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Social Media for recruitment and the workplace: Keeping it Legal

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Overview

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1. Social media, recruitment and privacy law
2. Employee use of LinkedIn
3. Misuse of social media by employees (and how to deal with it)
4. Cyberbullying in the workplace
5. Steps in protecting your workplace
6. Questions

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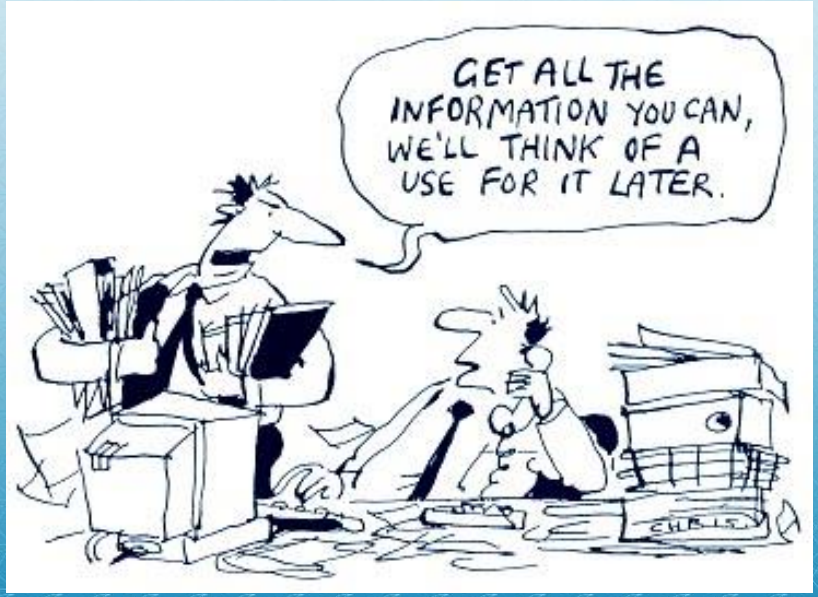
Social media, recruitment & privacy law



‘Social media recruiting’

- Social media is a common recruitment tool used for “screening” candidates
- However, there are legal risks including breach of privacy obligations by misusing personal information

Privacy obligations

- The *Privacy Act 1988* (Cth) governs how organisations collect, use and disclose personal information
- Major reforms were introduced in 2013, and all organisations were required to comply with the changes by July 2014
- *Privacy Amendment (Enhancing Privacy Protection) Bill 2012*
  - better protect people's personal information
  - simplify credit reporting arrangements
  - give new enforcement powers to the Privacy Commissioner
  - make data breach notification mandatory
  - introduce a statutory cause of action for interference with an individual's privacy

Privacy obligations

"…the changes represent the most significant developments in privacy reform since the Privacy Act in 1988. In an online world, we are sharing our personal information more than ever before – whether that be by paying our bills online, buying some footy tickets for the weekend, or connecting with friends and family through social media…These new privacy laws focus on giving power back to consumers over how organisations use their personal information."

Attorney-General Nicola Roxon (May 2012)

Privacy obligations

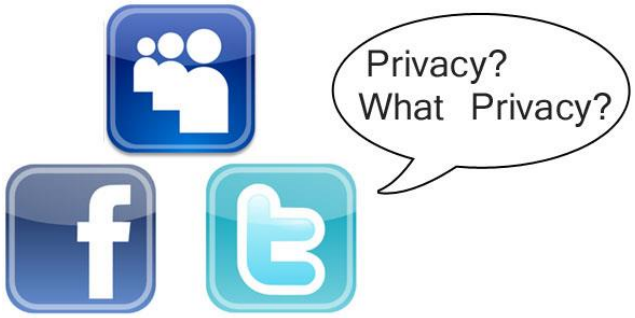
- Privacy Law applies to organisations with an annual turnover of more than $3m
- New reforms created 13 "Australian Privacy Principles" (**APPS**) as base line privacy standards which organisations must comply with
- Exception applies for employee records (personal information not directly related to employment)

BUT - what about using social media for recruitment?

