the case of *ACE Insurance Limited v Trifunovski*.¹³⁹ In this case, the predominant issue was whether five insurance sales agents were seen as employees of the insurance company they were associated with.¹⁴⁰ The sales agents were rewarded by way of commission and the contract expressly excluded them as employees but not as independent contractors.¹⁴¹ The sales agents argued that they were entitled to pay for

¹³⁶Fair Work Ombudsman, *Contractors and Employees – What’s the Difference?* (July 2015) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/contractors-and-employees-whats-the-difference>>.

¹³⁷(1986) 160 CLR 16.

¹³⁸Ibid 37.

¹³⁹[2013] FCAFC 3.

¹⁴⁰Ibid [20].

¹⁴¹Ibid.

untaken annual leave and therefore they were seen as employees.¹⁴² Buchanan J found that they were employees of the insurance company. According to Buchanan J:¹⁴³

The selling of insurance was an activity which was required to be carried out through the personal efforts of individual agents and only by them. They were the personal authorised representatives of Combined under relevant legislation regulating activities in the financial services sector. The requirement for personal service to discharge the obligations under the contract which each agent had made is a strong indicator in favour of a contract of employment.

Furthermore, Lander J held that a contract of service includes a number of express and implied terms in a contract such as leave, income tax and superannuation payments whereas the contract for service do not include these implied terms and must be addressed expressly in the contract between employer and independent contractor.¹⁴⁴ Therefore, Lander J agreed with Buchanan J in that there were no other indicia to suggest that the sales agents were independent contractors.¹⁴⁵

A further example where the courts applied the test in whether a contract is formed with an employee or independent contractor was in the case of *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*.¹⁴⁶ The Full Federal Court applied s 357 of the *Fair Work Act* as well as a ‘multifactorial test’ in order to determine whether someone is considered an employee or independent contractor.¹⁴⁷ Section 357 of the *Fair Work Act* states that:¹⁴⁸

- (1) A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

¹⁴²Ibid [22].

¹⁴³Ibid [120].

¹⁴⁴Ibid [6]-[7].

¹⁴⁵Ibid [16]-[17].

¹⁴⁶[2015] FCAFC 37.

¹⁴⁷Ibid [67], [168].

¹⁴⁸*Fair Work Act 2009* (Cth) s 357.

- (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:
 - (a) did not know; and
 - (b) was not reckless as to whether; the contract was a contract of employment rather than a contract for services.

In this case, the court held that a representation was made by the employer according to s 357 of the *Fair Work Act* as well as the ‘multifactorial test’.¹⁴⁹ Therefore, the worker was an employee and not an independent contractor and the court took into account an array of factors and indicia in determining this position.

Taking the above-mentioned case law into account, it is reasonable to argue that there is a distinction between employees and independent contractors as a result of the numerous tests and parts of legislation applied. For the purposes of this thesis, the discussion will not extend to independent contractors and their conduct relating to social media outside the workplace. However, it is necessary to point out the difference between the two workers in order to keep the boundaries clear of when an employer is responsible for conduct of an employee on social media platforms beyond the workplace.

In the absence of specific case law dealing with independent contractors and social media, the distinction and relevance between the employment relationship and contractor relationship in relation to the use and control of social media in the workplace can be explained in the following hypothetical scenario in which A is appointed by XYZ training company as an educational training facilitator. After facilitating in Bunbury, A was upset with the lack of interaction and enthusiasm from the current group. Emotional and upset, A decided to make her disappointment known by posting on social media ‘I can’t teach these stupid Bunbarians’. Not aware of any consequences, A is informed that members of the Bunbury training group are upset with the defamatory social media posts. The group will be taking steps to have the posts removed and claim damages from XYZ. As A is an employee of XYZ the Bunbury group will be able to hold XYZ vicariously liable and claim damages directly

¹⁴⁹*Quest South Perth Holdings Pty Ltd*, 235.

from XYZ. If A was appointed as an independent contractor to facilitate the Bunbury training program and posted defamatory comments on social media about the group, A would have been held personally responsible for any claim for damages and a claim for vicarious liability will not succeed.¹⁵⁰ Defamation and vicarious liability is discussed in Chapter 3.

The discussion on independent contractors and control is also pertinent to the vexing issue of whether social media workplace policies do or should apply to independent contractors. For instance, a thorny question that does arise is whether a business can prohibit an independent contractor from communicating information about the business on social media. This is considered in Chapter 4. In terms of an employment relationship, such issues and control are subject to the terms of the employment contract.

The following section discusses the employment contract duties, specifically express and implied duties in an employment contract, and will also include discussions on how the use of social media in the workplace affect the employment relationship. It will further consider how the decisions by courts dealt with implied terms, specifically within scenarios where the employment relationship has changed due to technological and legal adjustments.

2.4.3 Employment Contract Duties

The employment contract between employer and employee consists of different duties towards each other that can have an impact on their relationship in different situations.¹⁵¹ Kirby J described the relationship between an employer and employee, with reference to the contractual duties, as ‘one importing implied duties of loyalty,

¹⁵⁰See *Sweeney v Boylan Nominees Pty Ltd* (2006) 227 ALR 46; Shiva Sayah, ‘Managing Work–life Boundaries with Information and Communication Technologies: The Case of Independent Contractors’ (2013) 28 *New Technology, Work and Employment* 179.

¹⁵¹See in general, Craig McGregor, *Class in Australia* (Penguin Australia, 2nd ed, 2001) 253; David Campbell, ‘The Social Theory of Relational Contract: Macneil as the Modern Proudhon’ (1990) 18 *International Journal of the Sociology of Language* 75, 90; Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005); John Carter and Andrew Stewart, ‘Interpretation, Good Faith and the “True Meaning” of Contracts: The Royal Botanic Decision’ (2002) 18 *Journal of Contract Law* 182, 191; Frank Carrigan, ‘The Implications of Implied Terms in Law in the Common Law Contract of Employment’ (2009) 9(1) *Oxford University Commonwealth Law Journal* 73.

honesty, confidentiality and mutual trust'.¹⁵² Therefore, the duties are based on the nature of the employment relationship.¹⁵³ In relation to the employment contract, the duties and obligations that must be met by both the employer and employee are what make it an employment contract.¹⁵⁴ These are referred to as express and implied duties.

The importance of these duties, in particular implied duties, play a role where the workplace environment transforms because of the use of social media. It is therefore relevant to discuss these duties against the background of social media in the workplace.¹⁵⁵ These duties need to be considered to see how far an employer's duty stretches in order to monitor an employee's conduct regarding the use of social media outside of the workplace.

2.4.3.1 *Express Terms*

As mentioned earlier, an employment relationship is based on 'freedom to contract' and therefore an employer and employee will often agree to express terms and conditions in an employment contract.¹⁵⁶ As soon as these terms are incorporated into a document and signed, the terms are part of the contract and the parties are bound to the express terms.¹⁵⁷ Express terms in an employment contract are less likely to create problems, unless ambiguous or poorly constructed, and in the case where there would be some uncertainty about a term, the validity will be determined by normal contractual principles.¹⁵⁸ The court will determine the express terms according to the words used in the contract:¹⁵⁹

It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by

¹⁵²*Concut Pty Ltd v Worrell* [2000] 176 ALR 693 [51].

¹⁵³*Mears v Safecar Security Ltd* [1982] 3 WLR 366, 383.

¹⁵⁴See in general, *Thompson v Orica Australia* (2002) FCA 939; Adrian Brooks, 'The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence' (2001) 20(1) *University of Tasmania Law Review* 29.

¹⁵⁵See, eg, Ole Lando and Hugh Beale (eds), *Principles of European Contract Law Part I and II* (Kluwer Law International, 2000) 302, 305, art 6:102 which states that: 'In addition to the express terms a contract may contain implied terms which stem from (a) the intention of the parties, (b) the nature and purpose of the contract, and (c) good faith and fair dealing.'

¹⁵⁶See, eg, *Melrose Farm Pty Ltd v Milward* (2008) 175 IR 455, [21]-[22].

¹⁵⁷*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165.

¹⁵⁸Ornstein, above n 45, 154. See also *Lewandowski v Mead Carney – BCA Ltd* (1973) 2 NSWLR 640.

¹⁵⁹*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [40].

words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement.

Express terms include, for example, type of employment, payment, hours of work, termination and jurisdiction.¹⁶⁰ In this case, the employer and employee can expressly agree to terms regarding the use of social media in the workplace. Both parties need to agree and intend to have these terms in their contract in order to prevent any confusion. Furthermore, a workplace policy may expressly form part of an employment contract.¹⁶¹ For example, the case of *Raynes v Arnotts Biscuits Pty Ltd*¹⁶² dealt with policies forming part of an employment contract as the employee was made aware, prior to contract formation, of the workplace policy being a term in the employment contract.¹⁶³ The significance of workplace policies forming part of employment contracts is that when an employer utilises social media in the workplace, both workplace policies and employment contracts may deal with the inappropriate use of social media expressly. This will then determine the outcome of the action required for the inappropriate use thereof. This will also be dealt with further in Chapter 4.

In addition to express terms, the employment contract is subject to implied terms that is, terms ‘on which the parties have not actually agreed, but which are nonetheless taken to be part of their contract’.¹⁶⁴ As implied terms are not explicitly stated in a contract they are more likely to give rise to difficulties in terms of application and interpretation, especially where employees are not familiar with such terms.

2.4.3.2 *Implied Terms*

According to Wightman, ‘a crucial aspect of the theory of the common law contract of employment is that it embodies autonomous individuals creating the terms of their contractual relationship free from coercion; the state merely acts as a passive agent

¹⁶⁰Workplace Info, *Contract of Employment Conditions*

<<http://workplaceinfo.com.au/resources/employment-topics-a-z/contract-of-employment-conditions>>.

¹⁶¹*Goldman Sachs J B Were Services v Nikolich* [2007] FCAFC 120.

¹⁶²(1991) 33 AILR 363.

¹⁶³*Ibid.*

¹⁶⁴ Andrew Stewart, *Stewart's Guide to Employment Law* (The Federation Press, 2013) 97.

enforcing the free will and freedom of contract struck by two equals'.¹⁶⁵ Therefore, the employment contract, as discussed above, changed from a hierarchy of status to one that is now based on contract.¹⁶⁶ Therefore, many terms must be included in the employment contract through an express agreement, but sometimes it is difficult to define certain terms in a contract that must be covered implicitly.¹⁶⁷ The court in *Barker v Commonwealth Bank of Australia*¹⁶⁸ stated that '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'.¹⁶⁹ The application of implied terms remarked in this case will be discussed in greater detail under the duty of mutual trust and confidence below.

For example, the duty to obey is an implied term of the employment contract as it is an obligation placed on an employee to obey their employer's orders. Implied terms are viewed as a 'gap-filling' device and therefore the employment contract is 'fleshed out by implied terms – terms that the parties would not have directly or explicitly put their minds to'.¹⁷⁰ Likewise, Carrigan explains that:

Implied terms have been part of the matrix of different social formations for a number of centuries. They are part of the ideology of law and play a seminal role in reinforcing hierarchical conceptions of employment law. Implied terms are not abstract collective entities existing in a legal vacuum. They will not change their function in the face of criticism alone. They are a concentrated expression of economic, social and legal power.¹⁷¹

¹⁶⁵John Wightman, *Contract: A Critical Commentary* (Pluto Press, 1996) 2.

¹⁶⁶Henry Maine, *Ancient Law* (Dent, 1917) 170. See also Simon Deakin and Frank Wilkinson (eds), *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution* (Oxford University Press, 2005) 62 that states: 'the obligation of obedience was a feature of serfdom that was carried forward into labour contracts of master and servant, and then morphed into the common law contractual framework.'

¹⁶⁷*Ibid* 172. See also Kate Jenkins and Andrew Pollock, *Social Networking: Employer's Friend or Foe?* (2010) Herbert Smith Freehills
<<http://www.herbertsmithfreehills.com/insights/legal-briefings/social-networking-employers-friend-or-foe>>.

¹⁶⁸[2012] FCA 942.

¹⁶⁹*Ibid* [329].

¹⁷⁰*Ibid* 173. See also Karl Renner, *The Institutions of Private Law and Their Social Functions* (Routledge, 1949) 28.

¹⁷¹Frank Carrigan, 'The Implications of Implied Terms in Law in the Common Law Contract of Employment' (2009) 9(1) *Oxford University Commonwealth Law Journal* 73, 100.

Thus, where the use of social media by an employee in the workplace is expressly agreed to by the parties, the parties still have implied duties towards each other in relation to the use of social media in the workplace and how the consequences of the misuse thereof will affect the employment relationship and ultimately the employment contract.

There are two categories of implied terms within an employment contract, namely¹⁷² implication by law and implication of a term necessary.¹⁷³ The second category applies to business efficacy and works alongside the expressed terms in a contract. This was expressed by Lord Simon in the case of *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*.¹⁷⁴ He held that five requirements must be met with regard to the second category in any form of contract:

- (i) the term must be reasonable and equitable;
- (ii) the term must be necessary to give effect to business efficacy;
- (iii) the term must be so apparent that ‘it goes without saying’;
- (iv) the term must be clearly expressed; and
- (v) the term must not be in conflict with any express term in the contract.¹⁷⁵

The rigorous application of these requirements will be difficult. Nonetheless, the court in *Byrne v Australian Airlines Ltd*¹⁷⁶ held that this must only apply to oral or semi-written contracts and the test is now whether the ‘implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case’.¹⁷⁷

The first category, on the other hand, includes terms that should apply to the employment contract regardless of the intention of the employer or employee.¹⁷⁸ Under

¹⁷²*Castlemaine Tooheys Ltd v Carlton and United Breweries Ltd* (1987) 10 NSWLR 468, 486-7.

¹⁷³*Ibid.* See the difference between two categories in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

¹⁷⁴(1977) 16 ALR 363, 376. See also *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.

¹⁷⁵*Ibid* 283.

¹⁷⁶(1995) 195 CLR 410.

¹⁷⁷*Ibid* 422. See also *Brackenridge v Toyota Motor Corp Australia Ltd* (1996) 67 IR 162.

¹⁷⁸*Ibid.* See also Jane Knowler and Charles Rickett, ‘Implied Terms in Australian Contract Law: A Reappraisal After *University of Western Australia v Gray*’ (2010) 37(2) *Monash University Law Review* 145.

this category, a two-step process is required, namely that¹⁷⁹ there must be a contractual relationship that is identifiable¹⁸⁰ and the test of necessity must be satisfied.¹⁸¹ One example of a term implied by law is that an employee must obey all reasonable orders given by the employer.¹⁸² The difference between the two categories of implied terms will be important when considering terms in an employment contract that are essential to the employer–employee relationship. This is also relevant when considering the employment contract and social media workplace policies in Chapter 4.

With the development of social media in the workplace, certain implied duties between employers and employees apply to conduct involving social media. These duties form the foundation of the employment contract and provide the basis on which an employer will be able to monitor and control the social media and consequences for inappropriate use, which may extend beyond the workplace.

The following section will firstly look at the duties of employees followed by the duties of employers. It will provide a general discussion on each duty within the context of employment law and extend to the use of social media and the implications of inappropriate use on the employer–employee relationship. The discussion that follows does not seek to consider all rights and duties,¹⁸³ but only those duties that are most relevant in terms of the use of social media in the workplace, the inappropriate use of social media and the potential consequences, which forms the background for the discussion on monitoring and control of social media through workplace policies in Chapter 4.

¹⁷⁹William Dixon, *An Examination of the Common Law Obligation of Good Faith in the Performance and Enforcement of Commercial Contracts in Australia* (PhD, Queensland University of Technology, 2005) 17.

¹⁸⁰This includes different types of contracts such as contracts between master and servant; employer and employee and landlord and tenant. Each has their own duties implied by law.

¹⁸¹The court in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 450 states that ‘necessity’ means that ‘unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or perhaps, be seriously undermined’.

¹⁸²See, eg, *Public Service Association v Zoological Parks Board of New South Wales* [2007] NSWIRComm 1080; *Tibaldi Smallgoods (Australasia) Pty Ltd v Rinalida* (2008) 172 IR 86.

¹⁸³For a discussion on these general duties see, eg, Kathy Idensohn, ‘The Nature and Scope of Employees’ Fiduciary Duties’ (2012) 33 *Industrial Law Journal* 1539; Theodore Claypoole, ‘A Good Day’s Work: Duties Employees Owe their Employers’ (1994) 8 *Ohio Lawyer* 16; Rob Batty, ‘Examining the Incidence of Fiduciary Duties in Employment’ (2012) 18 *Canterbury Law Review* 187; Sharon Margoloth, ‘Regulating Individual Employment Contracts through Good Faith Duties’ (2011) 32 *Comparative Labour Law and Policy Journal* 663; Richard Lehr, ‘Employer Duties to Accommodate Handicapped Employees’ (1980) 31 *Labour Law Journal* 174;

2.4.4 Employee Duties

An employee has certain duties under the employment contract that they must adhere to. In the case of *Coconut Pty Ltd v Worrell and Anor*,¹⁸⁴ the court summarised the implied duties of an employee as the duty to work; duty to obey all laws; duty to care and skill; duty of good faith and fidelity; and duty not to disclose confidential information.¹⁸⁵

These key duties will accordingly be explained and discussed with specific reference to breaches of these duties in relation to the inappropriate use of social media in or outside of the workplace.

2.4.4.1 Duty to Obey

One of the fundamental duties of an employee is the duty to obey orders from the employer¹⁸⁶ and the failure to do so is highlighted in *Laws v London Chronicle (Indicator Newspapers) Ltd*:¹⁸⁷

It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard ... of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.

Therefore, an employee must show obedience towards their employer in the tasks they fulfil.¹⁸⁸ This harks back to the master–servant relationship and the notion of control. However, orders directed at an employee by the employer must be ‘lawful’ and ‘reasonable’.¹⁸⁹ In the case of *R v Darling Island Stevedoring and Lighterage Co Ltd*;

¹⁸⁴[2000] 103 IR 160.

¹⁸⁵See also Emma Jervis, *Employment Obligations and Implied Duties* (7 January 2015) Legal Vision <<https://legalvision.com.au/employment-obligations-implied-duties/>>.

¹⁸⁶Australian Law Reform Commission, *Frameworks for Effective Information Handling (Lawful and Reasonable Employer Directions)*, Report no 112 (2009) [14.54] <<http://www.alrc.gov.au/publications/14-frameworks-effective-information-handling/lawful-and-reasonable-employer-directions>>.

¹⁸⁷[1959] 1 WLR 698, 700.

¹⁸⁸*R v Darling Island Stevedore & Lighterage Company Limited* (1938) 60 CLR 301.

¹⁸⁹*Ibid.*

Ex part Halliday and Sullivan,¹⁹⁰ the court had to determine whether a reasonable command and order was breached by an employee. The High Court held that:¹⁹¹

If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable, in other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable.

Similarly, in the case of *Pepper v Webb*¹⁹² an employee was dismissed as a result of not acting on his employee duties. It was held by the court that the dismissal of the employee was fair because the employee ceased from acting on fair and reasonable duties as requested by his employer, and therefore he repudiated his employment contract.¹⁹³ The employer also accepted this breach.¹⁹⁴

The duty to obey is also illustrated in the case of *Adami v Maison De Luxe Ltd*,¹⁹⁵ in which the employer asked his manager to change the normal hours of the dancing club to include Saturdays. Mr Adami was worried about this as he had other part-time jobs on Saturdays, but decided to delegate the work to other staff members. The employer consequently dismissed Mr Adami. The High Court of Australia held that the employer dismissed Mr Adami on a fair and reasonable basis due to Mr Adami not performing or obeying the reasonable orders made by the employer.

Furthermore, the court in *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)*¹⁹⁶ had to consider whether the duty to obey

¹⁹⁰(1938) 60 CLR 601.

¹⁹¹Ibid 621.

¹⁹²[1969] 1 WLR 514.

¹⁹³Ibid [69].

¹⁹⁴Ibid [70], Karminski J held that ‘the essential question here is whether the employer (the defendant) was justified in his summary dismissal of the plaintiff on the ground of wilful disobedience of a lawful and reasonable order...It has long been part of our law that a servant repudiates the contract of service if he wilfully disobeys the lawful and reasonable orders of his master...’

¹⁹⁵(1924) 35 CLR 143. See *Turner v Mason* (1845) 153 ER 411, 153 where the employee was unfairly dismissed for failing to obey orders.

¹⁹⁶[1972] 2 QB 455.

was lawful orders was within the orders given to the employees. The court noted that:¹⁹⁷

There are many breaches of our law when an act which would otherwise be lawful is rendered unlawful by the motive or object with which it is done. So here it is the wilful disruption which is the breach. It means that the work of each man goes for naught ... wages are to be paid for services rendered, not for producing deliberate chaos.

This indicates that employers remunerate employees to obey lawful and reasonable orders and if an employee disregards these orders, it may constitute a breach of the implied duty and hence a breach of the employment contract.¹⁹⁸ The primary question is whether the duty to obey extends to employees being directed on the use of social media beyond working hours.

In relation to the use of social media in the workplace, the duty to obey is a matter that needs consideration, especially when examining the employer's right to control and manage an employee's actions outside the workplace. As held by *Adami v Maison de Luxe Ltd*,¹⁹⁹ employers have the right to issue lawful and reasonable orders to its employees. If an employee breaches this duty, it may lead to a reasonable dismissal by the employer.²⁰⁰ One of the aims of this thesis is to consider the control and management of employees through social media policies in connection with the employment contract. This will be further examined in Chapter 4; however, the relevance in this part of the chapter is that social media policies, which to some extent, form part of the employment contract, may include lawful and reasonable orders when there is use of social media in the workplace.

An example of this was demonstrated in the case of *Pearson v Linfox Australia Pty Ltd*²⁰¹ where the employee refused to undertake training of the use of social media in the workplace, which ultimately led to the employee's dismissal. The court held that,

¹⁹⁷Ibid 492.

¹⁹⁸See Ronald McCallum, 'Employee Loyalty in Australia' (1999) 20 *Comparative Labour Law and Policy Journal* 155; *Pettet v Readiskill LMT Mildura* [2001] VSCA 211; *Coal & Allied Mining Services Pty Ltd v MacPherson* (2010) 185 FCR 383.

¹⁹⁹(1924) 35 CLR 143, 151.

²⁰⁰Ibid 153.

²⁰¹[2014] FWC 446 (17 January 2014).

even though workplace policies are formed with the view to deal with actions by employees within the workplace, the social media policy and specific training on this extend to an employee's behaviour beyond the workplace.²⁰² The dismissal was therefore not considered unreasonable because of the employee not obeying the reasonable and lawful orders of the employer in relation to the use of social media in the workplace and beyond.

2.4.4.2 *Duty of Good Faith and Fidelity*

The duty of good faith and fidelity is indicative of the master–servant relationship and remains an important implied duty that requires an employee to be faithful and loyal towards their employer.²⁰³ The word 'loyal' can be defined as 'faithful or steadfast in allegiance'.²⁰⁴ Under common law, an employee has a duty of good faith and fidelity towards their employer to show loyalty within this employment relationship and therefore it is not an equitable term.²⁰⁵ This duty is mostly evident with intellectual property rights, confidential information of a corporation²⁰⁶ and competing with an employee's employer.²⁰⁷ Furthermore, this duty is vital in the employment contract because:²⁰⁸

Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal.

There exist two notions of loyalty when dealing with the duty of good faith and fidelity. The first refers to 'fiduciary obligations' and the second 'employment obligations'.²⁰⁹

²⁰²Ibid [47].

²⁰³Frank Carrigan, 'The Implications of Implied Terms in Law in the Common Law Contract of Employment' (2009) 9 *Oxford University Commonwealth Law Journal* 73, 75.

²⁰⁴Oxford English Dictionary, *Loyal* (Oxford University Press, 6th ed, 2007) 1650. See also *HIH Casualty v Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61 (HL), [15] which held that: 'Parties entering into a commercial contract . . . will assume the honesty and good faith of the other; absent such an assumption they would not deal.'

²⁰⁵*Robb v Green* [1895] 2 QB 315, 320.

²⁰⁶Ornstein, above n 45, 264-267. See also *University of Western Australia v Gray* (2009) 179 FCR 346.

²⁰⁷AJ Geare, 'An Employee's Duty of Loyalty: New Zealand Law and Practice' (1999) 20 *Comparative Labour Law and Policy Journal* 283, 287.

²⁰⁸*Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 81.

²⁰⁹Rob Batty, 'Examining the Incidence of Fiduciary Duties in Employment' (2012) 18 *Canterbury Law Review* 187, 188.

Generally, when fiduciary obligations exist, a fiduciary relationship normally exists and the courts will determine whether an employment contract gives rise to such a fiduciary relationship.²¹⁰ If an employment contract is established as a fiduciary relationship, two elements of loyalty exist: a fiduciary's interests must not conflict with the interests of their principal and a fiduciary must make no unauthorised profit in their position as fiduciary.²¹¹ As already mentioned, an employee also owes a duty of loyalty under common law to their employer. This is also known as the 'duty of good faith and fidelity'.²¹²

The case of *Dover-Ray v Real Insurance Pty Ltd*²¹³ is a prime example of the consequences for misusing social media and the impact on the employment relationship. In this case, an employee was dismissed for publishing disparaging material about the employer on a social media blog that was harmful to the employer's reputation and, importantly, for refusing to remove the blog when instructed to do so.²¹⁴ The Commission held that there was a valid reason for the dismissal pursuant to s 652(3)(a) of the *Workplace Relations Act 1996* (Cth) as 'the blog, in effect, was an attack on the integrity of management'.²¹⁵ The Commissioner did note that 'it is not necessary for me to find whether or not Ms Dover-Ray's conduct was a breach of her obligations as an employee not to conduct oneself in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between the employer and employee and to act with good faith towards her employer – that were implied terms of her contract of employment'.²¹⁶ Arguably however such conduct falls within the scope of the implied duty to act in good faith, and it can seriously damage the employment relationship as was clearly evident in this case. A refusal to carry out a reasonable instruction may also amount to a breach of duty to obey, as discussed above.

²¹⁰Paul Miller, 'A Theory of Fiduciary Liability' (2011) 56 *McGill Law Journal* 235, 239-240. See also *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL), 147-149.

²¹¹Ornstein, above n 45, 190. The court in *Breen v Williams* (1996) 186 CLR 71, 108 held that: 'Duty and self-interest, like God and Mammon, make inconsistent calls on the faithful. Equity solves the problem in a practical way by insisting that fiduciaries give undivided loyalty to the persons whom they serve.'

²¹²See in general Gordon Anderson et al, *Mazengarb's Employment Law* (LexisNexis, 2012) 1028.

²¹³[2010] FWA 8544 (5 November 2010).

²¹⁴*Ibid* [22].

²¹⁵*Ibid* [54].

²¹⁶*Ibid* [61].

The duty of good faith and fidelity indicates the importance of loyalty between an employer and employee and that serious consequences will arise from the inappropriate use of social media within and beyond the workplace.²¹⁷ Therefore, this duty is well established within the employment contract and any breach thereof will undermine the confidence of the employer.²¹⁸ This duty will also extend to how employers can control and monitor employee's behaviour outside of the workplace through their employment contract and workplace policies on social media. Aside from an employee having a duty to obey and good faith, it is also required from an employee to have a duty of care towards their employer.

2.4.4.3 *Duty of Care*

Employees have a duty of care towards their employer to perform their work in a skilful manner. In general terms, the existence of a duty of care was considered by the court in *Donoghue v Stevenson*.²¹⁹ In this case, Lord Atkin held that:²²⁰

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In an employment context, the reasonable duty of care will be applied in a similar fashion and an employee needs to be aware of their actions and whether it was foreseeable or not. This duty has also been marked as an 'inherent requirement of the job'.²²¹ This duty includes three steps. Firstly, the employee must possess the required skill for the job, which goes together with inherent requirements of the job.²²² Secondly, the employee must perform their job in an acceptable and skilful manner.²²³

²¹⁷See also *John Pinawin t/a RoseVi.Hair.Face.Body v Edwin Domingo* [2012] FWA FB 1359 (21 March 2012).

²¹⁸*Robb v Green* [1895] 2 QB 315, 15.

²¹⁹[1932] AC 562.

²²⁰*Ibid* 580.

²²¹Ornstein, above n 45, 282. See also *X v Commonwealth* (1999) 200 CLR 177.

²²²Adrian Brooks, 'Myth and Muddle: An Examination of Contracts for the Performance of Work' (1988) 11 *University of New South Wales Journal* 48, 83.

²²³*Ibid*. See also *Harmer v Cornelius* (1858) 141 ER 94; *Printing Industry Union v Jackson & O'Sullivan* (1957) 1 FLR 175.

Lastly, the employee must perform their job with the necessary care.²²⁴ This duty is essential to the employment relationship as the employee is required to comply with an employer's policies within the workplace.²²⁵ This extends to activities beyond the workplace, which is categorised in connection with their employment and the inappropriate use of social media in the workplace and beyond.

In relation to this duty, employees have a general duty to take reasonable care not to cause damage to their employer whether within working hours or beyond.²²⁶ Therefore, employees need to take care when using social media as a means of communication in the workplace and beyond due to their general duty of care towards the employer. In the case of *Wilkinson-Reed v Launtoy*,²²⁷ the employee was dismissed because of a message sent by the employee to her manager's estranged wife. The message contained derogatory comments about the manager. The Commissioner held that the comments made on the estranged wife's Facebook account was for private purposes only and therefore it would have remained confidential.²²⁸ The dismissal was found to be unlawful. Even though this was the position held by the Commission, employees need to take care when posting online as inappropriate behaviour by an employee in this regard may be against their implied duty of care. Furthermore, it may be against a social media workplace policy associated with the implied duties found within the employment contract.

As a result of the limited Australian case law on the use of social media in the workplace and breach of duty of care, the following case is instructive for illustrating the duty of care in relation to the inappropriate use of social media. The case of *PhoneDog v Kravitz*.²²⁹ involved a US company (PhoneDog) who provides online news and blogs to mobile device readers. In 2006, they employed Mr Kravitz as a blogger for their business. He was contracted to provide relevant information and news to PhoneDog's clients through Twitter and other online platforms. For this, Mr Kravitz

²²⁴Ornstein, above n 45.

²²⁵Department of Commerce, Government of Western Australia, Guidance Note. *General Duty of Care in Western Australian Workplaces* (2005)
<https://www.commerce.wa.gov.au/sites/default/files/atoms/files/general_duty_of_care.pdf>.

²²⁶*Lister v The Romford Ice and Cold Storage Company Limited* (1957) AC 555.

²²⁷[2014] FWC 644 (24 January 2014).

²²⁸*Ibid* [63].

²²⁹*PhoneDog v Kravitz*, No. 11-03474 (N.D. Cal. Nov. 8, 2011)

<<http://courtweb.pamd.uscourts.gov/courtwebsearch/cand/DduUX1LkLg.pdf>>.

made use of the Twitter account '@PhoneDog_Noah' and within his contract of service he gained more than 17 000 followers. Mr Kravitz's employment ended in 2010 and the dispute between him and his employer arose because he would not release the PhoneDog Twitter account back to his employer. Mr Kravitz changed the Twitter account name to '@noahkravitz'. Mr Kravitz gained employment at a competitor of PhoneDog and used this Twitter account name.

PhoneDog argued that there is an economic relationship between them and their users, who follow them on these social media platforms and that Mr Kravitz disrupted the relationship causing PhoneDog to be economically harmed by his actions.²³⁰ The court concurred with these arguments.²³¹ The most important argument advanced by PhoneDog, which is of relevance for this implied duty, was that Mr Kravitz owed them a duty of care and therefore he was negligent in changing the Twitter account and distributing news to the same Twitter followers from another account.²³² Therefore, Mr Kravitz was found to have breached his duty of care towards his employer.

The duty of care by an employee towards an employer when using social media is still relevant, even though it is outside the workplace. It has earlier been discussed that a 'workplace' can be considered anywhere and therefore employees need to be aware that their private activities when accessing social media platforms may be subject to monitoring and control by the employer. The above mentioned implied duties by the employee are important to fulfil the employment contract between the parties. However, just as the employee duties are important within this scope, so are the employer duties in order to complete the employment contract and the way employers have duties towards their employees when assessing the use of social media in the workplace and beyond.

2.4.5 Employer Duties

At the same time as employees have implied duties towards their employer, so too does the employer have duties towards their employee. An employer's duty towards

²³⁰Ibid 1-2.

²³¹Ibid 3. See also Corey Dennis, 'Legal Implications of Employee Social Media Use' (2010) *Massachusetts Law Review* 380.

²³²Ibid.

their employees is implied by operation of law.²³³ An employer's duties include the duty to pay wages,²³⁴ duty to provide work,²³⁵ duty to act reasonably,²³⁶ duty of care; and duty of mutual trust and confidence. The focal point and heart of these duties lie with mutual trust and confidence. The main discussion will surround the duty to act reasonably, duty of care and the duty of mutual trust and confidence. This discussion will expand into whether employers have the duty to control and manage the actions of employees outside the workplace when they use social media in an inappropriate way towards the employer.

2.4.5.1 *Duty of Care*

At common law, employers owe a duty of care to their employees with regard to the employer–employee relationship as well as within health and safety.²³⁷ This is to ensure the safety of all employees within the workplace.²³⁸ Although this is of a tortious or negligent nature, it also falls within the contractual relationship between employer and employee.²³⁹ An employee's safety is recognised through a 'neighbour' relationship between employer and employee.²⁴⁰ The court in *Cotter v Huddart Parker Ltd*²⁴¹ further described the duty of care by an employer as follows:

The special duties which are owed to an employee as contrasted with ordinary invitees arise by virtue of implications in the contract of employment. They comprise the duties to ensure, so far as it is possible to do so by the exercise of reasonable care, (1) that the

²³³See, eg, *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435; *Byrne & Frew v Australian Airlines Ltd* (1995) 131 ALR 422.

²³⁴This duty is dependent on the employee performing certain hours of work. The *Fair Work Act*, apart from any agreed industrial enterprise agreements, set out the normal working hours as well as minimum wages. They may be extended should they be differently agreed upon under the industrial enterprise agreement. See s 470 of the *Fair Work Act 2009* (Cth).

²³⁵Where an employer fails to provide necessary work to an employee on an implied promise, it can constitute a breach of this duty. An example where an employer can restrict an employee's work is when an employee takes all his or her contact to a new or rival company. See also *Tullett Prebon (Australia) Pty Ltd v Simon Purcell* [2008] NSWSC 852.

²³⁶See in general Hugh Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 *Current Legal Problems* 297-331.

²³⁷See JR Carby-Hall, 'The Sources of the Contract of Employment – Implied Terms at Common Law – The Employer's Duties' (1984) 26(1) *Managerial Law* 1.

²³⁸*Hamilton v Nuroof* (1956) 96 CLR 18.

²³⁹Pittard and Naughton, above n 67, 294-295. See also *Koehler v Cerebos Pty Ltd* (2005) 222 CLR 44; Government of Western Australia, Department of Commerce, *Guidance Note: General Duty of Care in Western Australian Workplaces* (2005)

<http://www.commerce.wa.gov.au/sites/default/files/atoms/files/general_duty_of_care.pdf>.

²⁴⁰*Donoghue v Stevenson* (1932) AC 562, 580.

²⁴¹(1941) 42 SR (NSW).

persons selected to work with him as his fellow employees are competent, (2) that the premises at which he is to work, and the appliances in use there, are safe, and (3) that the general system of working which is in use is also safe.²⁴²

Similarly, the case of *Pascoe v Coolum Resort*²⁴³ dealt with the duty of care by an employer. In this case the employee was walking with co-workers down a paved pathway and at the end of it, she slipped and injured her knee.²⁴⁴ The court, in this regard, held that:²⁴⁵

The degree of care necessary to discharge its obligation to take reasonable care for the respondent is, accordingly, of a higher order. In this regard, it is well established that, in the context of the employer's duty to its employees, the exercise of reasonable care for the employee's safety in the environment created for, and in the course of, the conduct of appellant's business operations includes recognition of the possibility of inadvertence or even careless lack of attention by its employees.

Therefore, this duty is not only seen as personal but also non-delegable, which means that an employer has a duty of care, not only towards employees but also independent contractors.²⁴⁶ Furthermore, the case of *Wright v Optus Administration Pty Limited*²⁴⁷ indicated that an employer always has a duty of care towards employees and their safety. In this case, a former employee attempted to murder a co-worker by pushing him off the roof where the training took place. The court in this case noted that Optus, as employer, had acted negligently in not keeping the workplace safe and calling the police immediately after becoming aware of this. In the context of social media, an

²⁴²Ibid 37-8.

²⁴³[2005] QCA 354.

²⁴⁴Ibid [3]-[5].

²⁴⁵Ibid [20].

²⁴⁶*Kondis v State Transport Authority* (1984) 154 CLR 672, 693: 'The employer's duty, to whomsoever it falls to discharge it, is to take reasonable care to avoid exposing his employee to an unnecessary risk of injury and the employer is bound to have regard to a risk that injury may occur because of some inattention or misjudgement by the employee in performing his allotted task.' The High Court in *Czatyрко v Edith Cowan University* (2005) 214 ALR 349 also held that 'An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards.'

²⁴⁷[2015] NSWSC 160.

employer has a duty of care towards any employee who is not safe in the workplace. This is evident from the case in *Cotter v Huddart Parker Ltd* noted above.²⁴⁸

The duty of care by an employer, for purposes of this thesis, will be aimed at keeping employees safe within the workplace when using social media and specifically focus on cyberbullying as an issue when employees misuse social media. A good example of inappropriate behaviour by employees towards one another is the case of *Sharon Bowker & Ors v DP World Melbourne Ltd & Ors*,²⁴⁹ which deals with bullying in the workplace. This case considered whether an employer has a duty of care towards employees whose safety is being threatened outside of the workplace on a social media network. In this case, the FWC stated that for an employer to take action and perform their duties there is no requirement for the bullying to take place within the workplace.²⁵⁰ Therefore, it can extend beyond the workplace and efficient control and monitoring is able to take place.

This is one of the few cases reported that deals with cyberbullying in the workplace;²⁵¹ the issue of cyberbullying will further be explored in Chapter 3. The duty of an employer to keep their employees safe is key within the employment relationship. Because of the significance of this duty on the employment relationship, the termination of employment as a result of inappropriate behaviour by employees towards co-workers must be taken seriously by employers.

2.4.5.2 *Duty to Act Reasonably ('In Good Faith')*

Baroness Hale in the case of *Crossley v Faithful & Gould Holdings Ltd*²⁵² held that: 'it seems to me that, rather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations'.²⁵³ Further, the court in *Woods v WM Car Services*²⁵⁴

²⁴⁸See also Tom Thawley, 'Duty to be Careful when giving Employees References' (1996) 70 *Australian Labour Journal* 403.

²⁴⁹[2014] FWCFB 9227 (19 December 2014).

²⁵⁰*Ibid* [48], [54].

²⁵¹See also *Roberts v VIEW Launceston Pty Ltd & Ors* [2015] FWC 6556 (23 September 2015).

²⁵²[2004] EWCA Civ 293.

²⁵³*Ibid* [36].

²⁵⁴(1982) ICR 693.

stated that an employer should be good and considerate.²⁵⁵ However, some case law suggests that ‘good faith’ and ‘reasonableness’ are two co-existing duties within the employment contract.²⁵⁶ In Australia, there is no set definition for ‘good faith’, but Mason refers to it in three stages: an obligation on the parties to cooperate; complying with standards of conduct in an honest way; and being reasonable within complying with standards of conduct in an honest way.²⁵⁷

In the case of *Downe v Sydney West Area Health Service (No 2)*,²⁵⁸ the court held that ‘the Health Department’s power cannot be exercised to undermine or destroy the basis of the employee’s contract of employment’²⁵⁹ and further submits that ‘the employee relies upon a breach of the implied duty not to engage in conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, which the employee says is implied into her contract of employment’.²⁶⁰ Therefore, traditionally this duty did not form part of the employment contract.²⁶¹

The interest with good faith comes in whether it should be seen as a subjective or objective standard of reasonableness, due to both being co-existing duties.²⁶² Farnsworth notes that ‘a requirement of fair dealing arguably incorporates an objective standard and may invite expert testimony as to the practices of a particular trade or profession’.²⁶³ In some cases, the courts have implied both ‘good faith’ and ‘reasonableness’ together.²⁶⁴ Mason further suggests that ‘the obligation of good faith

²⁵⁵Ibid 598. This duty comes from the concept of ‘constructive dismissal’.

²⁵⁶*Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Mangrove Mountain Quarries Pty Ltd v Barlow* [2007] NSWSC 492. See also Geoffrey Kuehne, ‘Implied Obligations of Good Faith and Reasonableness in the Performance of Contracts: Old Wine in New Bottles?’ (2006) 33 *University of Western Australia Law Review* 63.

²⁵⁷Sir Anthony Mason, ‘Contract, Good Faith and Equitable Standards in Fair Dealing’ (2000) 116 *Law Quarterly Report* 66. Sec 1-209(19) of the *Uniform Commercial Code* defines ‘good faith’ as: ‘honesty in fact in the conduct or transaction concerned.’

²⁵⁸(2008) 174 IR 385.

²⁵⁹Ibid 454 [320].

²⁶⁰Ibid.

²⁶¹See *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] 186 ALR 289.

²⁶²See for example *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *Burger King Corp v Hungry Jack’s Pty Ltd* [2001] NSWCA 187, [151]-[152].

²⁶³Allan Farnsworth, ‘Good Faith and Fair Dealing in United States Contract Law’ [2002] *AMPLA Yearbook* 1, 9.

