CHILLING TIMES:
LABOUR LAW AND THE REGULATION OF SOCIAL MEDIA POLICIES

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This paper is concerned with the implications for labour law of social media and the social media policies that employers increasingly are developing to regulate the behaviour of employees online. The growing use of web-based technologies presents many challenges to the employment relationship and labour law. One particular set of challenges involves the emergence of social media as a new frontier in the expression of collective and individual employee voice. To regulate employees' online behaviour, it is increasingly common for employers to establish detailed social media policies with wide-ranging prohibitions on social media use, including online activity in employees' personal lives. Employers may use alleged infractions of these policies to found misconduct allegations and subsequent disciplinary action, including termination. The object of this paper is to consider the ways in which organisational social media policies may regulate off-duty discussions about working lives, with a focus on the Australian situation, and the limits which labour laws impose on the content of this regulation. To examine regulation by social media policies in Australia, this study also draws on United States law in this area. The US case provides a comparative lens through which to view Australian law and policy in this area, in particular, through use of the National Labor Relations Board's reasoning in protected concerted action cases, to consider the implications of social media policies in Australian organisations. Through its focus on the implications of these policies for the regulation of employees' online behaviour outside work, this paper is concerned also with the purpose and limits of labour law.

Social media have changed forms of communication and expression within human relationships, with interactions through these technologies becoming increasingly visual, unedited and uncensored. Brice, Fifer and Naron (2012) have observed 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'. However, in 'creating a murky middle ground between public and private conduct' (Akers 2009), online technologies have also opened new windows through which employers may view and potentially regulate employees' off-duty conduct. This could enable a re-emergence of employer control over employees' lives resembling that associated with the traditional master-servant relationship, but without concomitant reciprocity

from employers. (Thornthwaite, 2013) Underpinning master-servant law was an assumption that an employer was entitled to control virtually all aspects of a servant's life.

A body of case law is emerging which deals with the intersections between social media and employment. To date, this case law has been concerned largely with unfair dismissal actions in a number of countries, with employees' online conduct, both within and outside work providing both grounds for termination and evidence for misconduct which may lead to dismissal. Many of these cases raise the issue of whether social media is affecting the scope of employees' implied contractual duties to employers by expanding employer regulation of their off-duty behaviour. In a survey of unfair dismissal cases involving social media use in Australia, Thornthwaite (2013) found that one implication of the growth of social media has been that employees are never entirely off-duty, and there is a real possibility that for employees to comply with their contractual duties they cannot safely communicate about their working lives in any online forum.

Alongside the explosion in social media technologies, social media policies have become increasingly a standard element of human resource management policy in employing organisations. Indeed, in a recent decision in Australia's national industrial tribunal, the Fair Work Commission (FWC),[1] Commissioner Roberts commented on the employer's failure to implement such a policy, observing that 'In the current electronic age, this is not sufficient'.[2] However, in Australia, while business advisory bodies and legal commentators have provided copious advice on what such policies should contain, their content and regulatory purpose has received little critical analysis (Miller and Markoska 2011; Smith 2011; Business Victoria; Economic Development Directorate). In the United States a growing body of litigation has examined whether specific clauses in employers' social media policies contravene the protected concerted action provisions in the *National Labor Relations Act 29 U.S.C. (*NLR Act*)*. In many of these cases, the National Labor Relations Board (NLRB) has commented extensively on the capacity of social media policies to chill collective voice and action contrary to section 7 and 8 of the Act. In 2012, the Board issued a report giving guidance regarding when restrictions on employees' social media usage might reasonably be construed to chill the exercise of those rights. Often, it is the broadness of clauses concerning online activity that falls foul of the law because employees could reasonably interpret them to proscribe discussion about work and working conditions. This may include private venting of opinions about work and working lives, but may also extend to voicing and canvassing industrial relations issues. (Cote, 2007; Richards 2008; Dennis, 2011) In contrast, while Australia's Fair Work Commission, has recently criticised several

[1] Formerly Fair Work Australia.
[2] *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 (19 December 2011) at [87]

social media policies for being overly broad and punitive, for the most part, these policies have been promulgated without legal challenge.

Social media policies typically include prohibitions on behaviour both within and outside the workplace, as well as disciplinary sanctions including dismissal for non-compliance. A key reason for this is to catch conduct that may damage the organisation's reputation and business. Employers have a legitimate interest in protecting the interests of the organisation and its stakeholders, and in avoiding potential liability that may arise from their employees' online communication. (Hudson and Roberts, 2011-2012) Arguably, however, the often 'seemingly benign' provisions in social media policies (Brice, Fifer and Naron, 2012) also enhance employers' capacity to scrutinise and control the private lives of employees beyond the limits which law as well as custom and practice had established in the post-master and servant era of labour law.