Social media and privacy

"You have probably seen some of those media reports where people have actually applied for a job and found out that their MySpace or Facebook page has let them down……Remember that comments you post on social networking sites are mostly public. So, think carefully about what information you publish about yourself."

National Privacy Commissioner



Employers' use of social media

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"…If the information on your social networking page is publicly available, then anyone can look at it, including people in organisations. This means potential employers could look at your page and perhaps base their decisions on what they see there. But, if an organisation ***collects*** *and* ***stores information*** *from your page to* ***use*** *for something, and that organisation is covered by the* Privacy Act 1988 (Cth) Privacy Act*, then it must comply with the Australian Privacy Principles (APPs)."*

Office of the Australian Information Commissioner
http://www.oaic.gov.au/


Kincaid
CARTOONSTOCK
.com
Search ID: kkin233
So I looked at your Facebook page
...oh man...there's no way you're
getting this job!

Key definitions

- **personal information:** "*... information or an opinion about an identified individual, or an individual who is reasonably identifiable ... whether true or not .. and whether recorded in a material form or not*"; and
- **sensitive information:** (amongst others) personal information about an individual's *racial or ethnic origin, political opinions, religious beliefs, union membership, or health information*. Sensitive information may also be personal information.

Which of the following is personal information?

- A screenshot of a person's Facebook "details" page?
- A print-out of a person's Facebook friends list?
- A print-out of a person's LinkedIn connections?
- A screenshot of a person's Twitter status updates showing political opinions?

Answer: potentially, all!

Personal information:

*"... information or an opinion about **an identified individual**, or an individual who is reasonably identifiable ... whether true or not .. and **whether recorded in a material form or not**"*

"Collect"

- An APP entity collects personal information *"only if the entity collects the personal information for inclusion in a* ***record or generally available publication****"*: section 6(1) Privacy Act
- Includes gathering, acquiring or obtaining from any source, by any means
- *"An APP entity does not collect personal information where that information is acquired but not included in a record or generally available publication. For example, a newspaper article containing personal information will not be 'collected' by the entity unless, for example, a clipping of the article is kept and stored with other documents held by the entity or the article is scanned and saved into the entity's electronic database."* (APP Guidelines, B.26)

APP 1 – Open and transparent management of personal information

- Must *"have a clearly expressed and up to date policy…about the management of personal information by the entity"* including:

  - ✓ the kinds of personal information held;
  - ✓ how personal information is collected and held (and for what purpose);
  - ✓ how an individual can access the information about them;
  - ✓ how an individual may complain about a breach of the APPs; and
  - ✓ whether the entity is likely to disclose personal information to overseas recipients (and if so, the countries in which the recipients are likely to be located).

APP 3 – Collection of personal information/notification

- Must only collect **personal information** (other than sensitive information) about an individual where the information is **reasonably necessary for one or more of the entity's functions or activities**
- **Sensitive information** also requires individual consent in order to be collected

APP 6 – Use or disclosure of personal information

- An organisation **must not** use or disclose personal information about an individual for a purpose (the secondary purpose) other than the **primary purpose** of collection unless the **secondary purpose** is related to the primary purpose of collection (and, if the personal information is sensitive information, directly related to the primary purpose of collection); and
  - the disclosure might reasonably be expected; or
  - the individual has consented to the use or disclosure.

APP11 – Security of personal information

- An organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure
- An organisation must take reasonable steps to destroy or permanently de-identify personal information if it is no longer needed for any purpose for which the information may be used or disclosed under APP 6

Quiz: Your turn

Which of the following might involve a breach of privacy law? If so, why?

- Looking up a potential candidate's public Facebook page, noting they have family responsibilities, and excluding them as a candidate on that basis?
- Looking up a candidate's public LinkedIn profile, extracting information from it and storing it on an internal database?
- Preparing a profile on a current candidate incorporating all of the above and emailing it to a client?