²⁶⁴See in general *Hillas & Co Ltd v Arcos Ltd* [1932] All ER 494, 507.

includes compliance with standards of conduct which are reasonable having regard to the interests of the parties'.²⁶⁵

In the case of *Royal Botanic Gardens and Domain Trust v South Sydney City Council*,²⁶⁶ the court suggested that the duty of 'good faith' will be implied in certain contracts. Nevertheless, the view on the existence of the duty of good faith and the duty to act reasonably has had conflicting views over the past few years. In the case of *South Australia v McDonald*,²⁶⁷ it was accepted that such a term should be implied 'to restrain abuses of an employer's power'. On the other hand, it has been suggested that this duty should be an implied term in all contracts.²⁶⁸ Currently, and in the case of *Australian Licenced Aircraft Engineers Association v Qantas Airways Limited*,²⁶⁹ the Commissioner held that the duty of good faith forms part of the employment contract, but is uncertain to what extent.²⁷⁰

One example of where the court approached both 'good faith' and 'reasonableness' was in the case of *Rogan-Gardiner v Woolworths*.²⁷¹ The employee was an accountant for Woolworths over a period of eight years and when restructuring took place Woolworths dismissed the employee while she was on maternity leave after she refused to be placed in another position. The court held that there is an implied duty of good faith within the employment contract but Woolworths did not breach this duty due to them informing the employee of other positions available.²⁷² Furthermore, the

²⁶⁵Mason, above n 253.

²⁶⁶(2002) 240 CLR 45.

²⁶⁷(2009) SASC 219.

²⁶⁸*Alstom v Yokogawa* (2012) SASC 49. See also contradicting views in *Esso v Southern Pacific Petroleum* (2005) VSCA 228. The courts made it clear that employers 'owe a negative duty to an employee and not to act in an unreasonable and intolerable manner towards an employee' and therefore it is a duty to deal fairly with employees when considering the dismissal of an employee – *Johnson v Unisys Ltd* [2003] 1 AC 518.

²⁶⁹[2009] AIRC 268.

²⁷⁰*Ibid* [146].

²⁷¹[2010] WASC 290. See also the case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439 where the court held that: 'In many civil law systems . . . the law of obligations recognizes an overriding principle that in making and carrying out contracts parties should act in good faith . . . English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.'

²⁷² *Ibid* 6 [12].

court held that Woolworths was reasonable in giving notice and reasonable remuneration to the employee.²⁷³

In circumstances where social media comes into play within the employment relationship, the employer will have a duty to act reasonably and in good faith (honestly) towards the employee in regard to their actions on social media. The duty to act reasonably and in good faith on the grounds of inappropriate use of social media by employees is especially relevant in the termination of employment contracts as a result thereof. Although the concept of dismissal is necessary, it is also essential for the employer to remember that when dismissing an employee regarding the inappropriate use of social media and any code of conduct within the workplace, it must be done reasonably and fair.²⁷⁴ The dismissal of an employee regarding the inappropriate use of social media beyond the workplace should also consider whether the employee understood their actions at the time the comments were posted in connection with employment. This was considered in the case of *Linfox Australia Pty Ltd v Stutsef*²⁷⁵ in which an employee was dismissed because of inappropriate and offensive comments being made to his employer on social media, but where it was held that the dismissal was unreasonable because the employer did not have a social media workplace policy and the comments were made within a private discussion. However, the dismissal may be subject to the employment contract as well as workplace policies making employees aware of their conduct when implemented within the workplace.²⁷⁶

Apart from the duty to act reasonably and in good faith, this also flows into the duty of trust and confidence within the employment relationship.²⁷⁷ Therefore, this duty and the following duty are closely related in terms of duties of the employer.

²⁷³See also Elizabeth Peden, 'Contractual Good Faith: Can Australia Benefit from the American Experience?' (2003) 15(2) *Bond Law Review* 186.

²⁷⁴See Mike Toten, *Social media: Employer Policy v Freedom of Speech* (2014) Workplace Info <<http://workplaceinfo.com.au/hr-management/communication-in-the-workplace/analysis/social-media-employer-policy-v-freedom-of-speech#.VpbzwY9OLIU>>.

²⁷⁵[2012] FWAFB 7097 (3 October 2012).

²⁷⁶*Ibid* [34].

²⁷⁷*Malik v BCCI* (1998) AC 20.

2.4.5.3 Duty of Mutual Trust and Confidence

This duty can be described as a duty ‘not to abuse or destroy the relationship of trust between employer and employee’.²⁷⁸ Furthermore, the case of *Thomson v Orica Australia Pty Ltd*²⁷⁹ summarised this duty as ‘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’.²⁸⁰ This duty and obligation in the contract must therefore be performed in good faith.²⁸¹ Neil and Chin state that:²⁸²

Whether contracts of employment include an implied term requiring employers to treat their employees in a manner that preserves a relationship of mutual trust and confidence between them and, if so, the basis for implying such a term, and the consequences flowing from its breach, constitute the most significant controversies in the common law of employment in Australia.²⁸³

Therefore, this is the most significant implied duty within the employment contract which needs careful consideration, especially when dealing with the use of social media within and beyond the workplace. The significance of the duty of mutual trust and confidence was especially dealt with in *Commonwealth Bank of Australia v Barker*,²⁸⁴ which considered three important aspects:²⁸⁵

- (i) current decisions on whether there exist an implied duty of mutual trust and confidence;

²⁷⁸See in general Joellen Riley, ‘Before the High Court: “Mutual Trust and Confidence” on Trial: At Last’ (2014) 36 *Sydney Law Review* 151.

²⁷⁹[2002] FCA 939.

²⁸⁰*Ibid* [141].

²⁸¹Pittard and Naughton, above n 67, 287-294. See also *Malik and Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 WLR 95 where the court held that ‘an implied term to the effect that the employer would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee’; Joellen Riley ‘Siblings but not Twins: Making Sense of ‘Mutual Trust’ and ‘Good Faith’ in Employment Contracts’ (2012) 36 *Melbourne University Law Review* 521.

²⁸²Ian Neil and David Chin, *The Modern Contract of Employment* (Lawbook Co, 2012) 137.

²⁸³See also Andrew Corney, ‘Unfair Dismissal Relating to the Use of Social Media – An Analysis of Case History’ (2014) 12(1) *Canberra Law Review* 144.

²⁸⁴(2014) 253 CLR 169

²⁸⁵Mark Cox, *Employment Contracts: Is Company Policy a ‘two-way street’?* (2013) 40(1) *Brief* (online) 13
<<<http://search.informit.com.au/ipacez.nd.edu.au/documentSummary;dn=614500889539909;res=IEL APA>>.

- (ii) no limit to providing damages after termination which relates to a breach within the employment contract; and
- (iii) strict treatment of employment policies by both employer and employee.

Thus, one of the most debated terms in a contract, and whether it should be implied or not, is the duty of mutual trust and confidence between the employer and employee. In 2014, the High Court of Australia in *Commonwealth Bank of Australia v Barker*²⁸⁶ decided whether a duty of mutual trust and confidence was a term implied by law in an employment contract.

Mr Barker was employed by the Commonwealth Bank of Australia as an executive manager in the bank's corporate banking section in Adelaide under a written contract of employment that permitted the bank to terminate the contract, without cause, by four weeks' written notice. On 2 March 2009, at a meeting with a number of officers of the bank, Mr Barker was handed a letter which informed him that his current position was to be made redundant with effect from the close of business that day.²⁸⁷ Mr Barker was told on 2 March 2009 that if he was not redeployed within the bank his employment would be terminated on 2 April 2009. That date was later extended to 9 April 2009 on which date Mr Barker was informed that his employment was terminated by reason of redundancy with effect from the close of business on that day.²⁸⁸

In 2010, Mr Barker brought proceedings against the bank for breach of his contract of employment. Mr Barker's claimed that certain written policies of the bank that covered, inter alia, the issue of redundancy were incorporated into his contract of employment.²⁸⁹ He claimed that the bank breached these policies, by failing to inform him of a possible alternative position within the bank, and that he thereby lost that opportunity. The primary judge (Besanko J) found that the policies were not incorporated into and did not form part of Mr Barker's contract of employment.²⁹⁰

²⁸⁶*Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

²⁸⁷*Ibid* [1]-[3].

²⁸⁸*Ibid* [4]-[5].

²⁸⁹*Ibid* [5]-[6].

²⁹⁰*Commonwealth Bank of Australia v Barker* (2012) 229 IR 249 - Besanko J held at [330] that: 'The term only operates where a party does not have reasonable and proper cause for his or her conduct and the conduct is likely to destroy or seriously damage the relationship of confidence and trust between

However, his Honour went on to find that the bank had been almost totally inactive in complying with its policies during a reasonable period after notifying Mr Barker of his redundancy.²⁹¹ He found that this was a serious breach of the implied term of mutual trust and confidence, which sounded in damages. His Honour awarded Mr Barker damages of \$317 000 for loss of the opportunity to be redeployed to a suitable position within the bank. The bank then appealed against the order for damages made by the primary judge in favour of Mr Barker.

Two issues arose on appeal. Firstly, whether the contract of employment contained the implied term and secondly whether, if it did, the bank's breach of its own policies constituted a serious breach of the relationship of trust and confidence upon which the term is founded.²⁹² The High Court dealt with the implied term as incorporated by law and not fact. In this sense, the necessity test is of particular importance. In the case of *University of Western Australia v Gray*,²⁹³ the Full Court observed that 'giving practical content to the notion of "necessity" in a particular case may often involve considerations of "justice and policy" and the need to have regard to the consequences of implying, or not implying, the term, including the "social consequences" thereof'.²⁹⁴

Although employment contracts have been modernised, the employer's obligation is still to take an employee into their service and keep them in their service in order to continue the employer–employee relationship. Therefore, the employment contract is then seen as something more than just to perform work and pay for the work.²⁹⁵ The High Court further held that the implied terms in the employment contract is premised

employer and employee. Furthermore, in this case I am not deciding whether the term applies at the point of dismissal.'

²⁹¹Ibid [335].

²⁹²Ibid [10].

²⁹³(2009) 179 FCR 346.

²⁹⁴*Byrne* [377]. At [379], their Honours further held that 'policy considerations may often be significant in negating the making of an implication, or else in demonstrating that the issues raised by the proposed implication are of such a character or complexity as to make it inappropriate for a court, as distinct from a legislature, to impose the obligation in question.'

²⁹⁵Ibid [291]. The High Court also included Professor Freedland's take on the employment contract as: 'the contract has a two-tiered structure. At the first level, there is an exchange of work and remuneration. At the second level, there is an exchange of mutual obligations for future performance. The second level – the promises to employ and be employed – provides the arrangement with its stability and with its continuity as a contract. The promises to employ and to be employed may be of short duration, or may be terminable at short notice; but they still form an integral and most important part of the structure of the contract. They are the mutual undertakings to maintain the employment relationship in being which are inherent in any contract of employment properly so called.'

on two principles.²⁹⁶ Firstly, the employment contract involves a relationship and not merely a contractual exchange between parties. Therefore, an employer is under some obligation not to terminate the relationship unless provided for in the contract. Secondly, intention must be clear between the parties and therefore the relationship between the employer and employee is one of trust and confidence and this is well established.²⁹⁷

The High Court came to the conclusion that trust and confidence is not an implied term in contracts of employment in Australia.²⁹⁸ The fact that the court rejected mutual trust and confidence as an implied term in the employment contract shows that employers will need to review their workplace policies and procedures more carefully, especially in the age of social media which impacts the employment relationship.

In relation to the inappropriate use of social media by employees and the decision held by Barker regarding the duty of mutual trust and confidence within the employment relationship, is a relevant consideration for social media policies to be adopted. It is unclear whether a social media policy would have contractual weight as some policies are expressly stated to have no contractual validity, whereas others expressly form part of the contract by forming part of the contract as an annexure or the letter of offer.²⁹⁹ In this case, it is possible for a social media policy to form part of the employment contract, depending on the mutually enforceable commitments by both the employee and employer. Therefore, even though there is no existing implied duty of mutual trust and confidence in employment contracts, the social media policy forming part of the employment contract may create mutual trust between parties in accepting the terms attached to the policy on the use of social media within and beyond the workplace. According to Barker, ‘an employer must not without reasonable or proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee’.³⁰⁰ Therefore, adopting the correct social media policies connected to the employment contract will increase trust

²⁹⁶Ibid [294].

²⁹⁷Ibid [294]-[295].

²⁹⁸Ibid [340].

²⁹⁹*Cicciarelli v Qantas* [2012] FCA 56.

³⁰⁰*Barker v Commonwealth of Australia* [2012] FCA 942, [323].

and confidence within the employment relationship, even though there is no such implied duty recognised under common law.

Against this background, it is necessary to consider how social media policies will be incorporated into the employment contract in order to keep a balanced policy between employer and employee. An employer places trust in their employees in order for them to fulfil the tasks they are ordered to perform. If an employee breaches this trust, the employer needs to focus on implementing the correct workplace policies connected with the employment contract in order to restrict the employee from inappropriately using social media again. This is also considered within the control and monitoring of social media outside of the workplace, which will be discussed in Chapter 4. However, the termination of an employee's contract is relevant to consider when there has been misuse of social media in and beyond the workplace. The way in which employees will be disciplined for their behaviour on social media platforms needs consideration because it could lead an employee being unfairly dismissed because of a lack in social media regulation in the workplace.

2.4.6 Discipline of Employees using Social Media Within and Beyond the Workplace

One of the objectives of the *Fair Work Act* is to create a structure for unfair dismissal procedures by employers who fear that they will lose their reputation as a result of the conduct of an employee.³⁰¹ Therefore, the *Fair Work Act* provides a 'fair go all round' to both employees and employers.³⁰² Furthermore, in the case of *Re Loty and Holloway v Australian Workers' Union*,³⁰³ the court stressed that in order to be protected from an unfair dismissal, an individual needs to be a national system employee and covered by an award.³⁰⁴

According to the *Fair Work Act* and the FWC, the following criteria will be used in order to assess whether an unfair dismissal has taken place:³⁰⁵

³⁰¹*Fair Work Act 2009* (Cth) s 381(1)(a).

³⁰²*Ibid* s 381(2).

³⁰³[1971] AR (NSW) 95.

³⁰⁴See *Fair Work Act 2009* (Cth) s 382(a), (b).

³⁰⁵*Ibid* s 385.

- (i) whether the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period;³⁰⁶
- (ii) whether the dismissal was harsh, unreasonable or unjust;³⁰⁷
- (iii) whether the employer is a small business;³⁰⁸ and
- (iv) whether there was a genuine redundancy.³⁰⁹

Therefore, when an employer considers dismissing an employee over the inappropriate use of social media, whether within or outside the workplace, the above criteria need to be considered otherwise an employer's dismissal of an employee will be unlawful and unreasonable in order.³¹⁰ The following discussion will therefore examine scenarios of dismissal within the context of employees inappropriately using social media within and outside the workplace.

In 2010, a number of employees employed with the New South Wales Department of Corrective Services posted comments on Facebook about the Commissioner and senior officers of the Corrective Department.³¹¹ Mr Ken Moroney was appointed by the Corrective Department to investigate the postings made on Facebook and to conduct disciplinary hearings with each of them to assess whether the comments made were an appropriate reason for dismissal.³¹² Mr Moroney concluded that the conduct by the employees was threatening to the business interests of the Corrective Department and made various orders ranging from warnings to dismissals.³¹³ The FWC held that the dismissals of the employees were unfair and that they should be reinstated.³¹⁴ However, the decision of the case centred on the unauthorised

³⁰⁶Ibid s 382(a).

³⁰⁷Ibid s 386(1)(b).

³⁰⁸Ibid s 386(1)(c). This is in conjunction with the Small Business Fair Dismissal Code.

³⁰⁹Ibid s 386(1)(d).

³¹⁰See general decisions in *Glen Stutsel v Linfox Pty Ltd* [2011] FWA 8444 (19 December 2011); *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 (5 November 2010); *O'Keefe v Williams Muir's Pty Ltd* [2011] FWA 5311 (11 August 2011); *Sally-Anne Fitzgerald v Dianna Smith T/A Escape Hair Design* [2010] FWA 7358 (24 September 2010) and *Ms Lee Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend* [2011] FWA 3496 (14 July 2011).

³¹¹*Public Service Association and Professional Officers Association Amalgamated Union of New South Wales v*

Director of Public Employment by his agent the Director General of the Department of Justice and Attorney General [2010] NSWIRComm 36, [1].

³¹²Ibid [3]-[4].

³¹³Ibid [4]-[7].

³¹⁴Ibid [76].

appointment of Mr Moroney as investigator for the Corrective Department, which counted in the employee's favour.

Furthermore, the case of *Paternella v Electroboard Solutions Pty Ltd*³¹⁵ dealt with a sponsored employee who was dismissed because of his inappropriate conduct towards fellow employees. After his dismissal, he sent threatening emails to the employer stating that he would post aggressive comments on Facebook, which could hurt the interest and reputation of the business.³¹⁶ One of the threatening emails read as follows: 'Facebook makes it easy to contact people don't forget that you idiots. When you s**t on people it will eventually come back and I am going to make it my focus to take a big American dump on you'.³¹⁷ Commissioner Ashbury concluded by noting that:³¹⁸

Mr Paternella's dismissal was unfair on the ground that it was harsh. The dismissal was harsh because Mr Paternella was not given any warning that his employment was in jeopardy, limiting his opportunity to mitigate the loss of his job, and consequently his right to remain in Australia. The lack of warning also made the dismissal harsh because Mr Paternella had a limited time in which he could obtain employment with an employer prepared to sponsor him so that he could remain in Australia.

This indicates that employers should be careful in dismissing employees before going through the proper procedures. Even though the employee did respond with aggressive emails about social media posts, it did not hurt the reputation of the employer and therefore not a subject for dismissal.

The case of *Dover-Ray v Real Insurance*³¹⁹ involved an employee who used a social media site to accuse her employer of corruption after the employer discarded her sexual harassment claims by a colleague. The employer dismissed her because of the allegations made on the blog (social media site). The Commissioner held that the employee was fairly dismissed due to the grossly offending claims on social media.³²⁰

³¹⁵[2011] FWA 3323 (27 May 2011).

³¹⁶Ibid [13]-[16].

³¹⁷Ibid [64].

³¹⁸Ibid [96].

³¹⁹[2010] FWA 8544 (5 November 2010).

³²⁰Ibid [108].

On the contrary, in the case of *Dianna Smith v Fitzgerald*,³²¹ the Commissioner held that an employee's posts on Facebook were not serious enough to warrant a dismissal because the comments did not specifically refer to the employer.³²² If the conduct is such that it affects the workplace then the employer can make a determination on the basis of that.³²³

Lastly, the case of *Winfield v Racing Qld Ltd*³²⁴ was heard in 2011 regarding the misuse of social media in the workplace. In this case, the court was provided with evidence of Winfield, who was a jockey and employee of Racing Qld Ltd, and who posted negative comments on her Facebook page. The FWC referred to these comments as 'colourful in language and perhaps of a disdainful view of the personnel of Racing Queensland or one person in particular'.³²⁵ Winfield made these comments as the Licensing Committee in Queensland did not want to approve her application as a jockey because of her poor health.³²⁶ As a result of her comments on Facebook, Racing Qld Ltd used this to show her character and conduct as an employee. The FWC held that 'if she were to provide evidence that she had worked hard, was physically fit, showed due and proper respect for her position and for persons who were trying to instruct her' then her employer did not have a case of discipline against her.³²⁷

In some cases, employers will regard the comments made by employees on a social media platform as misconduct that warrant a warning, whereas other cases used it as a primary point for dismissing the employee. As concluded above, implied terms are powerful within an employment contract and lay the foundations of rights and obligations between employer and employee.³²⁸ The cases discussed above once again confirm that when dealing with social media in the workplace, the employment

³²¹[2011] FWAFB 1422 (15 March 2011). See also *Wilkinson-Reed v Launtoy* (2014) FWC 644.

³²²*Ibid* [18]-[20].

³²³Ornstein, above n 45, 257-262. See also *McManus v Scott* (1996) 140 ALR 625; Joellen Riley, *Employee Protection at Common Law* (The Federation Press, 2005) 40.

³²⁴[2011] QCAT 271.

³²⁵*Ibid* [1].

³²⁶*Ibid* [6]-[7]. A further case was heard in 2010 regarding the unfair dismissal of an employee using social media. In the case of *Applicant v Respondent* [2010] FWA 1062 (11 February 2010), a 15-year-old girl was dismissed by her employer for making inappropriate comments on her Facebook page.

³²⁷*Ibid* [12].

³²⁸See also Adrian Brooks, 'Myth and Muddle – An Examination of Contracts for the Performance of Work' (1988) 11 *University of New South Wales Law Journal* 48.

contract should be formed in a way benefiting both the employer and employee, even when monitoring the employee outside the workplace.

Therefore, to know what terms should apply to such a contract, it is relevant to examine the content of an employment contract and whether terms (such as these discussed above) will form part of the employment contract explicitly or impliedly and further how it will impact on the use of social media within the employment relationship. As a result of the numerous cases dealing with the misuse of social media in the workplace, it is essential for employers to consider the inclusion of social media workplace policies into an employment contract in order to educate the employee on the risks of breaching terms and duties when misusing social media beyond the workplace.

2.5 CONCLUSION

Social media, as explained in this chapter, is now widely used for personal and professional activities and is firmly entrenched in the workplace environment. However, as discussed, the use of social media in the workplace has implications for the management and control of the employer–employee relationship. The first part of this chapter therefore considered the general meaning of ‘social media’ and how it sets the scene within both a private and public setting. The use of social media has spread within businesses, which provides both advantages and disadvantages for the business. However, the greatest concern with the use of social media within businesses is the misuse of social media platforms within the workplace.

This led to the second part of this chapter dealing with what a workplace is and what this means for the use and control of social media. Because of the broad definition of ‘workplace’, there is no longer a bright line between public and private spaces. This indicates that the ‘workplace’ can be anywhere the employee is performing their duties. This brought up the issue of whether the conduct of employees inappropriately using social media outside working hours can be controlled and monitored by the employer. It was considered that due to the definition of ‘workplace’ extending to homes and other contexts, it is possible to regulate the behaviour of employees outside of working hours. This points towards employers having greater control over

employees, which could lead to implications for the employer–employee relationship. This part also considered the difference between an employee and independent contractor in regard to their conduct and the inappropriate use of social media outside the workplace. However, the focus of this thesis is on the employer and employee relationship and not an independent contractor. Nonetheless it was useful to identify the difference between an employee and an independent contractor, and when an employer will be responsible for the inappropriate use of social media within and outside the workplace.

The last part of this chapter considered the employment contract and how the terms of the contract relate to the use and misuse of social media within and outside the workplace. This part considered the general relationship between employer and employee and the key rights and responsibilities of the parties within the employment contract. Each key duty was explained within the general scope of employment law principles, which preceded into a more detailed discussion of how social media impacts on these duties and the employment relationship.

The duties in an employment contract are important in order to establish and regulate the relationship between employer and employee. Therefore, express and implied terms form an integral part of the employment contract; the absence of these terms articulating the duties and obligations of employer and employees would be detrimental to the existence of an employer–employee relationship. However, the introduction of social media in the workplace has brought with it numerous challenges in relation to breach of these duties and therefore dismissal of employees because of the inappropriate use of social media beyond the workplace. It is therefore vital for an employer and employee to act within their respective duties and responsibilities in order to prevent any issues with the inappropriate use of social media within and outside the workplace.

The monitoring of social media by employers within and outside the workplace will be discussed further in Chapter 4 and will provide a discussion on how the implied terms in an employment contract can form part of the monitoring of social media inside and outside the ‘workplace’ within a social media workplace policy. As pointed out in this part, the social media policy may be structured in a way that attaches to the

employment contract. This will depend on the mutual acceptance of the employee and employer.

The following chapter is concerned with and focuses on three key legal issues regarding the use of social media in the workplace and beyond – privacy, defamation and cyberbullying. These legal challenges will be considered within general law and extend to a specific discussion on social media and how the employment relationship is impacted beyond the workplace.

CHAPTER 3

LEGAL ISSUES ASSOCIATED WITH THE USE OF SOCIAL MEDIA IN THE WORKPLACE

3.1 INTRODUCTION

The use of social media in the workplace has significantly changed the workplace environment, which has implications for the employer and employee relationship, as discussed in Chapter 2. Also, as discussed in Chapter 1, the advent of social media in the workplace has been a significant asset for businesses to further their business interests in a digital space; however, with the use of social media in the workplace comes legal risks and challenges for both employers and employees. Therefore, one aim of this thesis is to highlight the legal challenges social media presents in the workplace environment and how it affects the employer–employee relationship, as discussed in Chapter 2. Although the benefits of social media are numerous, and the use of social media can be beneficial to any business, the inappropriate use in the workplace can give rise to various legal issues. This chapter examines the use of social media in relation to three key issues, namely privacy, defamation and cyberbullying, and how these issues may impact on the employer–employee relationship.

These key legal issues can be summarised within the following hypothetical legal scenarios.

Privacy

Sarah is an executive chef at TopChef Culinary School teaching students how to prepare French culinary dishes. Sarah has been with TopChef Culinary School for the last ten years, but she wants to broaden her horizons at the newly established Revoir Restaurant in the city. Sarah has hinted on her Facebook account that she is interested in a position at Revoir restaurant knowing that it will stay private as she has changed her privacy settings for only her friends to see. She also applied a few days later for an executive chef position at Revoir restaurant. However, Charles, the Human Resource Manager at TopChef Culinary School, has seen this on her Facebook page as he is

friends with Sarah on Facebook. Charles is upset that she wants to leave and decides to send private and confidential information about Sarah to Revoir restaurant plus all the other restaurants and culinary schools in a 15-kilometre radius. When Revoir restaurant received this private and confidential information of Sarah, they immediately phoned Sarah and told her that they would not be interviewing her for this position because of the information they received of her prior misbehaviour in the kitchen.

Defamation

Lola is a teacher at Blue Mountain High School. She has been in education for nearly seven years and joined Blue Mountain High School seven months ago. Lola has found everyone inviting at her new High School except for one teacher, Harriet, who has been assisting the Principal of the school with administrative duties for the past four years. Harriet's son is in Lola's class and keeps disrupting Lola's class by not paying attention and playing on his phone and iPad continuously throughout class. Lola told Harriet's son that he needs to stop disrupting the class otherwise he will be sent to the Principal's office. Harriet was made aware of this by her son after school. The same evening, while waiting for her takeaway, Lola saw on her Twitter page that Harriet tweeted 'Lola is an incompetent teacher with no regard to her students and their activities. She should be fired for her level of incompetence and for placing Blue Mountain High School in a bad light'. Lola was surprised as she has no idea what Harriet is tweeting about but feels upset about these remarks on Twitter.

Cyberbullying

Tanya is a cashier at Billy Bob's Hardware shop. She started working at the shop five months ago, and it is the only job she could find because of the bad economy. Dave and Annie are her co-workers and have been making her work unbearable for the last two months. Dave and Annie have been tormenting Tanya by leaving worms in her lunchbox and making her work their shifts. They have also posted on their individual Facebook and Instagram pages memes of Tanya posing as a drug addict. Dave and Tanya have even gone as far as to post on her private Facebook messenger that 'if you try and convey any of this to the manager, we will give you a beating you'll never forget'. She has since left Billy Bob's Hardware shop and went into depression because

of her difficulty finding work. She has also left a Facebook post expressing her depression and what she endured. Tanya eventually took her own life.

These scenarios illustrate the kinds of situations that can arise in relation to workplace matters regarding social media and how they may concern the employment relationship. Although hypothetical, they reflect the reality of social media and the workplace and such issues are evident in the cases discussed in this thesis. This chapter will address each of these key issues.

The chapter does not purport to give a comprehensive analysis of each area of law, which is beyond the scope of the thesis, but rather to focus on key aspects and principles of the relevant law as it relates to social media in the workplace. The first part of this chapter will consider privacy laws in regard to the use of social media pre-, during and post-employment, and the relevance of the doctrine for the employment relationship. The second part of the chapter will consider social media and defamation in the workplace, which may affect an employer's business interests and reputation, but also that of the employee. Lastly, this chapter will focus on cyberbullying in the workplace; particularly, how this can affect employees within and crucially outside the workplace.

3.2 PRIVACY AND SOCIAL MEDIA IN THE WORKPLACE

The use of social media in the workplace gives rise to important legal considerations concerning privacy, largely because social media is borderless but also because of the relatively easy access to data and personal information of individuals gleaned from social media. According to O'Halloran, issues of privacy and inappropriate use of social media in the workplace is changing the workplace environment.¹ The issues regarding privacy and social media in the workplace range from employees accessing their personal social media sites at work to employers recruiting employees through social media vetting.² Moreover, when it comes to the question of privacy and the risks associated with the use of social media, there are also often misconceptions about the

¹Paul O'Halloran, 'The Rise of 'E-misconduct' in the Workplace' (2012) *Internet Law Bulletin* 90, 90.
²See Saby Ghoshray, 'The Emerging Reality of Social Media: Erosion of Individual Privacy Through Cyber-vetting and Law's Inability to Catch Up' (2013) 12 *John Marshall Review of Intellectual Property Law* 551. See also Jeff Sovern, 'Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information' (1999) 74 *Washington Law Review* 1033, 1035.

extent to which social media is private, rights to privacy and the extent to which the law in fact protects privacy rights in terms of social media.

Therefore, in terms of dealing with the use of social media in the workplace and the implications for monitoring and controlling employees' use thereof, it is relevant to consider the meaning of privacy and the extent to which privacy rights are protected. This section therefore provides an overview of key principles of privacy law in Australia in relation to the use of social media in the workplace.

3.2.1 Defining Privacy

The definition of privacy has been, and continues to be, the subject of much debate and it is notable that the courts have not necessarily reached consensus on the meaning of privacy.³ As noted by Professor McCarthy, the concept of 'privacy' has 'proven to be a powerful rhetorical battle cry in a plethora of unrelated contexts ... Like the emotive word "freedom", "privacy" means so many different things to so many different people that it has lost any precise legal connotation that it might once have had'.⁴ Therefore, privacy remains a debated and contentious matter in Australia. The Australian Law Reform Commission ('ALRC') also states that 'the very term "privacy" is one fraught with difficulty. The concept is an elusive one'.⁵ Nevertheless, for the ordinary literal interpretation of privacy, the Macquarie dictionary defines privacy as 'the state of being private' or 'seclusion'.⁶ The ALRC's definition of

³*Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199. Gleeson CJ at [43] stressed the difficulty of defining privacy and states that 'human dignity is the foundation of much what is protected where rights of privacy are acknowledged but otherwise noted the lack of precision of the concept of privacy.'

⁴See in this regard Australian Law Reform Commission, *The Meaning of Privacy* <<http://www.alrc.gov.au/publications/1.%20Introduction%20to%20the%20Inquiry/meaning-privacy>>. See also Thomas McCarthy, *The Rights of Publicity and Privacy* (Thomson Reuters, 2nd ed, 2005), 5.59.

⁵Australian Law Reform Commission, *Privacy*, Report no 22 (1983), 19 <<http://www.alrc.gov.au/report-22>>. See also Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 421, 424; Alec Samuels, 'Privacy: Statutorily Definable?' (1996) 17 *Statute Law Review* 115.

⁶Macquarie Dictionary, 'Privacy' (December 2016) <https://www.macquariedictionary.com.au/features/word/search/?word=privacy&search_word_type=Dictionary>.

privacy has ‘stayed as close as possible ... to the ordinary language concept’.⁷ The ALRC further defines privacy as:⁸

A value which is important for individuals to live a dignified, fulfilling and autonomous life ... [It] is an important element of the fundamental freedoms of individuals which underpin their ability to form and maintain meaningful and satisfying relationships with others; their freedom of movement and association; their ability to engage in the democratic process; their freedom to advance their own intellectual, cultural, artistic, financial and physical interests, without undue interference by others.

Similarly, the Fair Work Ombudsman (‘FWO’) considers privacy as ‘being able to keep certain information to ourselves and to control what happens to our personal information. It also refers to being able to do things without interference by others’.⁹ These definitions indicate the importance of privacy in an individual’s life and they reflect the common notion of autonomy, control over one’s personal information and non-interference by others. However, with advancements in technology, the exponential use of social media, the blurring of private and public spaces and the cyber-world dimensions, such notions of privacy are increasingly being challenged. Hence, the use of social media in the workplace raises particular concerns about privacy rights and the protection of privacy.

3.2.2 Privacy Law in Australia

Privacy, and hence the right to privacy, is a ‘meaningful and valuable concept’ as it preserves a person’s dignity and personal information.¹⁰ The right to privacy is recognised as a fundamental human right in international conventions,¹¹ the essence

⁷Australian Law Reform Commission, above n 5, 20. When dealing with the *Privacy Act* 1988 (Cth) it is interesting to note that the Act itself does not contain a specific definition of ‘privacy’.

⁸Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* Issue Paper 43 (October 2013), [24], 14 <https://www.alrc.gov.au/sites/default/files/pdfs/publications/summary_report_whole_pdf_.pdf>.

⁹Fair Work Ombudsman, *Privacy* (2016) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/best-practice-guides/workplace-privacy>>.

¹⁰Edward Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’ (1964) 39 *New York University Law Review* 962; William Parent, ‘Privacy, Morality and the Law’ (1983) 12 *Philosophy and Public Affairs* 269.

¹¹*Universal Declaration of Human Rights*, GA Res 217A (III) UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 12. Similarly, Article 17 of the *International Covenant on Civil and Political Rights* provides that ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation’:

of which is found in Article 12 of the Universal Declaration of Human Rights, which states that ‘no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation’.¹² The importance of international obligations is noted in the *Hosking v Runting*¹³ decision:¹⁴

To ignore international obligations would be to exclude a vital source of relevant guidance. It is unreal to draw upon the decisions of Courts in other jurisdictions (as we commonly do) yet not draw upon the teachings of international law.

Although a personal right to privacy is recognised in international conventions and national constitutions as a fundamental right, there is no right to privacy in the Australian Constitution.¹⁵ Moreover, as explained below, there is no general right to privacy under common law. Statutory law provides some protection to privacy in relation to the handling of personal information through the Commonwealth *Privacy Act*¹⁶ and state and territory legislation in some jurisdictions.¹⁷ Although constitutionally and at common law there is limited recognition and protection of privacy rights, privacy is nonetheless upheld as an important value. People unsurprisingly have an expectation of privacy and that their privacy will be respected in all aspects.

In this regard, the High Court of Australia had to decide whether a right to privacy exists in the case of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*.¹⁸ In this case, a dispute occurred between a radio station and the owner of the Victoria

International Covenant on Civil and Political Rights opened for signature 6 December 1966, GA Res 2200A (XXI) (entered into force 23 March 1976).

¹²Ibid.

¹³[2005] 1 NZLR 1.

¹⁴Ibid 6.

¹⁵For a right to privacy in national constitutions see for example: *Constitution of the Republic of South Africa 1996* s 14; *Constitution of the United States of America* 14th Amendment. See also David Richards, ‘Constitutional Legitimacy and Constitutional Privacy’ (1986) 61 *New York University Law Review* 800; Kevin McAdam, ‘Privacy: A Common Law and Constitutional Crossroads’ (2011) 40 *Colorado Lawyer* 55; Michelle van der Bank, ‘The Right to Privacy – South African and Comparative Perspectives’ (2012) 1(6) *European Journal of Business and Social Sciences* 77.

¹⁶*Privacy Act 1988* (Cth).

¹⁷*Information Privacy Act 2014* (ACT); *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2003* (NT); *Information Privacy Act 2009* (Qld); *Personal Information and Protection Act 2004* (Tas); *Privacy and Data Protection Act 2014* (Vic); *Freedom of Information Act 1992* (WA). State laws apply to public sector agencies.

¹⁸(1937) 58 CLR 479.

Park Racing club. The owner of a house, adjacent to the race park, erected a high platform in his front yard for the radio broadcasters to stream live racing updates of the races to their listeners.¹⁹ As a result, attendance at the park lessened.²⁰ This case held that there is no general right to privacy in Australia and stated that ‘any person is entitled to look over the plaintiff’s fence and to see what goes on in the plaintiff’s land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence’.²¹ Therefore, Latham CJ held that the defendants did not breach the law of privacy by simply looking over the fence into the racing grounds.²² The court accordingly held that ‘there are no legal principles which the court can apply to protect the plaintiff against the acts of the defendants of which it complains’.²³

Furthermore, in 2001, the High Court of Australia faced this question again in the case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.²⁴ The court, affirming the principle in *Victoria Park*, once again did not recognise a general right to privacy and further held that there is no cause of action for invasion of privacy. The court did however observe that ‘the requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private’.²⁵ However, Gummow and Hayne JJ observed that ‘invasions of privacy ... in many instances would be actionable at general law under recognised causes of action’.²⁶ Therefore, the court held open the possibility for the development of a cause of action for breach of privacy.

In contrast, two lower court decisions were prepared to recognise a right to privacy in Australia and a cause of action for breach of privacy.²⁷ In the cases of *Grosse v Purvis*²⁸

¹⁹Ibid 480-481.

²⁰Ibid.

²¹Ibid 494.

²²Ibid 494.

²³Ibid 527.

²⁴(2001) 185 ALR 1; (2001) 208 CLR 199.

²⁵Ibid [107].

²⁶Ibid [123].

²⁷*Doe v Australian Broadcasting Corporation* [2007] VCC 281; *Grosse v Purvis* [2003] QDC 151; *Gee v Burger* [2009] NSWSC 149. However, see, also, *Giller v Procopets* (2008) 24 VR 1 in which Judge Gillard noted that the law in Australia has not developed to the point where an action for a breach of privacy is recognised.

²⁸[2003] QDC 151.

and *Doe v Australian Broadcasting Corporation*,²⁹ the courts have identified a kind of action for invasion of privacy. In the case of *Grosse v Purvis*, Skoien SJDC was open to recognising a tort of invasion of privacy. His Honour pointed out that the elements of an action for invasion of privacy included:³⁰

- (i) willed act by the defendant;
- (ii) which intrudes upon the privacy or seclusion of the plaintiff;
- (iii) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and
- (iv) which causes the plaintiff detriment in the form of mental, physiological or emotional harm or distress, or which prevents or hinders the plaintiff from doing an act which he or she is lawfully entitled to do.

The court went further by awarding damages to the plaintiff, whereby Skoien SJDC recognised ‘a civil action for damages based on the actionable right of an individual person to privacy’.³¹

The case of *Doe v ABC* dealt with a rape case within marriage. The ABC broadcast the story about ‘YZ’, including the name of ‘YZ’, the circumstances under which it happened and where it happened.³² The court held that there was a breach of privacy by the defendant through unjustified publication of information and held that ‘the unjustified publication of personal information was a breach’.³³ The plaintiff in this case argued that there was a tort of invasion of privacy of information whereas the defendants argued that there is no tort of invasion of privacy recognised under Australian law.³⁴ Hampel J considered the tort of invasion of privacy and held that the ‘development of a tort of invasion of privacy is intertwined with the development of the cause of action for breach of confidence. What is seen to underpin both causes of action is the acceptance or recognition of the value of privacy as a right in itself deserving of protection’.³⁵ Justice Hampel further held that the employees who

²⁹[2007] VCC 281.

³⁰*Grosse v Purvis*, [444].

³¹*Ibid* [442].

³²*Doe v Australian Broadcasting*, [1]-[5].

³³*Ibid* [164].

³⁴*Ibid* [146]-[147].

³⁵*Ibid* [148].

published the personal information, were not only liable under the *Judicial Proceedings Reports Act 1958* (Vic), but also under an equitable breach of confidence.³⁶ However, the court did not provide an exhaustive definition of privacy.³⁷

These lower court decisions, however, are not binding on other higher courts in other states and territories. The lower court decisions appear to support an action for breach of privacy, but this is yet to be determined by the High Court of Australia.

Despite the lacuna in common law in terms of protecting breaches of privacy, Australia has passed national³⁸ and state legislation concerning privacy.³⁹ However, this is limited to dealing with personal information in certain circumstances. Consequently, in Australia an individual may complain to the Privacy Commission about a privacy issue but is not recognised as a right to privacy.⁴⁰ Therefore, privacy law is a ‘developing area’ and much more attention is required to the development thereof, especially with the advent of social media.⁴¹ This is expressed through the following statement:⁴²

When [Facebook] started, it was a private space for communication with a group of your choice. Soon, it transformed into a platform where much of your information is public by default. Today, it has become a platform where you have no choice but to make certain information public, and this public information may be shared by Facebook with its partner websites and used to target ads.

The development of technology within the workplace has resulted in legal issues with privacy and is but only one area that requires consideration within privacy laws. The protection of employees and the access of private information by their employers turn around the key question of whether a cause of action for invasion of privacy will be recognised under Australian common law. The court in *Maynes v Casey*⁴³ held that the

³⁶Ibid [163].

³⁷Ibid [162].

³⁸*Privacy Act 1988* (Cth).

³⁹Above n 17.

⁴⁰Patrick Fair, ‘Too Much Information’ (2014) *Law Society Journal* 20, 20.

⁴¹Des Butler, ‘A Tort of Invasion of Privacy in Australia?’ (2005) 29 *Melbourne University Law Review* 339, 362.

⁴²Roger Clarke, ‘Privacy and Social Media: An Analytical Framework’ (2015) 23 *Journal of Law, Information and Science* 169, 180.