In considering the impact of social policies, this paper focuses on two related issues. First, it examines whether employers' social media policies are expanding their regulation of employee voice in their personal lives and the limits which national labour laws might impose on this encroachment, with a focus on Australia and the United States. Second, the paper analyses the potential of these policies to repress the voicing of issues to do with work and working conditions by employees outside work. In addressing these questions, this paper presents the findings of a study on the content of a sample of social media policies. The analysis is based on an examination of fifteen social media policies published on the internet, including five from employing organisations operating in Australia in each of three sectors: the private, not-for-profit, and public sectors. Framework policies published by business advisory bodies in each sector are also examined. The policies were selected randomly from those published and freely available on the internet, and found through a google search, on the basis that this would provide a small but representative sample of policies currently in use. In presenting the findings, this study begins by examining current law concerning regulation of individual social media use in employees' private lives in Australia and the United States. This is followed with an outline of the content of social media policies, a detailed analysis of approaches to regulating employees' off-duty use of social media, and finally, a discussion of the implications of the findings for the nature of employment relationships. The analysis uses the NLRB's reasoning on social policy clauses challenged under the NLR Act's protected concerted action as a guide for when employees might reasonably construe sections of policies operating in Australian organisations to chill or preclude the expression of mutual concerns about work and working conditions.

1. How does US law currently regulate discussion of work in employees' private lives?

In the United States, the NLRB has increasingly been required to consider employee social media use as an issue in industrial law cases. The basic common law rule governing employment is the employment-at-will doctrine which allows employers to terminate an employee for any reason so long as the termination does not violate contracts or federal or state legislation. Most state courts have created judicial exceptions, such as public policy and implied contract exceptions, which provide limited but significant protections against employer efforts to limit employees' off-duty activities. (Cote 2007; Gely and Bierman 2007) However, US law also provides some protections for employees in relation to discussing work and working lives on personal social media channels, none of which are available in Australia. This section considers the four main forms of law, including US privacy legislation, the Constitutional right to freedom of speech, off-duty conduct statutes, and, perhaps the most pertinent, the protected concerted action provisions in the NLR Act.

In the US, State and federal privacy law generally enables employees to bring claims for invasion of privacy against employers on several grounds, perhaps the most relevant to social media use being 'unreasonable intrusion on the seclusion of another'. This does not extend to any reasonable expectation of privacy when information is stored on an employer's property but nonetheless has a broad application. (Dennis, 390-392) The US Constitutional freedom of speech provisions, contained in the First Amendment, may also give employees some protection in relation to online discussions about work and working lives. Under the First Amendment, an employer cannot discipline or terminate public sector employees who engage in expressive activities which satisfy the Pickering-Connick test: that the employee is speaking on matters of *public concern* and the interests of the employee, as a citizen, do not outweigh the interests of the State on the matter. Currently, non-government employees do not receive First Amendment protection because under the State Action Doctrine, it applies only to government action, not actions of private persons. However, there are increasing indications that courts may be entertaining the First Amendment argument also in relation to *private* sector employment claims. (Dennis, 2011, 389-392; Mintz 2011)

Some states, including New York, Colorado, California and North Dakota, have enacted off-duty conduct legislation which has codified employee rights not to be regulated outside work. These statutes, subject to varying exceptions, protect against termination, and in some cases, any adverse action, for lawful activities off the employer's premises during non-working hours. (Hudson and Roberts 2011-2012) These statutes appear to provide legal protection in the case of off-duty social media use, although, as Gely and Bierman (2007) note, ease and effectiveness of enforcement varies substantially.

Federal industrial law in the US also protects employees against adverse action for conduct that is protected concerted action under Sections 7 and 8 of the NLR Act. These rights apply to public and private employees and union and non-union employees. Section 7 guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) makes it unlawful for an employer to 'interfere with restrain, or coerce employees in the exercise of the rights guarantees in section 7'. These provisions concern the rights of employees to work together to improve working conditions. An employee's social media activity may constitute protected, concerted activity if online comments or discussions amount to promotion of common goals relating to wages or working conditions.

Generally, 'concerted activities' include discussions that an objective observer could determine are intended to spur group action. However, collective involvement is not a requirement for protection: in certain circumstances, individual conduct is also protected. On the question of whether communication on social media platforms when employees are off-duty may constitute protected concerted action, NLRB judgments have canvassed numerous issues that Australian tribunals have not yet had to consider. The NLRB has developed four standards of varying permissiveness to identify the circumstances necessary for individual protection to apply. One of these, the *Mushroom Standard* recognises that group activity often must begin with individual initiative and protects individual activity which induces or prepares for group action to correct a grievance or complaint. According to this approach, it is necessary to protect individual actions because 'if an employer can dismiss with impunity an individual employee who attempts to initiate group action, the employer will never have to face group action'. (Nereim, 1981-2, 821) The even more permissive *Benefit Standard* protects an employee's individual activity if it potentially benefits fellow employees, regardless of whether there exists an intention to induce co-worker interest or group activity. (Nereim; Smith and Parr, 182-3)

NLRB decisions and published guidelines have also elaborated on when an employers' social media policy will fail to protect the organisation in cases concerning protected concerted action. The Board has ruled that an employer violates the NLR Act not only where its social media policy explicitly restricts protected activities, but also when it is overbroad and would 'reasonably tend to chill employees in the exercise of their Section 7 rights'. For the NLRB, those rights include a broader right to discuss wages, hours and the working environment with co-workers and third parties. The NLRB has found that employer policies which prohibit or discourage employees from disclosing their wages or working conditions may have a chilling effect. The Board has also advised that rules are

unlawful when ambiguous as to their application to concerted protected activities, and/or contain no limiting language or context that would clarify to employees that the rule does not curtail rights.