Quiz: Your turn

Which of the following might involve a breach of privacy law? If so, why?

- Viewing a potential candidate's LinkedIn profile to see if they are currently employed prior to an interview?
- Using metadata to create a detailed profile of a potential candidate and tracking their professional activities?

Key messages…

- ✓ Consider reviewing or updating your privacy policy
- ✓ Only collect, use or disclose information for purposes necessary for your functions or activities as an organisation (i.e. recruitment!)
- ✓ Secure the information, and destroy it once no longer required (unless the individual has consented to it being kept on file)
- ✓ Limit your accessing of publicly accessible personal information to activities that don't include "collection"

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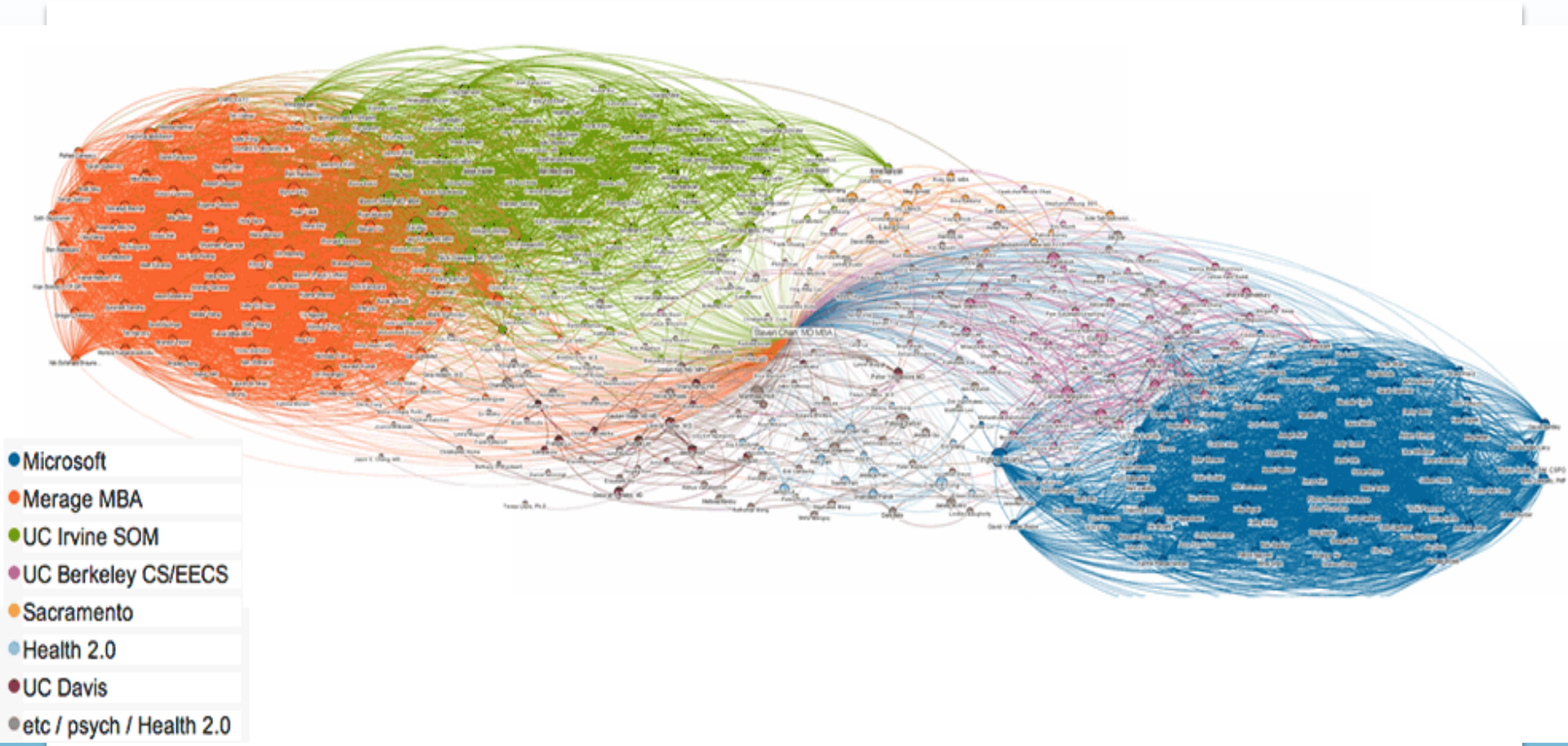
Legal issues with LinkedIn