⁴³[2011] NSWCA 156.

cases mentioned above⁴⁴ ‘may well lay the basis for development of liability for unjustified intrusion on personal privacy, whether or not involving breach of confidence’.⁴⁵ However, the ALRC considered that a statutory cause of action is possible when dealing with invasion of privacy and stated that ‘unauthorised use of personal information and intrusion on personal privacy’ will be ‘significantly affected by the digital era’.⁴⁶ Similarly, in March 2016, the New South Wales Parliament Standing Committee considered a statutory cause of action for serious invasions of privacy, which includes the use of social media.⁴⁷

The NSW inquiry into a statutory cause of action for serious invasions of privacy was established because of concerns raised regarding personal information dissemination through social media platforms.⁴⁸ The Committee considered several submissions regarding a statutory cause of action for invasion of privacy, noting that there were ‘several gaps and inconsistencies in existing [common law] legal protection that may amount to an invasion of privacy’.⁴⁹ However, because there is no right to privacy recognised under Australian law, the Committee referred to the *Lenah Game Meats* case, which recognise a breach of confidentiality and refer to it as ‘the main avenue of protecting privacy [in Australia]’.⁵⁰ A discussion on breach of confidentiality through the use of social media will be discussed later in this chapter.

The use of social media in the workplace provides numerous opportunities for businesses and individuals to connect and improve status, but the use of social media also raises concerns about privacy and how personal information of either an employee or employer will be handled and/or disclosed. For example, an employer may breach an employee’s privacy by disclosing personal information, via social media, of that employee to other staff members in the workplace. As there is limited recognition of privacy protection under common law, it is necessary to consider privacy legislation

⁴⁴*Australian Broadcasting Corporation v Lenah Games Meat* (2001) 185 ALR 1; (2001) 208 CLR 199; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

⁴⁵*Maynes v Casey*, [186].

⁴⁶Australian Law Reform Commission, above n 5, [5].

⁴⁷New South Wales Parliament Legislative Council Standing Committee on Law, *Remedies for the Serious Invasion of Privacy in New South Wales*, Report No 57 (3 March 2016) <www.parliament.nsw.gov.au>.

⁴⁸*Ibid* 13.

⁴⁹*Ibid* 41.

⁵⁰*Ibid* 42.

when dealing with the use of social media in the workplace and beyond. The discussion in relation to privacy is focused on the law relating to public sector employers and limited private sector entities. However, the challenge is whether the law is subject to traditional private employers outside the constraints of privacy legislation when employers are looking to control and monitor social media of employees.

3.2.2.1 *Privacy Act 1988 (Cth) and Australian Privacy Principles*

The *Privacy Act 1988* (Cth) regulates how personal information about individuals is handled by Commonwealth government agencies and some private sector entities.⁵¹ Private sector entities that fall within the ambit of the *Privacy Act* are businesses that have an annual turnover of more than \$3 million.⁵² A small business, that is a business with an annual turnover of \$3 million or less, does not have to comply with the Act. However, there are several small businesses that will be subject to the *Privacy Act*, such as a credit reporting agency and a health service provider or a business that holds health information.⁵³ For example, a private school with an annual turnover of \$3 million is subject to the *Privacy Act*. If the private school has a turnover of less than \$3 million but holds health information about staff and students, it will also be obliged to comply with the *Privacy Act*. Moreover, of significance is that the *Privacy Act* does not regulate how private individuals handle the personal information of other individuals. This is particularly relevant when dealing with the use of social media by individuals in a private capacity.

The objects of the *Privacy Act* are, inter alia, to ‘promote the protection of the privacy of individuals’, to provide the ‘basis for nationally consistent regulation of privacy and the handling of personal information’ and to promote ‘responsible and transparent handling of personal information by entities’.⁵⁴ Therefore, the Privacy Act was enacted to protect the handling and collection of personal information on a national level. This

⁵¹ Agency includes a Minister, a government department, a body established under a Commonwealth enactment and a federal court: *Privacy Act 1998* s 6.

⁵² *Privacy Act 1998* s 6D. For a further explanation and list see the Office of the Australian Information Commissioner, ‘How Do I know if My Small Business is Covered by the Privacy Act?’ <<https://www.oaic.gov.au/agencies-and-organisations/faqs-for-agencies-orgs/businesses/small-business>>.

⁵³ *Privacy Act 1998* s 6D4. Health information is defined in s 6 and includes an activity involved in assessing, maintaining or improving a person's physical or psychological health.

⁵⁴ *Privacy Act 1998* (Cth) s 2A

is relevant to the handling of social media information of an employee by an employer and whether the law is suited to address the unlawful handling of personal information on a social media platform.

Personal information is defined in s 6(1) of the Act as ‘information or opinion about an identified individual, or an individual who is reasonably identifiable, whether or not true and whether or not in material form’.⁵⁵ However, the ALRC stated that despite defining what personal information is, it is also useful to understand what personal information does not include, and noted that:⁵⁶

As part of a wider inquiry into the *Privacy Act*, the issue of what is or is not de-identification could be considered. This is an important threshold issue which determines whether or not information is protected. Developments in technology have made it increasingly difficult to determine whether information is de-identified or not.

The ALRC held that it is difficult to specifically identify what is not included as personal information; however, it mentioned that ‘for the purposes of the Act it is necessary to decide whether information is about an identified or reasonably identifiable individual’ and ‘this includes making a distinction between information that may be “re-identifiable” or reasonably identifiable in a particular context – for example, where an agency or organisation holds information identified by a unique identifier and also holds the master list – but is not reasonably identifiable for the purposes of the Act in another context – for example, where an agency or organisation holds information identified by a unique identifier but does not hold and does not have access to the master list’.⁵⁷

Therefore, in order to address whether an employer may or may not collect and access personal information, the Australian Privacy Principles (‘APPs’) address transparency, disclosure and quality of personal information, which indicates how government

⁵⁵Ibid s 6(1). See also *Telstra Corporation Limited and Privacy Commissioner* [2015] AATA 991.

⁵⁶Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report no 108 (August 2008), [6.64]

<[⁵⁷Ibid \[6.83\].](https://www.alrc.gov.au/publications/6.%20The%20Privacy%20Act%3A%20Some%20Important%20Definitions/what-not-%E2%80%98personal-information%E2%80%99>.”</p></div><div data-bbox=)

agencies and selected private organisation should implement privacy policies and guidelines or review them and what personal information include.⁵⁸

A key feature of the *Privacy Act* is the application of the 13 APPs contained in Schedule 1 of the Act.⁵⁹ The APPs apply to Commonwealth government and private sector agencies, and regulate how personal information is collected, stored, used, accessed, disclosed and changed. In relation to the APPs, only four of the APPs are directly applicable to the discussion of privacy and social media challenges in the workplace and beyond. The recently adopted APPs place the following obligations on certain employers⁶⁰ when dealing with personal information and privacy:⁶¹

- (i) the employer may not collect personal information unless the information is necessary for one or more of its functions or activities;⁶²
- (ii) the employer can collect personal information only by lawful and fair means and not in an unreasonably intrusive way;⁶³
- (iii) the employer can collect personal information about an individual only from that individual if it is reasonable and practicable to do so;⁶⁴ and
- (iv) the employer must provide the individual with access to the personal information held by it on request by the individual.⁶⁵

The *Privacy Act* as amended and the APPs apply to the handling of personal information that may be collected via social media platforms by public employers and private entities as discussed above. However, it is still limited and does not extend to

⁵⁸John Reen, *The New Australian Privacy Principles: Amendments to the Privacy Act 1988* (February 2013) DibbsBarker
<http://www.dibbsbarker.com/publication/The_new_Australian_Privacy_Principles__Amendments_to_the_Privacy_Act_1988.aspx>.

⁵⁹ The APPs came into effect in March 2014 following an amendment to the *Privacy Act* pursuant to the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth). These principles replaced the Information Privacy Principles that previously applied to Commonwealth government agencies and National Privacy Principles that applied to certain private sector organisations.

⁶⁰Entities not covered under the *Privacy Act* include small businesses with an annual turnover of \$3 million or less.

⁶¹Patrick George (ed) et al, *Social Media and the Law* (LexisNexis, 2nd ed, 2016) 32.

⁶²APP 3.2.

⁶³APP 3.5.

⁶⁴APP 3.6.

⁶⁵APP 12.1.

private individuals acting in private business; but it is a step in the right direction on the impact social media has on privacy in the workplace.

With regards to privacy in the workplace and technology, O'Rourke, Pyman and Teicher aptly note that:⁶⁶

Australia's privacy protection regime is still embryonic: legislatures, regulators, and other bodies, while needing to implement measures in response to immediate threats from new technologies, also need to explore a more coherent and comprehensive long-term approach to privacy. A precise definition of privacy remains elusive ... particularly in the workplace.

In terms the use of social media in the workplace, the APPs will find application in entities that are subject to the *Privacy Act* and hold personal information about employees that have been obtained through social media platforms. This will include small business that may be subject to the *Privacy Act*.⁶⁷ Therefore, when employers receive personal information regarding their employees, it will be best practice to treat this information as private and confidential according to the APPs.⁶⁸ This is considered below in the context of employment.

Although the *Privacy Act* does not give a person the right to privacy, the *Privacy Act* as amended, and the incorporation of the APPs do provide some protection in relation to the collection, use and access of personal information of an employee. However, this protection is limited, as mentioned, to Commonwealth departments and agencies, and to small businesses with a turnover that exceeds \$3 million. This can create

⁶⁶Anne O'Rourke, Amanda Pyman and Julian Teicher, 'The Right to Privacy and the Conceptualisation of the Person in the Workplace: A Comparative Examination of EU, US and Australian Approaches' (2007) 23 *International Journal of Comparative Labour Law and Industrial Relations* 161, 193.

⁶⁷Fair Work Ombudsman, *Best Practice Guide: Workplace Privacy* (2014) <www.fairwork.gov.au>. According to *Privacy Act 1998* (Cth) s 7B(3), private employers are exempted, in regards to accessing personal information, if the personal information is directly related to a current or former employment relationship and therefore does not benefit employers with regard to prospective candidates.

⁶⁸Personal information can also be seen as 'Information that identifies you or could identify you. There are some obvious examples of personal information, such as your name or address. Personal information can also include medical records, bank account details, photos, videos, and even information about what you like, your opinions and where you work - basically, any information where you are reasonably identifiable' – Alastair MacGibbon and Nigel Phair, *Privacy and the Internet* (2012) Centre for Internet Safety
<<http://www.canberra.edu.au/cis/storage/Australian%20Attitudes%20Towards%20Privacy%20Online.pdf>>.

problems for employees in entities and business that fall outside the scope of the *Privacy Act*, whose personal information is accessed through social media by an organisation. This is of particular concern given that accessing personal information of employees, including prospective employees, through social media has become common practice (discussed below in relation to vetting) and privacy laws have slowly started to recognise the threats social media causes in regards to privacy.⁶⁹ The breach of privacy through social media platforms plays a significant role within the employment relationship and how the collection of personal information may impact the workplace in general. In Chapter 2 it was argued that social media impacts on the employment contract and how the employer and employee are affected by the implied terms within the employment contract on the use of social media. This is key to how privacy applies to the employment relationship and what is expected from the employer and employee in relation to the collection and use of personal information.

As noted, a significant limitation of the *Privacy Act* is that it does not apply to individuals acting in a personal capacity and how individuals collect and share personal information on social media. If personal information is publicly available on social media, then anyone can access it. The individual may have little control over how that information may then be used and distributed. An individual using social media in a personal capacity will therefore not be able to rely on the *Privacy Act* to protect their rights relating to their personal information. They will need to rely on other areas of law, such as defamation law. Although individual employees using social media in a personal capacity or using personal information gleaned from social media are not covered by the *Privacy Act*, within the workplace context the misuse of social media to distribute personal information about employers or employees may constitute misconduct and may be a breach of the employment contract or a workplace policy, which can give rise to dismissal (see Chapter 2 and Chapter 4).

⁶⁹See, eg, Chika Anyanwu, 'Challenges to Privacy Law in the Age of Social Media: An Australian Perspective' (2013) 40 *Australian Journal of Communication* 121; Diane Gan and Lily Jenkins, 'Social Networking Privacy: Who's Stalking You?' (2015) 7 *Future Internet* 67.

3.2.3 Privacy, Social Media and Employment

When dealing with privacy issues regarding social media in the workplace, it is useful to discuss social media and privacy in relation to the employer–employee relationship in three parts, namely pre-, during and post-employment.

3.2.3.1 Privacy Concerns Pre-Employment

With the increase in businesses using social media sites to improve their business⁷⁰ as well as the increase in individuals (prospective employees) using their personal social media sites, it is easy to see how privacy can become an issue. This is because nowadays information about employees and prospective employees is mostly obtained from the internet and social media sites.⁷¹ Therefore, as discussed above, employers need to be cautious when obtaining information about employees or prospective employees. This is well captured by the FWO expressing the importance of employers collecting personal information without invading the right to privacy.⁷² The FWO explains that ‘employers will need to think about the way in which they collect, use and disclose information they obtain from employees’.⁷³

Social media vetting or so-called ‘online vetting’ is now increasingly used by employers when considering hiring a prospective candidate for a position.⁷⁴ ‘Vetting’ can be defined as ‘a thorough and diligent review of a prospective person or project prior to a hiring or investment decision’.⁷⁵ This is usually done by screening the candidate’s social media accounts in order to get a look at who the person is. The screening can be done through social media platforms such as Facebook, Twitter and LinkedIn.⁷⁶ Social media, in general, can be a great tool for employers in order to

⁷⁰Social media sites such as LinkedIn.

⁷¹George, above n 61, 29.

⁷²Fair Work Ombudsman, *Best Practice Guide: Workplace Privacy* (2014) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/best-practice-guides/workplace-privacy>>.

⁷³Ibid.

⁷⁴Murray Brown, ‘Applying for a Job with Big Brother: Is Online Vetting of Job Applicants Lawful in Australia?’ (2012) 37 *Alternative Law Journal* 186; Bill Greenwood, ‘Facebook: The Next Great Vetting Tool’ (2009) 26 *Information Today* 1.

⁷⁵Investopedia, *Vetting* <<http://www.investopedia.com/terms/v/vetting.asp>>.

⁷⁶Anthea Ellis, *Social Media and the Workplace* (2015) <<http://www.surrypartners.com.au/social-media-and-the-workplace/>>.

consider a potential candidate for the job; however, breach of privacy through social media platforms is a significant legal issue within the workplace.

Social media accounts can reveal significant personal information about prospective candidates such as age, religion, political views and qualifications. However, whilst this may be useful to employers, such information may be caught by APP 3.2, which relates to the collection of personal information of employees via their social media accounts.⁷⁷ Therefore, it is useful for employers to recognise when they are allowed to access personal information about a candidate, as they may be in breach of the *Privacy Act*.

Because the *Privacy Act*⁷⁸ and Australian Constitution do not afford an employee a right to privacy, it is important to find a way to protect employees when employers access their social media accounts and personal information prior to the formation of the employment relationship. The privacy legislation, as mentioned earlier, applies to the collection of personal information by public employers, and to an extent, private employers with a turnover of no less than \$3 million. These place significant restrictions on private employees having an action for breach of privacy against their private employer. However, employees still have a right to protect their personal information from being accessed, and Mack J notes that:⁷⁹

No man or woman on entering into an employment contract thereby agrees to forego those basic liberties which distinguish our society from more barbarous regimes. Were an employment contract to expressly limit the civil liberties of an employee [,] it would be void ... The law goes further and will imply in a contract of employment terms protective of those liberties.⁸⁰

⁷⁷Erica Marr, *E-Recruitment: The Effectiveness of the Internet as a Recruitment Source* (LLM-thesis, Queensland University of Technology, 2007) 58. See also Antony Funnell, 'Cyber Vetting and Personality', *ABC* (online), (3 March 2013) <<http://www.abc.net.au/radionational/programs/futuretense/cyber-vetting-and-personality/4518948>>.

⁷⁸Fair Work Ombudsman, above n 72. This is with regard to private employers.

⁷⁹*Re Security Arrangements in Retail Stores* 107 ARJ (1979) 72, 81.

⁸⁰According to *Fair Work Act 2009* (Cth) s 341(1)(a), prospective employees have a workplace right which means that prospective employees have the benefit of certain rights in the workplace. According to *Fair Work Act* s 13, 'a national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on a vocational placement'. Furthermore, *Fair Work Act* s 14 states that '(1) A national system employer is: (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or (b) the Commonwealth, so far as it employs, or usually employs, an individual; or (c)

Therefore, private employers still need to tread carefully when accessing personal information of a private employee and follow the APPs accordingly.⁸¹ The APPs include a private employee accessing and collecting personal information of a current or prospective employee when reasonably necessary and disclosing the handling of this information to the employee with their consent.

One example of how privacy and collection of information can play a role in pre-employment is demonstrated in the case of *Austin v Honeywell Ltd.*⁸² In this case the prospective employee was not offered a position due to pre-employment screening of the candidate's personal information and the employer found the content on the social media sites to be unsatisfactory. However, the court in this case held that the *Privacy Act* is not a workplace law as a 'workplace law' is defined 'as any ... law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees'.⁸³ The court went further by explaining that 'the *Privacy Act* incidentally imposes duties on some employers in respect of prospective employees but otherwise the *Privacy Act* does not concern the regulation of the employment relationship'.⁸⁴

As a result, workplace policies are important for addressing such issues and ought to reflect the principles of the *Privacy Act* and the allocated APPs in order to maintain the contractual duties between employer and employee. Taking the above mentioned into account, employers and especially employees need to be aware of the implications of breaching privacy during employment. The breach of privacy by an employer and

a Commonwealth authority, so far as it employs, or usually employs, an individual; or (d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as: (i) a flight crew officer; or (ii) a maritime employee; or (iii) a waterside worker; or (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.'

⁸¹See, eg, Janneke Hoek, Paula O'Kane and Martin McCracken, 'Publishing Personal Information Online: How Employers' Access, Observe and Utilise Social Networking Sites within Selection Procedures' (2016) 45 *Personnel Review* 67.

⁸²(2013) 277 FLR 372.

⁸³*Fair Work Act 2009* (Cth) s 12.

⁸⁴(2013) 277 FLR 372, 60.

employee during employment may be detrimental to the employment relationship and the employment contract.⁸⁵

3.2.3.2 *Privacy Concerns During Employment*

As discussed in Chapter 2, the employment contract is an essential part to the employment relationship between an employer and employee. Therefore, this is the focal point when boundaries and obligations need to be established between the employer and the employee. Chapter 2 referred to the express and implied duties that form part of the employment contract, which is relevant when dealing with privacy issues and confidentiality as well as the restraint of social media use during and outside of working hours.⁸⁶

The privacy concerns that may arise during employment when social media play a role include, firstly, employees using social media during working hours on the office device or employer-sponsored device and whether employers may access that information, which may constitute personal information. Secondly, employees may post information about the employer on a social media platform from their private network and outside the workplace, which makes it difficult for the employer to manage the conduct of an employee. Lastly, the inappropriate use of social media by an employee, in particular the publishing of personal information of an employer, may lead to dismissal. However, the publishing of the personal information may not necessarily have harmed the interest of the business, which means that the dismissal may be unfair, unjust and unreasonable.

When considering these concerns, it is evident that social media use by employees within and beyond the workplace be monitored in accordance with their duties and obligation in the employment contract.⁸⁷ Therefore, besides breach of privacy being

⁸⁵The duties of honesty, fairness and mutual trust and confidence is an integral to the employment relationship.

⁸⁶George, above n 61, 34. See also Michael Specht, *Social Media in the Workplace* (11 May 2009) <<http://specht.com.au/michael/2009/05/11/social-media-in-the-workplace/>>.

⁸⁷O'Halloran, above n, 1. See also, Rosemary Owens, Joellen Riley and Jill Murray (eds), *The Law of Work* (Oxford, 2nd Ed, 2011) 213. See also *McManus v Scott-Charlton* (1996) 140 ALR 625; Ronald McCallum and Greg McCarry, 'Worker Privacy in Australia' (1996) 17 *Comparative Labour Law Journal* 13, 14; Louise Thornthwaite, 'Chilling Times: Labour Law and the Regulation of Social Media Policies' (Paper presented at Macquarie University, 2013), 9.

regulated by the *Privacy Act*, workplace policies are convenient to deal with the access of personal information of an employee and the restrictions placed on this access.⁸⁸ This will ensure that an employer's liability is limited while an employee is protected from their personal information being circulated. This will further be discussed in Chapter 4.

The FWC deals with unfair dismissal cases regarding employees breaching privacy regulations by misusing information about their employers and possibly co-workers and posting this information on a social media platform. These cases will be explored accordingly within the following two sections.⁸⁹ In its decision, the FWC has given consideration to the following on the dismissal of employees regarding the inappropriate use of social media within the employment relationship:⁹⁰

- (i) whether the employee has an understanding of how social media works;
- (ii) whether the post is directly linked to the employee's work; and
- (iii) whether the comments made have a reasonable expectation to be seen as private.

These were the considerations made in the case of *Glen Stutsel v Linfox Australia Pty Ltd*.⁹¹ An employee made racial and sexist remarks against two of the company managers on Facebook in the public domain. The employee argued that he did not have satisfactory technological knowledge and that he thought the privacy setting was enabled.⁹² The employee made the argument that he had a freedom of expression in accordance with the International Convention on Civil and Political Rights and that 'the proposition in terms of the *right to privacy* is simply that Ms Russell's decision to investigate Mr Stutsel's page for no apparent reason, in an arbitrary way, to use the

⁸⁸John Clark, 'Social Media and Privacy' (2010) 29 *Air Medical Journal* 104, 107.

⁸⁹See in general *Linfox Australia Pty Ltd v Glen Stutsel* [2012] FWAFB 7097 (3 October 2012); *Ms Lee Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway* [2011] FWA 3496 (14 July 2011); *Sally-Anne Fitzgerald v Dianna Smith T/A Escape Hair Design* [2010] FWA 7358 (24 September 2010).

⁹⁰Andrew Denton, *Privacy Considerations and Social Media in the Workplace* (21 May 2014) 4 <[http://www.vicbar.com.au/GetFile.ashx?file=pdf/Privacy Considerations and Social Media in the Workplace - Andrew Denton - 21 May 2014.pdf](http://www.vicbar.com.au/GetFile.ashx?file=pdf/Privacy%20Considerations%20and%20Social%20Media%20in%20the%20Workplace%20-%20Andrew%20Denton%20-%2021%20May%202014.pdf)>.

⁹¹[2011] FWA 8444 (19 December 2011).

⁹²*Ibid* 79.

language of the Convention, was an unwarranted invasion of Mr Stutsel's right of privacy'.⁹³

However, the employer argued that there is a sufficient nexus between the comments made outside of the workplace with the workplace itself and that a tribunal cannot make a decision on a matter such as 'right to privacy'.⁹⁴ This argument against right of privacy was not acknowledged by the Commissioner, who found that the comments were made amongst friends, which was not seen as malicious, and that there was not a breach of privacy under these circumstances.⁹⁵

Also, the Commissioner found that the social media policy was flawed and only included induction training on social media use and stated 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. Linfox did not'.⁹⁶ This is a privacy issue concerned with the use of social media and in particular the use of it beyond the workplace. However, the control and management of the use of social media by employees beyond the workplace through a social media policy will be discussed in Chapter 4.

In *Griffiths v Rose*,⁹⁷ the employer made use of some desktop software (Spector360) in order to monitor laptops used by employees. It took information every 30 seconds and this information was uploaded to a server every time the employee connected to the network.⁹⁸ The employer had a policy in place that prohibited an employee from using the laptop and network in accessing pornography.⁹⁹ Mr Griffiths received a copy of this policy and he signed this policy stating that he read and understood the terms in the policy. The software identified that Mr Griffiths accessed several pornography sites at home on the laptop provided by the employer.¹⁰⁰ The employer initiated an

⁹³Ibid [58]-[59].

⁹⁴Ibid [68]-[69].

⁹⁵Ibid 81.

⁹⁶Ibid 87.

⁹⁷(2011) 192 FCA 130, [41].

⁹⁸Ibid [3].

⁹⁹Ibid [4]-[5].

¹⁰⁰Ibid [9].

investigation and even though Mr Griffiths had used his own internet provider, Mr Griffiths being dismissed.¹⁰¹

Mr Griffiths took his employer to court and argued that the policy was prohibited by the *Privacy Act* as the employer was not allowed to collect personal information through the desktop software (Spector360).¹⁰² The Federal Court in this regard held that the employer, as owner of the laptop, is correct in saying that it can only be used according to what the policy states.¹⁰³ The policy was put in place for a reason and that is to ensure that pornographic material does not appear in the workplace. Therefore, the employer was not in contravention of the APPs and collected the data in accordance with the company policies.¹⁰⁴

As seen from the cases discussed above, the APPs and workplace policies play an important role in the collection of personal information and the inappropriate use of social media can affect the employment relationship when personal information is accessed and used improperly by either an employer or employee. However, for an employer to bring a case against an employee for the inappropriate use of social media and publishing of personal information, the following elements must be satisfied:¹⁰⁵ there must be an interference with the individual's private affairs; this interference must be intentional; there must be a reasonable expectation of privacy; the interference of privacy must be of a serious nature; and the individual's privacy interests must outweigh the other party's freedom of expression rights. Some of these elements could be hard to prove for an employer, but it is a start to monitoring privacy in the workplace and beyond.

In order to avoid liability for a breach of privacy during employment, employers as well as employees need to be aware of the kind of personal information collected and

¹⁰¹Ibid.

¹⁰²Ibid [14].

¹⁰³Ibid [43].

¹⁰⁴See also *Stutsel v Linfox Australia Pty Ltd* (2011) 217 IR 28; [2011] FWA 8444 and *Linfox Australia Pty v Ltd v Stutsel* (2012) 217 IR 52; [2012] FWAFB 7097 (3 October 2012).

¹⁰⁵Australian Law Report Commission, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper no 80 (2014) 5-8 <<http://www.alrc.gov.au/publications/serious-invasions-privacy-dp-80>>.

how it will be managed and distributed within the workplace and beyond.¹⁰⁶ In particular, employees should be made aware that information they email or post on social media may result in a dismissal, even if the email or social media post was made outside of working hours.¹⁰⁷ Furthermore, and relevant to Chapter 4, the fact that an employee disregards a social media workplace policy may not be enough to justify a summary dismissal and there may need to be some aggravating circumstances to lead to their dismissal.¹⁰⁸ However, on occasion, employees will make use of social media outside of working hours to post inappropriate comments about a colleague or employer. The question which arises is when an employee posts inappropriate comments about a colleague or employer, can the employer monitor the employee's conduct outside of working hours and if so, can the employer dismiss the employee because of the comments posted on social media?

This question was addressed in the case of *McManus v Scott-Charlton*,¹⁰⁹ where the court stated that 'I am mindful of the caution that should be exercised when any extension is made to the supervision allowed an employer over the private activities of an employee. It needs to be carefully contained and fully justified'.¹¹⁰ Therefore, 'exceptional circumstances' should be present when an employer wants to monitor an employee's conduct outside working hours.¹¹¹ An example of where an employer might have an interest in an employee's conduct outside of work is where the conduct is directly related to the workplace. Where the conduct of an employee outside of work has a connection to their work, the court will need to draw a delicate line between the individual's public and private life. This conduct can consequently lead to dismissal of the employee.¹¹²

¹⁰⁶Proper induction and training should also be provided by employers to current employees on their right to privacy in the workplace and the use of social media when distributing private information about a fellow employee or employer.

¹⁰⁷See Chapter 2 where a 'workplace' is defined to include anywhere outside an office or building. Therefore, posts made outside of working hours may still be a ground for dismissal.

¹⁰⁸George, above n 61, 48. See also *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285.

¹⁰⁹(1996) 70 FCR 16.

¹¹⁰*Ibid* [60].

¹¹¹*Appellant v Respondent* (1999) 89 IR 407, 416. See also *McManus v Scott-Charlton* (1996) 70 FCR 16, [56] where the court held that: 'once an employee's conduct can be shown to have significant and adverse effects in the workplace – because of its impact on workplace relations, on the productivity of others, or on the effective conduct of the employer's business – that conduct becomes a proper matter of legitimate concern to an employer, and does so because of its consequences.'

¹¹²See also a discussion of this case in the section on cyberbullying.

Generally, when an employer is faced with an employee misusing social media, they must decide whether a dismissal for this misconduct is fair or not.¹¹³ An example of such a decision can be observed in case of *Pedley v IPMS Pty Ltd t/as Peckvonbartel (Pedley)*,¹¹⁴ in which the FWC noted that ‘the applicant’s conduct in sending the email to clients of PVH was incompatible with his duty to his employer and conduct liable to summary dismissal’.¹¹⁵ Furthermore, the conduct of the employee, in order to be dismissed, must be ‘conduct which in respect of important matters is incompatible with the fulfilment of an employee’s duty, or involves an opposition, or conflict [with their] duty to [the] employer, ... or is destructive of the necessary confidence between employer and employee’.¹¹⁶ Therefore, when an employee posts any negative comments on a social media platform, it is possible that such an activity would be contrary to their duties towards the employer and could subsequently be used as confirmation to dismiss the employee and be seen as an invasion of privacy.¹¹⁷

Even though employees can be summarily dismissed for their inappropriate use of social media towards an employer because of breach of privacy, an employer needs to be careful to not dismiss an employee unfair and unreasonably. This was the case in *Judith Wilkinson-Reed v Launtoy Pty Ltd t/as Launceston Toyota*.¹¹⁸ In this case, an employee was dismissed because of a private conversation the employee had on Facebook with the business owner’s wife, when he told her that everyone at work thought the owner was a ‘tosser’.¹¹⁹ At the time this private conversation was taking place, the owner and his wife had separated. The owner of the business saw the Facebook message through accessing his ex-wife’s account, using her password.¹²⁰ The Commissioner in this case held that ‘I do not believe the breach was particularly serious. The remark was not made to another employee or a customer of the business and, would have remained private to the parties to the conversation had Mr. Nixon not accessed his estranged wife’s email account. It was certainly not such a serious breach

¹¹³See *Rankin v Marine Power International Pty Ltd* (2001) 107 IR 117; [2001] VSC 150, 352.

¹¹⁴[2013] FWC 4282.

¹¹⁵*Ibid* [41].

¹¹⁶*Blyth Chemicals v Bushnells* (1933) 49 CLR 66, 81-82.

¹¹⁷Piper Alderman, *Social Media in 2013 – The Year in Review* (December 2013)

<http://www.piperalderman.com.au/__files/f/5290/Top%20Social%20Media%20moments%20-%20201213-v2.pdf>.

¹¹⁸[2014] FWC 644 (24 January 2014).

¹¹⁹*Ibid* [13].

¹²⁰*Ibid* [14].

of confidentiality as to justify termination of the applicant's employment'.¹²¹ Furthermore, even though the conversation was private, the comments expressed in the post and the small nature of the workplace, will possibly lead to the employment relationship deteriorating.¹²² However, the dismissal was unfair.

The above examples demonstrate that both employees and employers need to be aware of the consequences social media can create within a workplace and even outside the workplace when dealing with or posting personal information that can lead to a breach of privacy. Furthermore, by claiming that employees did not understand the privacy settings on their social media platforms is not enough to warrant them from being dismissed by an employer for an invasion of privacy, as held by the *Linfox* cases. However, as noted by the *Wilkinson-Reed* case, employers need to investigate the comments made by employees in context before deciding to dismiss the employee because of the content breaching privacy principles.

3.2.3.3 Privacy Concerns Post-Employment

In addition to the unfair dismissal cases regarding the inappropriate use of social media outside of the workplace, one of the relevant issues concerned with privacy post-employment is who owns a social media account if an employer asked an employee to set it up for the business. Most businesses use LinkedIn to gain a reputation and usually it will be employees who are contracted to set up such an account.¹²³ This can become problematic when an employee is dismissed or resigns from the workplace and the company's private information is held by that employee.¹²⁴ It is therefore crucial for employers to put in place a well-drafted contract that sets out the employee's duties and responsibilities with regard to login details and ownership of social media accounts in order to circumvent any problems in the future.¹²⁵

¹²¹Ibid [61].

¹²²Ibid [82].

¹²³See Kirsten Hodgson, *LinkedIn for Lawyers: Connect, Engage and Grow your Business* (LexisNexis, 2012) 80.

¹²⁴In a case in the United States of America, *Ardis health LLC v Nankivell* (United States District Court, Eastern District Pennsylvania, Case No 11-4303, 12 March 2013), an employer applied for an injunction (which was granted) requiring a previous employee to return all login information relating to the employer's website.

¹²⁵George, above n 61, 61.

The main problem for employers post-employment; however, seems to be when employees leave their positions and move on to a competitor or other employer and use confidential information of the company on social media platforms and access this information later through their own social media accounts. One solution to avoid problems with previous employees regarding social media accounts is by including a restraint of trade clause in the employment contract.¹²⁶ This can help prevent previous employees dispersing private and confidential information to future employers. In the case of *Hays Specialist Recruitment (Holdings) Ltd v Ions*,¹²⁷ Mr Ions (who was still an employee at Hays), kept a copy of confidential information regarding clients of Hays by using LinkedIn. Mr Ions downloaded the list of clients from the employer's database and uploaded them to his own LinkedIn account.¹²⁸ Mr Ions was leaving the company and starting a new company and so he sent invitations to the clients regarding this new venture.¹²⁹ In the meantime, Mr Ions deleted his LinkedIn account.¹³⁰ The High Court held that this was a breach of his express and implied duties and stated 'Mr Ions' contract of employment signed by him on 12 January 2001 required him to devote his whole time and attention during business hours to the business of Hays and to use his endeavours to promote Hays' interests in every respect, giving at all times the full benefit of his knowledge, expertise and skill'.¹³¹

As demonstrated by this example, former employees can cause harm to former employers by exacting revenge through social media and by making negative statements towards the former employer, which can damage the goodwill and business reputation and ultimately the employment relationship. Referring to Chapter 2 of this thesis, the employment contract consists of implied duties, which must be met by both

¹²⁶See in general *Planet Fitness Pty Ltd v Brooke Dunlop & Ors* [2012] NSWSC 1425.

¹²⁷[2008] EWHC 745.

¹²⁸Ibid [1]-[3].

¹²⁹Ibid [4]. The clause specifically read: 'You must not, during the course of your employment or at any time thereafter, make use of, or disclose or divulge to any person, firm or company, any trade secrets, business methods or information which you know, or ought reasonably to have known to be of a confidential nature concerning the businesses, finances, dealings, transactions, client database or other affairs of the Company or the Group or of any person having dealings with the Company which may have come to your knowledge during the course of your employment unless it is necessary for the proper execution of your duties hereunder, and you shall use your best endeavours to prevent the publication or disclosure of any such information.'

¹³⁰Ibid [37].

¹³¹Ibid [4], [51]. See also George, above n 61, 63. The same view will most likely be held in Australia where it will be a breach of an employee's duty of good faith and fidelity. See also *Naiman Clarke Pty Ltd v Tuccia* [2012] NSWSC 314 in this regard.

the employer and employee. However, when social media is inappropriately used, such in the case above, implied duties like good faith and fidelity will be breached. Even though the employment contract comes to an end, employer and employees still have employment and statutory duties imposed on them.¹³²

With the development of the digital era, privacy needs to be protected now more than ever as new threats and exposure to individual privacy emerge.¹³³ Exposure of private and confidential information by employees and employers through social media has become an everyday routine and challenge. These challenges leave employers and employees exposed in the digital world with limited recourse. It remains to be seen whether private employers will be able to take action, within privacy legislation, when personal information is disclosed inappropriately through social media platforms. As discussed, the employment relationship forms an integral part of how to deal with invasion of privacy within the workplace. However, this simultaneously raises concerns for breach of confidentiality. This thesis is not covering this area of law in depth, but it arises in the context of privacy and is particularly relevant when considering employee duties towards the employer and how the inappropriate use of social media can lead to a breach of confidentiality within the employment contract.

3.2.4 Privacy and Confidentiality

In the first part of the chapter, privacy risks associated with social media and the scope of privacy law were considered. However, given the fact that a right to privacy is not recognised and in the absence of a tort of invasion of privacy, a discussion on privacy and confidentiality is relevant to the inappropriate use of social media by an employee within the workplace and beyond. The equitable doctrine of confidentiality is important to the employment relationship and in protecting employers and employees in terms of confidential information, which may include personal information as described in the *Privacy Act*. As mentioned in Chapter 2, confidentiality is implied in the employment contract and a breach of this confidentiality may lead to dismissal of an employee. Therefore, breach of confidentiality, because of unreasonable comments made on social media, may lead to dismissal of employees. Therefore, this section will

¹³²*Naiman Clarke Pty Ltd v Tuccia (Naiman Clarke)* [2012] NSWSC 314.

¹³³Veronica Siow, 'The Impact of Social Media in the Workplace: An Employer's Perspective' (2013) 32(4) *Communications Law Bulletin* 12.

focus on examining breach of confidentiality in the employment contract with reference to social media use, which is related but distinguishable from a breach of privacy.

Given the limited scope of the *Privacy Act* and protections under common law for breach of privacy, a question that arises is whether the duty of confidence, (in particular the breach of confidence) can be relied on to ensure the protection of privacy. The suggestion that the law of breach of confidence should be a means to develop the protection of privacy in Australia has gained some criticism.¹³⁴ The ALRC argues that¹³⁵ privacy and confidentiality are seen as different concepts; the equitable doctrine of breach of confidence is not suitable for the protection of privacy because it goes on the conscience of the confidant; and there exists uncertainty as to whether breach of confidence will offer privacy protection beyond the scope of unauthorised publication.¹³⁶

In *Hosking and Hosking v Runting and Pacific Magazines NZ Ltd*,¹³⁷ the court also held that ‘privacy’ and ‘confidentiality’ are two separate concepts and stated that ‘breach of confidence, being an equitable concept is conscience-based’ and ‘invasion of privacy is a common law wrong which is founded on the harm done to the plaintiff by conduct which can reasonably be regarded as offensive to human values’.¹³⁸ In this regard, ‘confidentiality’ and ‘privacy’ can form part of one scenario, but it is up to the courts to establish that each of the elements contained within a breach of confidentiality also forms part of a breach of privacy.

¹³⁴See Jillian Caldwell, ‘Protecting Privacy Post Lenah: Should the Courts Establish a New Tort or Develop Breach of Confidence?’ (2003) 26(1) *University of New South Wales Law Journal* 90; Linda Tompkins, ‘Confidentiality Agreements in a Commercial Setting: Are They Necessary?’ (2008) 27 *Australian Resources & Energy Law Journal* 198; Normann Witzleb, ‘Monetary Remedies for Breach of Confidence in Privacy Cases’ (2007) 27 *Legal Studies* 430.

¹³⁵George, above n 61 120. See also Australian Law Reform Commission, *For your Information: Australian Privacy Law and Practice*, Report no108 (12 August 2008), [15.139-15.140] <<http://www.alrc.gov.au/publications/report-108>>.

¹³⁶Australian Law Reform Commission, *Obligations of Confidence*, <<http://www.alrc.gov.au/publications/15.%20Federal%20Information%20Laws/obligations-confidence>>.

¹³⁷[2005] 1 NZLR 1.

¹³⁸*Ibid* 307.

In *Commonwealth v John Fairfax and Sons Ltd*¹³⁹ it was held that ‘the court will act to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged’. This statement can be understood as a breach of confidence being used to restrict the disclosure of private information. The law of breach of confidentiality falls within equitable relief, whereas privacy falls within common law relief.¹⁴⁰ However, common law duties are also imposed upon the employment relationship when applying the duty of confidence.¹⁴¹ Therefore, the underlying rule for exercising equitable relief ‘lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained’.¹⁴²

A breach of confidence generally forms the protection of four particular classes:

- (i) trade secrets;
- (ii) personal confidences;
- (iii) government information; and
- (iv) literary and artistic confidences.¹⁴³

In this regard, any personal information regarding an employee that an employer possess, for example emails, internet or social media usage, will be subject to the duty of confidence when it is ‘improperly or surreptitiously acquired’.¹⁴⁴ This duty, under common law, may then possibly be recognised as invasion of privacy. However, as discussed above, the High Court has left the development of this idea open; whereas other lower courts, as discussed, imposed liability for unreasonable intrusion.¹⁴⁵ This would be the case where both employers and employees misuse confidential information to their own advantage.

In order to bring an equitable action, the court in *Coco v AN Clark (Engineers) Ltd*¹⁴⁶ held that the following elements are required:

¹³⁹(1980) 147 CLR 39, 50.

¹⁴⁰*Prince Albert v Strange* (1849) 1 Mac & G 25; 41 All ER 1171; *Argyll (Duchess) v Argyll (Duke)* [1967] 1 Ch 302 (*Argyll v Argyll*).

¹⁴¹*Prout v British Gas* (1992) FSR 478.

¹⁴²*Moorgate Tobacco Ltd v Phillip Morris Ltd (No. 2)* (1984) 156 CLR 414, 438.

¹⁴³George, above n 61, 109.

¹⁴⁴*ABC v Lenah Game Meats* (2001) 208 CLR 199, 224.

¹⁴⁵*Ibid.* See also *Doe v ABC* (2007) VCC 281; *Giller v Procopets* [2008] VSCA 236.

¹⁴⁶[1969] RPC 41, 47.

- (i) the information has some characteristic of confidence;
- (ii) the information has been conveyed under circumstances where there is an obligation of confidence; and
- (iii) there has been a misuse of the information.