The Board has adopted the three-pronged *Lutheran Heritage* test[3] to establish when a policy violates the NLRA by being overbroad. These conditions are that employees would reasonably construe the language to prohibit such activity, the rule was promulgated in response to union activity and/or the rule has been applied to restrict the exercise of legal rights. Brice, Fifer and Naron observe that most employer's policies do not explicitly restrict protected activity, and 'their lawfulness turns on the far more subtle and fact intensive question of whether employees would reasonably construe them as doing so'. The NLRB has identified many clauses as unlawfully broad, including provisions on confidentiality, privacy, contact information, use of company logos, photographs, and the tone of online postings. Also found to be overbroad are clauses prohibiting 'disparagement' of the company or co-workers, 'embarrassing' or 'defamatory posts', 'false' or 'misleading' communications, 'inappropriate' discussions and provisions aimed at discouraging employees from communicating about work issues externally. NLRB has also ruled against clauses that require employees to report co-workers' behaviour online. (Cote 2007; NLRB 2012b; Gordon 2011b)To illustrate the NLRB's reasoning in relation to social media policy clauses that fall foul of the protected concerted action provisions, Table 1 provides the Board's reasoning for finding a variety of clauses unlawful.

At the same time, the Board has also affirmed when certain provisions will not be unlawful. For example, policies may not be overbroad if they include a disclaimer that explicitly informs employees that the employer will not construe or apply the policy in a way that improperly interferes with their legal rights. (NLRB 2011; Gordon 2011b) Similarly, rules which clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that employees would not reasonably construe them to cover protected activity, are not unlawful. (NLRB 2012c)

Table 1. Examples of Provisions that NLRB has determined are overbroad or otherwise unlawful in Social Media Policies.

Provision	**NLRB Reasoning**
'Don't release confidential guest, team member or company information.'	This would preclude employees from discussing or disclosing information regarding their own conditions of employment, and those of co-workers. (Target Corp., Case 29-CA-030713)
'Offensive, demeaning, abusive or inappropriate	This proscription would preclude criticisms of the

[3] *Martin Luther Memorial Home, Inc d/b/a/ Lutheran Heritage Village-Livonia and Vivian A. Foreman*, Case 7-CA-44877, 343, NLRB 646 (November 19 2004).

remarks are as out of place online as they are offline, even if they are unintentional'	Employer's labour policies or treatment of employees. (General Motors, Case 07-CA-153570)
'Team Members may not reference…, cite or reveal personal information regarding fellow Team Members…without their express permission'.	Precludes employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with each other or with non-employees. (Giant Eagle, Inc.)*
'Any statements which lack or are reckless as to truthfulness or which cause damage to… the reputation or goodwill of the Hospital, its staff or employees in the community or otherwise'.	This is a broad term which would commonly apply to protected criticism of the Employer's labor policies or treatment of employees. (Flagler Hospital)**
'Employees are prohibited from posting information regarding [Employer] on any social networking sites.... that could be deemed material non-public information or any information that is considered confidential or proprietary.'	The term 'material non-public information', in the absence of clarification, is so vague that employees would construe it to include subjects that involve their working conditions. The terms 'confidential' or 'proprietary' would reasonably be interpreted to include information concerning terms and conditions of employment. (Clearwater Paper Corp, Case 19-CA-064418)
'Avoid harming the image and integrity of the company'.	Employees would reasonably construe this to prohibit protected criticisms of the employer's labor policies or treatment of employees. (Clearwater Paper Corp, Case 19-CA-064418)
'You may not make disparaging or defamatory comments about [Employer], its employees, officers, directors..... Remember to use good judgment.'	Employees would reasonably construe this prohibition to apply to protected criticism of the employer's labor policies or treatment of employees. (DISH Network, Case 16-CA-066142)
'Use of company logos, photographs of any company store, brand or produce…is not permitted without written proper authorization…'	Would restrain an employee from engaging in protected activity such as posting pictures of employees carrying a picket sign depicting the company, peacefully handbilling in front of a store or wearing a tshirt portraying the company logo.(Giant Eagle, Inc) *
'Employees who receive unsolicited or inappropriate electronic communications from persons within or outside [the employer] should contact the President or the President's designated agent.'	Employees could reasonably interpret this rule to restrain their right to communicate with fellow employees and third parties such as a union regarding terms and conditions of employment. (Us Helping Us, Case 05-CA-036595)

Sources. *Memorandum OM 12-59,* Office of the General Counsel, NLRB, May 30, 2012a; *Memorandum OM 11-74,* Office of the General Counsel, NLRB, August 18, 2012b; * Giant Eagle, Inc. Case No.6-CA-37260 *2011 NLRB GCM LEXIS 46* (June 22 2011); **Fagler Hospital, Case No.12-CA-27031 *2011 NLRB GCM LEXIS 45* (May 10 2011)

