THE IMPACT OF ELECTRONIC TECHNOLOGY ON WORKPLACE DISPUTES IN AUSTRALIA

Ronald McCallum† and Andrew Stewart††

I. INTRODUCTION

The shape of the world of work has been altered by the personal computer, e-mail, the Internet, and like methods of telecommunication. Although geographically distant from the industrialized countries of the northern hemisphere, Australia has gone through the electronic communications revolution, which has drawn it into the globalized economy. In fact, the instantaneous nature of modern electronic communications has lessened the distance between Australia and the centers of global capital in North America, Europe, and Japan. In this geographically far-flung nation where some 20 million people cover a continent, the use of electronic technology has become a permanent feature of work. It has increased flexibility and efficiency throughout the largely service-oriented economy. This report necessarily has to be selective in covering this complex, broad, and dynamic area of law.

In the following section, telework in Australia is examined with a view to determining the legal protections bestowed upon employees undertaking telework in home-based offices. An examination is made of the terms and conditions of employment of teleworkers, of the manner in which our discrimination laws affect these employees, and of the laws governing the health and safety of teleworkers.

Following a brief note in section III about responsibility for high technology work tools, section IV examines the laws that apply to electronic monitoring of work. Any monitoring must comply with

† Blake Dawson Waldron Professor in Industrial Law, University of Sydney; and Consultant to Blake Dawson Waldron (Lawyers). I wish to thank Joel Butler, Bilal Rauf and my wife Mary Crock for their assistance, and also to express my appreciation to Gregor Murray and my colleagues in the Department of Industrial Relations of the University of Laval, Quebec City, Canada, who assisted me in completing this report during my visitorship there.

†† Professor of Law, Flinders University of South Australia; and Legal Consultant, Piper Alderman.

Australia's recently enacted private sector privacy legislation, and with what may be an emerging right of privacy at common law. Questions have also arisen as to whether Australia's surveillance and telecommunications laws place restrictions on this type of employer monitoring.

Section V is concerned with the extent to which employers may restrict employee use of electronic facilities provided for work purposes. Although the governing legal principles are fairly settled, their application to this particular context has as yet been the subject of relatively few decided cases. Some judgments, however, have indicated potential pitfalls for employers in seeking to assert their authority over Internet or e-mail abuse. Similarly, the issue of union access to employer facilities for communication purposes, explored in section VI, is yet to be fully tested, but is almost certain to generate greater attention over time, both in the courts and as a subject of collective bargaining.

Before delving into these matters, it is necessary to write a few words about the laws that affect technology in the workplace. Australia is a federation somewhat akin to the United States and Canada. Both the parliaments of the Australian States and the federal ("Commonwealth") Parliament are empowered to enact laws that govern places of work. In fact, the major characteristic of the Australian federation, with respect to labor law, is that most workplaces are covered by a grid of Commonwealth and State laws.[1] Even where an employing enterprise is governed by a collective agreement under Commonwealth law, as will be shown more fully below, State laws concerning matters such as workers' compensation and occupational health and safety still apply to the enterprise.

The indigenous methods of compulsory conciliation and arbitration that were established in Australia and New Zealand at the beginning of the twentieth century still form the foundation of our labor laws. Australia's network of State[2] and Commonwealth[3] labor law statutes empower industrial tribunals to maintain a safety net of minimum terms and conditions of employment through the creation and variation of industrial awards for most industries and/or

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1. *See generally* B. CREIGHTON & A. STEWART, LABOUR LAW: AN INTRODUCTION (3d ed. 2000).

2. *See, e.g.,* Industrial Relations Act 1996 (N.S.W.); Industrial Relations Act 1999 (Queensl.); Industrial and Employee Relations Act 1994 (S. Austl.).

3. Primarily the Workplace Relations Act 1996 (Austl.).

occupations. This safety net, which may be supplemented by legislation,[4] typically specifies:

- minimum wage rates;
- hours of work;
- periods of notice upon termination of employment (generally up to 5 weeks);
- four weeks annual leave;
- between 5 and 10 days sick leave;
- family leave;[5] and,
- 12 months unpaid parental leave on the birth or adoption of a child.

The specific terms and conditions of employment for most public sector workers, and for many workers in medium to large businesses, are determined by collective bargaining at the level of the enterprise. This bargaining typically now results in a formal agreement which, if registered with a tribunal, prevails over any applicable award.[6] While most collective bargaining is between trade unions and employers, employers are also free to enter into collective agreements directly with their employees.[7] For employers outside the award system, and more especially for managerial, professional, and other high-ranking employees, terms and conditions of employment are set by written or unwritten employment contracts, which may incorporate policy manuals and other like documents.[8] Even in the award sector, however, employment contracts are still important. Unlike the

4. The extent to which minimum conditions are set by legislation rather than awards varies from State to State, though statutory minima are becoming more common. *See*, *e.g.*, the minimum terms and conditions of employment specified in the Industrial Relations Act 1999, c. 2 (Queensl.); the Minimum Conditions of Employment Act 1993 (W. Austl.).