Each element will be discussed accordingly. The first element requires the court to establish the necessary characteristic of confidence at hand. In the case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,¹⁴⁷ the court held that certain information is more vulnerable than others.¹⁴⁸ Whether private information is at hand, it needs to be obvious that it also indicates confidentiality. According to the *Lenah Game Meats* case, the court regards personal and private information such as medical reports, health information, personal relationships and finances as confidential, which means that any information falling outside this scope needs to be assessed against other factors in order to prove that it has a characteristic of confidence.¹⁴⁹ The court will consider the nature of the information; whether the information was expressly confidential; if not expressly confidential, it was otherwise treated as confidential; and whether it would be seen as confidential by a reasonable person.¹⁵⁰ Therefore, confidential information is information that is not mere ‘trivial tittle tattle’ or against public interest.¹⁵¹

The second element requires the court to establish whether the information has been conveyed under circumstances where there is an obligation of confidence. Normally under these circumstances, equity will intervene to protect the necessary confidential

¹⁴⁷(2001) 208 CLR 199.

¹⁴⁸Ibid 42 - ‘Certain kinds of information about a person such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved’.

¹⁴⁹George, above n 61, 111. See also *W v Egdell* [1990] Ch 359, 389; *Minter Ellison (a firm) v Raneberg* [2011] SASC 159, [30].

¹⁵⁰Ibid. See also *Sullivan v Sclanders & Goldwell Int Pty Ltd* (2000) 77 SASR 419.

¹⁵¹Ibid 112. In the case of *Saad v Chubb Security Australia Pty Ltd* [2012] NSWSC 1183, 183, photos were taken of a woman from CCTV cameras which was installed in her workplace. These photos were uploaded to Facebook and some comments written with the photo was present. The court held: ‘In the present case, the plaintiff was...the sole subject and focus of the photographic images. It is at least arguable that the unauthorised images of her amounted to an interference in what was essentially an activity forming part of her private, though not secret life associated with her employment. I do not consider that, at this stage of the proceedings, it is open to conclude that the cause of action for breach of confidence based on invasion of the plaintiff’s privacy would be futile or bad in law...’

information. In Australia, a person who entrusted confidential information to another is bound by an obligation of confidence.¹⁵² When employees post information on social media and even via email about fellow employees or their employers, they fail to uphold their obligation of confidence if the information was conveyed to them confidentially.¹⁵³

The last element requires the court to establish a misuse of the confidential information. When confidential information is conveyed to a social media user and this person posts this information, it is a breach of confidential information and therefore a misuse of the information. Misuse of information may include posting it electronically, in hardcopy or by word of mouth.¹⁵⁴ This can also create the issue of cyberbullying, which will be discussed later in this chapter.

It is significant that a breach of confidentiality must meet all the criteria discussed above. With these elements in mind, it is useful to consider whether there exists a duty of mutual trust and confidence between an employer and employee and whether a breach of confidence can be seen as a means to ensure the protection of privacy in the workplace. This is especially relevant with the advancement of social media in the workplace and the potential misuse of confidential and private information.

When considering a breach of confidentiality, Telford argues that ‘a more practical development would have been to differentiate between privacy as a right and privacy as a cause of action’ if cases were to be differentiated from breach of confidentiality actions.¹⁵⁵ However, this has not been done and therefore, referring to the case of *Lenah Game Meats*, the court held that the equitable breach of confidence seems to be the appropriate legal action in order to protect an individual’s private information. Specifically, Gleeson CJ held that:¹⁵⁶

The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy ... For reasons already given, I regard the law

¹⁵²*Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 268.

¹⁵³See, eg, *Norman South Pty Ltd v Geoffrey Edlesten v Stacey da Silva* [2012] VSC 477.

¹⁵⁴George, above n 61, 114.

¹⁵⁵Paul Telford, ‘Gross v Purvis: Its Place in the Common Law of Privacy’ (2003) 10(4) *Privacy Law and Policy Reporter* 66, 68.

¹⁵⁶*Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [40], [55].

of breach of confidence as providing a remedy, in a case such as the present, if the nature of the information obtained by the trespasser is such as to permit the information to be regarded as confidential.

Therefore, to prevent a breach of confidentiality, employers need to ensure that the correct measures, such as social media workplace policies and training on this aspect are provided to employees. This will further be discussed in Chapter 4. According to *Concut Pty Ltd v Worrell*,¹⁵⁷ equitable and contractual duties in relation to confidence may coexist and there may be a considerable overlap of these duties within the employment relationship.¹⁵⁸ Confidential information of both employees and employers may be protected by way of implied contractual duties of good faith in the employment contract. However, this information may also be protected through an action for breach of confidence by an express agreement by the parties.¹⁵⁹

Applying the elements of the duty of confidence above and taking into account implied duties of an employment contract as discussed in Chapter 2, a breach of dissemination of confidential information may arise. If, for example, an employee disseminates confidential business opportunities of an employer via social media, this might be a breach of an implied duty of trust and good faith between the parties. Furthermore, if there is an express contractual term added to the employment contract dealing with confidential information, this will be a breach of confidence if information is conveyed over social media.¹⁶⁰

In relation to confidential information under an employment contract, the information that is dealt with must be specifically mentioned, either through an express term in the contract or the policy attached to the employment contract. In *Dais Studio Pty Ltd v Bullet Creative Pty Ltd*,¹⁶¹ it was held that confidential information must be made known to the employee in order to be aware of that information.¹⁶² Therefore, in relation to the dissemination of information via social media platforms, the employee sharing confidential information must have known of its confidential nature.

¹⁵⁷(2000) 75 ALJR 312.

¹⁵⁸*Ibid* [26].

¹⁵⁹*Optus Networks Pty Ltd v Telstra* [2010] FCFCA 21, [38].

¹⁶⁰*Transpacific Industries Pty Ltd v Whelan* [2008] VSC 403.

¹⁶¹[2007] FCA 2054.

¹⁶²*Ibid* [95].

However, this will similarly apply with the equitable duty of confidence in the employment relationship where there was wrongful use of information, whether in a traditional sense or through social media.¹⁶³

The extent to which an employee could breach confidence may seriously undermine the employment relationship in that employees can harm the employer's business reputation and goodwill through breaching the employment contract duties implied within this relationship. However, an action for breach of confidentiality may be sufficient to remedy the breach in terms of the information that was regarded as confidential because of the restrictions within the *Privacy Act* and privacy principles.

The breach of privacy and confidentiality can possibly create further legal issues like defamation because of the published material on a social media platform being defamatory. The second legal issue will examine defamation laws in Australia and how this creates significant challenges for employers within a social media framework.

3.3 DEFAMATION

A defamation claim is one of the more significant issues associated with the use of social media in the workplace. In 2013, Judge Elkaim made the following statement regarding social media and defamation:

when defamatory publications are made on social media it is common knowledge that they spread. They are spread easily by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effect that stems from the use of this type of communication.¹⁶⁴

The quote by Judge Elkaim reflects the reach of social media and the speed with which damaging information can be communicated. This clearly has implications for employers and employees. As noted above, the inappropriate use of social media by current and even former employees can cause serious damage to reputation and relationships when social media communications are defamatory, especially within the

¹⁶³*Seager v Copydex Ltd* [1967] 2 All ER 415.

¹⁶⁴*Mickle v Farley* [2013] NSWDC 295, [21].

employment relationship. This section therefore examines the meaning of defamation and scope of defamation law in relation to the use of social media.

There is no specific or particular definition of defamation in Australia;¹⁶⁵ however, Richards, De Zwart and Ludlow note that ‘the essence of the tort of defamation is the protection of reputation, that intangible something that we all hold dear and which can, especially for a public figure, be so much larger than the individual and exist in more than one location (and thus be damages in more than one location)’.¹⁶⁶ Therefore, defamation can be defined as ‘a common law tort whereby communication occurs between two or more people which tends to cause a third party’s reputation to be negatively affected’.¹⁶⁷ This communication can occur either verbally or in writing (for example, via social media).¹⁶⁸ Defamation has the characteristic of injuring another party’s reputation.¹⁶⁹ Therefore, it is measured against a hypothetical person and how that person would react to these defamation claims.¹⁷⁰ The following verse from a poem by Thomas Moore paints a picture of how defamation was characterised since the early days:¹⁷¹

They slander thee sorely, who say thy vows are frail –
Hadst thou been a false one, thy cheek had look’d less pale!
They say, too, so long thou hast worn those lingering chains,
That deep in thy heart they have printed their servile stains:
O, foul is the slander! – no chain could that soul subdue –
Where shineth thy spirit, there Liberty shineth too!

¹⁶⁵Roy Baker, ‘Defamation and the Moral Community’ (2008) 13(1) *Deakin Law Review* 1, 4.

¹⁶⁶Bernadette Richards, Melissa de Zwart and Karinne Ludlow, *Tort Law Principles* (Lawbook Co, 6th ed, 2013) 550.

¹⁶⁷Defamation can also be defined as ‘the tort of publishing to persons, other than the person defamed, imputations the effect of which is to lower the reputation of the person defamed in the eyes of the public at large’ – Belinda Robilliard, ‘Jurisdiction and Choice of Law Rules for Defamation Actions in Australia Following the Gutnick Case and the Uniform Defamation Legislation’ (2007) 14 *Australian International Law Journal* 185, 186.

The general definition of ‘defamation’ is very broad. See also Katarina Klaric and Colette Downie, *Legal Traps: the Internet & the Office - Employer Liability for Employee Internet Misuse* (2010) <<http://www.stephens.com.au/Sites/2196/Images%20Files/Newsletters/May%202010%20%20Legal%20Traps.pdf>>.

¹⁶⁸Baker, above n 165, 5.

¹⁶⁹*Ibid.* According to Armstrong, ‘the underlying principles of modern Australian defamation law were formulated in England more than 400 years ago, against a backdrop of limited forms of personal and social communication’ – David Grant, ‘Defamation and the Internet: Principles for a Unified Australian (and world) Online Defamation Law’ (2002) 3(1) *Journalism Studies* 115, 116.

¹⁷⁰Baker, above n 165, 4.

¹⁷¹Thomas Moore, ‘The Irish Peasant to His Mistress’ (1779-1852) in Arthur Quiller-Couch, *The Oxford Book of English Verse 1250-1900* (1999) <<http://www.bartleby.com/101/583.html>>.

In Australia, defamation laws, derived from the United Kingdom, are based on the common law as well as statute law.¹⁷² Following the colonisation of Australia, the law regarding defamation under common law was codified through the *Defamation Act 1847* (NSW), which was primarily applied in New South Wales but adopted into other colonies.¹⁷³ Victoria repealed the *Defamation Act 1847* and replaced it with the common law principles of defamation.¹⁷⁴ South Australia applied the common law principles subject to amendments in the *Civil Liability Act 1936* (SA).¹⁷⁵ Queensland and Tasmania codified the law of defamation based on the Indian Penal Code 1860, which replaced the common law principles as *Defamation Act 1889* (Qld) and *Defamation Act 1957* (Tas).¹⁷⁶ The Australian Capital Territory applied the common law as amended by the *Defamation Act 1901* (NSW).¹⁷⁷ Lastly, Western Australia adopted the Queensland Criminal Code for purposes of defamation laws, but continued to apply defamation laws under common law in accordance with the *Criminal Code Act 1913* (WA).¹⁷⁸ As a result of the Australian Constitution being enacted in 1901, some states and territories preferred to keep the *Defamation Act 1847* within their laws while other states and territories enacted their own defamation laws.¹⁷⁹ However, because of inconsistencies arising within each state and territory on defamation laws, this led to defamation laws being reformed in 2006.

In 2005 it was announced that all states and territories would enact uniform legislation on defamation law.¹⁸⁰ This was a ‘watershed’, as uniformity had been debated for a long time.¹⁸¹ The uniform defamation laws were successfully passed by all states and

¹⁷²Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 2010) 42-43.

¹⁷³*Ibid.* 42. See Barbara McDonald, ‘Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia’ (2005) 27(3) *Sydney Law Review* 443.

¹⁷⁴Patrick George, *Defamation Law in Australia* (LexisNexis, 2nd ed, 2012) 70.

¹⁷⁵*Ibid.*

¹⁷⁶*Ibid.*

¹⁷⁷*Ibid.*

¹⁷⁸*Ibid.* 71.

¹⁷⁹Mark Pearson, ‘A Review of Australia's Defamation Reforms After a Year of Operation’ (2007) 29 *Australian Journalism Review* 41, 42.

¹⁸⁰*Ibid.*

¹⁸¹Steven Rares, ‘Defamation and Media Law Update 2006: Uniform National Laws and the Federal Court of Australia’ (2006) 28 *Australian Bar Review* 1, 1. See also Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report no 11 (1979).

territories in 2006;¹⁸² but each with some minor variations.¹⁸³ For example, in January 2006, Western Australia introduced the *Defamation Act 2005* (WA).

The change in statutory provisions for defamation has brought with it some significant changes to the general law on defamation. Rolph noted the following regarding the change in Australian defamation laws: ‘the changes are significant and bring about uniformity, but do not represent a radical departure from previous laws. It is seen as incremental’.¹⁸⁴ The changes to defamation legislation include that: the Act now makes provision for defamation regarding online publications; there is no difference between common law slander and libel; and parties now have access to statutory defences that operate in addition to the common law defences.¹⁸⁵

These uniform defamation laws and changes now make provision for defamation within online publications. However, the development of social media and technology can still make it challenging when defamatory remarks are made, especially in trying to determine who published the material, what the material was and where it was published. This is a particular issue within the workplace where an employee, colleague or customer posts defamatory comments on social media anonymously about another employee or the employer.¹⁸⁶ It is the anonymity of the defamatory social media posts that make the use of social media an issue. In regards to comments

¹⁸²Other States and Territories also introduced their legislation: *Defamation Act 2005* (NSW); *Defamation Act 2005* (SA); *Defamation Act 2005* (Qld); *Defamation Act 2005* (Tas); *Defamation Act 2005* (VIC); *Defamation Act 2006* (ACT); *Defamation Act 2006* (NT).

¹⁸³Patrick George, *Defamation Law in Australia* (LexisNexis, 2nd ed, 2012) 89.

¹⁸⁴David Rolph, ‘A Critique of the National, Uniform Defamation Laws’ (2008) 16 *Torts Law Journal* 207, 247. See also Kim Gould, ‘The More Things Change, the More They Stay the Same ... or Do They?’ (2007) 12 *Media & Arts Law Review* 29; Michael Tilbury, ‘Uniformity, the Constitution and Australian Defamation Law at the Turn of the Century’ in Nicholas J Mullany & Allen M Linden, *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, 1998) 244.

¹⁸⁵See in particular Linda Huan, *The Uniform Defamation Laws Reform 2006*, <<http://www.stephens.com.au/StephensLawyersConsultants2196/Page/24043/TheUniformDefamationLaws2006.aspx>>. See also Benedict Dugan and Bob Dugan, ‘The Internet and the Law’ (2002) 33 *Victoria University of Wellington Law Review* 433; Alex Mills, ‘The Law Applicable to Cross-border Defamation on Social Media: Whose Law Governs Free Speech in ‘Facebookistan?’ (2015) 7(1) *Journal of Media Law* 1-35; Peter Bartlett, ‘Differing Trends towards Internet Defamation Liability: Australia and the United States’ (2007) 3 *Convergence* 49.

¹⁸⁶Branscomb observes the following regarding social networking: ‘Cyberspace remains a frontier region, across which roam the few aboriginal technologists and cyberpunks who can tolerate the austerity of its savage computer interfaces, incompatible communications protocols, proprietary barricades, cultural and legal ambiguities, and general lack of useful maps or metaphors’ – Anne Branscomb, ‘Common Law for the Electronic frontier’ (1991) 165 *Scientific American* 112, 112.

made on social media, the court in *AB Ltd v Facebook Ireland Ltd*¹⁸⁷ stated the following:

It is indisputable that social networking sites can be a force for good in society, a truly positive and valuable mechanism. However, they are becoming increasingly misused as a medium through which to threaten, abuse, harass, intimidate and defame. Social networking sites belong to the ‘Wild West’ of modern broadcasting, publication and communication ... Recent impending litigation ... confirms that, in this sphere, an increasingly grave mischief confronts society.¹⁸⁸

Therefore, social media has made the way through which defamatory comments are made an issue within the employment relationship. Issues concerning defamation in the workplace are well illustrated in the case of ‘The Bell’, an historic 18th century inn that was promoted and advertised as iconic accommodation on Facebook in order to gain customers.¹⁸⁹ A dispute occurred between the owner of the inn and a previous employee who managed the Facebook page.¹⁹⁰ The employee retitled the Facebook page as ‘Toad of Bell Enders – How not to run a Cotswold Pub’.¹⁹¹ At that stage, the Facebook page had more than 100 members and the owner began receiving defamatory comments by the members.¹⁹² The plaintiff received £9 000 in damages.¹⁹³

This example is but only one of few recent cases dealing with defamation within the workplace on a social media platform.¹⁹⁴ The inappropriate use of social media in the workplace may trigger repercussions when defamatory remarks are made on a social

¹⁸⁷[2013] NIQB 14.

¹⁸⁸*Ibid* [13].

¹⁸⁹Leon Watson, ‘Old Etonian Businessman Wins £9,000 Libel Damages Payout After He was Dubbed Mr Toad on Disgruntled Pub Employee’s Facebook Page’, *Daily Mail Australia* (online), 7 October 2009, <<http://www.dailymail.co.uk/news/article-2551070/Old-Etonian-businessman-dubbed-Mr-Toad-vicious-Facebook-hate-page-set-disgruntled-former-employee-wins-9-000-libel-damages-payout.html>>.

¹⁹⁰*Ibid*.

¹⁹¹*Ibid*.

¹⁹²*Ibid*. See also David Rolph, ‘Align this Tort with Defamation Remedies’, *The Australian* (online), 30 September 2011

<<http://www.theaustralian.com.au/business/legal-affairs/align-this-tort-with-defamation-remedies/story-e6frg97x-1226152310203>>.

¹⁹³*Ibid*.

¹⁹⁴*Cairns v Modi* [2012] EWCA Civ 1382; *Cornes v The Ten Group Pty Ltd* (2011) 114 SASR 1; *Richardson v Oracle Corp Australia Pty Ltd* [2013] FCA 102; *Malcolm Pearson v Linfox Australia Pty Ltd* [2014] FWCFCB 1870 (19 March 2014); *Gloria Bowden v Ottrey Homes Cobram and District Retirement Villages Inc. T/A Ottrey Lodge* [2013] FWCFCB 431 (4 February 2013); *O’Keefe v William Muir’s Pty Ltd t/as Troy Williams The Good Guys* [2011] FWA 5311 (11 August 2011).

media site. This is a significant legal issue within the workplace and how the employment relationship is affected through defamatory material published online. The action for defamation is further blurred and complicated when defamatory remarks are made outside the workplace. To see how cases of defamation can be actioned in general and within a social media framework, an overview of defamation laws in Australia will be given followed by a discussion of where defamation laws are positioned currently in relation to social media in the workplace.

3.3.1 Defamation Action

Before an action for defamation can be brought against an individual, a distinction needs to be made between whether a person's reputation is being harmed and whether it is free speech. In relation to the right of free speech, the case of *Lange v Australian Broadcasting Corporation*¹⁹⁵ held that the freedom of speech in the Constitution is not conclusive. In this case, the then prime minister of New Zealand, David Lange, contended that the ABC's program 'Four Corners' broadcast false and defamatory imputations about him and the Labour Party at that stage.¹⁹⁶ The issues concerning this case were whether the 'constitutional defence' of freedom of speech extends to political discussions and whether these political discussions form part of qualified privilege under common law.¹⁹⁷ The High Court held that 'each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia' and therefore provide protection to those who publish information, opinions and arguments.¹⁹⁸

Defamation law allows for certain defences such as honest statements, fact or opinion when assessing whether an action is suitable for defamation.¹⁹⁹ It is argued that 'defamation provides a direct challenge to free speech, but the defences to defamation attempt to strike a balance between free speech and protection of reputation'.²⁰⁰ This thesis will not examine free speech, but forms part of an overall discussion to an action

¹⁹⁵(1997) 145 ALR 96.

¹⁹⁶Ibid 4-5.

¹⁹⁷Ibid 6-7.

¹⁹⁸Ibid 114-115.

¹⁹⁹See discussion on defences below.

²⁰⁰Richards et al, above n 166, 552.

for defamation. This thesis will therefore consider the protection of reputation and suitable defences regarding the use of social media platforms within the workplace.

The protection of a person's reputation is an important aspect to a defamation action as it is one of the elements that needs to be proven in order for an action to progress. Bower refers to the meaning of reputation as:²⁰¹

The esteem in which he is held, or the goodwill entertained towards him, or the confidence reposed in him by other persons, whether in respect of his personal character, his private or domestic life, his public, social, professional, or business qualifications, qualities, competence, dealings, conduct, or status, or his financial credit ...

Therefore, it is the published defamatory material that preys upon a person's reputation and goodwill within the community.²⁰² The damage that is caused through published material which is viewed by the community is subject to an action for defamation and damages. Likewise, Brennan J stated that '[a]lthough damages are awarded to vindicate the plaintiff's reputation, damages are not awarded as compensation for the loss in value of a plaintiff's reputation as though that reputation were itself a tangible asset or a physical attribute which, once damaged, is worth less than it was before'.²⁰³ Therefore, in order to rely on reputation and a demand for damages, the High Court of Australia confirmed in *Radio 2UE Sydney Pty Ltd v Chesterton*²⁰⁴ that the test applied in defamation cases is whether an ordinary person reading the published material would think less of the plaintiff.²⁰⁵ It is also contingent on community standards.²⁰⁶ Specifically, Kirby J explained the test as follows:²⁰⁷

The recipient has been variously described as a 'reasonable reader', a 'right-thinking [member] of society', or an 'ordinary man, not avid for scandal'. Sometimes qualities of understanding have been attributed, such as the 'reader of average intelligence'. The point of these attempts to describe the notional recipient is to conjure up an idea of the

²⁰¹Spencer Bower, *A Code of the Law of Actionable Defamation* (Butterworths, 2nd ed, 1923) 3.

²⁰²*Sim v Stretch* [1936] 2 All ER 1237, 1240.

²⁰³*Carson v John Fairfax & Sons Ltd* (1993) 178 CLR44, 70.

²⁰⁴(2009) 238 CLR 460.

²⁰⁵*Ibid* [5].

²⁰⁶*Ibid* [37].

²⁰⁷*Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519, 573.

kind of person who will receive the communication in question and in whose opinion the reputation of the person affected is said to be lowered ...

Furthermore, the court in *Radio 2UE Sydney Pty Ltd v Chesterton* held that the test applied in defamation cases and 'reputation' extends to businesses and the test must be met objectively within the confines of the elements of defamation (which will be examined below).²⁰⁸ Therefore, the application of this test also extends to the reputation of a business and how the community will view a certain business and the people working within that business.²⁰⁹ However, the development of social media in the workplace has made it a challenge for employers and employees to identify what material is defamatory and by whom it was anonymously posted. This part of the chapter will therefore identify the elements of defamation in order to bring an action for defamation and will strongly focus on an employee using social media inappropriately within the workplace and beyond.

For an employer to bring an action for defamation on a social media platform against an employee, the following three elements must be proven when an action for defamation is considered:²¹⁰

- (i) the information published is of a defamatory matter;
- (ii) the information published identified the person (plaintiff); and
- (iii) the information published was indeed defamatory.

These elements will be used to examine the general action for defamation and extend into a discussion on how social media impacts these elements within the workplace. Therefore, employers, who believe that the reputation of the business has been damaged, need to prove each of these elements. These three elements will be discussed accordingly within the ambit of social media and defamation in the workplace.

²⁰⁸*Radio 2UE Sydney Pty Ltd v Chesterton*, [36].

²⁰⁹See *Murphy v Plasterers Society* [1949] SASR 98.

²¹⁰ See Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 3rd ed, 2010); Andrew Kenyon, *Defamation: Comparative Law and Practice* (UCL Press, 2006) 239; Eric Deschheemaeker, 'Tort Law Defences: A Defence of Conventionalism' (2014) 77 *Modern Law Review* 493, 494; *Defamation Act 2005* (WA) s 12.

3.3.1.1 *Published Information and Defamatory Matter*

The earliest reference to a publication being defamatory, was in the case of *Parmiter v Coupland*²¹¹ in which the court held that ‘it is likely to injure the reputation of another by exposing the person to hatred, contempt or ridicule’.²¹² In Australia, the case of *Gardiner v John Fairfax & Sons*²¹³ similarly found that published defamatory matter ‘is anything which is likely to cause ordinary decent folk in the community, in general, to think less of the person’.²¹⁴ These cases and tests indicate that the publication of defamatory matter needs to be considered carefully in order to determine the harm a person has caused. The publication of defamatory material is concerned with two points: firstly, publication through a positive act and, secondly, publication through omission.²¹⁵ The court in *Webb v Bloch*²¹⁶ stated that in order for a publication to be made through a positive act, there must exist intention on the part of the offender. The court further stated that ‘if he has intentionally lent his assistance to its existence for the purposes of being published, his instrumentality is evidence to show a publication by him’.²¹⁷ Therefore, any positive acts such as ‘tweeting’,²¹⁸ posting on Facebook or LinkedIn and emails to co-workers, employers or customers is determined by the test set out in the *Webb v Bloch* case.²¹⁹ Any of these acts can lead to a defamation action when defamatory material is published.²²⁰

As mentioned, publication can be done through a positive act or through omission. The second point of publication through omission was dealt with in the cases of

²¹¹(1840) 151 ER 340.

²¹²*Ibid* 341.

²¹³(1942) 42 SR (NSW) 171.

²¹⁴*Ibid* 172.

²¹⁵*Frawley v New South Wales* [2007] NSWSC 1379.

²¹⁶(1928) 41 CLR 331.

²¹⁷*Ibid* 364.

²¹⁸See for example *Lord McAlpine v Bercow* [2013] EWHC 1342 (QB).

²¹⁹See also *Higgins v Sinclair* [2011] NSWSC 163.

²²⁰Aside from social media sites, courts also have difficulty deciding on cases with regard to internet search sites. One example was *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; 194 ALR 433, [44] where the court held that publication on sites such as Google occur when the defamatory material is uploaded and not downloaded.

*Urbanchich v Drummoyne Municipal Council*²²¹ and *Frawley v New South Wales*.²²² The court in *Byrne v Deane*²²³ held that the test for publication by omission is ‘whether having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?’.²²⁴ This test was applied in *Urbanchich v Drummoyne Municipal Council* and *Frawley v New South Wales*.²²⁵ Therefore, if there is any lack of a positive act by the defendant, knowledge is still required for the publisher to be liable through omission.²²⁶

There is still considerable disagreement as to whether defamatory published material through a positive act or omission should be punished. Kirby J commented in the case of *Dow Jones & Company Inc v Gutnick*²²⁷ that ‘[t]here are a number of difficulties that would have to be ironed out before the settled rules of defamation law ... could be modified in respect of publication of allegedly defamatory material on the Internet’.²²⁸ Specifically, publication through social media fulfils the elements of a defamatory claim through its electronic characteristic. Furthermore, social media does not only contain words online, but also pictures and videos, which contributes enormously to how defamatory material will be presented.²²⁹

Apart from information being published, the information needs to include defamatory matter. The *Defamation Act 2005 (WA)* defines ‘matter’ as:²³⁰

²²¹(1991) *Australian Torts Reports* 81–127. In this case, posters were posted on bus shelter in New South Wales which contained people wearing Nazi uniforms. One of the persons on the poster was identified as a war criminal and that he worked together with Adolf Hitler. The plaintiff informed the authorities of this and asked them to remove it immediately as he is not associated with this. They only removed the posters a month later. This was done through omission.

²²²[2006] NSWSC 248. In this case, the State published defamatory material of a teacher online and the material was accessible by the school students through the computers supplied by the State. The plaintiff informed the principal of the school and demanded the school to restrict the material to the school students. The principal ignored this and the State was held liable for publication through omission.

²²³[1937] 1 KB 818.

²²⁴*Ibid* 838. See also *Byrne in Bishop v New South Wales* [2000] NSWSC 1042.

²²⁵*Ibid*.

²²⁶Joachim Dietrich, ‘Clarifying the Meaning of “Publication” of Defamatory Matter in the Age of the Internet’ (2013) 18 *Media and Arts Law Review* 88, 93.

²²⁷(2002) 210 CLR 575.

²²⁸*Ibid* 632. See also *Wishart v Murray* [2013] NZHC 540; *Davison v Habeeb* [2011] EWHC 3031 (QB) and *Tamiz v Google Inc* [2012] EWHC 449 (QB).

²²⁹*Kermode v Fairfax Media Publications Pty Ltd* [2009] NSWSC 1263, [24]. See also *Waterhouse v The Age Co Ltd* [2011] NSWSC 159 where republishing of material can also lead to defamation.

²³⁰*Defamation Act 2005 (WA)* s 4.

- (a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical;
- (b) a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication;
- (c) a letter, note or other writing;
- (d) a picture, gesture or oral utterance; and
- (e) any other thing by means of which something may be communicated to a person.

Therefore, according to Davis, the definition of ‘matter’ refers ‘to the thing produced by the defendant that conveys or communicates some suggestion about the plaintiff to others’.²³¹ The ‘matter’ can be tangible or intangible as seen from s 4 of the *Defamation Act* above.²³² From this definition, ‘matter’ can extend to social media platforms. However, the matter being published can only be defamatory if it was read online by other persons and these persons understood the published matter.²³³ In this regard, courts have applied the laws and general rules in defamation cases published online, but according to Richards, it is necessary to address defamatory matter published on social media platforms within the workplace and beyond because of the issues social media present as an online platform where defamatory material may be published anonymously.²³⁴

One of the earliest cases regarding defamation in the workplace is the case of *Barach v University of New South Wales*.²³⁵ In this case, Dr Paul Barach filed an action for defamation against the University of New South Wales after they terminated his employment.²³⁶ Several individuals published material about Dr Barach’s background and qualifications for which the university, in Dr Barach’s opinion, is vicariously liable.²³⁷ The published material ranged from emails to Facebook notifications.²³⁸ The

²³¹Julia Davis, *Connecting with Tort Law* (Oxford University Press, 2012) 276.

²³²*Ibid.*

²³³See *Jameel v Dow Jones Inc* [2005] EWCA Civ 75 [25]. Information published in a different language will not necessarily suffice as defamatory.

²³⁴Richards et al, above n 166, 551.

²³⁵[2011] NSWSC 431.

²³⁶*Ibid* [1]-[3].

²³⁷*Ibid* [3].

²³⁸*Ibid* [7].

main dispute was whether Dr Barach's reputation was injured, not only in New South Wales, but also in Australia and internationally. Garling J noted that 'although the rationale of the test of defamation is the protection of reputation, compensatory damages which are awarded are not limited only to damage to reputation, because they are at large and may include more than one kind of compensation. Damages can include compensation for actual or anticipated pecuniary loss, as well as compensation for injury to feelings including any grief or distress which a plaintiff may have felt upon learning of the defamatory publication'.²³⁹ As a result, Dr Barach's reputation was only injured within the state of New South Wales.

Because of defamation being a tort of strict liability, intention is needed on the part of the defendant to bring an action for defamation.²⁴⁰ The court in *Morgan v Odhams Press Ltd*²⁴¹ stated that:

It does not matter whether the publisher intended to refer to the plaintiff or not. It does not even matter whether he knew of the plaintiff's existence. And it does not matter that he did not know or could not have known the facts which caused the readers with special knowledge to connect the statement with the plaintiff. Indeed, the damage done to the plaintiff by the publication may be of a kind which the publisher could not have foreseen.²⁴²

However, the issue with publication is when defamatory material is published anonymously. Where the author of the publication is anonymous, the issue is whether it may be possible to bring an action for defamation against the intermediary or publishing business who published the defamatory material. The court in *Metropolitan International Schools Ltd. (t/a Skillstrain and/or Train2game) v Designtecnica Corp (t/a Digital Trends) & Ors*²⁴³ stated that 'when a search is carried out by a web user via the Google search engine it is clear that none of its officers or employees takes any part in the search. It is performed automatically in accordance with computer programmes'.²⁴⁴ Therefore, an intermediary such as Google cannot be held

²³⁹Ibid [47].

²⁴⁰Ibid 287.

²⁴¹[1971] 1 WLR 1239.

²⁴²Ibid 1242.

²⁴³[2009] EMLR 27, [2011] 1 WLR 1743.

²⁴⁴Ibid 1757, [50].

accountable for posting defamatory material because it is done through social media networks like Facebook or Twitter, which automatically link to Google as an intermediary for these social media networks. However, Australian courts have criticised this approach. In the case of *Trkulja v Yahoo! Inc & Another*,²⁴⁵ Mr Trkulja claimed damages for defamation because of an article and photo published of him by Yahoo, as a criminal and part of the Melbourne criminal underworld.²⁴⁶ Pursuant to s 22 of the *Defamation Act 2005* (Vic) Kaye J noted that ‘the plaintiff was awarded damages in the sum of \$225,000 in respect of the publication of the articles through the “Yahoo! 7” search service. In this case, the jury accepted that Yahoo’s publication conveyed that “the plaintiff is such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a website that chronicles crime in Melbourne”’.²⁴⁷ Therefore, the type of social media platform that is applicable will depend on liability for defamation. It is not made out whether Yahoo knew that the published material was false; however, if the social media platform is aware of defamatory material on their site and do not remove it within a reasonable time, they open themselves up to liability.²⁴⁸

From this first element of defamation, it is submitted that the publication of defamatory material applies to every part of a person’s life and reputation and whether the community will see harm caused to that person through the publication.²⁴⁹ However, it becomes difficult to establish damages and harm when the defamatory posts have been published by an anonymous person through a social media platform. Therefore, the identification of a person, especially when the published material is between an employee and employer, is an important element to establishing an action for defamation.

3.3.1.2 *Identification of Person*

The second element regarding an action for defamation is to identify the person against whom the defamatory material has been published. When a publication identifying the

²⁴⁵[2012] VSC 533. Cf *Trkulja v Google Inc LLC & Anor (No 5)* [2012] VSC 533.

²⁴⁶*Ibid* [1].

²⁴⁷*Ibid* [34], [60].

²⁴⁸David Rolph, ‘Publication, Innocent Dissemination and the Internet After *Dow Jones & Co Inc v Gutnick*’ (2010) 33 *University of New South Wales Law Journal* 562.

²⁴⁹See, eg, *Slatyer v Daily Telegraph Newspaper* (1908) 6 CLR 1.

person is made, it is important to remember that an employer can be liable for any publication made by their employee (if the publication was made in the course of employment).²⁵⁰ When the plaintiff has been clearly identified in the defamatory material, this element is usually satisfied. In a case where the plaintiff's name was not published, but referred to the plaintiff in general, the test is whether the reasonable person would identify the person in the material.²⁵¹ One important consideration for defamation is that defamation laws protect individuals and therefore a group may not sue in order to protect their reputation.²⁵² However, if a person is clearly identified within that group, the person can bring an action for defamation.²⁵³ In the case of *Bateman v Shepherd*,²⁵⁴ the court applied an objective test in identifying the person in the publication. In this case, Shepard published material on Bateman without referring to his name and all the facts combined led people to conclude who the person was in the published material.²⁵⁵

Likewise, the case of *Norman v Woods*²⁵⁶ came to a similar conclusion regarding identification of a person in the published material. In this case, cartoons were published on Facebook depicting two women with the title 'Shirley can't believe MN still gets donations ... Aren't people educated to scams?'.²⁵⁷ However, no name was ever published with this title and the plaintiff referred to as 'MN'.²⁵⁸ The court noted that 'the scope of publication is accordingly confined to any person who read the Facebook post, knew all of the extrinsic facts specified in the statement of claim and understood the cartoon to refer to Ms Norman'.²⁵⁹

The identification of employers or fellow employees may be more identifiable when material is published on a social media platform or through email. A good example of

²⁵⁰See discussion on publication. See for example *Citizen's Life Assurance Co Ltd v Brown* [1904] AC 423, 428; *New South Wales Country Press Co-Operative Co Ltd v Stewart* (1911) 12 CLR 481; 17 ALR 554.

²⁵¹Julia Davis, *Connecting with Tort Law* (Oxford University, 2012) 285.

²⁵²*Ibid* 285.

²⁵³*Ibid*. For example, in the case of *Lloyd v David Syme* (1985) 3 NSWLR 728 an article mentioned that the West Indies team had fixed a match. The article did not refer to any cricket players specifically, but the captain was successful in recovering damages for defamation.

²⁵⁴[1997] ACTSC 6.

²⁵⁵*Ibid* [29].

²⁵⁶[2016] NSWSC 257.

²⁵⁷*Ibid* [2].

²⁵⁸*Ibid*.

²⁵⁹*Ibid* [3].

identification of a person in defamatory material in the workplace is the case of *Enders v Erbas & Associates Pty Ltd (No. 2)*.²⁶⁰ In July 2010, Mr Erbas, the managing director, sent an email to the staff members regarding absenteeism in the workplace. The email confirmed that in 30 days, he had totalled ‘24 sick days, 21 latecomers and 26 days of holidays’.²⁶¹ The email further stated that this level of absenteeism was unfair to those who come to work every day and that the absenteeism is costing the company ‘big dollars’.²⁶² An electronic diary was attached to the email showing the days on which the staff came late or were sick. Mr Erbas also highlighted the names of staff who were absent on those days.²⁶³

The plaintiff, Ms Enders, had taken 17 days’ sick leave in the period noted and had been receiving breast cancer treatment.²⁶⁴ Ms Enders claimed that numerous defamatory accusations were made in the email including that she pretended to be sick and therefore made up the story.²⁶⁵ In the case, Gibson J did not uphold these claims, but she did agree that there were some defamatory allegations in the email, which included that the employees had ‘hurt the management’ by taking some time off work.²⁶⁶ Gibson J also concluded that although the email had displayed defamatory allegations, it was not done with malicious intent and therefore not defamatory.²⁶⁷ Therefore, as mentioned above, a person, who formed part of a group, may bring an action for defamation if the publication, via social media or email, was made to a group without identifying an employee specifically. However, in this case the court found that it was not defamatory for the employer to send an email to the group of employees as the employer argued qualified privilege because of the interest the employees had in the matter. Defences by employers and employees in a defamation action will be discussed below.

²⁶⁰[2013] NSWDC 44.

²⁶¹*Ibid* [6].

²⁶²*Ibid*. See also Dan Svantesson, ‘The Right of Reputation in the Internet Era’ (2009) 23(3) *International Review of Law, Computers and Technology* 169 for a discussion on defamatory material and reputation.

²⁶³*Ibid* [10].

²⁶⁴*Ibid*.

²⁶⁵*Ibid*.

²⁶⁶*Ibid* [62]-[64].

²⁶⁷*Ibid* [65].

Another case dealing with publication of material defaming an employee is the case of *Saad v Chubb Security Australia Pty Limited t/as Chubb Security & Anor.*²⁶⁸ In this case, the plaintiff was an employee of the Commonwealth Bank of Australia and filed an action for defamation against the bank and Chubb because her image was posted on Facebook using CCTV footage caught in the workplace.²⁶⁹ The footage was accompanied by degrading comments on Facebook.²⁷⁰ However, the action of the plaintiff was not successful because she did not specifically convey how the defamatory material was published against her as a claimant.²⁷¹ This example demonstrates that both employers and employees should be careful in bringing an action for defamation as it can be rejected because of relevant legal principles.²⁷² Therefore it is imperative that a person who brings an action for defamation be confident that it is indeed defamatory material.

3.3.1.3 Defamatory Material

The third element to prove an action for defamation is the release of defamatory material. Not only should the plaintiff identify the material²⁷³ that was published about them, but also show that the published material was indeed defamatory. The court in *Jones v Skelton*²⁷⁴ stated that defamation must be interpreted in accordance with its ‘natural and ordinary meaning’ and that this test is based on the ordinary knowledge of the reader.²⁷⁵ Furthermore, the court in *Prefumo v Bradley*²⁷⁶ states that:

²⁶⁸[2012] NSWSC 1183.

²⁶⁹*Ibid* [1]-[2].

²⁷⁰*Ibid*.

²⁷¹*Ibid* [26]. See also *Saad v Chubb Security Pty Ltd (No 2)* [2014] NSWSC 1833.

²⁷²Walter MacCallum, ‘Defamation Actions and Social Media: Where are the Risks?’ (2015) *Governance Directions* 677, 679.

²⁷³The *Defamation Act 2005* (WA) s 4 defines ‘matter’ as:

- (a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical;
- (b) a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication;
- (c) a letter, note or other writing;
- (d) a picture, gesture or oral utterance; and
- (e) any other thing by means of which something may be communicated to a person.

This is similar in other statutes: *Defamation Act 2005* (NSW); *Defamation Act 2005* (SA); *Defamation Act 2005* (Qld); *Defamation Act 2005* (Tas); *Defamation Act 2005* (VIC); *Defamation Act 2006* (ACT); *Defamation Act 2006* (NT).

²⁷⁴[1964] NSW 485.

²⁷⁵*Ibid* 491.