Thus, in the recent Walmart case, the NLRB concluded that the company's social media policy was not ambiguous because it provided sufficient examples of prohibited conduct such that, in context, employees would not reasonably construe the rules to prohibit section 7 activity. For instance, Walmart's rule entitled 'Be Respectful', which exhorted employees to be respectful, 'fair and courteous', provided sufficient definition and examples of the conduct it sought to constrain so that employees could not construe reasonably that it prohibited s.7 activity. For instance, the rule

cautioned employees to avoid posts that "could be viewed as malicious, obscene, threatening or intimidating." It further explained that prohibited "harassing or bullying" posts would include "offensive posts meant to intentionally harm someone's reputation" or "could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy." (NLRB 2012c)

2. Employer control of employee's private life in Australia

In Australia, the limits to an employer's control of employees' activities outside work are based largely in common law. In particular, the boundary rests heavily on judicial interpretations of obligations implied into the employment relationship, including duties of obedience, fidelity, good faith and cooperation. These duties, which originated in master-servant models of regulation, are based on the personal subordination of employees to employers rather than an equal status between the parties. (Deakin and Wilkinson, 2005, 61-66) As McCallum (2000) has pointed out, under master-servant laws, 'servants' were required to obey their masters *at all times.* With the shift in common law from basing the employment relationship on status (that of master and servant) to contract (between employer and employee),'[4] courts have held that an employee ' is entitled to a private life.'[5] Nonetheless, in certain circumstances, such as where off-duty conduct breaches an implied duty, courts have held that employers are entitled to discipline employees for it.[6]

Essentially, implied common law duties operate to prohibit behaviour inconsistent with an employee's work performance and hence with continuation of the employment relationship on the basis that it destroys trust or otherwise injures proper performance of their contractual obligations. An employer must be able to show a sufficient, requisite connection between the employee's off-duty conduct and the employment relationship legitimately to base an adverse action upon it. The connection may be that the conduct causes significant detriment within the workplace, serious damage to the employer-employee relationship, or damage to the employer's interests by threatening its reputation, performance or efficiency. As well, it has long been established that 'the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.'[7] The decision of the Full Bench of the national tribunal in *Telstra and Streeter*, arguably made the degree of gravity required less

[4] *Byrne v Australian Airlines* [1995] 185 CLR 410 at [436]
[5] *Rose v Telstra Corporation Ltd* (unreported, AIRC Print Q9292, Vice President Ross, 4 December 1998).
[6] R Owens, J Riley, and J Murray, *The Law of Work*, Oxford University Press, Melbourne, 2011, at 213; For discussion of employee duties and the public -private distinction, see also: B Creighton and A Stewart, *Labour Law,* The Federation Press, Sydney, 2010, at 409-412; *Robb v Green* (1895) 2 QB 315 at[317]*;* and *McManus v Scott-Charlton* (1996) 140 ALR 625
[7] *Rose v Telstra*, above n 5.

predictable, by determining that after-hours conduct need only cause 'difficulties' at work to provide grounds for dismissal.[8]

For employees in Australia, there is no statutory or common law right to privacy which might protect them against encroachment of employer control into personal lives. The common law has not legally recognised a right to privacy as such, although in *Australian Broadcasting Corporation v Lenah Game Meats*[9], the High Court did not rule out development of a privacy tort. In several judgments, lower courts have since held the cause of action to be part of common law.[10] One factor impeding further development of this legal action, however, is that the concept of privacy itself remains so contested. (Thornthwaite 2013; Mason 2006; Doyle and Bargaric 2005) Overall, common law currently is ill-equipped to protect employees against employer intrusions into their personal lives. The emerging implied duty of mutual trust and confidence may catch employer conduct which unreasonably intrudes upon an employee's privacy, but its application in Australian law remains haphazard and unsettled. As well, in some circumstances, the Privacy Act 1988 (Cth) may nonetheless override such common law obligations.

The Privacy Act 1988 (Clth) is confined largely to regulating information privacy interests. While the Privacy Commissioner has questioned the need for systematic and pervasive surveillance of staff internet activities, the Act does not limit employers' rights to view private social networking websites of employees or require them to check the veracity of information found. Nor does it preclude employers from making and retaining records of sites they access, or passing that information to third parties. (Russo et al 2012, 12; Creighton and Stewart, 2010, 576-7) However, some limits do apply and may be pertinent to the regulation of employees' online behaviour when off-duty. For example, to comply with the Privacy Act, employers must only collect personal information that is necessary for their function, use fair and lawful ways to collect it, and not be unreasonably intrusive (Jarrett 2010).

The indeterminacy of contractual commitments and obligations implied by the common law allows for their application and scope to change over time as circumstances change at work. Legal scholars along with institutional economic theorists have argued that this indeterminacy is an essential aspect of the employment contract: rather than regulating a simple exchange transaction, it regulates a wage-effort bargain that is continually subject to renegotiation. Thus, the employment

[8] *Telstra Corporation Ltd v Streeter* (2008)170 IR 1
[9] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199
[10] *Gross v Purvis* (2003) Aust Torts Reports, 81-706; *Doe v Australian Broadcasting Commission* [2007] VCC 281.

contract also contains elements of a relational contract. (Freedland, 2003, 88-92; Deakin, 2002, 180-182) These include commitments, rights and other obligations directed at maintaining the work relationship over time through explicit and implicit normative regulation. (Freedland, 88-89) The extent to which these commitments extend beyond the workplace into the private lives and expression of employees remains unclear. However, the explosion of social media is challenging the traditional boundary of that regulation. A key reason why social media may extend the scope of these commitments is that it involves published written comments. While Australian courts are unlikely to find that comments made by individuals at hotels or clubs about their work or working conditions constitute a breach of duty sufficiently grave to indicate rejection or repudiation of the employment contract, the medium of online communication alters that position.