Legal issues with LinkedIn

- LinkedIn is…
  - a marketing tool for employers
  - a self-branding and networking tool for employees
  - a source of information for recruiters and candidates alike
- **BUT – what happens when an employee leaves a business?**
  - Does the employer own the contacts, or the employee?


Microsoft
Merage MBA
UC Irvine SOM
UC Berkeley CS/EECS
Sacramento
Health 2.0
UC Davis
etc / psych / Health 2.0

Traditional legal principles relating to post-employment activities

- Confidentiality
  - Express and/or implied obligations for an employee not to use or disclose information obtained in the course of employment
- Restraint of Trade
  - Common law doctrine (i.e. based on case law) under which reasonable restraints may be enforced where an employer has a **legitimate interest** to protect

Confidentiality

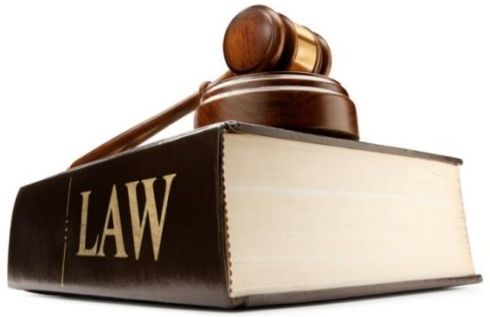
- Most employment contracts impose explicit obligations of confidentiality on an employee, including client information
- These can apply:
  - during the course of employment; and/or
  - after employment ends
  - Does not apply to ‘know how’

Restraint of trade

- A legal doctrine based on common law, i.e. case law
- Standard clauses in many employment contracts (depending on the industry) which seek to prevent ex-employees from:
  - competing with the organisation
  - soliciting or canvassing customers or employees

Restraint of trade

- **The rule:**
  - post-employment restraints are presumed to be unenforceable because they restrict a person's ability to engage in trade



Restraint of trade

- **The exception:**

  IF the employer can show it was **reasonable** at the time agreed to because:

  1. the employer had a **"legitimate interest"** in imposing the restraint;

     and

  2. the scope of the restraint was **no wider than necessary** to protect that interest

How does this apply to LinkedIn?

- "Connections" are arguably…
  - **Confidential information** gained in the course of employment
  - **"Legitimate business interests"** of an employer

Are 'connections' "legitimate business interests"?

- Arguably, yes – e.g. *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717 (a case involving a printer salesman):

  "While the employer is not entitled to be protected against mere competition by a former employee, the employer is entitled to be protected against unfair competition based on the use by the employee after termination of employment of the ***customer connection*** *which the employee has built up during the employment – which, because the employee has in effect represented the employer from the customer's perspective during the employment, might at least temporarily appear attached to the employee, but in truth belongs to the employer…"*

Are 'connections' "legitimate business interests"?