²⁷⁶[2011] WASC 251.

a matter is defamatory if it is likely to lead ordinary reasonable persons to think less of the plaintiff or is likely to expose a plaintiff to hatred, contempt or ridicule amongst ordinary reasonable persons, or is likely to cause the plaintiff to be shunned or avoided amongst ordinary reasonable persons, even if there is no moral discredit on the plaintiff's part.²⁷⁷

The published form of social media is different to ordinary published forms such as newspapers and magazines in that the communication of defamatory material is seen as unexpected and careless due to the anonymity it provides for the publishers.²⁷⁸ In regards to published material on social media, defamatory legislation still applies to scenarios where social media is used as a vehicle for defamation and, therefore, the reasonable person will consider the whole publication and not just parts.²⁷⁹ The case of *North Coast Children's Home Inc (Caspa) v Martin*²⁸⁰ is an example of where defamatory material was identified as being communicated through a social media platform. In this case, the defendant, a 71-year-old foster carer, made Facebook publications about the abuse he suffered 30 to 40 years ago at the Children's Home.²⁸¹ The Facebook publications gained many likes; however, when the plaintiff demanded the posts cease, the defendant left it on Facebook.²⁸² Because of the continuing publications of defamatory material on social media by the defendant, the court made a ruling on damages in favour of the plaintiff because of the false imputations made by the defendant.²⁸³ Accordingly, Gibson DCJ awarded costs to the plaintiffs.²⁸⁴

More specifically, the case of *Cairns v Modi* provides insight into how social media can negatively impact a person within the workplace through the publication of defamatory remarks/matter. Furthermore, one of the first defamation cases regarding social media is *Cairns v Modi*.²⁸⁵ Chris Cairns was a well-known cricket player who

²⁷⁷Ibid [86]-[87]. See also *Parmiter v Coupland* (1840) 151 ER 340, 108; *Ettingshausen v Aust Consol Press* (1991) 23 NSWLR 443; *Boyd v Mirror Newspapers* [1980] 2 NSWLR 449; Ray Watterson, 'What is Defamatory Today?' (1993) 67 *Australian Law Journal* 811, 818-827.

²⁷⁸*Smith v ADVFN Plc* [2008] ALL ER (D) 335; [2008] EWHCC 1797 (QB), [14]-[17].

²⁷⁹*Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186 [17].

²⁸⁰[2014] NSWDC 125.

²⁸¹Ibid [13].

²⁸²Ibid [52].

²⁸³Ibid [57].

²⁸⁴Ibid [95].

²⁸⁵[2012] EWHC 756 (QB).

played for New Zealand. In 2007 and 2008, Chris Cairns was appointed to captain one of the Indian Premier League teams.²⁸⁶ In 2010, Lalit Modi, who was the former Chairman and Commissioner of the Indian Premier League and Board of Cricketing Control, tweeted that ‘Chris Cairns removed from the IPL auction list due to his past record of match fixing. This was done by the Governing Council today’.²⁸⁷ Further to this, Modi told a journalist at Cricinfo on the day the tweet went public that ‘we have removed him from the list for alleged allegations [sic] as we have zero tolerance of this kind of stuff. The Governing Council has decided against keeping him on the list’.²⁸⁸

Accordingly, Chris Cairns brought a case of defamation on social media against Modi. Bean J found that Modi had ‘singularly failed to provide any reliable evidence that [the Claimant] was involved in match fixing or spot fixing, or even that there were strong grounds for suspicion that he was’.²⁸⁹ Bean J found that damages of up to £90 000 were reasonable. The judge’s reasoning was that these allegations were ‘as serious an allegation as anyone could make against a professional sportsman’.²⁹⁰ The extent of such a publication on social media platforms makes an action for defamation valid but challenging within the employment relationship because of the defamatory material being published not only in the workplace but outside.

It is argued that the use of social media can affect both public and private life, but the point at issue with defamation and social media is whether employees can be dismissed when defamation claims have been made outside of working hours. Is it a breach of the employment contract if an employee publishes defamatory remarks not within the scope of employment that could lead to dismissal?

A recent occurrence brought the above mentioned questionable issue to light when a man was dismissed for writing defamatory remarks on his Facebook page.²⁹¹ Mr Nolan

²⁸⁶Ibid [1]-[3].

²⁸⁷Ibid [6].

²⁸⁸Ibid [7].

²⁸⁹Ibid [118]. See also *Broome v Cassell* [1972] AC 1027.

²⁹⁰Ibid [121].

²⁹¹Rebecca Sullivan, *Sydney Man Fired after calling Feminist Writer Clementine Ford a ‘sl**’* (2015) <<http://www.news.com.au/lifestyle/real-life/news-life/sydney-man-fired-after-calling-feminist-writer-clementine-ford-a-sl/news-story/e1179d6bd723ab6e395c1e2735e4a157>>. See also Burgess, Melanie, ‘Employees can be Sacked for Social Media Use, Even Outside of Work’, *News.com.au* (online), 18

worked for Meriton Apartments as a hotel manager. He posted defamatory remarks on Ms Ford's Facebook page, calling her a 'sl**t' and other racial posts.²⁹² Ms Ford is a feminist activist and a journalist who has close to 80 000 Facebook followers. Meriton, evidently, looked into the matter and dismissed Mr Nolan.²⁹³ The question is whether this dismissal was fair even though the defamatory remarks were not made within the scope of employment and outside of working hours. It is argued that it does not make a difference whether the comments were made on social media within or outside of working hours.²⁹⁴ Ultimately, it is the employer's reputation that must be mended as the close relation between the employee's social media comment and employer's reputation has damaging effects.²⁹⁵ Even though the 'employee is perfectly entitled to have his personal opinions, he is not entitled to disclose them to the "world at large" where to do so would reflect poorly on the company and/or damage its reputation and viability'.²⁹⁶

3.3.1.4 Concluding Remarks

With the ever-increasing use of social media in the workplace, issues concerning defamation and the consequences for the employment relationship have come to the fore in recent times. In this regard, the use of social media beyond the workplace has also presents a challenge for employers and the implications of monitoring an employee's behaviour and conduct accordingly (see Chapter 4). Furthermore, this is made more complex by the need to distinguish between what constitutes protected free speech and defamatory material. This part of the chapter identified the elements needed to bring a cause of action for defamation and applied it to long-established principles of law and how these principles can apply to social media within the workplace and beyond. Therefore, it is useful that employers understand the harm social media can cause in the workplace and beyond and that each of the elements,

December 2015 <http://www.news.com.au/finance/work/at-work/employees-can-be-sacked-for-social-media-use-even-outside-of-work/news-story/7c975ad1f66c1d18d127b9407b8b9f8d?utm_content=SocialFlow&utm_campaign=EditorialSF&utm_source=News.com.au&utm_medium=Facebook>.

²⁹²Mark Ritchie, *Social Media and Dismissal - Can/should you be Dismissed for being 'offensive' on Social Media without any Connection to your Employment?* (2015) HR Daily

<http://community.hrdaily.com.au/profiles/blogs/social-media-and-dismissal-can-should-you-be-dismissed-for-being?xg_source=activity>.

²⁹³Ibid.

²⁹⁴Ibid.

²⁹⁵Ibid. See *Cairns v Modi* [2012] EWHC 756 (QB).

²⁹⁶*Little v Credit Corp Group Limited t/as Credit Corp Group* [2013] FWC 9642 (10 December 2012).

namely publication, identification and defamatory meaning, must be proven in light of the inappropriate use of social media by an employee.

The cases discussed in regards to published information and defamatory matter indicate how defamation law play a significant role in social media and online platforms.²⁹⁷ The predicament this entails is how to deal with defamation laws with the inappropriate use of social media within the workplace and beyond.²⁹⁸ Even though the uniform defamation legislation includes online platforms as a way to publish defamatory matter, MacCallum notes that the defamatory laws need a review, focusing on social media platforms, especially in the workplace.²⁹⁹ Subsequently, this thesis argues that social media is a significant legal issue in regards to defamation and that defamation laws need to address the potential risks of social media.

The case law and commentary discussed above also referred to cases where damages were rewarded to victims of defamation. However, not all cases are concerned with defamation and employers or employees, depending on who the action is brought against, may have defences to these actions. The next section will deal with defences, in particular truth, privilege and honest opinion, and how these defences can justify the published defamatory material.

3.3.2 Defences

An employee or employer in a defamation action can raise a number of defences that justify or excuse them from the defamatory publication on a social media platform. According to Descheemaeker, the word ‘defence’ is labelled ‘those ingredients of tortious liability (ie the elements required for the success of the action, whether they be defined positively, by their presence, or negatively, by their absence) which fall on the defendant to prove or disprove, by contrast with the prima facie cause of action, which contains the elements that are for the claimant to prove’.³⁰⁰ Therefore, an

²⁹⁷Jennifer Ireland, ‘Defamation 2.0: Facebook and Twitter’ (2012) 17 *Media & Arts Law Review* 53, 68.

²⁹⁸See in general *Wishart v Murray* [2013] NZHC 540; *Trkulja v Google Inc LLC* [No 5] [2012] VSC 533.

²⁹⁹Walter MacCallum, ‘Defamation Actions and Social Media: Where are the Risks?’ (2015) *Governance Direction* 677, 679.

³⁰⁰Eric Descheemaeker, ‘Tort Law Defences: A Defence of Conventionalism’ (2014) 77 *Modern Law Review* 493, 494.

employer and employee has certain defences they can raise for their actions taken on a social media platform and this part will examine the different defences available to employers or employees. Part 4 Division 2 of the *Defamation Act 2005 (WA)*³⁰¹ includes the following defences: truth, privilege and honest opinion.

3.3.2.1 Truth

If the defamatory material is true, it is one of the defences an employee has against such a publication.³⁰² The purpose of this defence is to protect the person making a statement from an action for defamation as the statement is true.³⁰³ In the case of *Rofe v Smith's Newspapers Ltd*³⁰⁴ the court held that when defamatory material is substantially true, it will lower the reputation of that person and will not damage it.³⁰⁵ Therefore, it is necessary to prove the defamatory imputation.³⁰⁶

There exist two types of statutory 'truths' within this section, substantial and contextual truth.³⁰⁷ In regards to substantial truth, the plaintiff must prove the substantial truth of the published material.³⁰⁸ This was held in the case of *Alexander v Rys*,³⁰⁹ however, however, this defence involves an extended process of 'fact finding'.³¹⁰ According to the *Defamation Act 2005 (WA)*, 'substantial truth' can be defined as 'true in substance or not materially different from the truth'.³¹¹ Therefore, 'a true and not a misleading picture must be presented to the reader'.³¹²

³⁰¹*Defamation Act 2005 (NSW); Defamation Act 2005 (NT); Defamation Act 2005 (Qld); Defamation Act 2005 (SA); Defamation Act 2005 (Tas); Defamation Act 2005 (Vic); Defamation Act 2005 (WA); Civil Law (Wrongs) Amendment Act 2006 (ACT)*. See also Michael Gillooly, *The Third Man: Reform of the Australian Defamation Defences* (The Federation Press, 2004) 6.

³⁰²*Defamation Act 2005* s 25.

³⁰³*Rofe v Smith's Newspapers Ltd* (1924) 25 SR (NSW) 4, 21.

³⁰⁴(1924) 25 SR (NSW) 4.

³⁰⁵*Ibid* 21.

³⁰⁶*Sutherland v Stopes* [1925] AC 47; [1924] All ER Rep 19.

³⁰⁷Richards, above n 156, 571.

³⁰⁸*Defamation Act 2005 (WA)* s 25.

³⁰⁹(1865) 122 ER 1221.

³¹⁰*Habib v Nationwide News Pty Ltd* [2008] ATR 81-938.

³¹¹*Defamation Act 2005 (WA)* s 4.

³¹²*Howden v 'Truth' and 'Sportsman' Ltd* (1937) 58 CLR 416, 424.

Even though this is a statutory truth, the common law approach applies in all other respects. The common law approach was expressed in the case of *Polly Peck (Holdings) v Trelford*³¹³ in the English Court of Appeal. O'Connor J held that:³¹⁴

Where a publication contained several defamatory statements which in their context had a common sting and the plaintiff complained of one or more, but not all, of them, the defendant was entitled to justify the sting or assert that it was fair comment; that in either case the particulars of such pleas could be derived from parts of the publication of which the plaintiff did not complain ...

Therefore, if the imputation did not continue damaging the plaintiff's reputation, the plaintiff could then argue partial justification (which is also known as the 'Polly Peck' defence).³¹⁵ This defence was not warmly welcomed in Australia,³¹⁶ however, the case of *David Syme & Co Ltd v Hore-Lacy*³¹⁷ suggests that 'a defence which alleges a different meaning to that relied on by the plaintiff would merely be an argumentative plea' and therefore will take into consideration other imputations that are in line with the same claim.³¹⁸ With the implementation of the uniform defamation legislation, it introduced a regular contextual truth defence.

On the other hand, contextual truth refers to material that the plaintiff has not complained about; however, it can be considered within a claim as additional information that does not hurt the plaintiff's reputation any further.³¹⁹ Levin J went further by noting the following regarding contextual truth:³²⁰

It is to operate in circumstances where a publication conveys various imputations, substantially different one from the other, but in respect of which the plaintiff elects to sue on one or some only. It entitles the defendant properly to defend the action by pleading the other imputations not sued upon, and justifying them to bring about a just result ...

³¹³[1986] QB 1000.

³¹⁴*Ibid* 1000.

³¹⁵See Terence Tobin and Michael Sexton, *Australian Defamation Law and Practice Bulletin* (Butterworths Loose-Leaf, 1991) 39, [11].

³¹⁶*Chakravarti v The Advertiser* (1998) 193 CLR 519.

³¹⁷(2000) 1 VR 667.

³¹⁸*Ibid* [101].

³¹⁹*Defamation Act 2005* (WA) s 26.

³²⁰*Blake v John Fairfax Publication Pty Ltd* [2001] NSWSC 885, [12].

Therefore, the contextual truth defence was introduced in order to ‘prevent the partial truth defence from operating unjustly in a situation where the matter complained of contained a serious charge ... together with a minor change’.³²¹

In terms of social media and defamation, the case of *Dabrowski v Greeuw*³²² set the scene regarding the truth defence, which is a defence for disclosing the truth regarding the published defamatory matter. In this case, the defendant posted on her Facebook page ‘separated from Miro Dabrowski after 18 years of suffering domestic violence and abuse. Now fighting the system to keep my children safe’.³²³ The plaintiff stated that the posts were only removed two months after asked to do so and that the post was defamatory.³²⁴ The court held that ‘[i]t is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true’.³²⁵ Therefore, the court must find that the ‘defamatory stings’, as noted in the *Polly Peck (Holdings) v Trelford* case, are objectively true.³²⁶ The court further noted that ‘Ms Greeuw does not have to prove that every word she published was true but she must establish the “essential” or “substantial” truth of the stings of the defamation. To prove the truth of some lesser defamatory meaning does not provide a complete defence’.³²⁷ As mentioned above, there exists two types of statutory truths and the court held that in order for a person to succeed with the ‘truth’ defence, the defendant must establish that the defamatory material was ‘substantial’.³²⁸ The court found that the plaintiff could not prove the substantial truth of defamation and therefore the post was defamatory.³²⁹

When social media posts are made outside of working hours, the employer will usually complain about the publication rather than the defamatory material of the publication. This is known as contextual truth where the employer will be able to sue for one and

³²¹Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (The Federation Press, 1998) 117.

³²²[2014] WADC 175.

³²³*Ibid* [4].

³²⁴*Ibid* [5].

³²⁵*Ibid* [186]. See also *Defamation Act 2005* (WA) s 26.

³²⁶*Ibid* [187].

³²⁷*Ibid* [188].

³²⁸*Ibid* [187].

³²⁹*Ibid* [242].

not the other.³³⁰ However, the employee can state that the other meaning is true and therefore the meaning the employer is complaining of will not harm the reputation of the employer.³³¹

3.3.2.2 *Privilege*

If the employee cannot prove that the defamatory material was true, it is possible for them to show that the publication was privileged. This is done either through the defence of absolute privilege or qualified privilege.³³² When the employee uses the defence of qualified privilege, this defence must determine that the occasion was one where a person had a duty or interest to receive it.³³³ For example, in *Ives v State of Western Australia*,³³⁴ Mrs Ives made a complaint at the Perth Police Station that she had a restraining order against Mr Ives because Mr Ives posted the following words on a social media site: ‘But sometimes after what she did I just want to kill her!! I want to beat up her body and smash her to pieces and make her regret everything!!!’. It went further and stated that: ‘The cops are dead meat if they try to keep us apart!!’.³³⁵ Therefore, she felt threatened by these posts.

A sergeant went to the house of Mr Ives’ mother (and others living there) and told them about what happened between Mr and Mrs Ives. As a result, Mr Ives brought a case against the sergeant for approaching his mother, in the presence of his children, and telling her about the threatening social media posts. This is what caused an action for defamation. However, the court held that the statements made by the sergeant to Mr Ives’ mother was a defence of qualified privilege and relevant to the occasion.³³⁶

In the circumstances where social media is used, it is necessary to identify the relevant terms and conditions of the social media platform because those people who register on these platforms and share the necessary information provides an occasion where

³³⁰*Defamation Act 2005 (WA) s 26.*

³³¹*Ibid.* See also *Dering v Uris* [1964] 2 QB 669.

³³²*Defamation Act 2005 s 27.*

³³³*Magna v Marshall* [2010] NSWC 686, [50]. See also *Papaconstantinos v Holmes a Court* [2012] 249 CLR 534.

³³⁴[2013] WASC 277.

³³⁵*Ibid* [45]-[61].

³³⁶*Ibid* [74]-[76].

there was a duty to publish and interest to receive it.³³⁷ One example of defamation on social media by a government employee is the case of *Banerji v Bowles*.³³⁸ In this case, Banerji worked as a public servant for the Immigration Department and regularly criticised Australia's policies on refugee laws. However, Banerji tweeted under a pseudonym 'La Legale' and no one knew that she was working for the Immigration Department. As a result, the Immigration Department found her tweets to breach the Code of Conduct because it was harsh and defamatory and dismissed her.³³⁹ Banerji argued that she has freedom of political expression, including criticising the government's policies.³⁴⁰ The Fair Work Commission held that Banerji was fairly dismissed due to there being a Code of Conduct and Social Media Policy in the Immigration Department.³⁴¹ The fact that the Immigration Department had measures in place dealing with the inappropriate use of social media indicates that the defence of privilege will not always count in the employee's favour and therefore employees need to be cautious and vigilant when posting comments on social media platforms.

3.3.2.3 *Opinion*

Other than proving the defence of truth and privilege, the employee can also prove that the publication was an expression of opinion.³⁴² Section 31 of the *Defamation Act 2005* (WA) states that for the opinion defence to succeed the post or remark must be an expression of an opinion rather than a statement of fact; the opinion must be in the interest of the public; or the opinion is based on proper material.³⁴³

The most recent example of where the opinion defence was relied upon was in *McEloney v Massey*.³⁴⁴ The court held that 'the imputations on the Facebook page

³³⁷See *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 355; *Brady v Norman* [2008] EWHC 2481 (QB). In Australia, the Lange defence is available for members of the Australian community regarding government discussion – *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

³³⁸(2013) FCCA 1052.

³³⁹See also Public Eye, 'The Fascinating Case of Banerji v Bowles', *The Canberra Times* (online), 1 September 2013

<<http://www.canberratimes.com.au/national/public-service/the-fascinating-case-of-banerji-v-bowles-20130901-2sz1b.html>>.

³⁴⁰*Banerji v Bowles*, [98]-[106].

³⁴¹*Ibid* [78].

³⁴²*Defamation Act 2005* s 31.

³⁴³See also *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245; [2007] HCA 60.

³⁴⁴(2015) WADC 126. In this case the defendant made certain statements about the plaintiff on a Facebook page called 'Poms in Australia (WA)'. The statement expressed that no one should use the

were defensible as either fair comment or honest opinion ... but ... this does not mean that a member of a Facebook page has carte blanche to defame service providers or other persons or that all statements made necessarily qualify as opinions'.³⁴⁵ Therefore, if the opinion defence does not fulfil the elements under s 31 of the Act, then the opinion defence will not apply.

The publication of material in the 21st century can be portrayed as 'an age when tort law is dominated by the search for the deep pocket'.³⁴⁶ The damages awarded by courts indicate that employees and employers need to be cautious when posting something in connection with their employment. As can be seen from the examples given above, social media has made it easier to communicate with others, but with this type of communication comes the risk of employers being liable for inappropriate comments made or dismissal of employees because of their unacceptable activities on social media within and beyond the workplace. The risk of defamation occurring on social media platforms within the workplace and beyond is useful to consider in the digital age and it is necessary for employees and employers to be aware of the defamation laws surrounding publication of defamatory material in order to prevent unnecessary harm to a person's reputation in the workplace.

The third and last key issue is cyberbullying and will be dealt with in the following section. This legal issue will examine the repercussions cyberbullying can have in the workplace, especially for the employer, in the sense of being vicariously liable.

3.4 CYBERBULLYING

The preceding discussion has examined how the inappropriate use of social media in the workplace can create risks associated with privacy and breaches of confidentiality, as well as the risk of defamation that can be damaging to the reputation of employers and employees. Associated with these issues, are the legal risks and issues that arise when social media within and beyond the workplace is used to engage in

plaintiff as accountant due to the plaintiff being rude and unprofessional. As a result, fourteen people liked this post and the plaintiff lost clients. The defendant argued the opinion defence.

³⁴⁵Ibid [118]. See also *Dabrowski v Greeuw* [2014] WADC 175 where a husband brought a defamation action against his estranged wife for damage of his reputation, as a school teacher, and was awarded substantial damages because of the publication and defamatory material.

³⁴⁶Richard Posner, *Economic Analysis of Law* (Aspen Publishers, 5th ed, 1998) 205.

cyberbullying. This is one of the most serious misuses of social media. Cyberbullying, as explained below, presents a significant risk to workplace safety.³⁴⁷ The issue of cyberbullying can impact on the employer–employee relationship and also the duties and obligations of each outside of the workplace. This section therefore provides an overview of the meaning and nature of cyberbullying and the implications to the employer–employee relationship.

3.4.1 What is Workplace Bullying?

Workplace bullying can be a detrimental issue to the employment relationship. In order to recognise what workplace bullying entails, it is helpful to refer to definitions relating to workplace bullying and what will entail workplace bullying within the ambit of legislation. Akella defines workplace bullying as ‘a repeated hurtful negative act or acts (physical, verbal or psychological intimidation) that involve criticism and humiliation to cause fear, distress, or harm to the individual’.³⁴⁸ Similarly, Bartlett and Bartlett describe workplace bullying as ‘a repeated and enduring act which involves an imbalance of power between the victim and the perpetrator and includes an element of subjectivity on the part of the victim in terms of how they view the behaviour and the effect of the behaviour’.³⁴⁹ Evans, Fraser and Cotter note that ‘[b]ullying is a complex, dynamic social behaviour that involves intent to harm, repetition, and power imbalance’.³⁵⁰ According to the Fair Work Ombudsman, a worker will be bullied if a person or group of people repeatedly act unreasonably towards them or a group of workers and the behaviour creates a risk to health and safety.³⁵¹ Definitions of workplace bullying point to destructive behaviour that is ongoing and harmful to the person against whom it is targeted. This is reflected in the *Fair Work Act 2009* (Cth).

³⁴⁷Government of Western Australia, Worksafe, *Workplace Cyberbullying* (October 2013) <<http://smartmove.safetyline.wa.gov.au/mod/page/view.php?id=316>>.

³⁴⁸Devi Akella, ‘Workplace Bullying: Not a Manager’s Right?’ (2016) 6 *Journal of Workplace Rights* 1, 1.

³⁴⁹James Bartlett and Michelle Bartlett, ‘Workplace Bullying: An Integrative Literature Review’ (2011) 13 *Advances in Developing Human Resources* 69, 72.

³⁵⁰Caroline Evans, Mark Fraser and Katie Cotter, ‘The Effectiveness of School-Based Bullying Prevention Programs: A Systematic Review’ (2014) 19 *Aggression and Violent Behaviour* 532, 540.

³⁵¹Fair Work Ombudsman, *Bullying & Harassment* (2014) <<https://www.fairwork.gov.au/employee-entitlements/bullying-and-harassment>>.

The *Fair Work Act* provides the following definition of when an employee is bullied in the workplace:³⁵²

- (1) A worker is bullied at work if:
 - (a) while the worker is at work in a constitutionally-covered business:³⁵³
 - (i) an individual; or
 - (ii) a group of individuals;repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
 - (b) that behaviour creates a risk to health and safety.

Apart from the Fair Work legislation, the *Work Health and Safety Act 2011* (Cth)³⁵⁴ also includes that employers have a duty to ensure the health and safety of their employees. Safe Work Australia published a guideline in 2013 on bullying in the workplace and they define workplace bullying as ‘repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety’.³⁵⁵ Unreasonable behaviour according to Safe Work Australia includes ‘abusive or offensive language, unjustified complaints and spreading misinformation’.³⁵⁶

Therefore, bullying behaviour can take many forms including physical, psychological and emotional bullying.³⁵⁷ Pagura notes that the following can be considered bullying in the workplace: aggressive conduct; threatening behaviour; belittling and humiliating comments; unreasonable work expectations; and showing of inappropriate material.³⁵⁸ However, with the advent of technology in the workplace, these forms of

³⁵²*Fair Work Act 2009* (Cth) s 789FD. Unreasonableness can include victimisation, humiliation and intimidation.

³⁵³See *Australian Constitution 1901* (Cth) s 21 which refers to National System Employers. See, eg, Laura Crothers and John Lipinski, *Bullying in the Workplace* (Taylor and Francis, 2013) 3.

³⁵⁴*Work Health and Safety Act 2011* (Cth).

³⁵⁵Safe Work Australia, *Guide for Preventing and Responding to Workplace Bullying* (2016) 5.

³⁵⁶*Ibid.*

³⁵⁷Michelle Tuckey, Maureen Dollard, Patrick Hosking and Anthony Winefield, ‘Workplace Bullying: The Role of Psychosocial Work Environment Factors (2009) 16(3) *International Journal of Stress Management* 215-232.

³⁵⁸Ingrid Pagura, ‘Workplace Bullying’ (2015) 21 *Journal of Australian Traditional-Medicine Society* 50, 50-51.

bullying can become more challenging when used within social media platforms and trigger cyberbullying as a significant challenge in the workplace environment and beyond. According to Piotrowski, cyberbullying can be explained as ‘initiated by a perpetrator via online or wireless communication technology and devices’.³⁵⁹ Similarly, Tokunaga defines cyberbullying as ‘any behaviour performed through electronic or digital media by individuals or groups that repeatedly communicates hostile or aggressive messages intended to inflict harm or discomfort on others’.³⁶⁰ The extent to which cyberbullying affects the employment relationship, will be discussed below. Furthermore, cyberbullying in the workplace can be instigated through ‘anonymous, fraudulent, aggressive, unwanted messages, spreading rumours, hacking into email accounts, threats, harassment, attacks, unwanted phone calls, malicious, abusive messages’.³⁶¹ Therefore, the use of social media in the workplace causes cyberbullying to be a ubiquitous issue affecting the employment relationship.

Under the Fair Work legislation, all national system employees are covered against bullying including outworkers, volunteers and contractors.³⁶² Therefore, if a person reasonably believes they have or are being bullied in the workplace, they can apply to the FWC for an order to stop the bullying.³⁶³ However, the FWC can only make interim orders and cannot order pecuniary penalties for the employee who is being bullied unless the employer, who was given these orders, contravenes them and will be fined accordingly.³⁶⁴ Therefore, the FWC may only make orders that will stop the employee

³⁵⁹Chris Piotrowski, ‘From Workplace Bullying to Cyberbullying: The Enigma of E-Harassment in Modern Organizations’ (2012) 30 *Organization Development Journal* 44, 45.

³⁶⁰Robert Tokunaga, ‘Following you Home from School: A Critical Review and Synthesis of Research on Cyberbullying Victimization’ (2010) 26 *Computers in Human Behavior* 277, 278-279. Cf Lucie Corcoran, Conor McGuckin and Garry Prentice, ‘Cyberbullying or Cyber Aggression?: A Review of Existing Definitions of Cyber-Based Peer-to-Peer Aggression’ (2015) 5 *Societies* 245-255.

³⁶¹Dorothy Grigg, ‘Cyber-Aggression: Definition and Concept of Cyberbullying’ (2010) 20 *Journal of Psychologists and Counsellors in Schools* 143, 144.

³⁶²See also David Beale and Helge Hoel, ‘Workplace Bullying and the Employment Relationship: Exploring Questions of Prevention, Control and Context’ (2011) 25 *Work, Employment and Society* 5.

³⁶³Part 6-4B of the *Fair Work Act*. Examples of orders include (i) requiring individuals to stop the behaviour; (ii) for an employer to monitor behaviour; and (iii) for a person to comply with the employer's bullying policy.

³⁶⁴*Fair Work Act 2009* (Cth) s 789FF. See also *Harris v WorkPac Pty Ltd* [2013] FWC 4111.

from ongoing bullying in the workplace by either the employer or co-workers.³⁶⁵ According to the *Fair Work Act*, the following orders may be made:³⁶⁶

- (i) ongoing bullying to end;
- (ii) regular monitoring by employer;
- (iii) compliance of anti-bullying policies; and
- (iv) employers providing training and education to employees on what bullying behaviour is, especially cyberbullying.

Furthermore, the *Fair Work Act* also provides that the FWC must take the following factors into account when making the above-mentioned orders:³⁶⁷

- (i) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body – those outcomes; and
- (ii) if the FWC is aware of any procedure available to the worker to resolve grievances or disputes – that procedure; and
- (iii) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes – those outcomes; and
- (iv) any matters that the FWC considers relevant.

An example of workplace bullying orders under s 789FF of the *Fair Work Act* is the case of *Rachael Roberts v Launceston Pty Ltd as trustee for the VIEW Launceston Unit Trust T/A View Launceston; Ms Lisa Bird; Mr James Bird*.³⁶⁸ In this case, Ms Roberts filed an application pursuant to section 789FC of the *Fair Work Act* for orders to stop bullying at work. The application alleged that bullying occurred in the course of Ms Roberts' employment as a real estate agent with the VIEW Launceston franchise located in Tasmania ('View'), and alleged two persons working at View, Mr James

³⁶⁵Anne O'Rourke and Sarah Kathryn Antioch, 'Workplace Bullying Laws in Australia: Placebo or Panacea?' (2016) 45 *Common Law World Review* 3, 15. See Rodney Worth and Joan Squelch, 'Stop the Bullying: The Anti-Bullying Provisions in the *Fair Work Act* and Restoring the Employment Relationship' (2015) 38 *University of New South Wales Law Journal* 1015, 1044.

³⁶⁶*Fair Work Act 2009* (Cth) s 789FF.

³⁶⁷*Ibid* s 789FF(2).

³⁶⁸[2015] FWC 6556 (23 September 2015).

Bird and Mrs Lisa Bird, had bullied her. Ms Roberts alleged that she was countlessly humiliated and also asked to perform sexual favours. Commissioner Wells stated that he is content that bullying will keep on recurring in the workplace and pursuant to s 789FF of the *Fair Work Act* he orders for the bullying to stop.³⁶⁹ However, there is no compensation given to Ms Roberts, only a decision that there is a risk of bullying continuing at work and the parties will need to discuss the matter further in a conference.³⁷⁰

The risk of bullying, particularly cyberbullying, in the workplace, is not only detrimental to an employee's general physical and psychological wellbeing, but also to an employee's safety in the workplace.³⁷¹ According to the *Work Health and Safety Act*, employers have an implied duty of care towards their employees in regards to their safety and wellbeing in the workplace.³⁷² The difficulty with both the *Fair Work Act* and *Work Health and Safety Act* is that the alleged bullying must take place while the employee is at work.³⁷³ This is significant within the *Work Health and Safety Act*, which refers to the duty of workers while at work.³⁷⁴ This raises concerns on how employers will deal with this risk outside of 'working hours'. If the bullying occurs outside of working hours, can it be said that it happened 'at work'?³⁷⁵ Therefore, the employee can only make a claim to the FWC if that employee reasonably believes that they have been bullied at work.³⁷⁶ An employer may argue that if bullying took place outside of working hours, they do not have a duty towards the employee to protect their health and safety.

Bullying that occurs in the workplace may also continue outside the workplace via social media platforms and emails.³⁷⁷ Whether cyberbullying occurs within working

³⁶⁹Ibid [121]-[123].

³⁷⁰Ibid [122].

³⁷¹See in general Nicholas Linke and Susan Babidge, 'The New Anti-Bullying Jurisdiction of the Fair Work Commission' (2014) 36 *Law Society of South Australia Bulletin* 8.

³⁷²*Work Health and Safety Act 2011* (Cth) s 19.

³⁷³*Fair Work Act 2009* (Cth) s 789FD.

³⁷⁴*Work Health and Safety Act 2011* (Cth) s 28.

³⁷⁵*Work Health and Safety Act 2011* (Cth) s 19, 28. This will be discussed further in the case of *McManus v Scott-Charlton* (1996) 70 FCR 16 below.

³⁷⁶*Fair Work Act* s 789FC(1). See also Nadia Stojanova, 'The Regulation of Workplace Bullying in Victoria: Is Legislation Required?' (2014) 24 *Labour and Industry* 146.

³⁷⁷Allison Ballard and Patricia Easteal, 'Mapping the Legal Remedy Pathways for Workplace Bullying' (2014) 39 *Alternative Law Journal* 194, 194-195.

hours or outside, it is a serious matter to be addressed by employers.³⁷⁸ According to Smith, Fisher and Russell, the definition of cyberbullying include ‘an aggressive, intentional act carried out by a group or individual, using electronic forms of contact, repeatedly and over time against a victim who cannot easily defend him or herself’.³⁷⁹ On the other hand, Kowalski defines cyberbullying ‘through email, instant messaging, in a chat room, on a website or gaming site, or through digital messages or images sent to a cellular phone’.³⁸⁰ When an employee is being bullied by either a co-worker or employer through email, social media platforms or mobile phones, it is necessary to consider the relevant law on cyberbullying outside working hours and whether an employer’s duty to ensure the health and safety of their employees extends to outside working hours. This will also impact on the employer–employee relationship and whether an employer can dismiss the employee for such conduct.

The underlying principle for workplace bullying outside of working hours was laid down in the case of *McManus v Scott-Charlton*.³⁸¹ In this case, the court held that it was reasonable for an employer to inform the employee that his conduct outside of working hours must come to an end. The court held:³⁸²

Once an employee’s conduct can be shown to have significant and adverse effects in the workplace – because of its impact on workplace relations, on the productivity of others, or on the effective conduct of the employer’s business – that conduct becomes a proper matter of legitimate concern to an employer, and does so because of its consequences.

Therefore, appropriate measures must be put in place when cyberbullying starts impacting on the employment relationship because of the consequences it may cause. Furthermore, in the case of *Little v Credit Corp Group Ltd*³⁸³ an employee made sexual

³⁷⁸See in general Marilyn Campbell, ‘Cyberbullying: An Old Problem in a New Guise?’ (2005) 15 *Australian Journal of Guidance and Counselling* 68; Qing Li, ‘New Bottle but Old Wine: A Research on Cyberbullying in Schools’ (2007) 23(4) *Computers and Human Behavior* 1777.

³⁷⁹Peter Smith, Jess Mahdavi, Manuel Carvalho, Sonja Fisher, Shanette Russell and Neil Tippett, ‘Cyberbullying: Its Nature and Impact in Secondary School Pupils’ (2008) 49(4) *Journal of Child Psychology and Psychiatry* 376.

³⁸⁰Robin Kowalski, Susan Limber and Patricia Agatston, *What is Cyberbullying?* (2012) <<http://www.cyberbullyhelp.com/whatis.html>>.

³⁸¹(1996) 70 FCR 16.

³⁸²*Ibid* [56].

³⁸³[2013] FWC 9642 (10 December 2013).

comments towards a new employee.³⁸⁴ The FWC held that: ‘for a young person who seemingly frequently used Facebook, it strikes me as highly implausible that he was incapable of adjusting privacy settings’.³⁸⁵ The employee’s defence was that it was done outside of working hours, but the FWC further held that ‘it was not when the comments were made which is important, but the effect and impact of those comments on the employer, its employees and new employees’.³⁸⁶

The issue relating to cyberbullying outside the workplace was further determined in the case of *Sharon Bowker & Ors v DP World Melbourne Ltd & Ors*.³⁸⁷ In this case, the FWC had to decide when the use of social media is considered within the workplace and to what extent the workplace bullying took place. A group of employees made various comments on a Facebook page toward co-workers outside of the workplace, which fell within the ambit of the definition of workplace bullying.³⁸⁸ The question was whether the FWC had jurisdiction to put an end to the bullying when it was outside of working hours.

In relation to workplace bullying outside the workplace, the FWC took into account the Explanatory Memorandum of the Work Health and Safety Bill 2011 (Cth), which states that ‘the primary duty of care is tied to the work activities wherever they occur and is not limited to the confines of a physical workplace’.³⁸⁹ Therefore, the duty to care for employees does not end when they leave the workplace, as Chapter 2 argued that ‘workplace’ is not confined to an office. The FWC then held that ‘being “at work” is not limited to the confines of a physical workplace. A worker will be “at work” at any time the worker performs work, regardless of his or her location or the time of day’.³⁹⁰ The relevance to cyberbullying outside of the workplace, further posed the question as to whether there is a requirement for an employee to be at work when workplace bullying takes place on a social media platform. The FWC held that ‘[t]he relevant behaviour is not limited to the point in time when the comments are first

³⁸⁴Ibid [1], [10].

³⁸⁵Ibid [73].

³⁸⁶Ibid [75]. See also Angela Ragusa and Philip Groves, ‘Stigmatisation and the Social Construction of Bullying in Australian Administrative Law: You Can’t make an Omelette without Cracking an Egg’ (2015) 38 *University of New South Wales Law Journal* 1507.

³⁸⁷[2014] FWCFB 9227 (19 December 2014).

³⁸⁸Ibid [4].

³⁸⁹Ibid [40]. Also, see Explanatory Memorandum of Work Health and Safety Bill 2011 (Cth) s 22.

³⁹⁰Ibid [48].

posted on Facebook. The behaviour continues for as long as the comments remain on Facebook. It follows that the worker need not be ‘at work’ at the time the comments are posted’³⁹¹ However, the FWC noted that there will be cases when ‘at work’ will present challenges and provided that ‘for example, a worker receives a phone call from their supervisor about work related matters, while at home and outside their usual working hours. Is the worker ‘at work’ when he or she engages in such a conversation? In most cases the answer will be yes, but it will depend on the context, including custom and practice, and the nature of the worker’s contract’.³⁹² This was a similar scenario discussed in Chapter 2 and whether an employee’s home is considered a ‘workplace’. Therefore, cyberbullying within and outside the workplace presents regulatory challenges and whether employers have the right to control and monitor the employee’s use of social media beyond the workplace.

Currently, there is little national uniformity on cyberbullying legislation within the workplace. Although legislation such as the *Fair Work Act* and *Health and Safety Act* includes bullying in the workplace, it is still not clear how cyberbullying fits within the employment relationship.³⁹³ However, the Parliament of Victoria introduced ‘Brodie’s Law’, which specifically deals with bullying offences under the *Crimes Act* (Vic).³⁹⁴ This law was introduced following the tragic death of a young waitress Brodie Panlock, who committed suicide as a result of ongoing, insidious bullying by her co-workers.³⁹⁵

The enactment of these kinds of laws indicates that the person responsible for the bullying may face prosecution, but will possibly release the employer of their duty of care to provide a safe and healthy work environment.³⁹⁶ In this case, it is necessary to consider vicarious liability within the employment relationship and cyberbullying and

³⁹¹Ibid [55].

³⁹²Ibid [53].

³⁹³See Aashish Srivastava and Janice Boey, ‘Online Bullying and Harassment: An Australian Perspective’ (2012) 6 *Masaryk University Journal of Law and Technology* 299.

³⁹⁴*Crimes Act 1958* (Vic).

³⁹⁵Geoff Wilkinson, ‘Brodie's Law Means Workplace and Cyber Bullies Face 10 years in Jail’, *Herald Sun* (online), 5 April 2011 <<http://www.heraldsun.com.au/news/workplace-and-cyber-bullies-face-up-to-10-years-jail-under-anti-harassment-brodie-panlock-laws/story-e6frf7jo-1226033612374>>. See also Colette Langos, ‘Regulating Cyberbullying: A South Australian Perspective’ (2014) 16 *Flinders Law Journal* 73.

³⁹⁶Ibid.

whether employers will be liable for any inappropriate use of social media by employees outside of working hours.

3.4.2 Vicarious Liability of the Employer Through Cyberbullying Posts

The increase in the use of social media has made cyberbullying a concern for employees and employers in the workplace and has played a vital role within the modern employment relationship.³⁹⁷ The employment relationship can be affected through cyberbullying in the workplace as both the employer and employee has an implied duty of care towards each other, as discussed in Chapter 2. However, the implied duty of care by an employer towards an employee plays a greater role when cyberbullying is proliferating not only within the workplace but also outside it. Therefore, this section will examine whether an employer will be vicariously liable for the inappropriate use of social media by their employees towards co-workers within and beyond the workplace.

Generally, when an employee commits a tort within their employment, an employer may be vicariously liable for the conduct. This was defined in the case of *The Catholic Child Welfare Society and Others v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and Others*³⁹⁸ where it was stated that:³⁹⁹

The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment.

Further to this, vicarious liability can be defined as ‘liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties’.⁴⁰⁰ Vicarious liability within the context of the employment relationship rests on two pillars: (i) that both parties need to be within an employment relationship; and (ii) that the tort had to

³⁹⁷Anita Sarkar, ‘Step-by-Step to Stopping the Cyber-bully’ (2015) 23 *Human Resource Management International Digest* 31, 31.