In Australia, employees do not have rights directly comparable with the US protected concerted action provisions. The adverse action provisions in the FW Act apply to protect employees from 'adverse action' for exercising a workplace right, which includes making a complaint or inquiry in relation to a person's employment (s.341). It is also unlawful for employees to be dismissed, treated detrimentally, or have their position altered to their prejudice because they engage in industrial activity. When employees post comments or criticisms about working conditions and management on social media forums, even when these are impetuous expressions of frustration, they may constitute industrial action, as broadly defined in s347. For instance, postings may represent or advance the views or claims of an industrial association (s347(b)(ii)). However, according to the High Court judgment in *Barclay*,[11] for an adverse action claim to proceed, the claimant must prove the adverse action happened for the proscribed reason. This means that courts will have to balance the reliability and weight of evidence led by the employer against evidence by the employee in order to establish the reasons why the decision-maker engaged in the adverse action. This will be extremely difficult to prove if no direct testimony is given by the decision-maker who acted for the employer.

Australian law imposes no specific regulatory limits on the content of an organisation's social media policy. Thus, the Commonwealth Bank introduced a policy in 2011 which threatened employees with disciplinary action, including dismissal, if they did not report criticism of the bank by others on social media forums. Employees were required to notify their manager immediately on becoming aware of 'inappropriate or disparaging content and information' on internet sites and to assist the bank with any associated investigations and removal of the material. (Hannan, 2011) These provisions could reasonably be construed as prohibiting employee discussions of mutual interests even when off-duty, and in the US might have been caught by the protected action provisions. It was only when the

[11] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 at 45, 101.

Finance Sector Union demanded the policy's suspension, and used print and television media to accuse the Bank of restricting employees' freedom of expression inside and outside the workplace, that the Bank agreed to negotiate changes to the policy.

In considering whether to approve an enterprise agreement, in the Broadmeadows Disability Services case, one of the issues for FWC was whether the proposed social media clause went too far in its regulation of employees. This was pertinent to establishing whether the Agreement as a whole passed the 'better off overall test' (BOOT). The BOOT establishes whether on balance, the beneficial and less beneficial provisions of an agreement cause detriment to employees when compared to provisions already existing under the relevant Modern Award. Commissioner Gooley determined that the social media clause in the proposed agreement imposed limitations on the freedom to talk about work that went far beyond obligations under common law and the Modern Award. The clause:

> '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'.[12]

Commissioner Gooley commented that the common law already regulates social media use that affects confidentiality, would damage an employer's reputation or constitutes gross misconduct. He rejected the need for further obligations which essentially imposed a blanket ban on communicating about working life. The effect of this decision is limited, however, because it could apply only where such provisions are contained in a proposed enterprise agreement, and thus subject to the BOOT.

3. Research Findings

3.1 *Scoping Social Media Policies*

A review of social media policies available on the internet indicate that they are remarkably similar in terms of structure and content. (Hudson and Roberts, 2011-12; Business Victoria 2013; Economic Development Directorate 2013) Most contain clauses pertaining to the following:

- Statement of Purpose
- Definition of 'social media'
- Scope: to whom does the policy apply?

[12] *Broadmeadows Disability Service*, [2011] FWA 4063, 29 June 2011, at [105].

- General guiding principles on use
- Detailed policy on use - including:
    - Standards of online conduct and responsible behaviour, including prohibitions on harassment, discrimination, disparaging and offensive communications.
    - Disclosure and confidentiality boundaries, including such matters as protecting confidential information and proprietary information; use of branding and trademarks; and having regard to business sensitivity.
    - Who has authority to speak on the employer's behalf?
    - Rules regarding copyright material
    - Transparency and the Requirement to disclose identity
    - Monitoring provisions
    - Sanctions for non-compliance/policy breach
    - Specific statement on personal use and private behaviour outside work.

A notable feature of the policies surveyed is that while all identify employees' obligations to their employer in relation to online conduct, few identify any employees' rights in relation to use of these technologies. Thus, for instance, most do not include any rights to privacy for employees such as protection against unreasonable intrusion into personal lives. Further, while policies commonly refer to disciplinary consequences of inappropriate online activity, they rarely give employees specific information concerning possible legal consequences of social media conduct under company, marketing, discrimination and other laws.