- Connections are a valuable asset in many professions
- Employers invest time and money in their LinkedIn presence, and have intellectual property in their contact lists
- Employers also train employees in using LinkedIn profile-building, and expect them to use this as a marketing tool
- **OR… are connections instead part of an individual career profile?**

The *Naiman Clarke* Case

- *Naiman Clarke Pty Ltd v Marianna Tuccia [2012] NSWSC 314*
  - Legal recruiter NC took legal action against a former recruiter, Ms T
  - Shortly before resigning, Ms T allegedly:
    - took contact details from NC's database
    - used the details to gather LinkedIn connections
  - Ms T obtained new role with a rival recruiter, then made placements via the LinkedIn connections gathered via the NC contacts

The *Naiman Clarke* Case

- NC sued for damages for the loss of opportunity to place candidates with law firms
- No outcome on substantive issue
- Appeal later this year expected to confirm the Australian position about restraints and LinkedIn connections

However…

- The restraint must still be **reasonable** in its scope
  - E.g. restraint too wide where imposed on an employee from dealing with a class of clients, not all of whom have had sufficient contact with that employee to be at risk of being solicited

What can employers do to protect their connections?

1. **Review your current employment contract template**
   - ✓ Industry-specific restraint clauses
   - ✓ Tailored and detailed confidentiality clauses
   - ✓ Direct references to LinkedIn connections in clauses relating to confidentiality and intellectual property

What can employers do to protect their connections?

2. **Update (or create) your social media policy, and make the policy accessible**
   - ✓ Rules governing use of LinkedIn, e.g…
     - privacy settings
     - payment for LinkedIn Premium
   - ✓ How the organisation intends for connections to be made and managed

What can employers do to protect their connections?

3. **Make your expectations about LinkedIn clear from the outset**
   - ✓ Training on use of LinkedIn for company purposes
   - ✓ Directly address what your organisation expects when a person leaves (e.g. do you expect them to delete their LinkedIn connections?)
   - ✓ If appropriate, draw specific attention to this clause with the employee

Quiz: Your turn

Which of the following might involve restraint issues?

- An employee using an internal database to add LinkedIn connections before leaving, then performing work for those clients soon after leaving?
- An ex-employee posting a LinkedIn update showing they now work freelance?

Quiz: Your turn

Which of the following might involve restraint issues?

- An ex-employee receiving LinkedIn messages from previous candidates they placed?
- An employee is trained to use LinkedIn in their employment develops a stock of LinkedIn connections from the employers' contacts , then actively solicits those contacts after they leave?

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Misuse of social media by employees

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Employees' obligations

- Obligations are both **express** and **implied at common law**
- **Implied:**
  Fiduciary duties including
  - to act fairly and reasonably
  - to behave in a manner consistent with contract
  - good faith
  - mutual trust and confidence
  - Fidelity
- **Express:**
  Duties may be expressly enlarged in contract
  - specify what conduct is expected or prohibited
  - impose further restrictions on the use of social media

‘Out of hours’ misconduct

“The conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or the conduct damages the employer’s interests; or the conduct is incompatible with the employee’s duty as an employee. In essence 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.”

VP Ross in *Rose v Telstra Corporation* [1998] AIRC 1592

However…

- Taking action against an employee based on information sourced from social media may risk claims including:
  - Adverse Action
  - Discrimination
  - Unfair dismissal

Adverse action and discrimination claims

- Potential scope for discrimination claim by employees or candidates where social media is relied upon by an employer as a basis for termination
- *Sayed v CFMEU* [2015] FCA 27:
  - Employer of a trainee organiser for the CFMEU discovered previous association with Socialist Alliance
  - Employee terminated
  - **Held:** adverse action against the employee because termination due to political opinion and affiliation

Adverse action and discrimination claims

- *Scott McIntyre v SBS* (May 2015):
  - Recent case involving SBS journalist who was dismissed after making distasteful ANZAC day tweets

PHOTO: Sacked SBS journalist Scott McIntyre. (Twitter)

Source: ABC News

Scott McIntyre
@mcintinhos

Follow

The cultification of an imperialist invasion of a foreign nation that Australia had no quarrel with is against all ideals of modern society.

5:39 PM - 25 Apr 2015

911 1,332

Scott McIntyre
@mcintinhos

Follow

Wonder if the poorly-read, largely white, nationalist drinkers and gamblers pause today to consider the horror that all mankind suffered.