³⁹⁸[2012] UKSC 56.

³⁹⁹*Ibid* [35].

⁴⁰⁰Legal Information Institute, *Vicarious Liability* (2015) Cornell University Law School <https://www.law.cornell.edu/wex/vicarious_liability>.

be committed within the course of employment.⁴⁰¹ As a result, the foundation for vicarious liability is not based on fault, but on the employment contract.⁴⁰²

The second limb of vicarious liability often creates problems as the employee may not always act within the course of employment.⁴⁰³ Generally, the employer will not be liable for any conduct by an employee outside the course of employment; however, the court in the case of *New South Wales v Lepore and Another; Samin v Queensland and Others; Rich v Queensland and Others*⁴⁰⁴ noted that an employer may be vicariously liable when there is a ‘sufficiently close connection’ to the employer’s business and the conduct of the employee.⁴⁰⁵ Gleeson J particularly stated that:⁴⁰⁶

Not everything that an employee does at work, or during working hours, is sufficiently connected with the duties and responsibilities of the employee to be regarded as within the scope of the employment. And the fact that wrongdoing occurs away from the workplace, or outside normal working hours, is not conclusive against liability.

This is illustrated by the case of *Leslie v Graham*,⁴⁰⁷ where two employees shared an apartment on a business trip and sexual harassment took place. The employer was held vicariously liable due the trip being ‘work related’.⁴⁰⁸ Therefore, for an employer not to be vicariously liable, they must act with reasonable care towards the employee to keep them safe and healthy within the work environment. This is one of the duties of the employer under the employment contract; however, the employee has a reciprocal duty of care towards the employer and co-workers.

This opens up the scenario whether an employer will be liable on the general law of vicarious liability for an employee misusing social media outside the course of

⁴⁰¹David Neild, ‘Vicarious Liability and the Employment Rationale’ (2013) 44 *Victoria University of Wellington Law Review* 707, 707.

⁴⁰²Ibid. See also Engin Mustafa, ‘The Liability for Employers for the Conduct of their Employees – When does an Employee’s Conduct Fall within “The Course of Employment”?’ (2016) 24 *Human Resource Management International Digest* 44-47.

⁴⁰³Ibid. See also Alison Todd, ‘Vicarious Liability for Sexual Abuse’ (2002) 8 *Canterbury Law Review* 281.

⁴⁰⁴195 ALR 412 (2003) 195 ALR 412.

⁴⁰⁵Ibid 481. See also *Deatons Pty Ltd v Flew* (1949) 79 CLR 370.

⁴⁰⁶Ibid [40]. See also *Sestili v Triton Underwriting Insurance Agency Pty Ltd* [2007] SASC 241.

⁴⁰⁷[2002] FCA 32.

⁴⁰⁸See also *Webb v State of Queensland* [2006] QADT 8 where the employer was vicariously liable for an employee’s conduct regarding sexual harassment via email.

employment. When an employer is trying to protect its business reputation, it is then firstly important for the employer to establish that the person who is making the remarks outside of working hours is indeed an employee of the business.⁴⁰⁹ If this has been established, secondly an employer needs to establish whether the comments or remarks made were ‘work related’ in order to establish liability.⁴¹⁰ If they were, then an employer may possibly be liable for the conduct of an employee outside of work hours if reasonable steps have not been taken.⁴¹¹

As in the case of *Malcolm Pearson v Linfox Pty Ltd*, if an employer introduced appropriate social media policies in the workplace that applies to both an employee’s conduct within and outside the workplace, the employer has taken reasonable steps to secure its liability. However, this will be a case-by-case scenario.

3.5 CONCLUSION

Chapter 2 discussed the role that social media has come to play in the workplace environment and its pervasive use, which has implications for the employer–employee relationship, and the concomitant control and monitoring of social media use. Therefore, in Chapter 2, the duties of both employee and employer were discussed in relation to social media and the effect of the inappropriate use of social media on the employment relationship. Against this background context, Chapter 3 has examined three key legal issues social media present in the workplace, namely privacy, defamation and cyberbullying. Within the limited scope of the thesis, the chapter focused on providing an overview of key principles of the relevant areas of law and the application to social media in general, within the workplace and outside.

As discussed in Chapter 3, the use of social media has given rise to concerns about the use of social media in the workplace. Firstly, privacy was considered pre-, during and post-employment. The breach of privacy by either an employer or employee using social media is a noteworthy challenge in the workplace. Although a right to privacy is not recognised by the Australian Constitution, the *Privacy Act* as amended extends

⁴⁰⁹*Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 (5 November 2010).

⁴¹⁰See also Charles Power, *How to Avoid Vicarious Liability* (2014) Employment Law Handbook <<http://www.employmentlawhandbook.com.au/how-to-avoid-vicarious-liability/>>.

⁴¹¹See for example the case of *Blakey v Continental Airlines*, 751 A.2d 538, 2000 WL 703018 where an employer was liable for illegal remarks made on a blog by an employee.

to dealing with the increase of technology in workplace environments; although it does not specifically refer to social media platforms as a mechanism through which an employer may breach privacy of an employee. The *Privacy Act* includes the APPs, which require an employer to only collect reasonable personal information of an employee and inform employees when personal information will be collected. However, APPs are very restricted in that they mainly protect Commonwealth public system employers and employees and only private employers and their employees in businesses with a turnover of more than \$3 million. This indicates that there are limited privacy protection laws to protect private employers and employees, especially in scenarios dealing with the inappropriate use of social media.

The breach of privacy was further considered in light of confidential information and the impact breach of confidentiality has on the employer–employee relationship. This chapter argued that confidentiality may be breached by an employee if the employee takes confidential information from an employer and uses it on a social media platform for their own gain. By doing this, the employee will be in breach of confidentiality, under the equitable doctrine and common law contract, because this type of action will cause harm to the reputation of the business. Thus, it was argued that dismissal of an employee, through the inappropriate use of social media, is possible through implied duties in the contract or express terms relating to duties of confidence. Therefore, the control and monitoring of social media platforms as well as giving access of information to employees, needs to be monitored closely within the workplace. Chapter 4 will therefore examine the role of workplace surveillance in general and when using social media, within and beyond the workplace.

The second key issue discussed was defamation. The misuse of social media in the workplace can have a negative impact on the employer–employee relationship where defamatory material is published of a co-worker or employer that can lead to action against the employer and dismissal of the employee. However, as discussed, for an action of defamation to be brought against an employee, an employer must prove that there was a publication of the defamatory matter, identify the person who published the matter and lastly that the matter/material was indeed defamatory. In terms of social media, this may be affected if posts on social media are made anonymously. The cases considered in this part dealt with defamation in general as well as in the workplace and

how dismissals and damages can be considered regarding the inappropriate use of social media within and outside the workplace. This could be damaging to an employer's business reputation. However, employers need to be aware of dismissing an employee summarily for the posts they have made on social media because the employee can have a defence for their actions. This was particularly significant in the case of *Linfox Australia Pty Ltd v Glen Stutset*⁴¹² in which Fair Work Australia held that.⁴¹³

In ordinary discourse, there is much discussion about what happens in our work lives and the people involved. In this regard, we are mindful of the need not to impose unrealistic standards of behaviour and discourse about such matters or to ignore the realities of workplaces ... In the present matter, the Commissioner considered that the statements and comments made by the Applicant were distasteful. However, when viewed in the context of the Facebook conversations he considered that they were not of such a nature as to warrant *dismissal* for serious misconduct, or even as to constitute a valid reason for *termination*.

If the employee told the truth, and it was simply privileged information or that the employee only gave their opinion of the employer, then the employee will have a defence against an action for defamation.

Lastly, the issue of cyberbullying was discussed and how it can affect the employment relationship. As discussed in Chapter 2, both the employer and employee have a duty of care in the workplace and when this duty of care is overstepped it may lead to a dismissal of the employee or unreasonable behaviour by an employer. Therefore, when an employer is aware of any cyberbullying in the workplace, it is their duty to take care that no one will get hurt and the employee must be disciplined. The issue with cyberbullying and legislation is that the act of cyberbullying needs to take place 'at work'. However, the case law discussed in this section argued that it is not necessary to be 'at work' when cyberbullying takes place and a perpetrator can be disciplined for conduct outside the workplace. Likewise, an employee has a duty of care not to hurt any of their co-workers or employers through the inappropriate use of social media by

⁴¹²[2012] FWAFB 7097 (3 October 2012).

⁴¹³*Ibid* [25], [27].

engaging in cyberbullying conduct. This can also lead to a dismissal of the employee and it is important to note that an employer may be vicariously liable for an employee's conduct outside of work in regards to the cyberbullying conduct.

The above-mentioned issues illustrate the implications of using social media in the workplace and the kind of legal challenges that may arise that could impact on the employment relationship. To avoid these issues from arising in the workplace, an employer will need to monitor an employee when accessing social media sites within the workplace and to an extent outside the workplace. The following chapter will therefore discuss the monitoring and control of workplace surveillance of employee's social media use within and outside the workplace. This discussion will further focus on whether an appropriate workplace surveillance policy, coupled with a social media policy, will be effective in monitoring employees this way.

CHAPTER 4

CONTROL AND MANAGEMENT OF SOCIAL MEDIA IN THE WORKPLACE

4.1 INTRODUCTION

The use of social media has become an integral part of the workplace environment as discussed in Chapter 2. Furthermore, there is no doubt that social media has become part of everyday life; however, in Chapter 3, it was highlighted that the use of social media in the workplace also presents certain legal challenges concerning privacy, defamation and cyberbullying. Therefore, an important issue to be considered is the means by which employers regulate social media in the workplace environment in order to manage an employee's conduct within and beyond the workplace that is reasonable, fair and appropriate. However, the use of workplace surveillance to control and monitor social media use is a challenge for employers because of the construction of current workplace surveillance legislation in regard to social media platforms. This, together with possible breach of privacy, raises concerns in the control and management of social media by an employee and how social media policies and employment contracts should be drafted. The employment contract as well as workplace policies are important tools to regulate the use of social media within the workplace and beyond.

This chapter will therefore examine the control and management of social media in the workplace and how it can affect the employer–employee relationship.¹ This chapter will focus on how employers can control and manage employees' conduct through the

¹*Barker v Casco Australia Pty Ltd* 7 October 2011 (unreported, Mackay District Court): In this case, Barker injured her right bicep and median nerve in 2008. As a result, Barker did not return to work since her injury and provided medical certificates to support her injuries. Barker acknowledged that she could not do her work properly as a result of this. However, WorkCover received surveillance footage which indicated that Barker had some capacity to do her work, even though she had done nothing. See Workplace Health and Safety, Electrical Safety Office, Workers' Compensation Regulator, Government of Queensland, *Surveillance and Other Related Issues of Credibility* (2015) <<https://www.worksafe.qld.gov.au/forms-and-resources/case-studies/common-law-claim-case-studies/surveillance-and-other-related-issues-of-credibility>>.

use of workplace surveillance and by implementing appropriate social media workplace policies for conduct within but importantly also outside the workplace.

Although workplace surveillance is not new, advancements in technology provide a wide range of measures by which employers can monitor the workplace and employee activities. This; however, also raises concerns about privacy and the extent to which surveillance can extend beyond the workplace given the use of social media within and outside the workplace for both personal and professional purposes.

In addition to workplace surveillance, this thesis focuses on the employment relationship and the employment contract. It has also been noted that workplace policies are an important aspect of managing the employment relationship apart from employment contracts. This chapter therefore considers the role of workplace policies, which also links to surveillance, in more detail. It is argued that it is essential to have well-developed policies designed specifically for the appropriate use of social media in the workplace and provide education and training to employees regarding the use of social media within and beyond the workplace. Furthermore, it is also useful for employers to provide employer-sponsored devices to employees to control and monitor their use of social media.² Whether social media policies can or should form part of the employment contract is also examined. Further, this thesis provides an example of a social media policy (see Appendix 1) that aims to assist employers in monitoring and controlling workplace conduct within and outside in relation to social media use.

4.2 WORKPLACE SURVEILLANCE

As discussed in Chapter 2, the right of employers to control and monitor an employee's conduct and activities can be found in the implied duties of the employment contract. With the rise of social media use in the workplace, one area an employer can control the use or inappropriate use of social media is through workplace surveillance.³

²See, eg, Dorothy Bollinger, 'Social Media and Employment Law: A Practitioner's Primer' (2011) 20 *Temple Political & Civil Rights Law Review* 323, 326.

³The *Fair Work Act 2009* (Cth) s 27(2)(m) permits state governments to regulate workplace surveillance. See for example *Occupational Safety and Health Regulations 1996* (WA) reg 5.23 which states that an employer must ensure employee's health and safety within a workplace. See also

Workplace surveillance is not a new phenomenon. Ball refers to workplace surveillance as ‘management’s ability to monitor, record and track employee performance, behaviours and personal characteristics in real time (for example, Internet or telephone monitoring) or as part of broader organizational processes’.⁴

The purpose of using workplace surveillance is to ‘recognise that employees are justified in monitoring workplaces for purposes of protecting property, monitoring employee performance and ensuing health and safety’.⁵ However, notwithstanding the benefits of workplace surveillance (noted below), the control and monitoring of an employee’s use of social media through workplace surveillance may have a negative impact on the employment relationship. It is therefore important to be cognisant of how workplace surveillance of social media platforms may affect the employment relationship when conducting workplace surveillance and developing associated workplace policies.⁶

Leonard notes that ‘workplace monitoring and surveillance is becoming increasingly common’ and the ‘ability to undertake surveillance of employee communications is often a significant benefit to employers’.⁷ Likewise, Craig notes that there are a couple of reasons why workplace surveillance is an effective tool to use for monitoring conduct of employees.⁸ Firstly, the employer will implement surveillance in order to try and exclude theft from occurring or any other security threat.⁹ Secondly, it will reduce liability of an employee in terms of misconduct.¹⁰ Lastly, an employer can increase productivity in the workplace by monitoring workplace performance.¹¹ Relevant to social media and the workplace, Ball further notes that ‘with the

Worksafe, Government of Western Australia, *Occupational Health and Safety Regulations 1996* (June 2015)

<<http://www.commerce.wa.gov.au/worksafe/occupational-safety-and-health-regulations-1996>>.

⁴Kristie Ball, ‘Workplace Surveillance: An Overview’ (2010) 51 *Labor History* 87, 87.

⁵Australian Law Reform Commission, *Surveillance Devices: Workplace Surveillance* (2012) <<https://www.alrc.gov.au/publications/14-surveillance-devices/workplace-surveillance>>.

⁶For purposes of this thesis, the relationship between an employer and independent contractor will not be taken into account.

⁷Peter Leonard, ‘Surveillance of Workplace Communications: What are the Rules?’ (August 2014) *Privacy Law Bulletin*, 115.

⁸John Craig, *Privacy in Employment Law* (Hart Publishing, 1999) 26.

⁹*Ibid* 27.

¹⁰*Ibid* 28. See also John Weckert (ed), *Electronic Monitoring in the Workplace: Controversies and Solutions* (Idea Group Publishing, 2005) ch 1.

¹¹*Ibid* 32-33.

emergence with the blogosphere, organisations are keen to protect themselves from defamation, and employees' web activities are checked for offensive or libellous content, sometimes even if they are posted on private servers outside company time' (as discussed below).¹²

Similarly, Roth cites the following reasons why employers engage in workplace surveillance and believe they are entitled to monitor equipment: '(i) detecting excessive personal use of computers, (ii) avoiding legal liability, including in relation to sexual harassment claims arising from office emails containing pornography, (iii) preventing employees from leaking confidential information, and (iv) maintaining the security of the computer system'.¹³ This is well illustrated by the examples cited by Friedman and Reed in which the New York Times fired 24 employees for sending 'potentially offensive emails' and Chevron, who reportedly paid US\$ 2 million to settle a lawsuit brought by employees based on sexually explicit emails they received.¹⁴

Besides the legitimate interests in conducting workplace surveillance, there are equally compelling counter arguments, one being the issue of privacy, which has been raised as a legal challenge for employers in Chapter 3. Ball, for instance, notes that excessive monitoring can be detrimental because 'privacy can be compromised if employees do not authorize the disclosure of their information, and it is broadcast to third parties' and because of 'function creep'.¹⁵ The latter occurs when more information is gathered than is intended or needed and it is used for purposes for which employees have not been consulted, such as promotion.¹⁶ Even though this is the case, the surveillance of social media by employers, may be more beneficial than harmful when applied appropriately.

¹² Ball, above n 4, 92.

¹³ Lenny Roth, Workplace Surveillance (Parliament of New South Wales, Briefing Paper No 13/04) <<https://www.parliament.nsw.gov.au/researchpapers/Documents/workplacesurveillance/workplace%20surveillance.pdf>> 1.

¹⁴ Barry Friedman and Lisa Reed, 'Workplace Privacy: Employee Relations and Legal Implications of Monitoring Employee E-mail Use' (2007) 19 *Employee Responsibility Rights Journal* 75, 77.

¹⁵ Ball, above n 4, 93.

¹⁶ *Ibid* 93.

The use of surveillance can also erode loyalty and trust, which are central to the employment relationship. Significantly it is perceived or experienced as a serious infringement of privacy. From an employee perspective, electronic surveillance not only violates privacy but also infringes on their human dignity, decreases employee loyalty, increases stress, and ultimately decreases productivity'.¹⁷ Employers have electronically monitored the workplace environment and employee activities using clock in systems, time-sheets, record books and, importantly, the appointment of supervisors and managers. Advancements in technology have provided a whole range of technologies that can now be used to conduct workplace surveillance, monitor and control employee's behaviour and their use of technical equipment and social media platforms in the workplace and beyond. In addition to the above-mentioned ways of monitoring, CCTV has been around for a long time and is perhaps the most well-known and common use of technology for workplace surveillance. Other workplace surveillance technologies include screening devices, metal detectors and biometric technology.¹⁸ However, using sophisticated software applications, employers can also monitor employees' phones, computers, email and Internet use.¹⁹

In relation to the use of electronic workplace surveillance, Charlesworth bleakly points out, 'the modern employee may be watched by CCTV whilst working in an open plan office, her telephone calls recorded, her office conversation monitored by listening devices, her movements noted by sensors in her seat [and] her whereabouts in the building pinpointed by location badge'.²⁰ This may sound fanciful but consider the common use of swipe cards, cameras, GPS tracking devices on company vehicles and computer software that can remotely control an employee's computer and keystrokes. Hence it is not surprising that employees may be concerned about privacy.

The ALRC thus notes that:²¹

¹⁷ Friedman and Reed, above n 14, 80.

¹⁸ Surveillance also includes testing of employees for alcohol and drug abuse in the workplace.

¹⁹ Karen Wheelwright, 'Monitoring Employees' Email and Internet Use at Work - Balancing the Interests of Employers and Employees' (2002) 13(1) *Journal of Law, Information and Science* 70, 71.

²⁰ Andrew Charlesworth, 'Opinion. Privacy, Personal Information and Employment' (2003) 1(2) *Surveillance & Society* 217, 218.

²¹ ALRC, above n 5, 205.

Employers are justified in monitoring workplaces for the purposes of protecting property, monitoring employee performance or ensuring employee health and safety. However, the interests of employers must be balanced against employees' reasonable expectations of privacy in the workplace.

An employer has a right to implement workplace surveillance; however, this is not unfettered and is regulated by laws specific to workplace surveillance, for example, the *Surveillance Devices Act 1998* (WA). Similar laws apply in other states and territories.²² Even though an employer has a right to implement workplace surveillance, these laws may restrict the lengths to which an employer can go to control and monitor employees in the workplace. This can create an obstacle for an employer when looking to monitor and control an employee's use of social media outside the workplace. Therefore, a key aim of this thesis is to examine the nature of workplace surveillance legislation and policies and how an employer can control and monitor an employee when they are working in an office or at home in their private space.²³

4.2.1 Legal Framework of Workplace Surveillance

Australia does not have uniform laws regarding surveillance and as a result, each state and territory has its own laws to monitor and control the conduct of their employees within each jurisdiction.²⁴ This part of the chapter will address the specific workplace surveillance legislation and the legislative framework around implementation of workplace surveillance in general and examine the control and monitoring of the use of social media by employees within and outside the workplace.²⁵

4.2.1.1 Surveillance, Surveillance Devices and Limitations

The ordinary meaning of 'surveillance' refers to 'the act of carefully watching someone or something especially to prevent or detect a crime'.²⁶ In a workplace

²²*Workplace Surveillance Act 2005* (NSW); *Surveillance Devices Act 1999* (Vic); *Listening Devices Act 1991* (Tas); *Workplace Privacy Act 2011* (ACT); *Invasion of Privacy Act 1971* (Qld); *Surveillance Devices Act 2007* (NT); *Listening and Surveillance Devices Act 1972* (SA).

²³See discussion on 'workplace' in Chapter 2. See also Andrew Charlesworth, 'Opinion. Personal Information and Employment' (2003) 1(2) *Surveillance and Society* 217, 218.

²⁴Leonard, above n 7, 115.

²⁵Ibid.

²⁶Merriam-Webster Dictionary, 'Surveillance'
<<http://www.merriam-webster.com/dictionary/surveillance>>.

context, States and Territories have implemented laws dealing with workplace surveillance and workplace devices in order to control and monitor an employee.

Although State and Territory legislation vary in terms of the scope and meaning of ‘surveillance’ and ‘surveillance device’, they generally include optical (or visual), listening and tracking devices,²⁷ and in some jurisdiction data surveillance (see below). Surveillance devices include cameras, webcams, Global Position Systems, computer keyboard keyloggers, digital audio voice recorder, recording pens and monitoring software. For the purpose of this section, the WA legislation is illustrative. Pursuant to the *Surveillance Devices Act 1998* (WA), a surveillance device includes: ‘a listening device, an optical surveillance device or a tracking device’.²⁸

The *Surveillance Devices Act* (WA) prohibits a person from using, installing and maintaining a listening, optical and tracking surveillance device to record a private conversation or private activity.²⁹ A ‘private conversation’ under this Act refers to ‘any conversation carried on in circumstances that may reasonably be taken to indicate that any of the parties to the conversation desires it to be listened to only by themselves, but does not include a conversation carried on in any circumstances in which the parties to the conversation ought reasonably to expect that the conversation may be overheard’.³⁰ This is a significant consideration for social media in the workplace because employers must identify between private and public distributed conversations before taking any action against the employee. In relation to this, employers must also be vigilant in identifying whether the employee made use of an employer sponsored device or their personal device. This is relevant in the control and monitoring of social media conversations beyond the workplace addressed in social media policies and terms in the employment contract later in this chapter.

²⁷ *Crimes (Surveillance Devices Act) 2010* (ACT); *Surveillance Devices Act 2007* (NSW); *Surveillance Devices Act 2007* (NT); *Invasion of Privacy Act 1971* (Qld); *Surveillance Devices Act 2016* (SA); *Listening Devices Act 1991* (Tas); *Surveillance Devices Act 1999* (Vic); *Surveillance Devices Act 1998* (WA). The *Surveillance Devices Act 2004* (Cth) applies to Commonwealth government agencies.

²⁸*Surveillance Devices Act 1998* (WA) s 3.

²⁹*Ibid* 5-7 and specifically s 9.

³⁰*Ibid* s 3.

The *Surveillance Devices Act* (WA) does not specifically refer to workplace surveillance; however, it will apply to employers.³¹ Moreover, despite gaps in the legislation and the absence of any specific provisions, surveillance in the workplace should be conducted according to appropriate and transparent workplace policies and practices (as discussed later in this chapter).

4.2.1.2 *Specific Workplace Surveillance*

Most surveillance legislation does not deal specifically with the workplace. However, a few states and territories, for example the ACT, NSW, and to some degree Victoria, have specific workplace surveillance laws.³²

The *Workplace Privacy Act* (ACT), for instance, states that ‘an employer may only conduct surveillance of a worker in a workplace if – (a) the employer gives written notice to the worker under this section; and (b) the surveillance is conducted in accordance with the notice’.³³ The definition of ‘worker’³⁴ refers to employees, independent workers, outworkers and volunteers and ‘workplace’ refers to ‘a place where work is, has been, or is to be, carried out by or for someone conducting a business or undertaking’.³⁵ Therefore, this Act makes provision for employee email surveillance unless otherwise stated. Furthermore, this Act provides for covert surveillance, which means that an employer can implement workplace surveillance without giving notice to the employee where unlawful activity is suspected.³⁶

³¹See also Katrin Scheicht, Amelia Berman, Laure Joncour and Claire Darbourne, *Global Update: Monitoring your Employees’ Use of Technology* (2012) Norton Rose Fulbright <http://www.nortonrosefulbright.com/knowledge/publications/61978/global-update-monitoring-your-employees-use-of-technology?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original>.

³²See *Workplace Surveillance Act 2005* (NSW); *Workplace Privacy Act 2011* (ACT); *Surveillance Devices Act 1999* (Vic) pt 2A.

³³*Workplace Privacy Act 2011* (ACT) s 13(1). The following must be stated in the notice given to the employee: (i) type of surveillance which will be used; (ii) who the person is subjected to surveillance; (iii) date of surveillance; (iv) purpose for use of surveillance; and (v) whether it will be continuous – See Emma Reilly, *Australia: Workplace Privacy Act 2011 (ACT): Workplace Directions* (2011) Moray & Agnew <<http://www.mondaq.com/australia/x/137436/Employee+Rights/Workplace+Privacy+Act+2011+ACT>>.

³⁴*Ibid* s 7.

³⁵*Ibid* s 10.

³⁶*Ibid* s 24.

The *Workplace Surveillance Act 2005* (NSW) has similar restrictions to the ACT legislation. This Act provides that ‘surveillance devices must not be used in a workplace without sufficient notice being provided to employees, must not be used in a change room, toilet, or shower facility, and must not be used to conduct surveillance of the employee outside work’.³⁷ Under this legislation, an ‘employee’ is seen as someone who is employed by an employer and related corporation.³⁸ This Act will only apply when those employees are under surveillance during work. The definition of ‘at work’ refers to ‘when the employee is: (a) at a workplace of the employer (or a related corporation of the employer) whether or not the employee is actually performing work at the time, or (b) at any other place while performing work for the employer (or a related corporation of the employer)’.³⁹ According to this section, an employer is entitled to use any type of surveillance outside of working hours to observe the conduct of employees.⁴⁰ Covert surveillance on the part of the employer applies in a similar way as the ACT legislation.⁴¹

In Victoria, the *Surveillance Devices Act 1999* (Vic) provides for the following offence: ‘an employer must not knowingly install, use or maintain an optical surveillance device or a listening device to observe, listen to, record or monitor the private activities or conversations of a worker in a toilet, washroom, change room or lactation room in the workplace’.⁴² The Act further defines ‘private activity’ as ‘an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include – (a) an activity carried on outside a building; or (b) an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else’.⁴³ The only exception to when surveillance will be allowed within the scope of ‘private activity’ is, for example, where the interest of the business needs protection against unlawful acts.⁴⁴

³⁷Ibid ss 15, 16.

³⁸Ibid s 3.

³⁹Ibid s 5. See also NSWLRC: NSW Law Reform Commission, *Surveillance: An Interim Report*, Report 98 (2001) Rec 57

⁴⁰This includes personal emails and devices of the employee.

⁴¹*Workplace Surveillance Act 2005* (NSW) div 2.

⁴²*Surveillance Devices Act 1999* (Vic) s 9B.

⁴³Ibid s 3.

⁴⁴Ibid s 7(2).

This workplace surveillance legislation indicates that it is important to identify what a ‘private activity’ is and how it applies within the workplace and beyond. This is significant to the discussion given in Chapter 2 on what a ‘workplace’ is and how surveillance applies to private conversations over social media outside working activities.

4.2.1.3 *Data or Computer Surveillance*

Of particular relevance to the thesis on social media in the workplace and the issue of surveillance, is computer and data surveillance. Data surveillance is essentially any device or program that can be used to record or monitor the input and output data from a computer.⁴⁵ A computer is broadly defined as ‘any electronic device for storing or processing information’,⁴⁶ which includes smartphones, iPads and notebooks. While general legislation may apply to the workplace, only a few jurisdictions namely NSW, South Australia, Victoria and the Northern Territory include specific provisions on data surveillance generally and with reference to the workplace.⁴⁷

By way of example, in the *Workplace Surveillance Act 2005* (NSW), states that ‘surveillance’ on an employee includes:⁴⁸

‘computer surveillance’, which is surveillance by means of software or other equipment that monitors or records the information input or output, or other use, of a computer (including, but not limited to, the sending and receipt of emails and the accessing of Internet websites) ...

Section 10 of the *NSW Act* further provides that:

- (1) A person must not knowingly install, use or maintain a data surveillance device on or in premises to record or monitor the input of information into, or the output of information from, a computer on the premises if the installation, use or maintenance of the device involves:

⁴⁵ *Surveillance Devices Act 2007* (NT) s 3.

⁴⁶ *Ibid* s 3.

⁴⁷ *Surveillance Devices Act 2007* (NSW); *Surveillance Devices Act 2007* (NT); *Surveillance Devices Act 2016* (SA); *Surveillance Devices Act 1999* (Vic).

⁴⁸ *Ibid* s 3.

- (a) entry onto or into the premises without the express or implied consent of the owner or occupier of the premises, or
- (b) interference with the computer or a computer network on the premises without the express or implied consent of the person having lawful possession or lawful control of the computer or computer network.

However, data surveillance provisions are limited in their application. Although the NSW and South Australian provisions on data surveillance applies to ‘a person’, the Northern Territory and Victoria provisions on data surveillance provisions apply to law enforcement agencies⁴⁹ and is silent on the application to other persons. The legislation is therefore not helpful in terms of the workplace and defining the limitations on monitoring employees. However, where an employer engages in inappropriate data and computer surveillance, for instance to monitor private social media accounts without consent, they may be subject to a computer offence under the criminal code.⁵⁰

4.2.1.4 *Concluding Remarks*

Surveillance laws, as discussed above, prohibit an employer from using certain devices to monitor *private* activities that could adversely affect the control and monitoring of employees within and beyond the workplace. Surveillance laws only prohibit the use of surveillance devices to record and monitor private conversations and activities. Generally, activities in the workplace are mostly public and therefore there would not necessarily be an expectation of privacy; an employee could reasonable expect an employer to monitor public activities. Moreover, various daily business or management activities would not constitute surveillance, such as the management of a workplace intranet or email system, or asset tracking. Moreover, a vexed problem is the use of mobile devices for both personal and work activities in which activities can be so intermingled it is not possible to be able to separate the surveillance of private and public activities. This is discussed further below in relation to the practice of ‘bring

⁴⁹ *Surveillance Devices Act 2007* (NT) s 14; *Surveillance Devices Act 1999* (Vic) s 9.

⁵⁰ See, eg, *Criminal Code Act 2016* (NT) div 10 and *Crimes Acts 1958* (Vic) s 247A.

your own device'. Surveillance laws do not necessarily address these issues, and as noted, few jurisdictions have workplace specific surveillance laws.

As noted, there is no uniform workplace surveillance law in Australia. The fact that states and territories vary in the scope and application of surveillance devices can be problematic for employers who operate across multiple jurisdictions and when having to deal with different aspects of surveillance. Moreover, not all jurisdictions include specific provisions on computer surveillance, which is most relevant to the discussion on social media in the workplace and use of employer-owned devices on which social media can be accessed and used.

It is submitted that there is a need for reform of workplace surveillance laws and more specifically workplace surveillance legislation in WA. This is because unlike some states and territories that include specific workplace surveillance of computer-based devices as a means to control and monitor an employee's conduct, WA does not make specific reference to computer-based devices. Nonetheless, the legislation has been drafted in a way to not expressly 'exclude' these devices from the *Surveillance Devices Act 1998* (WA). The ALRC has proposed that in order for uniformity to occur it will be 'preferable to enact a Commonwealth law to replace state and territory surveillance device laws, rather than attempting to achieve uniformity in state and territory laws'.⁵¹ However, even though uniform laws have been proposed regarding surveillance and privacy, it has been noted that not all States and Territories will benefit from this uniformity; what will be effective in one state or territory will not necessarily be effective in another.⁵² It is proposed that this matter is a subject for further research (see Chapter 5).

Notwithstanding the patch-work of legislation and the potential for reform, the legislation provides some protection to employees to the extent that the law limits the employers' use of surveillance devices. In addition to legislation, the rights, duties and obligations, workplace surveillance can be further clarified and implemented via the

⁵¹Ibid 198.

⁵²Louise Thornthwaite, 'Chilling Times: Social Media Policies, Labour Law and Employment Relations' (2016) 54 *Asia Pacific Journal of Human Resources* 332.

employment contract; providing that the contract does not breach any statutory or common law.

4.2.2 Workplace Surveillance and Employment Contracts

Workplace surveillance is relevant to the employment relationship because it concerns the employment contract and any bargaining agreements the employer enters. Furthermore, if an employee is obligated to be subjected to workplace surveillance, it will either be contained within a workplace policy or the employment contract.⁵³ Generally, an employee may provide express consent by virtue of terms in the employment contract or by accepting a workplace policy in being monitored on social media. Moreover, express consent may be obtained by clicking an acceptance box on a device so that all activities on devices used at the workplace and connected to workplace systems will be monitored, thereby not distinguishing between private and public activities.

An example where the court applied the principles of contract and policies collectively, was in the case of *Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)*.⁵⁴ In this case an altercation commenced between Ms Romero (an officer on board a supply ship) and Captain Martin in relation to professional competence.⁵⁵ After Ms Romero complained about how she was treated, Farstad underwent an investigation in relation to the conduct of both parties. However, Ms Romero was not satisfied with the way in which the investigation was conducted and alleged that Farstad failed to comply with their own Workplace Harassment and Discrimination Policy which, according to Ms Romero, has been incorporated into her contract.⁵⁶ Justice Tracey, at first instance, held that the policy did not form part of the employment contract and therefore no breach of contract or policy.⁵⁷

However, on appeal, the court held that ‘many employment contracts operate effectively without the employer’s policies on various matters being incorporated as

⁵³Mark Giancaspro, ‘Do Workplace Policies Form Part of Employment Contracts? A Working Guide and Advice for Employers’ (2016) 44 *Australian Business Law Review* 106, 106.

⁵⁴[2016] FCA 1453.

⁵⁵Ibid [1].

⁵⁶Ibid.

⁵⁷Ibid [2].

terms. The existence of the Policy and its status as being contractual is quite different from the question of whether or not compliance with it is an essential term.⁵⁸ The court went further by explaining that ‘even if the terms of the Policy had not comprised the initial terms of Ms Romero’s contract, they became terms at the time at which the parties varied or changed their contractual relationship to include those terms’.⁵⁹ Therefore, the appeal court agreed with Tracey J that the Policy did not form part of the employment contract and therefore no breach of the contract or policy.

As will be discussed later in this part of the chapter, the consideration of the policy and employment contract in the above mentioned case, will be similarly applied in scenarios concerning social media use within and beyond the workplace.

The duties of the employee and employer in regards to the employment contract are important considerations because this articulates the behaviour of both parties in the employment contract. It has been stated in Chapter 2 that an employee has a duty to obey their employer and therefore, if an employer decides to monitor an employee within the workplace, it is an implied duty that forms part of the employment contract. Sempill explains that:⁶⁰

A toll that reinforces the employer’s power in the employment relationship by giving the employer an additional opportunity to enforce obedience to the employer’s directions and by providing a means to gain objective evidence of behaviours which might be used to justify dismissal, particularly summary dismissal of employees.⁶¹

Therefore, most cases referred to in this part will consider the dismissal of employees due to a breach of policy, either connected to the employment contract or not, and will be further clarified in relation to social media use and termination of employment. The duties, as mentioned by Sempill above, form an important part to the employment

⁵⁸*Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)* [2017] FCAFC 102, [63].

⁵⁹*Ibid* [65].

⁶⁰Julian Sempill, ‘Under the Lens: Electronic Workplace Surveillance’ (2001) 14 *Australian Journal of Labour Law* 111, 112.

⁶¹*Ibid* 116. See also Johanna Betteridge, *Privacy and Surveillance in the Workplace (Victoria)* (2003) TEN Public Paper

<http://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=http://www.tved.net.au/PublicPapers/February_2003,_Lawyers_Education_Channel,_Privacy_and_Surveillance_in_the_Workplace__Victoria_.html>.

contract. Therefore, if a workplace policy does not form part of an employment contract, the employee still has a duty to obey reasonable instructions given by the employer and follow the employer's decisions. It is important that the employer clearly informs the employee that they are still required to obey workplace surveillance policies even though not connected to the employment contract itself.⁶² Therefore, the employer has, to some extent, the right to terminate an employee, on reasonable grounds, when found to breach a workplace policy, especially relating to social media use. However, an employer does not always have power over their employee, especially in cases where employers wanted to monitor the employee outside of working hours due to privacy principles.⁶³

An exception to the monitoring of employees outside of working hours was the case of *McManus v Scott-Charlton*⁶⁴ where the court held that 'it was within the scope of the employer's power to exercise control over the employee's conduct outside his course of employment and physical confines of the workplace in this instance as it was considered to be within the scope of the employer's legitimate interests'.⁶⁵ The court went further by stating that 'while the employee's conduct may not have been engaged "in connection with" his employment, it could still properly be said to have a relationship to – to be attributable to – that employment'.⁶⁶

Nevertheless, the courts are prepared to consider scenarios outside of the employment relationship regarding conduct outside the workplace. The reality is that employees are employed by employers to fulfil their duties as set out in the employment contract and anything that impacts on this relationship. This is the case even outside the workplace, and will be questionable and open for dismissal depending on the circumstances of each case. In the case of *Orr v The University of Tasmania*,⁶⁷ a professor was dismissed

⁶²Warnings can be given to employees if they do not follow orders.

⁶³See for example *Australian Telecommunications v Hart* (1982) 43 ALR 165; *Wall v Westcott* (1982) 1 IR 45.

⁶⁴(1996) 140 ALR 625.

⁶⁵In this case, there was an alleged case against an employee sexually harassing a female employee outside of working hours.

⁶⁶*McManus v Scott-Charlton*, 636. In the case of *Rose v Telstra* (1998) AILR 45, the Vice President stated that: 'modern law of employment has its basis on contract and an employee's behaviour outside of working hours will only have an impact on their employment to the extent that it can be said to breach an express or implied term of his or her contract of employment.'

⁶⁷(1957) 100 CLR 526.

for having an affair with a student off campus.⁶⁸ The court stated that ‘the fact that Professor Orr was engaging in a sexual relationship with one of his students made it impossible for him to dispassionately carry out his duties of examining and presenting candidates for their degrees’.⁶⁹ Therefore, if the interest of the business is gaining a bad reputation by conduct of employees outside the workplace, it is reasonable for the employer to monitor these employees subject to a workplace surveillance policy.⁷⁰ This will be similarly applied in the application of social media policies and the monitoring of inappropriate use of social media.

A further important nexus between workplace surveillance and employment contracts is in regard to workplace health and safety. According to s 3 of the *Work Health and Safety Act 2011* (Cth):⁷¹

The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by:

- (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.

Furthermore, the *Occupational Safety and Health Act 1984* (WA)⁷² provides that:

An employer shall, so far as is practicable, provide and maintain a working environment in which the employees of the employer (the employees) are not exposed to hazards and in particular, but without limiting the generality of the foregoing, an employer shall –

- (a) provide and maintain workplaces, plant, and systems of work such that, so far as is practicable, the employees are not exposed to hazards.

⁶⁸Ibid 529.

⁶⁹See also *R v Railways Appeal Board; Ex parte Haran* [1969] WAR 13. In this case the issue was whether an employer could validly dismiss an employee for misconduct which occurred at work and extended to outside work conduct.

⁷⁰See the case of *Shaun Kinnane v DP World Brisbane Pty Limited* [2014] FWC 4541 (9 July 2014). In this case, an employer arranged for covert surveillance of his employee as the employer believed that the employee, who took medical leave, was working on his own business and against medical restrictions. The evidence showed that the employee was working on his own business and therefore the employer dismissed the employee. However, the Fair Work Commission stated that the dismissal was unfair and gave numerous reasons for this decision.

⁷¹*Work Health and Safety Act 2011* (Cth) s 3(1)(a).

⁷²*Occupational Safety and Health Act 1984* (WA) s 19(1)(a).

Even though legislation requires that an employer needs to ensure that their employees are safe, the argument regarding workplace surveillance can fall on both sides of the coin. On the one hand, the employer will maintain that to keep employees safe and free from risk, workplace surveillance is needed, especially in circumstances of bullying and harassment. On the other hand, employees will maintain that it is infringing upon their privacy and they feel harassed by being subjected to workplace surveillance.⁷³ According to Braue, subjecting employees to workplace monitoring 'is likely to cause resentment among workers if they feel they are being spied upon or continually pressured to improve their performance. While the use of such programs is quite legal, it could backfire on employers by fostering low morale, widespread resentment and a negative public image that can be difficult to repair'.⁷⁴ Even though employees might feel this way, it is important to understand that employers have a duty to keep their employees safe and with the necessary underlying workplace policy, which incorporates workplace surveillance in an effective way, it can benefit both the employee and employer.

Monitoring employees in and beyond the workplace presents various challenges regarding the monitoring of social media use and how it should be regulated. As discussed in Chapter 2, a 'workplace' can be categorised as anywhere and not an old-fashioned office anymore and therefore employers are able to monitor employees outside the workplace. This ensures the control of an employee's conduct outside of the workplace in order to protect the interests of the business, especially when posting comments on social media. If the correct workplace policies on social media are in place, and the employment contract makes provision for it, an employer is entitled to dismiss the employee on the evidence provided. However, if an employee's social media accounts were monitored and did not damage the business interest of the employer and the employee is dismissed, this may result in the unlawful termination of an employee.