5. Family leave provisions enable employees to use days of annual leave or sick leave to take care of dependents (usually their children).

6. For an account of the legislative encouragement of formalized enterprise bargaining over the past decade, *see* THE AUSTRALASIAN LABOUR LAW REFORMS: AUSTRALIA AND NEW ZEALAND AT THE END OF THE 20TH CENTURY (D. Nolan ed., 1998). As to the consequences of these reforms, *see* D. Macdonald, I. Campbell & J. Burgess, *Ten Years of Enterprise Bargaining in Australia: An Introduction*, 12 LAB. & INDUS. 1 (2001).

7. The neo-liberal labor law reforms of the 1990s have increased the scope for non-union collective bargaining, and have even enabled employers and individual employees to conclude statutory individual agreements. *See* Amanda Coulthard, *The Decollectivisation of Australian Industrial Relations: Trade Union Exclusion Under the Workplace Relations Act 1996 (Cth)*, *in* EMPLOYMENT RELATIONS, INDIVIDUALISATION AND UNION EXCLUSION: AN INTERNATIONAL STUDY 48 (S. Deery & R. Mitchell eds., 1999); Andrew Stewart, *The Legal Framework for Individual Employment Agreements in Australia*, *in* EMPLOYMENT RELATIONS, INDIVIDUALISATION AND UNION EXCLUSION: AN INTERNATIONAL STUDY 18 (S. Deery & R. Mitchell eds., 1999).

8. *See, e.g.,* Riverwood International Pty. Ltd. v. McCormick, 177 A.L.R. 193 (2000) (Austl.).

United States and Canada, Australian collective agreements do not oust the individual contract of employment, but rather supplement or add to the obligations of the employee and the employer that are part and parcel of the employment contract.

Generally, if an employer's terms and conditions of employment are governed by Commonwealth awards or collective agreements, then its employees are entitled to invoke Commonwealth laws that deal with unfair termination of employment.[9] On the other hand, where the terms and conditions of employment are set out in awards or collective agreements made under the labor laws of a State, the employees are able to access that State's unfair termination machinery.[10]

Leaving aside the Commonwealth public sector, the laws governing occupational health and safety[11] and workers' compensation[12] are the sole preserve of the Parliaments of the States. This means that even where a large employer has its terms and conditions of employment embodied in a collective agreement under Commonwealth law,[13] its health and safety and workers' compensation obligations are embodied in State law. Where an employer has workplaces in several States, the safety and compensation obligations are those imposed by the law of the State in which the place of work is situated.

More complex situations do arise when employees who are employed in one State undertake work in another State. This is particularly so when employees suffer work-related injuries. In these situations, forum shopping can occur and the Australian conflicts of laws rules are utilized to determine liability.[14] In the recent decision of the High Court of Australia in *John Pfeiffer Pty. Ltd. v. Rogerson*,[15] the employer and the employee resided in Canberra, the capital of Australia, which is situated in the Australian Capital Territory. The employee, who was a carpenter, crossed over the border into New South Wales and was injured while undertaking work in that State. New South Wales law caps the amount of compensation that an

9. Workplace Relations Act 1996, Pt. VIA, Div. 3 (Austl.).

10. *See*, *e.g.*, Industrial Relations Act 1996, §§ 83–90 (N.S.W.); Industrial and Employee Relations Act 1994, §§ 105–109 (S. Austl.).

11. *See*, *e.g.*, Occupational Health and Safety Act 2000 (N.S.W.); Occupational Health and Safety Act 1985 (Vict.); Occupational Safety, Health and Welfare Act 1986 (S. Austl.).

12. *See*, *e.g.*, Workplace Injury Management and Workers Compensation Act 1998 (N.S.W.); Accident Compensation Act 1985 (Vict.).

13. Workplace Relations Act 1996, Pt. VIB (Austl.).

14. *See* Ronald McCallum, *Conflicts of Laws and Labour Law in the New Economy*, 16 Austl. J. Lab. L. 50 (2003).

15. 203 C.L.R. 503 (2000) (Austl.).

injured employee may obtain from the employer in a common law action for negligence. The employee sued the employer in the Supreme Court of the Australian Capital Territory, and the question that eventually reached the High Court was whether this compensation cap applied. The High Court held that it did, finding that the compensation cap was a matter of substantive rather than procedural law and thus that it would operate to limit any damages awarded in respect of the proceedings, even in the Australian Capital Territory.[16] The choice of law rules applied in this case may obviously affect employees when they are undertaking telework at their homes, which are in a different State than their employer.

II. HOME-BASED TELEWORK IN AUSTRALIA

The word telework is most obviously used to describe situations where employees undertake computer work and transmit completed work to their employer through the use of a modem connected to their computer. There is an enormous variety of telework in Australia, including

- engaging in telephone marketing;
- undertaking research via the Internet;
- word processing;
- data entry;
- the management of accounts and inventories;
- editing of material;
- the operation of airline booking systems;
- desktop publishing;
- the writing of reports; and,
- the preparation of legal material and related documents.