5:39 PM - 25 Apr 2015

533 1,010

Scott McIntyre v SBS

- Employee argues SBS breached s 351 of the *Fair Work Act 2009* (which prohibits dismissal for discriminatory reasons, including expressing a political opinion) and did not follow its own policies when it dismissed him
- SBS argues his actions contrary to SBS Code of Conduct and social media policy
- Case to be heard in the Fair Work Commission later this year

Linfox v Glen Stutsel [2012] FWAFB 7097

- Mr Stutsel, a truck driver at Linfox, had his employment terminated for publishing on his Facebook wall (which was publicly available):
  - racially derogatory remarks about a manager (*'bacon hater'*);
  - sexually discriminatory comments about a second manager (alluding to sexual favours provided by female colleague to male colleagues); and
  - extremely derogatory remarks about both managers
  - ...amounting to 'serious misconduct'.
- Not all comments directly identified the subject, but they were still identifiable based on the details given
- Managers were not 'Facebook friends' with Mr S, but were still able to access the comments on his page

Linfox v Glen Stutsel [2012] FWAFB 7097

- Linfox argued comments were contrary to the general obligations of his employment contract and the Workplace Diversity Policy (no social media policy was then in place)

Decision at trial –

- Commissioner accepted that Mr S was unaware of the privacy settings, and did not intend to vilify, hurt or embarrass his coworkers
- Conversation akin to '**a group of friends letting off steam and trying to outdo one another in being outrageous**. *Indeed it has much of the favour of a conversation in a pub or cafe, although conducted in an electronic format.*'
- In the circumstances, dismissal was 'harsh, just and unreasonable' – compensation and reinstatement awarded

Linfox v Glen Stutsel [2012] FWAFB 7097

Appeal decision –

- In the circumstances, dismissal was 'harsh, just and unreasonable' – compensation and reinstatement awarded
- A reminder of the importance of having a comprehensive social media policy:

"*At the time of* [the employee's] *dismissal,* ***Linfox did not have any policy relating to the use of social media by its employees****....The Company relies on its induction training and relevant handbook ... To ground its action against [the employee]. 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.*"

Disparaging online material

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- **Issue:**

What do you do when an employee is seen "badmouthing" your organisation online?

O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys [2011] FWA 5311

- Mr O'Keefe worked at The Good Guys
- Paid on partial commission basis
- Commissions incorrectly paid for several weeks
- Mr O'Keefe posted on his Facebook wall:

  "Damien O'Keefe wonders how the f..k work can be so f..king useless and mess up my pay again. C..ts are going down tomorrow."

- The Good Guys had Sexual Harassment and Workplace Bullying Standards of Conduct under an Employee Handbook

O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys [2011] FWA 5311

- Mr O'Keefe summarily dismissed for serious breach of the Employee Handbook requirement that

  "Employees will not use offensive language, resort to personal abuse or threaten or engage in physical contact"

- Mr O'Keefe brought an unfair dismissal claim in Fair Work Australia
- The Good Guys argued:
  - sexual harassment towards female employees in payroll
  - threat to the Operations Manager in charge of payroll
  - intimate link to the workplace as what was published "was about a co-worker and was published so that some of his co-workers could see what he had written"

O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys [2011] FWA 5311

- Mr O'Keefe argued:
  - justifiably angry about not being paid commissions
  - comments were not public as he had maximum Facebook privacy settings
  - only 70 friends could see the comments and only 11 of them co-workers
    - did not identify his employer
    - not intended to be seen by Operations Manager
- Held:
  - Mr O'Keefe behaved in a manner sufficiently repudiatory to constitute serious misconduct
  - dismissal was therefore fair

How should you handle social media misuse?

1. Create and implement a comprehensive **social media policy** which:
   - ✓ directly abolishes misuse of Facebook and specifies what will be considered ‘misuse’ constituting misconduct
   - ✓ asserts your right to monitor publically accessible content
   - ✓ makes clear that failure to maintain adequate privacy settings no defence to publishing inappropriate comments

How should you handle social media misuse?