⁷³Johanna Betteridge, *Privacy and Surveillance in the Workplace (Victoria)* (2003) TEN Public Paper <http://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=http://www.tved.net.au/PublicPapers/February_2003,_Lawyers_Education_Channel,_Privacy_and_Surveillance_in_the_Workplace__Victoria_.html>.

⁷⁴David Braue, 'Every Breath You Take' (2000) *The Bulletin*, 65.

4.2.3 Key Issues Concerning Workplace Surveillance

The use of social media in the workplace and workplace surveillance to track, monitor and control conduct within and beyond the workplace ‘challenge privacy’ and inevitably raise concerns about workplace privacy. When an employer considers the implementation of workplace surveillance, they need to be aware of the challenges in regards to such implementation. Therefore, the ease with which social media can be used within and beyond the workplace, combined with the legal challenges, gives rise to complicated workplace surveillance issues. As discussed above, certain states and territories have enacted legislation that specifically deals with workplace surveillance; however, in the absence of such legislation, issues can arise when dealing with the control and monitoring of social media beyond the workplace, especially with privacy and breach of workplace surveillance laws. Therefore, this section discusses workplace surveillance in relation to privacy, the use of personal devices for work activities and surveillance that extends beyond the workplace.

4.2.3.1 Workplace Surveillance and Privacy in the Workplace

One of the key issues and concerns about workplace surveillance is privacy. It is not surprising that employees may believe that personal emails and social media accounts used to communicate with family or friends, and to conduct private matters, are private even if accessed and used during working time. Employees may have a reasonable expectation that their private communication and activities will not be monitored and if so it will be a breach of privacy. Certainly, as discussed above, workplace surveillance legislation does restrict the use of surveillance devices in the workplace to monitor private conversations and activities. However, if accessed on employer-owned devices and work email systems, the conduct and content may lose the element of privacy. This raises further issues in relation to ‘bring your own devices’, which is discussed below.

Nonetheless, a key issue when using surveillance devices in the workplace and that further creates a privacy issue is the protection of data that is lawfully collected using surveillance devices, which includes visual, audio and written data. In this regard, the *Privacy Act (Cth)*, discussed in Chapter 3, provides some protection to employees with regards to the use, storage and disclosure of personal information through the

application of the APPs.⁷⁵ However, APPs do not extend to conduct between private individuals. They also do not apply to all organisations (see Chapter 3) and state entities. Moreover, privacy and data protection laws across states and territories are limited. For instance, Western Australia does not have specific privacy laws.

Therefore, relevant to this section is the application of the APPs to workplace surveillance and data protection. For public and private entities that are subject to the *Privacy Act*, they must implement workplace surveillance policies in accordance with the *Privacy Act*⁷⁶ as well as the nine APPs.⁷⁷ Data collected by means of surveillances devices that consists of personal information must be dealt with in accordance with the APPs.

It is worth recalling that in terms of the *Privacy Act*, ‘personal information’ is:⁷⁸

Information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.⁷⁹

Taking this into account, it is possible that videos and any other form of surveillance will identify an employee. Therefore, it will suffice as personal information, which is taken in a material form. If an employee believes that their privacy is being infringed upon in regards to workplace surveillance, they can lodge a complaint under s 40(1A) of the *Privacy Act*.⁸⁰

It is therefore necessary to have employment policies and practices regarding workplace surveillance that balances an employee’s expectation for privacy with the

⁷⁵Fair Work Ombudsman, *Best Practice Guide: Workplace Privacy* (2014) <www.fairwork.gov.au>.

⁷⁶*Privacy Act 1988* (Cth).

⁷⁷Office of the Australian Information Commissioner, *Australian Privacy Principles* (2016) <<https://www.oaic.gov.au/privacy-law/privacy-act/australian-privacy-principles>>.

⁷⁸*Privacy Act 1988* (Cth) pt II, s 6. See also Jim Nolan, ‘Employee Privacy in the Electronic Workplace Pt 1: Surveillance, Records and Emails’ (2000) 7(6) *Privacy Law and Policy Reporter* 105.

⁷⁹The *Telecommunications (Interception and Access) Act 1979* (Cth) s 187LA extends the definition of ‘personal information’ to include ‘information kept’ under the Act.

⁸⁰This is done through the Australian Information and Privacy Commissioner.

employer's obligation to keep employee's safe from providing personal information to anyone.⁸¹ In order for workplace surveillance measures to be successful within the workplace, the employer needs to set-off workplace policies against the privacy expectations of employees.⁸² This will, in turn, ensure that all implied duties within the employment contract are adhered to and workplace policies regarding workplace surveillance on the misuse of email and social media sites respected by employees.

A further challenge facing the employment relationship and workplace surveillance is whether employees should provide consent to employers when considering monitoring the conduct of employees on social media.⁸³ As noted above, privacy law functions to protect the independence of a person and not to disclose personal information to the public.⁸⁴ Not only are privacy laws protecting this interest, but it can also be created within an employment contract where employers are able to gain consent from employees through signing of the contract.⁸⁵ Therefore, the consent of an employee can be made through express terms of privacy contained within workplace privacy policies, and if not, implied duties will become significant as the duty to obey and mutual trust and confidence exists between the parties.⁸⁶

Even though an employer may have these policies in place, dismissing an employee based on misuse of emails or social media sites will still have to be fair in their dismissal.⁸⁷ Dismissal of employees on this basis will be discussed later in this chapter.

⁸¹Jim Nolan, 'Employee Privacy in the Electronic Workplace Pt 2: Drug Testing, Out of Hours Conduct and References (2000) *Privacy Law and Policy Reporter* 7, 144. A discussion on privacy in Chapter 3 indicated that the limitation of privacy monitoring is limited within private organisation who have less than \$3 million turnover. See also Officer of the Federal Privacy Commissioner, *Getting in On the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005) 74 <<https://www.oaic.gov.au/privacy-law/privacy-archive/privacy-reports-archive/getting-in-on-the-act-the-review-of-the-private-sector-provisions-of-the-privacy-act-1988>>.

⁸²Steven Penning and Aaron Magner, 'Workplace Surveillance and Privacy' (2006) *Commercial Law Quarterly* 24, 25.

⁸³John Weckert (ed), *Electronic Monitoring in the Workplace: Controversies and Solutions* (Idea Group Publishing, 2005) ch XII.

⁸⁴*Ibid* 35.

⁸⁵See Steven Willborn, 'Consenting Employees: Workplace Privacy and the Role of Consent' (2006) 66 *Louisiana Law Review* 975, 979.

⁸⁶*R v Darling Island Stevedoring & Lighterage Co Ltd; ex parte Halliday and Sullivan* (1938) 60 CLR 601, 622.

⁸⁷In *Windsor Smith v Liu and Others* [1998] Print Q3462 the Australian Industrial Relations Commission held that: 'The question of whether there was a valid reason for the termination of employment is no longer the critical question in determining whether the termination was contrary to the Act ... Under the *Workplace Relations Act 1996*, the principal question is whether the termination was harsh, unjust or unreasonable.'

Examining workplace surveillance and privacy on a broader and international level, the ILO promotes the protection of employee's personal information and provides the following guidelines for monitoring employees through workplace surveillance:⁸⁸

- (i) Personal data should be processed lawfully and fairly, and only for reasons directly relevant to the employment of the worker.
- (ii) Personal data should, in principle, be used only for the purposes for which they were originally collected.
- (iii) If personal data are to be processed for purposes other than those for which they were collected, the employer should ensure that they are not used in a manner incompatible with the original purpose, and should take the necessary measures to avoid any misinterpretation caused by a change of context.
- (iv) Personal data collected in connection with technical or organisational measures to ensure the security and proper operation of automated information systems should not be used to control the behaviour of workers.
- (v) Workers and their representatives should be kept informed of any data collection process, the rules that govern that process, and their rights.
- (vi) All persons, including employers, workers' representatives, employment agencies and workers, who have access to personal data, should be bound to a rule of confidence consistent with the performance of their duties and the principles in this code.
- (vii) Workers may not waive their privacy rights.⁸⁹

In considering that question, the Commission is to ensure that a "fair go all round" is accorded to both the employer and the employee concerned.'

⁸⁸International Labour Organisation, *Code of Practice on the Protection of Workers' Personal Data* (Geneva, 1997) cl 5
<http://www.ilo.org/safework/info/standards-and-instruments/codes/WCMS_107797/lang--en/index.htm>.

⁸⁹See in general Paul Roth, 'The International Labour Office Code of Practice on the Protection of Workers' Personal Data' (1998) 5(1) *Privacy Law & Policy Reporter* 5, 6.

In line with the above mentioned international principles, employers, within Australia, can safeguard against breach of personal information, through workplace surveillance, by:

- (i) recognising any legal problems;
- (ii) including provisions of workplace surveillance into the employment contract as an express term;
- (iii) making employees aware of the workplace surveillance;
- (iv) introducing additional policies and procedures into the workplace regarding the monitoring of employees; and
- (v) using systems correctly which would not lead to the abuse of personal information of employees.⁹⁰

With the development of technology, especially social media in the workplace, technology allow employers to have ‘record keepers involved in traditional relationships with clients, customers, patients, research subjects and others to increase the volume of information held’ and therefore personal information is emerging ‘in directions never envisaged by the existing legal and official framework governing those relationships’.⁹¹

This will increase the protection of privacy of the employee in the workplace and also set boundaries when employers are entitled to monitor the private activities of employees, whether in the workplace or outside. One inquiry into workplace privacy, which recommended a Workplace Privacy Bill, was the Victorian Law Reform Commission.⁹² The Commission indicated the following regarding the operation of this Bill:⁹³

⁹⁰J Cooper and L Croxford, *Employment Law – Workplace Surveillance and Employee Information* (July 2000) Australian Company Secretary, 361 in Joanna Betteridge, *Privacy and Surveillance in the Workplace* (February 2003) TEN

<http://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=http://www.tved.net.au/PublicPapers/February_2003,_Lawyers_Education_Channel,_Privacy_and_Surveillance_in_the_Workplace__Victoria_.html>.

⁹¹Gordon Hughes, ‘An Overview of Data Protection in Australia’ (1992) 18 *Melbourne University Law Review* 83, 85.

⁹²Victorian Law Reform Commission, *Workplace Privacy: Final Report* (2005)
<<http://www.lawreform.vic.gov.au/sites/default/files/Privacy%2BFinal%2BReport.pdf>>.

⁹³*Ibid* 36.

- (i) providing a fair balance between the right of privacy and giving employers the right to protect their legitimate interests;
- (ii) be sufficiently flexible with future developments in the nature of technology;
- (iii) ensure that acts or practices which affect privacy are proportionate to the interest the employer is seeking to protect; and
- (iv) give adequate protection to workers without imposing excessive regulation costs on government.

The Commission also applied this Bill not only within working relations but also within a non-working framework.⁹⁴ Therefore, this Bill clearly distinguishes between public and private life and how the employer can monitor out of work conduct. Furthermore, it recognises the difference between an employer's business interest and an employee's expectation of privacy.⁹⁵ However, Chapter 2 examined the employer–employee relationship and depending on what the employment contract states will depend on whether an employee has a reasonable expectation of privacy in the workplace. Furthermore, the monitoring is not so much concerned with public life, but the conduct of the employee during work in the course of employment, which then connects it to what the employee does beyond the workplace and in public. This Bill is a good example of how employers will be able to monitor and control the conduct of employees beyond the workplace where the interests of the business is harmed.

Employment matters such as workplace surveillance as well as privacy are not specifically covered under the *Fair Work Act*, but rather in an employment contract or workplace policy. These matters are mostly terms agreed upon between employer and employee and how it should be regulated. Thus, the employee will usually be placed in a position where they have to either agree to the terms of the employer or not, which creates disparity between the employer and employee.⁹⁶ The rigorous application of these regulations in the workplace imposes strict use technology such as social media. However, due to the duties imposed on the employee to carry out tasks set out by the

⁹⁴Ibid 39-40.

⁹⁵Ibid 40.

⁹⁶Dan Svantesson, 'Online Workplace Surveillance - The View from Down Under' (2012) 2(3) *International Data Privacy Law* 179, 181.

employer, these restrictions are undisputed.⁹⁷ Thus, the level of workplace monitoring by an employer on an employer-sponsored device needs to be carefully considered in order to avoid, for example, accessing private information from an employee on an email, which will be considered breaching the employment contract or workplace policy on workplace monitoring.⁹⁸

4.2.3.2 'Bring Your Own Device'

It is uncontroversial that an employer has a right to monitor employer-owned equipment and mobile devices in the workplace, whether derived from workplace surveillance legislation or from implied rights under the employment contract. However, what is controversial is whether employers can or should monitor personal mobile devices owned and supplied by the employee and which may be used for both personal and work-related activities within and outside the workplace and working hours.

The BOYD practice has gained significant interest to both employers and employees in regards to workplace monitoring.⁹⁹ A BOYD practice and policy permits employees to use their own technological device for work activities but also for other purposes such as accessing social media sites for personal use.¹⁰⁰ One advantage of a BYOD practice is that employers do not have to pay for any devices as the employee uses their own and work can be done more effectively as employees are able to use the device at any time and in any place.¹⁰¹ But even though this is attractive to an employee, an initiative such as BOYD can have negative effects on the business.¹⁰²

⁹⁷Ibid.

⁹⁸Ibid. See also Anna Johnston and Myra Cheng 'Electronic Workplace Surveillance, Part 1: Concerns for Employees and Challenges for Privacy Advocates' (2003) 9(9) *Privacy Law and Policy Reporter* 161.

⁹⁹Aurelie Leclercq-Vandelannoitte, 'Leaving Employees to their Own Devices: New Practices in the Workplace' (2015) 36(5) *Journal of Business Strategy* 18 – 24; Holy Ansaldi, 'Addressing Challenges of the 'Bring Your Own Device' Opportunity' (2013) 83(11) *The CPA Journal* 63-65; Phil Offer, 'Bringing Your Own Device to Work: The Business Dilemmas', *ABC* (online), 9 July 2012 <<http://www.abc.net.au/technology/articles/2012/07/09/3541839.htm>>.

¹⁰⁰Ibid. See also Raphael Rajendra, 'Employee-Owned Devices, Social Media, and the NLRA' (2014) 30 *American Bar Association Journal of Labour and Employment Law* 47.

¹⁰¹Simon Hinde, 'Bring Your Own Device: The Pros and Cons', *The Telegraph* (online), 2 October 2013 <<http://www.telegraph.co.uk/sponsored/technology/business-technology/10347308/bring-your-own-device-pros-cons.html>>.

¹⁰²Ibid. See also Fiona Graham, 'BYOD: Bring Your Own Device Could Spell End for Work PC', *BBC News* (online), February 2012 <<http://www.bbc.com/news/business-17017570>>.

Employers may well be concerned about data security, the potential loss of data especially if a device is not backed-up by a secure workplace server, the inadvertent or intentional disclosure of confidential information, the potential for defamation claims (see Chapter 2) and liability for the devices (for example, insurance and licences).

In terms of employers monitoring employee devices, one issue is that it is difficult to monitor only business-related information when it is potentially mixed with private information, especially as monitoring private information and activities may be a breach of privacy and a breach of surveillance legislation as outlined above. Therefore, the problem may arise where, for example, the employee inappropriately uses social media at home on their device to either defame or bully a co-worker or employer and the employer is not allowed to monitor such conduct because of privacy restrictions. Nonetheless if such conduct were to come to the attention of the employer, disciplinary action could be taken pursuant to the employment contract or a workplace policy.

This does raise pertinent questions as to when an employer can monitor devices used by employees outside the workplace and to what extent the employer can monitor conduct of an employee at home, whether having an employer-sponsored device or not.

4.2.3.3 Workplace Surveillance and Privacy Outside the Workplace

A key question addressed in this thesis is the extent to which an employer can monitor and control an employee's conduct outside the workplace and working hours with specific reference to technology and social media. As already indicated in Chapters 2 and 3, there may be circumstances in which employer control over employee conduct can extend beyond the workplace. However, the monitoring of employee's conduct outside the 'workplace' can be restricted and limited.¹⁰³ According to Nolan, the employer does not have 'an unfettered right to sit in judgment of out of work behaviour'.¹⁰⁴ Furthermore, Ierodiaconou notes that 'an employer's ability to discipline workers for their after-hours conduct is limited to activities with a direct link

¹⁰³*Rose v Telstra Corporation Ltd* [1998] AIRC 1592.

¹⁰⁴Jim Nolan, 'Employee Privacy in the Electronic Workplace Pt 2: Drug Testing, Out of Hours Conduct and References' (2000) 7(7) *Privacy Law and Policy Reporter* 139.

to their employment and which have a serious and significant impact on the workplace or employer's interests'.¹⁰⁵

In terms of monitoring and surveillance, an employer must exercise great care when conducting workplace monitoring beyond the workplace as the conduct of an employee may not be work-related. This is significant because as noted the control and monitoring of social media on a device will differ when it is an employer-sponsored device and when it is the employee's personal device.¹⁰⁶ In Chapter 2, it was determined that a 'workplace' is not restricted to an office, but wherever the employee is conducting work. However, with this broad definition, the boundaries of work-related activities and non-work-related activities can be blurred. Therefore, the inappropriate use of social media outside the workplace can affect the employment relationship and hence the employment contract, as discussed above.

Nonetheless, employers may argue that they have a legitimate business interest in the conduct of an employee's use of social media outside of working hours, especially where there is a nexus between the activity and the workplace, and it relates to concerns about protecting business interests, the reputation of the business and the impact of conduct on other employees (see Chapter 3 on the discussion on defamation and cyberbullying). As discussed above, the monitoring of employees outside the workplace and within their private lives will be regulated by the employment contract or workplace policy (see below). The monitoring of employees outside the workplace is most likely to arise when employees make use of employer-sponsored devices at home.¹⁰⁷

A seminal case in point regarding the use of an employer-sponsored device for personal use at home is *Griffiths v Rose*.¹⁰⁸ In this case, the employee worked for an Australian Public Service and was sponsored a laptop from his Department, which he

¹⁰⁵Mary-Jane Ierodiaconou, 'After Hours Conduct' (2004) 78(4) *Law Institute Journal* 42, 45.

¹⁰⁶See discussion below on employer-sponsored devices and an employee's personal device.

¹⁰⁷See Brad Swebeck, *Regulating Employee Conduct Outside of Work Hours: Managing Social Networking, Bullying and Harassment* (2011) Hickson Lawyers;

<<http://www.mondaq.com/australia/x/146434/Discrimination+Disability+Sexual+Harassment/Workplace+Update+Regulating+employee+conduct+outside+of+work+hours+managing+social+networking+bullying+and+harrassment>>.

¹⁰⁸[2011] FCA 30.

was actively using from home. While at home, the employee accessed pornographic material through this device. Before returning the laptop to the employer, he deleted all the material as well as the browsing history. During a routine inspection of the device using audit software, the pornographic downloading was discovered.¹⁰⁹ Upon this discovery, the employee was charged with a breach of the Australian Public Service Code of Conduct.¹¹⁰ In particular, one of the policies the Department implemented stated that:¹¹¹

Employees are prohibited from using Departmental ICT facilities to deliberately access, display, download, distribute, copy or store:

- pirated software and/or material;
- racist material;
- pornography; or
- links to such material.¹¹²

The sanctions available to the Department extended from giving warnings to termination of employees. The Department chose to terminate the employee because of his conduct.¹¹³ However, the employee argued that his actions were lawful and reasonable under the Code of Conduct and also submitted that the Department breached s 16 of the *Privacy Act*. Section 16 of this Act provides that if the Department breach the APPs, they are in contravention with s 14 of the Act.¹¹⁴ In particular, APP 3 deals with the collection of solicited personal information, which states that:¹¹⁵

¹⁰⁹The court stated at [3] that ‘Spector360 was a utility of a kind known as a “desktop logging system”. It performed a number of functions including logging the occurrence of particular keywords and taking a precise snapshot of the user’s desktop every 30 seconds. On the next occasion that a laptop installed with Spector360 was connected to the Department’s network it was configured to send the data it had collected to a dedicated server. For completeness, it might be noted that Spector360 also collected all emails, attachments, internet searches and instant messages performed by a user and sent them to the same dedicated server. Three of the Department’s security officers had access to this server.’

¹¹⁰Ibid [6]. The court also took note that the employee did not commit any offence and that the employee also did not forward any of the pornographic material to other colleagues or friends.

¹¹¹Use of District Facilities Policy.

¹¹²Ibid [6].

¹¹³Ibid [5].

¹¹⁴*Privacy Act 1988* (Cth) s 14.

¹¹⁵Ibid. Previously NPP 1.

if an APP entity is an agency, it must not collect personal information (other than sensitive information) unless the information is reasonably necessary for or directly related to, one or more of the entity's functions or activities;

if an APP entity is an organisation, it must not collect personal information (other than sensitive information) unless the information is reasonably necessary for one or more of the entity's functions or activities.

When considering APP 3, it is clear that a software program such as Spector360 will breach an employee's privacy by collecting personal information unfairly. However, the court held that the collection of information by the employer was done fairly and in accordance with the Code of Conduct.¹¹⁶ The court further pointed out that according to Article 17 of the *International Covenant on Civil and Political Rights*¹¹⁷ there was no unlawful behaviour by the Department in monitoring of these devices.¹¹⁸

In concluding this case, when a device is sponsored by the employer, then the employer, as owner, has the right to determine what rules apply regarding taking that device home. Furthermore, if these rules were communicated or made clear to the employee, for example, not utilising it for personal use, the employer has a right to control, monitor and access the data on that device without it being unfair and unreasonable.¹¹⁹

Taking the above-mentioned discussion into account, the issue with monitoring employees outside the workplace, is whether employers can dismiss their employees in regards to such conduct, specifically in relation to the misuse of social media by the employee. This is an important aspect regarding dismissal, as a dismissal of an employee who misused a social media platform outside the workplace can lead to an

¹¹⁶*Griffiths v Rose*, [23]. At [27] the court further held that: 'the policy set out above does not warn employees that if they visit on-line banking sites Spector360 may record all of their banking details. It is difficult to see what interest the Department would have in such material. The Department's answer to that is, in part, to suggest that the laptop could not be used for personal use. I would, however, reject that submission. It is plain from the policy that the Department does permit limited personal use of its IT facilities' and therefore breach may be possible with such software.

¹¹⁷*International Covenant on Civil and Political Rights* opened for signature 6 December 1966, GA Res 2200A (XXI) (entered into force 23 March 1976).

¹¹⁸*Griffiths v Rose*, [39]. Further international case law was referred to, *Potter v Scottish Ministers* [2010] CSOH 85 [530].

¹¹⁹See in general Beatrix van Dissel, 'Social Media and the Employee's Right to Privacy in Australia' (2014) 4(3) *International Data Privacy Law* 222.

unfair dismissal under the *Fair Work Act*.¹²⁰ In the case of *Streeter v Telstra Corporation*,¹²¹ an employee was involved in unlawful out of work activities with other co-workers in a hotel room.¹²² The court in this case had to determine whether the employer could dismiss the employee for such conduct outside the workplace. The court cited the case of *Rose v Telstra Corporation*¹²³ and determined that if there exists a clear and relevant connection between conduct of an employee and their employment, it may be seen as a ground for dismissal.¹²⁴ Furthermore, the conduct referred to must be so clear and relevant that the employment contract is ended by the employer.¹²⁵ However, in this case the circumstances were not clear and relevant enough for the employee to be dismissed. Therefore, employers should be careful in dismissing employees for conduct outside the ‘workplace’. This corresponds with the duty of good faith between employer and employee as discussed in Chapter 2.

Furthermore, the court in *McManus v Scott-Charlton*¹²⁶ held that an employer can legitimately dismiss an employee where the employee’s conduct influenced the ‘efficient equitable and proper conduct of the employer’s business’.¹²⁷ Therefore, any conduct by an employee that exposes the employer’s business interest, is a ground for dismissal.¹²⁸ The following should be taken into account by an employer when monitoring employer-sponsored devices:¹²⁹

- (i) apply reasonable and clear policies or terms in the employment contract which stipulates the use of social media on an employer-sponsored device;
- (ii) the monitoring of the employee’s use of social media should only stretch as far as necessary to protect the interests of the business;¹³⁰ and

¹²⁰*Fair Work Act 2009* (Cth) pt 3-2.

¹²¹[2007] AIRC 679.

¹²²*Ibid.*

¹²³[1998] AIRC 1592.

¹²⁴*Streeter v Telstra Corporation*, [82].

¹²⁵*Ibid* [59].

¹²⁶(1996) 140 ALR 625.

¹²⁷*Ibid* 626. The court further held that the employee’s conduct had an adverse effect on the employer’s business.

¹²⁸Daniel Ornstein, ‘Social Media Usage in the Workplace around the World – Developing Law and Practices’ (2012) 13(2) *Business Law International* 195, 197-198.

¹²⁹*Ibid.*

¹³⁰The case of *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway* [2011] FWA 3496 is a good example of when an employee’s use of social media did not harm the interests of the business. In this case, an employee posted a photo on Facebook where she dressed up as a car which was made from paper cups and cardboard. This photo which was posted

- (iii) education and training on the unauthorised use of social media on such a device.¹³¹

The second issue that needs consideration is the employer's right to monitor an employee's social media use outside of working hours. Generally, an employer does not have a right to prohibit an employee to use their social media networks outside working hours, only within working hours.¹³² However, Chapter 2 has established that the 'workplace' can be anywhere and not necessarily in the office. Does this mean that employers can restrict an employee from using social media when, for example, an employee is working from home? It is considered within the employment contract that the employee is not free from responsibility for any work-related misconduct.¹³³ This would include the misuse of confidential information, privacy and harassment of other employees or the employer.¹³⁴

Therefore, when considering the conduct of employees outside of working hours and employment in regards to the use of social media, the employer should look to the following features when considering dismissal of an employee:¹³⁵

- (i) the relationship between the employer and employee has been harmed due to the misuse of social media;
- (ii) the employer's business interest has been damaged; or
- (iii) there was a clear breach of the duties of the employee as set out in the employment contract.¹³⁶

showed that the employee took it behind the Subway counter. The employer then dismissed the employee because he argued that the employee stole the items which damaged Subway's name. The employee argued that she took the paper cups and cardboard from her own bin at home. The Commissioner in this case held that there was no damage to the reputation of the business and dismissal was too harsh.

¹³¹Ibid. Daniel also states that different jurisdictions apply these policies and monitoring differently. For example, in England, the government has enacted guidelines for employers to follow when monitoring employees. The monitoring should also be proportionate.

¹³²Ibid 201. See also for example *National Labour Relations Act 1935 s 7*.

¹³³Ibid.

¹³⁴See for example *Crisp v Apple Retail UK Limited* (2011) ET/1500258/11 and *Karl Knauz Motors Inc v Robert Becker* (2011) No 13-CA-46452.

¹³⁵Sean Millard and Natalie Novak, *Social Media and the Workplace* (2011) Workplace Law Update, Issue

17
<<http://www.ccilawyers.com.au/assets/320/files/WORKPLACE%20LAW%20UPDATE%20ISSUE%20November%2011%20-%20Website%20version.pdf>>.

¹³⁶These duties will be discussed later in this Chapter.

In considering these aspects, the Commissioner in *Sally Ann Fitzgerald v Dianna Smith T/A Escape Hair Design*¹³⁷ held that the comment the employee made regarding her employer on Facebook was not discriminatory enough for a dismissal. Taking into account the relationship between the parties and the fact that the employee did not mention the employer's name, there were no reasonable grounds to dismiss the employee.¹³⁸

Therefore, it is necessary for an employer to have some regulation in place when dealing with conduct of employees outside of working hours. Furthermore, the court in *Dover-Ray v Real Insurance Pty Ltd*¹³⁹ held that the conduct of an employee when publishing on a social media site and not removing it, qualifies as a lawful reason to dismiss an employee.¹⁴⁰

In respect of this, employers should keep their workplace policies and practices up-to-date in regards to the use of social media outside the workplace. In this way, employers can then assess whether there is a breach of privacy when monitoring an employee's personal information on a sponsored device. Therefore, the workplace policy should consider indicating firstly, under which circumstance personal information will be gathered; secondly, who will be able to see this information in the workplace; thirdly, the time frame of how long information will be kept; and lastly the chance given to an employee to correct information provided.¹⁴¹ Furthermore, the policy relating to social media use outside of the workplace, should accord with the language in the employment contract, which outlines the duties and obligations of both the employer

¹³⁷[2010] FWA 7358 (24 September 2010). See also in general *Rose v Telstra Corporation Limited* [1998] AIRC 1592 for a discussion on conduct outside of workplace where employees got into an altercation.

¹³⁸*Ibid* [86]-[89]. See also Meredith Booth, 'Social Media poses Risks for Employers and Employees' *The Australian* (online), 13 April 2015 <<http://www.theaustralian.com.au/life/social-media-poses-risk-for-employers-and-employees/story-e6frg9zo-1227300689335?sv=89d24276c93a9d51b2b5dd77f35f49fb>>.

¹³⁹[2010] FWA 8544 (5 November 2010).

¹⁴⁰*Ibid* [108].

¹⁴¹Monica Whitty, 'Should Filtering Software Be Utilised in the Workplace? Australian Employees' Attitudes towards Internet usage and Surveillance of the Internet in the Workplace' (2004) 2(1) *Surveillance and Society* 39, 50.

and employee when matters arise where an employee's conduct outside the workplace is unlawful.¹⁴²

When an employer considers monitoring employees outside the workplace, an employer needs to address the following when controlling the conduct of an employee using social media outside the workplace:¹⁴³

- (i) explain to the employee why they are being monitored and the extent of monitoring;
- (ii) provide an explanation of circumstances under which the employee will be monitored, including social media platforms;
- (iii) guide employees on their duty of care and what information is allowed to be included on social media platforms regarding themselves and the employer;
- (iv) discuss the use of employer-sponsored devices and information accessed on this device; and
- (v) detail the penalties that will apply if an employee breaches the guidelines provided by the employer on the misuse of social media platforms.

Because there is still some uncertainty as to how employers should incorporate workplace policies regarding the conduct of employees beyond the workplace, the next section discusses workplace policies specific to social media use within and beyond the workplace.

4.3 SOCIAL MEDIA AND WORKPLACE POLICIES

As mentioned in Chapter 2, the balance between work and personal life is less noticeable because a 'workplace' can be defined as anywhere and not necessarily in an office. Moreover, as private and public activities become more blurred and intermingled, especially in terms of the use of technology and social media, the management and control of employee conduct in relation to social media in the

¹⁴²Issues regarding workplace privacy can be read together with the *Guidelines on Workplace Email, Web Browsing and Privacy* from the Federal Privacy Commissioner as a guideline for employers, <<http://www.privacy.gov.au/materials/types/guidelines/view/6056>>.

¹⁴³Leonard, above n 7, 119-120.

workplace becomes more challenging. As Akers argues ‘creating a murky middle ground between public and private conduct’ opens the possibility for employers to regulate and monitor employees outside of working hours.¹⁴⁴

To this end, it is essential for employers to have well defined policies and for employees to be very familiar with any workplace policies (including the employment contract) that extend to monitoring their conduct within and outside the workplace.¹⁴⁵ As noted in *Malcolm Pearson v Linfox Australia Pty Ltd*,¹⁴⁶ an employer has the right to regulate the general behaviour of employees in regard to social media in a social media policy. The FWC held that:¹⁴⁷

in any employment context the establishment of a social media policy is clearly a legitimate exercise in acting to protect the reputation and security of a business. It also serves a useful purpose by making clear to employees what its expected of them.

Although social media is used for private communication, Brice, Fifer and Naron observe that ‘with the non-stop stream of individual expression on social media platforms ... as would be expected, many posts and tweets discuss work and employment-related matters’.¹⁴⁸ Furthermore, Vinson states that ‘social networks break down boundaries, make it easy for intended private communications to become public, and have a seemingly limitless reach’.¹⁴⁹ Therefore, using workplace policies in a constructive way, will promote the benefits of the use of social media in the workplace as well as reduce the potential challenges it presents such as privacy, breach of confidentiality, defamation, cyberbullying (Chapter 3) and workplace surveillance (discussed above). This part of the thesis will therefore consider the nature and importance of workplace policies, specifically social media policies, and the

¹⁴⁴Bridget Akers, ‘Face Off on Facebook’ (2009) 47 *Law Society Journal* 42 in Louise Thornthwaite, ‘Chilling Times: Labour Law and the Regulation of Social Media Policies’ (2016) 54 *Asia Pacific Journal of Human Resources* 332.

¹⁴⁵*O’Keefe v Williams Muir’s Pty Ltd t/as Troy Williams The Good Guys* [2011] FWA 5311 (11 August 2010).

¹⁴⁶[2011] FWA 4063 (19 March 2014).

¹⁴⁷*Ibid.*

¹⁴⁸Thomas R Brice, S Fifer and Gregory Naron, ‘Social Media in the Workplace: The NLRB Speaks’ (2012) 24(10) *Intellectual Property & Technology Law Journal* 1, 10.

¹⁴⁹K Vinson, ‘The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It’ (2010) 41 *University of Memphis Law Review* 355, 405.

incorporation of workplace policies into the employment contract, with specific reference to social media use within the workplace and beyond.

4.3.1 Workplace Policies

Workplace policies have an important role to play in the control and management of the workplace and the employer–employee relationship. Owing to ‘today’s complex and numerous employment laws require employers to have workplace policies on a wide range of issues in place and ensure these are known and understood by their employees’.¹⁵⁰

According to the New South Wales Industrial Relations Department, a ‘workplace policy’ refers to ‘statements of principles and practices dealing with the ongoing management and administration of the organisation’.¹⁵¹ Therefore, a ‘workplace policy’ will ‘act as a guiding frame of reference for how the organisation deals with everything from its day-to-day operational problems or how to respond to requirements to comply with legislation, regulation and codes of practice’.¹⁵² This indicates that legal risks such as the use of social media in the workplace and beyond can be managed more effectively.

Some of the advantages of introducing suitable and effective workplace policies include that:¹⁵³

- employees understand what is expected of them and how to behave in the workplace;
- employees will be treated equally and fairly;
- there is a system in place for dealing with complaints and to whom to address them; and
- it provides employees with a better understanding of breach of duties.

¹⁵⁰Australian Federation of Employers and Industries, *Workplace Policies* (2016) <<http://www.afei.org.au/workplace-policies>>.

¹⁵¹New South Wales Industrial Relations, *Workplace Policies and Procedures: Employment Essentials* (July 2013) <www.industrialrelations.nsw.gov.au>.

¹⁵²*Ibid.*

¹⁵³Joanna Weekes, *Advantages of Workplace Policies and Which Ones You Need* (July 2013) Health & Safety Bulletin <<http://www.healthandsafetyhandbook.com.au/advantages-of-workplace-policies-and-which-ones-you-need/>>.

The NSW Industrial Relations list the following aspects as constituting a well-written workplace policy:

- consistency with the values of the organisation and employment legislation;
- demonstrates that the organisation is being operated in an efficient and business-like manner;
- ensures uniformity and consistency in decision-making and operational procedures;
- saves time when a new problem can be handled quickly and effectively through an existing policy;
- fosters stability and continuity;
- maintains the direction of the organisation even during periods of change provide the framework for business planning;
- assists in assessing performance and establishing accountability; and
- clarifies functions and responsibilities.¹⁵⁴

These elements serve as a useful guideline to employers for developing a social media policy concerning the use of social media within and beyond the workplace.

It is submitted that every organisation should have a specific policy dealing with the use of social media. As noted by Floyd and Spry, the increase of social media use in the workplace has made employers keen to include the use of social media into workplace policies.¹⁵⁵ The FWC has made a remark regarding the failure of implementing social media policies in the workplace and stated that ‘in the current electronic age, this is not sufficient’.¹⁵⁶ The implementation of a workplace policy regarding the use of social media has the effect of prohibiting the inappropriate use of social media outside working hours and whether an employee will be subject to dismissal when breaching this policy. In order to protect the interest of the business,

¹⁵⁴ New South Wales’s Industrial Relations, above n 151, 1.

¹⁵⁵ Louise Floyd and Max Spry, ‘Four Burgeoning IR issues for 2013 and Beyond: Adverse Action; Social Media & Workplace Policy; Trade Union Regulation (after the HSU affair); and the QANTAS Aftermath’ (2013) 37 *Australian Bar Review* 153, 153.

¹⁵⁶ *Glen Stutsel v Linfox Australian Pty Ltd* [2011] FWA 8444 (19 December 2011), 87.

Hudson and Roberts explain that ‘the employer must create a Policy that furthers the employer's business purposes’, which then makes the employer ‘proactive rather than reactive’.¹⁵⁷

However, the introduction of social media policies can lead to employers monitoring and examining an employee’s private life beyond the employer–employee relationship.¹⁵⁸ The issue with the latter is whether employees are being treated fairly when employers dismiss them according to the social media policy. What conduct, according to the policy, will subject the employee to being dismissed by their employer? Was the conduct in connection with employment? According to Thornthwaite, ‘the real possibility that for employees to comply with their implied contractual duties they cannot safely communicate about their working lives in these forums’ and therefore the implication is that employees are rarely seen as being off-duty.¹⁵⁹ In this case, an employer needs to be careful when considering out of hours conduct as they could breach the privacy of the investigated employee.

The development of a workplace policy will include a planning and consultation stage, the drafting of a policy, followed by the development of a final policy that includes the necessary terms and conditions. It is essential for any policy to be made available to employees and to provide appropriate information and training sessions for employees on the policy. Robertson and Black indicate that ‘[a] critical aspect of such training would be to emphasise the likely contractual nature of the policies and that a failure to follow them may give rise to breach of contract proceedings’.¹⁶⁰ Therefore, training and education on workplace policies is an important part of an employee understanding their duties towards the employer. Furthermore, the implementation of workplace policies needs to be effective and central to an employee’s employment.¹⁶¹ The appropriate and constructive use of social media in the workplace, combined with social media policies, can help to maintain a positive employer–employee relationship.

¹⁵⁷Susan Hudson and Karla Roberts, ‘Business Leadership Symposium: Drafting and Implementing an Effective Social Media Policy’ (2012) 18 *Texas Wesleyan Law Review* 767, 768.

¹⁵⁸Brice et al, above n 148, 10.

¹⁵⁹Louise Thornthwaite, Social Media, Unfair Dismissal and The Regulation of Employees’ Conduct Outside Work (2013) 26(2) *Australian Journal of Labour Law* 164, 176.

¹⁶⁰G Robertson and H Black, ‘Making the Most of Workplace Policies – Avoiding Potential Legal Pitfalls’ (2008) 60(2) *Keeping Good Companies* 100, 102.

¹⁶¹J Catanzariti, ‘Burgeoning Workplace Policies May Hide Unwanted Obligations’ (2006) 44(7) *Law Society Journal* 46, 47.

However, there needs to be a balance between control and flexibility as restrictive social media policies may impact on an employee's morale and productivity in the workplace.¹⁶²

As noted, employees may be subject to a wide range of workplace policies, including a social media policy. For policies to be effective and meaningful, they need to be well-drafted, regularly reviewed and implemented effectively. Policies need to be readily available and accessible to employees, and they should be regularly reminded, updated and informed about policies. The importance of regular information and training is aptly demonstrated in *Agnew & Others v Nationwide News Ltd*¹⁶³ in which four employees were reinstated having been dismissed for breaching the company's alcohol and drug policy. The employees had been drinking alcohol during their lunch break, which was grounds for their dismissal. However, it was found that the employees had misunderstood the policy. It was noted that the policy on alcohol consumption 'had not always been clear cut', that the company had been 'battling a culture of drinking during and before working time' but that breaches of the policy had not been dealt with consistently and there were 'mixed signals about the policy and in particular the consequences of drinking during lunch breaks'.¹⁶⁴

Therefore, social media workplace policies need to be concise, consistent and well-drafted in order to address the control and monitoring of social media within and beyond the workplace and also limit the challenges social media present in the workplace, as examined in Chapter 3. One question that does arise however, is when and how workplace policies may form part of the employment contract and the consequences thereof. This is useful to consider as employees may be held to both workplace policies and their employment contract simultaneously through the express and implied terms considered in Chapter 2.

¹⁶²See James Richards, 'What Has the Internet Ever Done for Employees? A Review, Map and Research Agenda' (2012) 34 *Employee Relations* 22, 30; Annamarie Rooding, 'Cyberbullying in the Workplace: Dealing with Social Networking Sites' (2009) 12 *Internet Law Bulletin* 13.

¹⁶³ *Nationwide News Pty Limited re Brian John Agnew, Barry Joseph Jelly, Frank Peinado and George Mandilakis v Nationwide News Pty Limited* - PR936856 [2003] AIRC 1056 (27 August 2003).

¹⁶⁴ *Ibid* [9] – [12].

4.3.2 Relationship Between Workplace Policies and Employment Contracts

As noted above, employers may have a wide range of workplace policies, conveying aspects ranging from parking to health and safety. Workplace policies generally sit alongside employment contracts. Though, some difficulties can arise when an employer wants to incorporate workplace policy terms into an employment contract, the relationship between workplace policies and employment contracts can co-exist, but both the employer and employee must intend to have them incorporated within one document.¹⁶⁵ According to *University of Western Australia v Gray*,¹⁶⁶ the court held that the employment contract may contain contractual terms relating to other documents like policies that may be explicitly referred to.¹⁶⁷ Therefore, in relation to social media and the use thereof within and beyond the workplace, the employer may incorporate a social media policy expressly in the employment contract or the letter of appointment.¹⁶⁸

According to Hobhouse J, ‘the fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee’.¹⁶⁹ Furthermore, Irving notes that for a workplace policy to form part of an employment contract, written consent needs to be given by the employee, which then expressly forms part of the contract as a whole.¹⁷⁰ This was confirmed in the case of *Cicciarelli v Qantas Airways Ltd*¹⁷¹ in which it was held that the actions by the employees incited unlawful industrial action and was in breach of their employment contract.