3.2 Regulating personal conduct on social media outside work.

Almost every social media policy examined contains a specific restriction on social media conduct in employees' private time, but the breadth of provisions varies considerably. Table 2 documents the extent and terms with which each of the fifteen surveyed policies applies to employees' personal social media use. Only one organisation, Thomson Reuters, makes no reference to off-duty social activity. Most, including all the not-for-profit bodies, while referring to off-duty conduct, appear only to regulate online expression where an individual employee's association with the organisation is also apparent and their conduct could impact adversely on their employment and/or the organisation's interests. Although Dell does not refer explicitly to personal use, along with IBM, it imposes general requirements that employees observe the organisation's espoused ethical principles when using social media at any time, including outside work. The policies of public sector organisations also have this effect, reminding employees to comply with their sector's code of conduct. Traditionally, government employees have been expected to display dedicated professionalism in their personal conduct, consistent with 'public service' values and norms, and these policy statements affectively reiterate this commitment. Somewhat exceptional, the media

company, Associated Press, while otherwise silent on employees' online behaviour when off-duty, imposes a blanket restriction on political expression in any forum during their personal time.

IBM	One of IBM's core values is "trust and personal responsibility in *all* relationships." 'IBM trusts—and expects— IBMers to exercise personal responsibility *whenever* they participate in social media'.
Dell	The policy does not explicitly mention off-duty use, but applies to personal online conversations that may impact on the company.
Pfizer	The policy contains no specific provision concerning off-duty use. The policy does apply to all workers who use social media on company equipment or make reference to the company or its interests. By definition, Pfizer's interests include, for instance, its business, people, colleagues, work, and policies.
Thomson Reuters	The policy applies explicitly to professional and personal use of social media, and contains special guidelines for 'personal use'. However, personal use is defined in terms of personal use on company equipment at work. Social media outside work is not mentioned.
Associated Press	The policy states that employees may not include political affiliations in their profiles and should not make any postings that express political views. As well, employees must refrain from declaring their views on contentious public issues in *any public forum* and must not take part in organized action in support of causes or movements.'
Lifeline	In their personal use of social media, employees, volunteers or supporters who do not identify themselves as affiliated 'are still counted as representing the organisation' – and therefore must comply with Lifeline's ethics and guiding principles for social media use.
Surf Lifesaving Australia (SLA)	The policy 'does not apply to the personal use of social media platforms by SLA members or staff where the SLA's member or staff makes no reference to SLA or related issues.
Equestrian Australia	This policy 'only extends to Equestrian Australian representatives when they use social media in an official capacity or when referring to Equestrian Australia in a private space'.
BMX Australia	'Due to the unique nature of BMX Australia in Australia, the boundaries between a member's profession, volunteer time and social life can often be blurred. It is therefore essential that Members make a clear distinction between what they do in a professional capacity and what they do, think or say in their capacity as a Member for BMX Australia…'
Melbourne Football Club	'The Club is not seeking to restrict your use of social

	media but to create clear lines between private and Club material and set guidelines where material relates to the Club.'
National Library of Australia	'It is important to note that these guidelines do not apply to employees' personal use of social media platforms where the employee makes no reference to the library related issues and does not identify themselves as an employee.' (Further information on the rights and responsibilities of [Australian Public Service] (APS) employees making political and other comment in a private capacity is contained in the *APS Values and Code of Conduct in Practice…)*
Telstra (Fed)	The policy 'does not apply to employees' personal use of social media platforms where the employee makes no reference to Telstra related issues'. The rules *do* apply whenever an employee makes reference to Telstra-related issues when engaged in personal use of social media.
National Broadcast Network Co (Fed)	When participating in social media as an individual, your legal obligations as an employee, consultant or contractor with NBN remain the same as they would be in other contexts of your life, even if you believe you are participating anonymously'. The policy states that: when employees talk about their jobs on social media sites, they must observe the Company's social media rules and any employee …. participating as a private citizen in social media … should do so without damaging the reputation or infringing the intellectual property rights' of the company.
Department of Human Services (Fed)	'The department supports staff who choose to use social media in their capacity as private citizens, however …… you should ensure …you are mindful that your behaviour is still bound by the APS Values and Code of Conduct – even outside work hours'.
Australian Technology Park Sydney (ATPSL)	The policy addresses personal online use explicitly, cautioning staff to recognize the potential to damage the organization in certain circumstances by personal use of social media, and encourages them to approach the online space using sound judgment, common sense and by adhering to ATPSL values and code of conduct.

A host of advisory bodies have also published guidelines for *pro forma* social media policies that organisations can tailor and adopt. For many small and medium organisations, access to such policy templates is useful because it obviates the need to use scarce resources to devise their own principles and processes while enabling them to customise the framework to their needs. The content of these generic guidelines is therefore informative in relation to how organisations more widely are approaching this issue.

The *HR Policy and Procedure Manual Template* which Business Victoria publishes largely to assist small business operators, includes a Social Media Policy in the Personal Conduct section. The framework policy places an expectation on employees to maintain a certain standard of behaviour when using Social Media for work *or personal purposes'*. It applies to all employees who, 'have an active profile on a social or networking site, and post comments on web-based forums, message boards or any other internet sites'. In the section on Private/Personal Use , the template prohibits 'inappropriate behaviour' which might damage the business, any online posting which identifies the individual's association with the business, and also posting or transmitting 'any inappropriate material'. While 'inappropriate behaviour' is undefined, 'inappropriate material' is given some definition through a non-exhaustive list of examples.