2. **Document:**
   - ✓ all reports of misuse/misconduct
   - ✓ all evidence of material that is sexually explicit, harassing, defamatory or profane, discriminatory or which brings you as an employer into disrepute
   - ✓ all meetings and contact with employees being investigated for misuse/misconduct involving social media

Quiz: Your turn

Which of the following might constitute misconduct by an employee involving social media?

What further information might you need to decide what action you can take?

- An employee complaining about personal problems unrelated to work on a public Facebook profile?
- An employee writing disparaging comments about your organisation on a private Twitter account (which is seen by followers they are friends with)?
- An employee bragging about being on holiday on Facebook (when you know they are on sick leave)?

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How to deal with Cyberbullying

Cyberbullying

- Cyberbullying falls within the ordinary definition of bullying: *"repeated unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety"*
- Cyberbullying is simply, bullying that involves via email, text message, social media or other technologies
- A rising phenomena in Australian workplaces:
  - 8 out of 10 Australian workers have discovered secret discussions about them online initiated by colleagues using social media
  - 6 out of 10 Australian workers feel their privacy has been eroded by social media in the workplace
  - 1 in 10 have had embarrassing photos/videos taken at a work event and uploaded on social media sites

Source: Survey and study by AVG Technologies, February 2013

Employers' obligations

- Employers have obligations under:
  - Employment contracts (implied and express terms that employees will not be subject to bullying
  - *Occupational Health and Safety Act 2004* (Vic): to provide and maintain for employees, so far as is **reasonably practicable**, a workplace that is safe and without risks to health
  - *Fair Work Amendment Bill 2013* (Cth): no positive obligation imposed, but civil remedies available to employees, and matter may be referred by the FWC to OHS regulator
  - 'Brodie's Law', section 21A *Crimes Act 1958* (Vic): stalking provisions

Dealing with cyberbullying in the workplace

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- ✓ Ensure your workplace has comprehensive policies addressing cyberbullying and social media
- ✓ Assert your right to record monitor public social media and company email/internet usage in your policy
- ✓ Act immediately if any cyberbullying conduct is witnessed or reported
- ✓ Monitor the work environment to ensure that acceptable standards of conduct are observed
- ✓ Ensure that the workers in their work area understand the contents of the DWS Workplace Policies Pack on bullying and social media use
- ✓ Document all evidence of cyberbullying behaviour

Quiz: Your turn

Which of the following might constitute cyberbullying?

What should you do?

- Repeated derogatory or insulting comments about a person by direct email at work, or by reply all email?
- Belittling a colleague on their Facebook wall or via inbox message?
- Publishing embarrassing photos of a colleague at a work event on the internet, or circulating photos via text message without their consent?

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Recap: Suggestions

- ☑ Be mindful of how you collect, use or disclose personal information
- ☑ Create comprehensive policies addressing:
  - privacy
  - social media
  - cyberbullying
- ☑ Ensure that the policies are regularly updated and easily accessible
- ☑ Educate your employees on the policies and how they apply

Recap: Suggestions

- ☑ Ensure your employment contract templates are up to date, and deal with issues such as:
  - confidential information
  - restraint of trade
  - the application of your policies
- ☑ Clearly document any complaint, investigation and findings
- ☑ Consult TressCox on drafting the above, or if issues arise

Final Quiz

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Could you….

- Handwrite notes on, and tell colleagues about a potential candidate you have initiated a connection with on LinkedIn?
- Discipline a colleague who posts a status update saying *"No Xmas bonus AND working on a public holiday – AWESOME! The recruitment industry rocks man!"*
- Paste a colleague's face onto a googled picture of a dictator and circulate it via group email?
- Take action against an ex-employee who stays connected with former candidates on LinkedIn?

Why/why not?

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Questions?

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