Therefore, an employee who signs the contract agrees to the workplace policy forming part of that contract; however, employers need to be careful when incorporating such policy terms into the contract and need to help the employee understand the consequences of the inclusion of a workplace policy in the employment contract.¹⁷²

¹⁶⁵*Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403 [34].

¹⁶⁶*University of Western Australia v Gray (No 20)* [2008] FCA 498.

¹⁶⁷*Ibid* [90]-[91],

¹⁶⁸See *Victoria University of Technology v Wilson* [2004] VSC 33 in relation to approval of policies in employment contracts.

¹⁶⁹*Alexander v Standard Telephones & Cables Ltd* (No 2) [1991] IRLR 286, 293. See also *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120, [23].

¹⁷⁰Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 227.

¹⁷¹[2012] FCA 56, [321]-[325].

¹⁷²*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 180-182.

Owens, Riley and Murray further note that in order for a workplace policy to have an effect within the employment contract, the provisions must accord with the nature of the contract.¹⁷³ One example where a workplace policy and employment contract united was in the case of *Goldman Sachs JBWere Services Pty Ltd v Nikolich*.¹⁷⁴ In this case, Jessup J held that the following need to be considered when deciding whether a workplace policy and employment contract combined is contractual in nature:¹⁷⁵

- (i) the nature of the term and whether it can form part of a contract;
- (ii) the expression of the term and whether it imposes obligations on the employer and employee;¹⁷⁶
- (iii) whether the document, which contains both the policy and contract, was presented to the employee for signature; and
- (iv) if the employee indeed understood the document when they signed it.¹⁷⁷

A further example is the case of *Romero v Farstad Shipping (Indian Pacific) Pty Ltd*.¹⁷⁸ In this case the workplace policy stated that the employer will ‘handle complaints promptly, with confidentiality, impartiality and with sensitivity to the complainant’s needs’; however, this was never done.¹⁷⁹ The employee therefore indicated that because the policy formed part of her employment contract, the employer breached its duties. The court held that the workplace policy formed part of the employee’s contract and therefore mutual obligations were imposed on both the employer and employee.¹⁸⁰ As the employee signed the contract, both parties were bound by it.¹⁸¹

Workplace policies can become part of an employment contract when a new employee enters the workplace or when existing employees agree to include the terms of the policy into their current employment contracts. However, sometimes an employee will

¹⁷³Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 252.

¹⁷⁴[2007] 163 FCR 62; [2007] FCAFC 120.

¹⁷⁵*Ibid* [329].

¹⁷⁶*Ibid*.

¹⁷⁷*Ibid* [327].

¹⁷⁸(2015) 315 ALR 243.

¹⁷⁹*Ibid* [27].

¹⁸⁰*Ibid* [55].

¹⁸¹*Ibid* [60].

not agree to this, which means that the employer cannot implement new procedures or expectations.¹⁸² When this occurs, it is then questionable whether the policy forms part of the contract or not. Rothman J in the case of *Downe v Sydney West Area Health Service (No 2)*¹⁸³ held that ‘the employee either take some positive step or decline to take an objection in circumstances where objection would be necessary or at least expected’.¹⁸⁴ Therefore, where an employee expressly indicates that they will not comply with the terms of the policy as set out in the contract of employment, such indication may lead to termination as a result of breach of contract.¹⁸⁵ This further indicates that an employer can still exercise their duty towards the employee and ‘an employer is entitled, subject to the express provisions of the contract, to give lawful and reasonable directions to an employee as to the manner in which the employee shall perform work’.¹⁸⁶

Workplace policies are often amended to fit in with current changes in the workplace. Therefore, if a policy is to form part of an employment contract, the contract should also make room for amendments and variations. One example of where such leeway is provided is with the development of technology and social media in the workplace. Because of the perpetual changes in social media and the different challenges it presents, an employer needs to be able to update and change policies, which may have implications for changing contracts of employment. In the case of *Riverwood International Australia Pty Ltd v McCormick*,¹⁸⁷ the court noted that an employer who changes their policies is ‘constrained by an implied term that it would act with due regard for the purposes of the contract of employment ... so it could not act capriciously, and arguably could not act unfairly towards the employee’.¹⁸⁸ When an employer decides to change an employee’s contract, which includes terms of a workplace policy, an employer should bear in mind that the terms should be fair and reasonable towards the employee. This would be in the case where employers include that they can monitor employees after hours; however, employers need to be clear on

¹⁸²*Petrie v Mac Fisheries Ltd* [1940] 1 KB 258.

¹⁸³(2008) 71 NSWLR 633.

¹⁸⁴*Ibid* 669 [431].

¹⁸⁵*Bingham v St John Ambulance Western Australia Ltd* [2014] WADC 122.

¹⁸⁶*Downe v Sydney West Area Health Service (No 2)* [2008] NSWSC 159, [342]. See also *Re Woolworths Ltd* (2005) 145 IR 285, 296.

¹⁸⁷(2000) 177 ALR 19.

¹⁸⁸*Ibid* 223 [152].

the control and monitoring of employees who are not on duty as they could breach and employee's privacy.

One matter of concern regarding workplace policies and employment contracts regarding social media, is whether an employee, once the contract is signed with the variations, are subject dismissal for behaviour outside of working hours. Having a social media policy linked to the employment contract is one way of ensuring that both employers and employees fulfil their duties towards each other and to observe how employees conduct themselves outside the workplace. If the conduct of an employee on a social media platform is unsatisfactory, is it reasonable and lawful to dismiss the employee for such comments made.¹⁸⁹

An example of how the social media policy was incorporated into how the employees act outside the workplace was by the Commonwealth Bank of Australia. In 2011 the Commonwealth Bank of Australia presented a social media policy to its employees, which stated that if the employer or any employees were alerted to 'inappropriate or disparaging content and information stored or posted by others in the social media environment' regarding the employer or employee, the employer would remove these postings and assert dismissal of those employees.¹⁹⁰ This policy certainly prohibited employees from even talking about anything regarding the bank off-duty. The Finance Sector Union raised its concern regarding this policy and stated that:¹⁹¹

participation in a public debate about the four major banks increasing interest rates above the RBA increases or charging too much for their credit cards would also fall within the purview of the policy ... Such conduct, whilst being a breach of the policy, would not constitute a breach of the employee's duty of good faith under the contract of employment and would not cause damage to the reputation or interest of the banks.

¹⁸⁹See for example *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500.

¹⁹⁰Ewin Hannan, 'Bank Threatens Staff with Sack Over Social Media Comments', *The Australian* (online), 5 February 2011

<<http://www.theaustralian.com.au/news/nation/bank-threatens-staff-with-sack-over-social-media-comments/story-e6frg6nf-1226000454432>>.

¹⁹¹*Ibid.*

As a result, the Commonwealth Bank of Australia agreed to look at its social media policy again and make the necessary changes.¹⁹² Therefore, a social media policy needs to be clear, transparent and easy to understand. This example leads to consideration as to whether employers comply with the ‘better off overall test’. According to the *Fair Work Act*, this test states that:¹⁹³

For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.

This needs to be considered because the regulation of employees within the workplace, especially regarding their use of social media in the workplace, is important. Therefore, the ‘better off overall’ test needs to be applied in order to provide employees with fair and reasonable expectations within agreements and employment contracts in order to keep the employer–employee relationship respectable. In the case of *Broadmeadows Disability Services*,¹⁹⁴ the social media clause in the enterprise agreement stated that it:¹⁹⁵

prohibits an employee from putting any comments about the employer’s business on any social media site at any time. Further the clause extends to conversations that take place about their employment and during their employment that are provided to a third party that results in the publication on Social Networking Media.

The clause indicates that there is no mutual obligation on the parties – the only obligation rests on the employees. Therefore, the social media clause restricted the employees’ freedom to talk about their work.¹⁹⁶ Commissioner Gooley concluded that the enterprise agreement, especially with the clause on social media, does not meet the

¹⁹²Ibid. See also a copy of the Commonwealth Bank’s social media policy in *The Financial Brand, Bank’s Social Media Policy Says Snitch & Spy on Your Friends or You’re Fired* (February 2011) <<http://thefinancialbrand.com/16718/commonwealth-bank-social-media-policy/all/>>.

¹⁹³*Fair Work Act 2009* (Cth) s 193(7).

¹⁹⁴[2011] FWA 4063.

¹⁹⁵Ibid [105].

¹⁹⁶Ibid [109].

‘better off overall test’ and therefore the agreement is subject to changes that will represent a mutual obligation on both parties.¹⁹⁷

Furthermore, according to *Goldman Sachs JBWere Services Pty Ltd v Nikolich*,¹⁹⁸ the court identified that the following terms from workplace policies can be seen as incorporated into the employment contract and which binds the two:¹⁹⁹

- (i) terms normally found in an employment contract such as hours of work, grievance and remuneration;
- (ii) terms expressed in a fixed language and which relates to duties and obligations;
- (iii) it was made known to the employee that the workplace policy would form part of the employment contract and run concurrently when starting employment; and
- (iv) the employee was required to read and understand the terms of the workplace policy and was asked to sign a declaration by accepting this as part of the employment contract (see example of social media policy below).²⁰⁰

Some other terms of a workplace policy that will likely form part of the employment contract include where the offer letter for employment stated that the workplace policy is connected to the employment contract,²⁰¹ the hindering of an employment contract to continue without such a policy term²⁰² and where training is provided in this area relating to the workplace policy that might affect the employment contract if not implemented thoroughly.²⁰³

The above-mentioned case law and discussion on whether employment contracts include terms of workplace policies as well as whether employees can be dismissed regarding a comment made on social media of the employer outside of working hours

¹⁹⁷Ibid [143].

¹⁹⁸(2007) 163 FCR 62.

¹⁹⁹Ibid.

²⁰⁰Ibid.

²⁰¹*Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403.

²⁰²*Honeyman v Nhill Hospital* [1994] 1 VR 138.

²⁰³*Dare v Hurley* [2005] FMCA 844.

is challenging. Nereim notes that ‘allowing retaliation against one employee who speaks out on a matter relating to employment creates a workplace atmosphere in which there is fear of protest’.²⁰⁴ Therefore, employers should be careful in not restricting an employee’s freedom to talk on these social networks when it is not hurting the interests of the business. However, having a well-drafted social media policy that can correlate with the employment contract is a better way of monitoring an employee’s conduct within and outside the workplace when the employee is behaving in a manner that could harm or undermine the employer–employee relationship.

A social media workplace policy should address the following criteria when an employer considers introducing some of the terms into an employment contract in order to maintain a positive employer–employee relationship:²⁰⁵

- (i) explaining that surveillance will be carried out on the employee’s social media platforms where permissible;
- (ii) discussing with the employee how it will be carried out and when it will begin; and
- (iii) explaining the duration of the monitoring, whether it is occasional or continuous.

In addition to these, it is useful for an employer to clearly express in a social media workplace policy:²⁰⁶

- (i) the meaning of ‘social media’ within and outside the workplace;
- (ii) what reasonable use will be of social media by an employee;
- (iii) what misuse of social media is;
- (iv) the consequences of misusing social media within and outside the workplace; and
- (v) what workplace policies will be associated with the policy.

²⁰⁴M Nereim, ‘National Labor Relations Act Section 7: Protecting Employee Activity through Implied Concert of Action’ (1982) 76(5) *Northwestern University Law Review* 813, 837.

²⁰⁵Leonard, above n 7, 120.

²⁰⁶See Appendix 1.

These principles will ensure that employees have a clear understanding on the use of social media within and outside the workplace. Moreover, it will make the employee aware that if they harm the reputation of a business and if there is a misuse of social media, dismissal is a possibility, especially when coupled with other workplace policies such as privacy and workplace bullying (cyberbullying). Therefore, as discussed in Chapter 2, an employee has the implied duty of obeying an employer's directions when dealing with the employment contract in connection with the workplace policies. For example, the implied duty of fidelity states that an employee must not behave in a manner contrary to their contractual obligations and the social media workplace policy requires the employee not to disclose confidential information of their clients. In this scenario, both the employment contract and the social media policy will be put into action if the employee defames a client of the employer on social media by releasing the details of that client.

In this regard, the social media workplace policy and employment contract are connected in relation to the implied duties between an employer and employee. Therefore, the above measures, together with a clearly stipulated employment contract dealing with the use of social media within and outside the workplace, will ensure that an employer will be able to minimise the risks to the business associated with the misuse of social media by an employee and at the same time ensure that an employee still has an interest in their own privacy.

This thesis, as mentioned previously, provides an example of a social media policy (see Appendix 1) that may be used by employers for the inappropriate use of social media by employees within and outside the workplace. This policy specifically deals with the necessary privacy challenges concerned with monitoring employees outside the workplace and what the consequences will be when employees misuse social media, which is against the social media workplace policy.

Against this background, an employer will need to develop appropriate social media policies in the workplace to make a decision regarding termination if there is a misuse of social media by an employee within the workplace that could lead to breach of privacy, defamation or cyberbullying. These social media policies can also be

connected to the employment contract to couple express and implied duties of both the employee and employer within that policy. A proper social media policy will secure the adequate control and management of social media by an employee within and outside working hours.

4.4 CONCLUSION

This chapter introduced the legal challenges faced by employers in regards to the control and management through workplace policies of social media use by employees beyond the workplace. The first challenge addressed was whether workplace surveillance legislation is relevant to the monitoring of social media in the workplace. In summary, the *Surveillance Devices Act 1998* (WA) does not specifically refer to monitoring of the conduct of employees in the workplace, whereas the *Surveillance Devices Act 2007* (NSW) makes provision for the control and monitoring of employees in the workplace. However, these pieces of legislation do not specifically apply to the monitoring of social media outside the workplace. The question was also addressed as to whether uniform legislation will be applicable in regards to the monitoring of employees within and outside the workplace; the ALRC is in favour of such legislation. However, breach of privacy of an employee and whether the monitoring of information will fall within the walls of ‘personal information’ is an issue and may create legal challenges for employers.

Furthermore, it was made clear in Chapters 3 and 4 that the *Privacy Act*²⁰⁷ only applies to public employers or private entities with a turnover of more than a certain threshold per annum and therefore privacy laws are not as effective in each state and territory because of this distinction. Therefore, surveillance laws need to address the issue of control and monitoring in the workplace and breach of privacy in this respect. Notwithstanding the advantages of adequate surveillance laws, it is unquestionably creating challenges for employers in the area of social media and the workplace.

One of the main concerns discussed in this chapter was the breach of an employee’s privacy when monitoring their use of social media in and outside the workplace. Therefore, a distinction was drawn between monitoring of social media within and

²⁰⁷*Privacy Act 1988* (Cth).

outside the workplace in order to identify whether an employer has a 'right' to monitor employees and their use of social media. The main question and aim of this thesis is whether the monitoring of employees outside the workplace is possible. This question was addressed in the chapter and it was noted that if an employer sponsors a device to an employee, that device is possible to control and monitor by the employer. However, when an employee is using their own device, the appropriate connection between work and the employee's conduct must be established. Once there is a connection with their employment and the misuse of social media outside the workplace, it is reasonable for an employer to establish whether an employee should be dismissed or not.

In relation to the dismissal of employees, this part of the thesis considered whether a social media policy is possible to form part of the employment contract and once this is achieved, whether the employer can dismiss an employee on the basis of the policy forming part of the employment contract and any breach thereof will be a breach of the employee's terms and conditions. The increase in case law and decisions by the FWC indicate that employers need to be aware of social media activities by their employees, now more than ever.²⁰⁸ This can only be addressed through the introduction of appropriate social media policies in the workplace managed concurrently with the employment contract in order to prevent legal consequences such as breach of privacy, defamation and cyberbullying. This is not only a duty owed to the employee using social media, but also their co-workers.

Given the perpetual transmutation of social media, especially in the workplace, liability is a serious concern and needs to be addressed from the onset. This chapter endeavoured to identify the use of workplace policies attached to employment contracts and how the appropriate and transparent surveillance of an employee within and outside the workplace can play a vital role in the control and management of the employment relationship, while at the same time respecting the employee's private life and expectations of privacy in the workplace. Also, workplace policies should not act

²⁰⁸See *Sally-Anne Fitzgerald v Dianna Smith T/A Escape Hair Design* [2010] FWA 7358 (24 September 2010); *Glen Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 (19 December 2011); *Linfox Australia Pty Ltd v Stutsel* [2012] FWA 7097 (3 October 2012).

as an unnecessary and onerous ‘chilling effect’ on the constructive use of social media for professional and personal activities.

CHAPTER 5

OVERVIEW, CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

This thesis has discussed the use of social media in the workplace and the implications for the employer–employee relationship as well as the employment contract as a whole. This final chapter provides an overview of the thesis and a summary of the key issues that address the research aims and questions set out in Chapter 1. The chapter presents recommendations and suggestions for further research on the use of social media in the workplace and beyond.

5.2 OVERVIEW OF THESIS AND SUMMARY OF KEY ISSUES

The main purpose of this thesis was to examine the extent to which an employer can manage and control an employee’s use of social media within and outside the workplace and working hours. The thesis therefore focused on the nature and significance of social media in the workplace, the employment relationship, and issues concerning privacy, defamation and cyberbullying. This was followed by a discussion on workplace surveillance and social media policies as a central discussion to the monitoring and control of the use of social media within and beyond the workplace.

Chapter 2 commenced with a background discussion on social media in the workplace and noted that social media has become a global phenomenon and well entrenched in the workplace. However, although there are many advantages to social media there are also potential legal pitfalls for employers and employees. Social media in the workplace can be perceived as an effective advertising tool for employers. The everyday use of social media and email in the workplace has become a necessary tool to communicate with clients and co-workers.¹ However, the wide use of social media in the workplace can create problems for employers and employees, especially when

¹Teresa Thompson and Norah Bluvshstein, ‘Where Technology and the Workplace Collide: An analysis of the Intersection between Employment Law and Workplace Technology’ (2008) *Privacy & Data Security Law Journal* 283, 284.

social media is used inappropriately.² A further issue arises with the use of social media by employees outside the workplace may have a negative effect on the workplace environment and employment relationship. Therefore, one aim of this thesis was to determine what constitutes a ‘workplace’ and how the potential misuse of social media outside the workplace provides the employer with the right to dismiss an employee because of this conduct.

Chapter 2 then explored the meaning of a ‘workplace’. The ‘workplace’ is not generally defined in employment legislation; however, the *Work Health and Safety Act 2011* (Cth) does provide a definition for ‘workplace’. It was noted in this piece of legislation that a ‘workplace’ is not limited to an office or cubicle, but extends to an employee’s house and vehicle as well.³ The significance of the word ‘workplace’ in relation to the use of social media out of working hours was highlighted in the case of *Ziebarth v Simon Blackwood (Worker’s Compensation Regulator)*⁴ where it was held that because the employee’s contract held that he should be available out of working hours, the injury he sustained was at a ‘workplace’.⁵ Therefore, with the development of technology in the workplace and the use of mobile devices anytime and anyplace, it is reasonable to assert that a workplace can be anywhere. However, this can affect the employment contract and whether the inappropriate use of social media outside of working hours may be subject to dismissal of an employee.

In this respect, an employee who misuses social media outside working hours can therefore be subject to disciplinary action, depending on the seriousness of the conduct and whether it was in connection with employment.⁶ This, in turn, impacts the employment contract and how the duties between an employer and employee are subject to change when the employment relationship and use of social media in the workplace connect. A further issue within this thesis was whether expressed and

²David Kelleher, *5 Problems with Social Networking in the Workplace* (October 2009) Information Management
<http://www.information-management.com/specialreports/2009_165/socialnetworkingmedia-10016208-1.html>.

³*Work Health and Safety Act 2011* (Cth) s 8.

⁴[2015] QIRC 121.

⁵*Ibid* [47].

⁶See in general *Commissioner for Railways (NSW) v O'Donnell* (1938) 60 CLR 681; *Comcare v PVYW* (2013) 250 CLR 246; *Ziebarth v Simon Blackwood (Workers' Compensation Regulator)* [2015] QIRC 121.

implied duties within an employment contract extend to out-of-hours activities of employees and whether the employer will be able to dismiss the employee for such conduct.⁷ If an employee breaches an express or implied term within the employment contract, such as confidentiality, honesty or good faith as well as mutual trust and confidence,⁸ it is a ground for dismissal and therefore the employer may need to consider whether the misuse of social media beyond the workplace falls within such a category. The implication of this change is that employers and employees do not fulfil their implied duties under the employment contract.⁹ Consequently, when boundaries are overstepped by an employee in respect of the inappropriate use of social media beyond the workplace, it further places a burden on the employment contract and essentially a breach of the implied terms in the contract.

Because employers place trust and confidence in their employees to perform the tasks contracted for, employers need to be cautious when considering using social media in the workplace.¹⁰ This research has demonstrated that social media in the workplace has become commonplace, as discussed in Chapter 2, and therefore can significantly impact on the employer–employee relationship. The impact social media has on the employment relationship creates legal issues and challenges for employers such as privacy, defamation and cyberbullying, as discussed in Chapter 3. Therefore, one of the key aims of this thesis was to address these legal challenges within the context of social media.

The first key legal issue examined in this thesis was the breach of privacy through the inappropriate use of social media platforms in the workplace and beyond. As discussed in Chapter 3, there exists no definition for ‘privacy’ and no general right to privacy, hence the law provides limited protection and remedies in the regard. However, limited protection is provided by in privacy legislation. Privacy legislation in Australia is a complex area especially with the development of technology and breach of privacy by

⁷See in general *Robb v Green* [1895] 2 QB 315, 317.

⁸The duty of mutual trust and confidence has been dismissed as an implied duty by the High Court in the case of *Commonwealth Bank of Australia v Barker* (2014)253 CLR 169.

⁹See in general *Australian Communications Commission v Hart* (1982) 43 ALR 165; *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] 69 NSWLR 198. See also *Gillies v Downer EDI Ltd* [2011] 218 IR 1, 43.

¹⁰Employers need to put in place efficient workplace policies dealing with the use of social media within and outside the workplace.

employers and employees through social media platforms. The *Privacy Act 1988* (Cth) mainly applies to public employers and employees regarding breach of privacy and therefore limited protection is given to private employers and employees. However, with the introduction of the APP's, which specifically deal with the collection and access of personal information by employers, it provides protection to private employers and employees to a limited extent.¹¹ The aim of this key legal issue was to determine how employers and employees may breach privacy pre-, during and post-employment using social media. This thesis submitted that the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) was implemented to deal with breach of privacy through the development of technology in the workplace. Therefore, to protect those private employers and employees not subject to the *Privacy Act* and APPs, this thesis argued that workplace policies need to reflect the *Privacy Act* and give effect to the APPs when social media is inappropriately used within and beyond the workplace. This will add to the protection of personal and confidential information of employers and employees within the workplace.

In conjunction with privacy is the principle of confidentiality, which applies to both employer and employee. Given that there is no cause of action for an invasion of privacy in Australia, as explained in Chapter 3, the equitable doctrine of confidentiality was an alternative remedy. The breach of confidentiality through social media platforms has raised an additional legal issue under privacy. This has been considered within the context of an employee relaying confidential information of an employer to potential future competitors. This thesis argued that the breach of confidentiality through social media platforms can cause harm to an employer's business reputation. This may have significant consequences as employees may be dismissed because of their inappropriate actions through social media and the release of confidential information. Thus, this thesis argues that employers need to ensure that workplace policies are in place to inform employees of the consequences of such actions, especially beyond the workplace.

¹¹Office of the Australian Information Commissioner, *Australian Privacy Principles*, Privacy Factsheet 17 (January 2014)
<<https://www.oaic.gov.au/individuals/privacy-fact-sheets/general/privacy-fact-sheet-17-australian-privacy-principles>>.

The second key legal issue considered in this thesis was whether the employment relationship is affected by defamatory remarks posted on social media. With the use of social media in the workplace, it creates opportunities for employers and employees to communicate with friends and co-workers more easily. However, communication on social media may also be negative and defamatory. When considering defamation in light of the use of social media in the workplace, the necessary elements need to be present in order for it to be classified as defamatory, as discussed in Chapter 3.¹² Therefore, these elements are central to bringing an action against an employee or employer for defamatory remarks made on a social media platform and a key aim to this thesis. In terms of the common law, there must be published information of a defamatory matter, the information must identify the plaintiff and the published information must indeed be defamatory. The general law of defamation and the elements apply to social media in the workplace. However, it was argued that it is difficult for employers to identify who posted defamatory remarks made outside of working hours as social media platforms allow employees to post anonymously. However, when employees are not posting remarks anonymously, it is argued that employees need to be aware of the potential consequences of their defamatory remarks, even if made on personal social media forums. This is important as it could lead to dismissal of that employee if it concerns the workplace and employment matters, whether it was published within the workplace or beyond.

Furthermore, employers should be careful when dismissing an employee in regard to defamatory material posted on social media. Key cases such as *Cairns v Modi*;¹³ *Banjeri v Bowles*¹⁴ and *McEloney v Massey*¹⁵ indicate that employers need to be aware of such conduct because circumstances can arise where a defence can be raised by an employee where they have made comments that point towards the truth or that was an opinion by an employee.¹⁶ Therefore, defamatory comments made by employees on social media may not necessarily harm the reputation of the employer because of these

¹²See Chapter 3. The elements are that: (i) The information was published; (ii) The information published also identified the person (plaintiff); and (iii) The information which was published was indeed defamatory.

¹³[2012] EWHC 756 (QB).

¹⁴(2013) FCCA 1052.

¹⁵(2015) WADC 126.

¹⁶See in general *McEloney v Massey* (2015) WADC 126; *McManus v Scott-Charlton* (1996) 70 FCR 16.

defences. This thesis argued that, although social media may be an asset within the workplace, it can lead to disciplinary actions or unreasonable behaviour by employers and employees in the workplace.

Beyond issues such as privacy, confidential information and defamation, an employer's implied duty of care towards their employees applies greatly when social media is impacting co-workers and their productivity. This can lead to an employer being vicariously liable if not monitoring and controlling employees when inappropriately using social media in the workplace and beyond. The last key legal issue relating to the inappropriate use of social media in the workplace is cyberbullying, not only within the workplace, but outside of working hours and beyond the control of an employer. As discussed in Chapter 3, workplace safety is an important part in the regulation of employee safety within the workplace.¹⁷ Therefore, the key aim of this part of the chapter was whether the employment relationship is impacted by cyberbullying activities within and beyond the workplace.

Because of the development of different types of technology in the workplace, legislation has not been updated to include cyberbullying as a legal issue in the workplace. The *Fair Work Act 2009* (Cth) and *Work Health and Safety Act 2011* (Cth) include bullying as a definition but have not incorporated technological advancements to bullying into legislation. Therefore, it is the duty of an employer to be aware of the cyberbullying activities whether within the workplace or beyond. It has further been argued in this thesis that it is not necessary for an employee to be at work when bullied through social media.¹⁸ Therefore, the person who is bullying a co-worker or employer through social media may be disciplined for their inappropriate conduct outside of working hours. This thesis therefore argues that employers need to implement sufficient workplace policies dealing with what cyberbullying conduct is, that it is irrelevant whether the cyberbullying takes place within the workplace or beyond, and what the consequences of cyberbullying will be. Therefore, to avoid the key legal issues associated with the use of social media in the workplace, an employer will need

¹⁷*Fair Work Act 2009* (Cth) s 789FD. See in general Geoff Wilkinson, 'Brodie's Law Means Workplace and Cyber Bullies Face 10 years in Jail', *Herald Sun* (online), 5 April 2011 <<http://www.heraldsun.com.au/news/workplace-and-cyber-bullies-face-up-to-10-years-jail-under-anti-harassment-brodie-panlock-laws/story-e6frf7jo-1226033612374>>.

¹⁸*Sharon Bowker & Ors v DP World Melbourne Ltd & Ors* [2014] FWCFB 9227 (19 December 2014).

to incorporate a well-structured employment contract as well as social media workplace policies that address out-of-work activities involving social media activities.

The final aim of this thesis was to consider current workplace surveillance and monitoring policies in Australia and to what extent an employer has the right to control and monitor the use of social media by an employee within and beyond the workplace. This thesis argued that workplace surveillance is one approach to monitoring the use of social media by employees in and beyond the workplace. The laws pertaining to workplace surveillance are not uniform¹⁹ and each state and territory has its own laws on how to monitor employees in the workplace.²⁰ In Western Australia, for example, the *Surveillance Devices Act 1998 (WA)* does not specifically refer to workplace surveillance therefore sufficient workplace policies need to be incorporated in order to provide for such monitoring in the workplace.²¹ With the monitoring of employees, it is important for an employer not to breach an employee's privacy in the workplace or to overstep their contractual boundaries.

In terms of workplace policies addressing the use of social media in the workplace, Chapter 4 introduced a discussion on the monitoring of social media use by employees outside the workplace without breaching privacy principles through social media workplace policies. However, when implementing such a workplace policy, employers need a balance between their business interests and the interest of employees in order to maintain a good employer–employee relationship.²²

Furthermore, this thesis highlighted that employment contracts and workplace policies are important tools in regulating, monitoring and controlling an employee's behaviour within and outside working hours. Both employment contracts and workplace policies relating to social media may co-exist, but it was emphasised that employees need to agree to this as one document and understand the consequences when breaching this

¹⁹However, the Australian Law Reform Commission considered implementing uniform laws regarding workplace surveillance and privacy.

²⁰See *Workplace Surveillance Act 2005 (NSW)*; *Workplace Privacy Act 2011 (ACT)*; *Surveillance Devices Act 1999 (Vic)*; *Surveillance Devices Act 1998 (WA)*.

²¹See Chapter 4. This needs to bear in mind the definition of a 'workplace' as discussed in Chapter 2.

²²Dan Svantesson, 'Online Workplace Surveillance' (2012) 2(3) *International Data Privacy Law* 179, 189.

document. However, when social media workplace policies are linked with employment contracts, this thesis submits that employers need to clearly identify to employees the different kinds of monitoring of devices. This applies whether employers sponsor a device, which is subject to control and monitoring, or employees use their own device (BOYD), which is subject to monitoring of social media activities. Employers may, to a certain extent, control and monitor the use of social media on an employee's device outside of working hours. This will depend on the type of information, harm to the interests of the business and breach of privacy principles.

5.3 KEY RECOMMENDATIONS

The key recommendations for this thesis are as follows.

Recommendation 1

That social media and technology should be directly addressed in the employment contract and periodically reviewed against the contractual duties. This should be accompanied by ongoing training and awareness in the workplace for employees on the use of social media within and beyond the workplace and identify legal issues and risks associated with the use of social media.

Recommendation 2

That social media workplace policies should be implemented to deal with the control and monitoring of inappropriate use of social media outside the workplace and the consequences of such misuse. These social media policies should also be accompanied by the employment contract dealing with social media and technological change in the workplace. Social media policies should be regularly reviewed and updated. Policies should be readily available to employees and supported by information and training sessions.

Recommendation 3

That there is a need for law reform by states and territories dealing with privacy and workplace surveillance of social media use within and beyond the workplace. It is recommended that there is a need for substantial changes to workplace surveillance

legislation to certainly greater certainty and consistency, and to better reflect the reality of technology in the workplace. For instance, it is recommended that the WA legislation be amended to include provisions on data and computer surveillance. Moreover, given the limited protection afforded by the *Privacy Act* and the patchwork of privacy laws in states and territories, further law reform is needed in this area. Given that WA does not have a privacy law regime, this is one jurisdiction in which law reform is recommended.

5.4 FURTHER RESEARCH

This research has focused specifically on the use of social media in the workplace, with special reference to selected legal issues and the misuse of social media outside and beyond the workplace. Through examining this specific topic and the issues it presented, this thesis has sought to contribute to improved policy and practices in the workplace, and also in the field of social media and employment law. However, there is further opportunity for research as this thesis did not intend to cover all aspects of social media in the workplace.

Privacy and technology is a complex issue and area of law in which further research could be conducted with a view to supporting law reform.

Workplace bullying, including cyberbullying, remains a concern in the workplace and although there is an extensive body of research on workplace bullying, there is scope for further legal research in this area.

Workplace surveillance is also an ongoing contentious issue, and there is scope for further in-depth research on surveillance in the workplace, which may include international comparative law perspectives.

5.5 CONCLUDING REMARKS

The quote ‘Businesses need to fully transform to properly address the impact and demands of social media’ by Eric Qualman²³ indicates the multiple concerns social media in the workplace imposes on the employer–employee relationship. For the employment relationship to function successfully, the workplace needs to adapt to and accommodate the use of social media. However, there needs to be clear boundaries and responsible use of social media in the workplace. The issues and case law dealt with in this thesis demonstrate the need for control and monitoring of social media in the workplace and beyond where it impacts on the employment relationship. Therefore, by employers implementing appropriate and effective social media policies as a tool to positively and constructively monitor and control the use of social media in the workplace and beyond, while recognising the benefits of social media, it is considered a step in the right direction.

²³Erik Qualman, *Socialnomics: How Social Media Transforms the Way We Live and do Business* (John Wiley & Sons, 2011) 36 in Francois Quintin Cilliers, ‘The Role and Effect of Social Media in the Workplace’ (2013) 40 *Northern Kentucky Law Review* 567, 567.

APPENDIX 1

MODEL WORKPLACE SOCIAL MEDIA POLICY

DRAFT CLAUSES FOR A WORKPLACE SOCIAL MEDIA POLICY²⁴

A. PURPOSE

The purpose of this Social Media policy is to inform employees on the appropriate use of Social Media within and outside the workplace for work purposes, whether employees are using their own devices or [Company]-sponsored devices, and to set out the responsibilities and obligations of [Company] and its employees.

B. SOCIAL MEDIA POLICY STATEMENT

Social Media is changing the workplace in many aspects. [Company] recognises the need for employees to use Social Media and to connect with each other; however, because Social Media distorts the line between personal activities and professional activities, there is a need to ensure the appropriate use of Social Media in the workplace and for work purposes in order to protect the [Company's] and employee's reputation from any damage through the inappropriate use of these Social Media platforms.

C. SCOPE OF POLICY

This policy applies to all employees (permanent, part-time, casual, temporary) of [Company].

²⁴The following are policies selected for the desktop survey: New South Wales Industry, *Social Media Policy* (12 April 2016) <<http://www.industry.nsw.gov.au/policies/items/social-media-policy>>; Business Victoria, *HR Policy and Procedure Manual Template* (21 December 2015) <<http://www.business.vic.gov.au/search-results?q=social+media+policy>>; Robert McHale, *Monitoring, Regulating, and Disciplining Employees Using Social Media* (30 August 2012) Pearson <<http://www.quepublishing.com/articles/article.aspx?p=1945832>>; Beachcroft, *Social Media Policy Template* (2014) <<https://www.hashdoc.com/documents/3436/template-social-media-policy#!>>; Spencer Hamer, 'Social Media' (2013) 10 *HRfocus* 1.

D. DEFINITIONS

1. **Company** refers to the ‘employer’ [insert name].
2. **Employee** refers to the ‘employee’ under the relevant section of the *Fair Work Act 2009* (Cth) as either a ‘national system employee’ or having its ordinary meaning.
3. **External** refers to Social Media platforms outside the Company domain in an employee’s private space.
4. **Internal** refers to Social Media platforms within the Company which is only accessible by employees through the Company domain.
5. **Misconduct** refers to an employee breaching this social media policy and any terms of the employment contract through engaging in inappropriate use of Social Media platforms stated in (4) above, internally and externally where indicated as breach.
6. **Personal Information** refers to ‘personal information’ under the relevant section of the *Privacy Act 1998* (Cth) as:
 - Information or an opinion about an identified individual, or an individual who is reasonably identifiable:
 - (a) whether the information or opinion is true or not; and
 - (b) whether the information or opinion is recorded in a material form or not.
7. **Reasonable** refers to the appropriate use of Social Media by an employee as stated in Clause G of this Policy.
8. **Social Media** refers to various social networks, which include but is not limited to, Facebook, Twitter, YouTube, LinkedIn, Blogs and Discussion Forums, and where communication is generated online.

9. **Social Media Policy** refers to this made in the workplace regarding the appropriate use of Social Media and permitted monitoring thereof by an employer and do not refer to any legal principles unless clearly stated.
10. **Workplace** refers to a ‘workplace’ under the relevant section of *Work Health and Safety Act 2011* (Cth) as:
 - (1) a workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.
 - (2) In this section, place includes:
 - (a) A vehicle, vessel, aircraft or other mobile structure; and
 - (b) Any waters and any installation on land, on the bed of any waters or floating on any waters.

E. USE OF PERSONAL INFORMATION AND PRIVACY

1. The *Privacy Act 1988* (Cth) is the legislation dealing with use of personal information and [Company] will regulate the collection and handling of personal information through this legislation. Furthermore, the employer is responsible for the safeguard of personal information of an employee under each State or Territory laws where applicable.
2. If an employee provides personal information to [Company], whether pre-or during employment, [Company] may not disclose this information to any other person under the relevant legislation.
3. Clause 2 of this part will further apply when personal information of an employee is provided by a third party. [Company] will handle this information as if it was provided by the employees personally.

F. SOCIAL MEDIA USE BY EMPLOYEE IN THE WORKPLACE

1. All employees of [Company] must obtain written approval by [Company] to use Social Media platforms as a representative of [Company]. [Company] trusts and requires an employee exercising appropriate responsibility when

using Social Media in order to obey the duties imposed on the employee by [Company].

2. Employees who are instructed and authorised to represent [Company] on Social Media platforms internally, must conduct themselves professionally and act in the best interest of [Company] by disclosing their name and affiliation with [Company].
3. Employees are responsible for any material posted on or comments made on Social Media. To avoid a breach of the policy, an employee may not post or re-post any information or make comments on Social Media that:
 - Harms, intimidates or insult [Company] and its partners, clients and other employees;
 - Defames and may cause harm to the reputation of [Company] and its partners, clients, employees and other persons or organisations; and
 - Discloses personal or confidential information of [Company] and its partners, clients or other employees.
4. To ensure that employees comply with this Policy and use of Social Media appropriately, [Company] will:
 - Provide mandatory training to new and existing staff on the use of Social Media within and outside the workplace.
 - Where appropriate, make available an official Social Media account specifically approved by [Company] to distinguish between private and work-related activities.
 - Not include any personal views or comments on Social Media platforms.
 - Ensure [Company's] policy do not conflict with any of the Social Media Platforms' terms and conditions.
5. If an employee is uncertain on whether to post information or comments about [Company] or interact, as a representative, with other businesses regarding

information about [Company], he or she should seek advice from [insert name] or the Legal Department.

G. PERSONAL USE OF SOCIAL MEDIA

1. [Company] authorises the reasonable use of Social Media in the workplace on an employee's personal device. The use of Social Media Platforms during official working hours for private and personal purposes are subject to the following:
 - Use of personal Social Media Platforms must occur out of working hours, which means during lunch time or before/after scheduled working hours.
 - Use of personal Social Media Platforms must not interfere with an employee's performance.
 - Use of personal Social Media Platforms must be used in compliance with [Company's] other Policies and Code of Conduct.
 - Employees may not use work email address to create a personal Social Media account.
2. This Social Media Policy does not apply to the personal use of Social Media by employees on their personal devices outside of the workplace and work activities unless posts or comments refer to directly or indirectly to [Company] and may harm the reputation of [Company] or its employees, or are in breach of [Company] policies and the Code of Conduct.
3. An employee acting in their personal and private capacity, using personal devices, must not post, upload, forward, tweet, re-tweet:
 - False and defamatory material of [Company], clients or other employees;
 - Confidential information of [Company] to other staff or businesses;
 - Private information of other employees, intellectual property of [Company] or copyright material; or
 - Any other material that may be directly or indirectly harmful to [Company] and its employees.

4. If an employee becomes aware of the inappropriate or unlawful use of Social Media that relates directly or indirectly to the [Company] it should be reported to [insert name].

H. MONITORING OF SOCIAL MEDIA

1. Employees should be aware that any use of Social Media websites on [Company] sponsored devices during or outside of working hours will be monitored by the [Company]. The Company reserves the right to prohibit and limit access to Social Media sites on [Company] sponsored devices where there might be inappropriate use thereof.
2. Any employee who makes inappropriate use of [Company] sponsored devices inside or outside of working hours will be in breach of this Policy and subject to a disciplinary hearing.

I. BREACH OF SOCIAL MEDIA POLICY

1. All employees must comply with this Social Media Policy and a breach of any terms of the Policy will result in misconduct and breach of their duties in the employment contract which is subject to disciplinary action.
2. Disciplinary action for serious breach of the Social Media Policy by an employee may include:
 - termination of employment contract;
 - non-renewal of a contract;
 - verbal and written warnings;
 - suspension from the workplace; and
 - mandatory education and training.

J. ACCEPTANCE OF SOCIAL MEDIA POLICY

I, [employee name] confirm that I understand and will comply with the terms contained in the Social Media Policy of [Company]. I acknowledge that I am responsible for the appropriate and professional use of Social Media while in the employ of [Company].

NAME:

TITLE:

SIGNATURE AND DATE:

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