In contrast to Business Victoria's template, the recently published draft social media policy which would cover all officers, consultants, contractors and outsourced service providers working for the NSW Government, makes no explicit mention of personal use of social media and apparently applies only to online activity when performing work for the government. The guidelines urge workers to 'be a responsible digital citizen', comply with core values of the public sector and understand the Government's Code of Conduct when using social media. As noted earlier, for government employees, codes of conduct generally extend to aspects of their private lives, but typically only where it has some connection with their employment.

A third generic social media policy caters for not-for-profit sport and recreation clubs in the Australian Capital Territory. Published by the Economic Development Directorate, ACT Government, the policy clearly states that it does not apply to personal use of social media platforms by members or staff unless they make reference to the organisation, clearly identify their association with it and/or discuss their involvement in it. Once a member or employee has drawn attention to any such connection, however, the policy applies to all personal online conduct.

In their stated general approach to regulating personal online expression, the policy templates that the government and not-for-profit advisory bodies have developed and the policies of individual organisations are similar. Only the small business template includes a sweeping provision regulating personal use of social media. Our analysis now turns to the specific focus of this research, on whether, given the specific rules and disciplinary sanctions they contain, these policies might constrain expression of employees' opinions about work and working conditions outside work.

3.3 Could current policies chill employee discussion about work and working conditions?

While most social media policies purport to regulate personal expression in employees' personal lives only as it connects to their employment, consistent also with current Australian common law, the question is whether policies prohibit or restrict discussion of industrial relations issues outside work. Using NLRB reasoning as a guide, analysis of the surveyed policies reveals that fourteen of the fifteen policies directly have the potential to chill such communication. Most contain specific rules, standards of conduct, disclosure boundaries and other prohibitions which are overbroad and have the potential not only for employees to construe them as precluding such discussion, but also, to provide a basis for employer allegations of misconduct. One third of policies also contain provisions that require employees to report on the personal online behaviour of colleagues.

Typically, social media policies emphasise that they apply only to personal, off-duty conduct when the employee makes reference to their employing organisation. The Business Victoria template for private sector firms goes further, requiring that all employees, contractors and sub-contractors must agree not to publish any material in any form which identifies themselves as being associated with the business, a requirement which would prevent discussion of mutual concerns among employees and with trade union representatives. Most organisations, however, require that employees identify themselves when discussing issues to do with the organisation whether at work or off-duty and that they use disclaimers, acknowledging that any opinions expressed are their own and not those of the organisation. Complying with these requirements provides a catch-22 for employed individuals. Once they identify their association to the organisation, they are regulated by the social media policy, and if they breach this, risk termination.

Very few of the surveyed policies prohibit **off-duty discussions about working conditions and other industrial relations issues** explicitly. One exception, the National Library policy, includes in its definition of 'inappropriate use': 'using services for industrial campaigns (apart from messages sent by officials of unions and professional associations for informational or consultative purposes).' ATPSL's policy states that 'ATPSL staff are not to comment on ATPSL policies and work-related matters. ATPSL staff are not to engage in online discussions on ATPSL matters'. Employees could reasonably interpret that the provisions in both policies apply to conversations about employment relations issues, whether collective or individual expressions of voice concerning issues potentially of mutual concern.

Perhaps the provision with broadest scope for constraining discussion about work, however, is the Melbourne Football Club's rule that, 'If you would not say something to a member of the media, do not publish it on any form of social media'. By its lack of definition, this could effectively preclude discussion about almost everything. Similarly, however, the guiding principles in Lifeline's policy,

which include 'I will always ensure my activity does not harm' and 'I will champion Lifeline' could also chill conversations about work issues.

A number of policies contain clauses that would foreclose discussion that involved **criticism of management, particular managers or management policies**. These include provisions that prohibit employees from identifying or commenting on anyone in any social media without such person's consent; disclosing any personal information about other individuals without their consent (where personal information is defined as 'any written or electronic information that relates to an identified or identifiable person') (Pfizer); and making any statements that are unsubstantiated (Pfizer). Lifeline's policy prohibits staff from 'criticising or denigrating' Lifeline and its employees, which could reasonably preclude criticisms of working conditions, management practices and particular managers. Dell's policy cautions employees to 'have conversations rather than push agendas.' IBM instructs employees that 'You should also show proper consideration ...for topics that may be considered objectionable or inflammatory - such as politics and religion'. Another IBM clause that could reasonably be construed as prohibiting discussion about industrial relations issues states that 'while it is fine for IBMers to disagree .... please don't use your external blog or other online social media to air your differences in an inappropriate manner', without defining what an *inappropriate* manner might be. It is this failure to define terms that renders many such clauses overbroad. In a similar vein, the National Library does not elaborate on the *best interests* of the library when it states that 'employees who participate in online communication deemed not to be in the best interest of the Library will be subject to disciplinary action under the Library's Managing Misconduct Policy'. Similarly, like the ACT Economic Directorate policy guide for not-for-profit organisation, the SLA policy contains the rule that staff 'must not comment on, or publish, information that is confidential or in any way sensitive to SLA' without providing any indication of what might be, in any way sensitive. However, even with injunctions such as Telstra's 'be mindful...of not damaging the corporation's reputation, commercial interests and/or bringing Telstra into disrepute', employees could reasonably construe this to apply to discussions about working conditions.

Many policies include broad proscriptions against the **disclosure of confidential or proprietary information** about the organisation, that effectively could preclude discussion about wages and working conditions. In specifying specific categories of information that may be confidential, including financial, intellectual, business performance, sensitive or proprietary information, these provisions could encompass communication and criticism concerning wage rates, enterprise agreement-making, working conditions and management policy. Most public sector policies, which sit atop codes of conduct which bind employees, include relatively simple exhortations to observe

the organisation's values, not to disclose information obtained through work unless it is publicly available and authorised for disclosure. In the policies of private organisations, these sections tend to be more elaborate. For instance, IBM prohibits employees from providing IBM's 'confidential or other proprietary information and never discuss IBM business performance or other sensitive matters publicly'. IBM's policy goes further, stating that 'you must not comment on, or speculate about, IBM's future business performance.....legal or regulatory matters affecting IBM and other similar subjects that could negatively affect IBM. This applies to anyone including conversations with ..... other third parties (including friends)'.

Several policies also contain instructions that online postings must be **completely accurate and not misleading.** In the absence of guidance on the specific application of these terms, such provisions could reasonably be construed as applying to criticisms of industrial relations and human resource management policies and organisational treatment of employees.

One policy contains a provision that would preclude any online conversation about work-related matters **with an employee's own lawyer**. It prohibits employees from disclosing any 'information about ...legal matters, internal or government investigations, or litigation, including in particular your communications with [company] attorneys or outside counsel' (Pfizer). This specifically restricts employees from discussing grievances, disputes and potential claims against employees.

Provisions, which make every employee a potential informant, may also discourage employees from expressing individual and collective voice. Like the Commonwealth Bank policy referred to earlier, a number of the surveyed policies require employees to **report the activities of others online**, including colleagues. Thus Dell's policy contains the clause: 'If you see something being shared related to Dell on a Social Media platform *that shouldn't be happening*, immediately inform the Social Media and Communities team, your manager, Ethics and Compliance or some other appropriate contact' (emphasis added). ATPSL's policy requires that, if employees 'come across negative or disparaging posts remarks about ATPSL ... or see third parties trying to spark negative conversations, ...pass the post(s) to the Communications Manager...'. The meaning of *negative* and *disparaging* in this policy is not defined, but third parties could include trade unions. The Melbourne Football Club's policy provides that, 'It is the expectation of MFC that employees, contractors and volunteers will promptly advise the management of any facts or circumstances which may suggest a breach of this policy'. Similarly, Lifeline's policy states that, 'it is the duty of everyone who is affiliated with Lifeline to alert the Communications, Marketing and Government Relations Unit... to any inappropriate content they may come across'. This policy outlines the meaning of *inappropriate*

use, through a long, but not exclusive list of activities. Such provisions have the potential to discourage employees from engaging in individual and collective voice through online forums.

4. Conclusion.

Nereim (1981-2, 837) has observed 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'. To the extent that organisational social media policies contain provisions that limit or preclude employee comment online about work when off-duty and /or in private forums, employers are establishing an avenue for the lawful termination of employees who voice opinions about industrial relations issues in these forums. They are also edging towards a greater regulation of employees private lives, reminiscent of the master-servant era. The present analysis of social media policies and industry guidelines indicates that most policies intentionally or unintentionally intrude on employees' freedom to explore issues of mutual concern among colleagues or members of the same occupation or profession, during off-duty conversations, and, more broadly, their rights of personal expression. While it is important for organisations to protect themselves against the threats which social media use may pose to their reputations and business interests, this should not be achieved at the expense of employee rights to both a private life and to discuss their working lives when off-duty.

In the United States, as publication of the NLRB's guidelines on social media policies illustrates, dialogue has well and truly begun on this issue. Referring to a number of separate State statutes which protect the privacy of employees' off-duty behaviour, in their analysis of employee off-duty blogging, Gely and Bierman (2007) recommend amendment of these statutes to provide explicit protection for off-duty use of personal computers. Arguing for a broader legislative approach, Kirkland (2006-2007) has proposed a unified federal law which blends provisions from existing whistleblowing, privacy and off-duty conduct statutes to prevent employers terminating employees 'on their day off' for off-duty conduct unrelated to their work. In Australia, this dialogue is in its infancy. The development of privacy law in relation to employees' private lives would be one way of extending protections to employees against adverse actions for off-duty social media use. Alternatively, social media policies need to stipulate that employees have a reasonable expectation of privacy when using social media unless there is a legitimate work-related connection. Adopting the NLRB's reasoning on overbroad policy provisions which encroach on off-duty communication, employers should also include limiting language in social media policies which specifies explicitly the behaviours they both cover and do not cover. While the disciplining or termination of an employee who communicates online about working conditions when off-duty might fall foul of the adverse

action provisions in the FW Act, pursuit of such an action in the tribunal is problematic, particularly after *Barclay*, and few other avenues of protection exist under Australian law. As the law develops, employers and employees need to be mindful not only of the risks associated with social media use but also the risks for both when employers implement social media policies that crush lawful employee dissent.

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