Most teleworkers undertake telework at their employer's workplace, often together with many white collar workers in buildings owned or leased by their employer. However, in this section we shall leave out of consideration those teleworkers who undertake work at their employer's premises. This is because these employees raise few

16. For comment, *see* Elizabeth James, *John Pfeiffer Pty Ltd v. Rogerson: The Certainty of 'Federal' Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications*, 23 SYD. L. REV. 145 (2001); Gary Davis, *John Pfeiffer Pty Ltd v. Rogerson: Choice of Law in Tort at the Dawning of the 21st Century*, 24 MELB. U.L. REV. 982 (2001).

novel issues in the manner in which Australian labor laws apply to their situation.

In Australia, as is the case throughout the industrialized world, there are now a significant number of consultants and independent contractors who perform telework in their own homes for corporations, enterprises, and undertakings. As these persons are not employees, Australia's minimum labor standards do not generally apply to them.[17] Instead, their payments and fees are determined purely by the contracts they have concluded. This report, however, will concentrate upon the applicability of our labor laws to employees who undertake telework in their own homes.

Telework from home appears to be increasing in popularity in Australia. A recent Australian Bureau of Statistics survey has shown that 3% of Australian employees undertake work solely at home, with a further 9% working from home for some of their working time. Two-thirds of employees who undertake work at home used information technology.[18] We have no doubt that during the coming years, even larger numbers of Australians will spend some or all of their working time undertaking telework from their homes.

For many Australians, being able to undertake telework in their homes is advantageous in various ways. Employees working at home are often better able to balance their work and family responsibilities as parents and as carers of the disabled and the elderly, because they possess greater flexibility with respect to their hours of work. In Australia's large cities, the capacity to undertake telework at home means that time is not wasted in long commutes to and from the employer's place of work. While telework can be beneficial for Australian workers, however, it does appear that our labor laws are lagging behind this change in the manner in which work is being performed. The assumption, on which Australia's employment laws are still based, is that the vast bulk of employees undertake tasks in workplaces owned or controlled by their employers.

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17. The number of self-employed persons, many of them "dependent contractors" who derive work predominantly from a single source, has been steadily increasing in Australia. M. Waite & L. Will, *Self-Employed Contractors in Australia: Incidence and Characteristics* (Productivity Commission Staff Research Paper, 2001). For criticism of Australian law's failure to prevent employees being disguised as contractors, *see* A. Stewart, *Redefining Employment? Meeting the Challenge of Contract and Agency Labour*, 15 AUSTL. J. LAB. L. 235 (2002).

18. AUSTL. BUREAU OF STATISTICS, LOCATIONS OF WORK, AUSTRALIA, JUNE 2000 (Catalogue No. 6275.0, 2001). The figures are higher for self-employed persons.

A. *The Terms and Conditions of Teleworker Employment*

Employees working from home will be protected by the same safety net of minimum wage rates and terms and conditions of employment as their counterparts undertaking tasks in the workplaces of their employers. For example, in all of Australia's jurisdictions, the safety net of terms and conditions of employment, either through rulings of the relevant industrial relations tribunals or by statutory provisions, entitles employees to four weeks annual leave after twelve months' continuous service, and accordingly teleworker employees, whether they are working at home or in their employer's premises, will have this entitlement. Similarly, where the actual terms and conditions of employment are prescribed in a collective agreement, it will usually be the case that those employees working from home will receive the same benefits as the employees who are working in the enterprise.[19]

For employees to be able to undertake telework from home, however, they must obtain the permission of the employer. While an employer may expressly hire employees to work from home, it is still the case in Australia that most teleworkers seek to change their mode of work to home-based work after having completed an initial period of employment with the employer. In some instances, a process for obtaining this permission may be set out in the relevant collective agreement. One of the earliest agreements to deal with this issue was a 1994 collective agreement between Telstra, Australia's largest provider of telephone services, and what was then the Public Sector Union.[20] Clause 7(a) of the Telstra Agreement provided:

> Teleworking is not an entitlement or a right nor an obligation and may only be entered into by agreement between Telstra and an employee. Teleworking at a home-based office must be by mutual agreement between Telstra and the individual employee concerned. An employee's engagement in teleworking is on a voluntary basis.

The Agreement made it clear that home-based teleworkers were to receive the same wage rates, entitlements, and opportunities for promotion as their counterparts who were performing telework in

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19. Registered enterprise agreements are usually stated to be applicable to all workers employed in certain defined categories by the employer party, and as such would usually cover any home-based teleworkers. Where, however, an agreement is specified to have effect at a particular location, it is possible that the position might be different.

20. Re Telstra Corp. Ltd.; P.S.U. Teleworking Agreement 1994, Print T0472 (Austl. Indus. Rel. Comm'n 1994). *See* R.J. Owens, *The Traditional Labour Law Framework: A Critical Evaluation*, *in* REDEFINING LABOUR LAW: NEW PERSPECTIVES ON THE FUTURE OF TEACHING AND RESEARCH 3, 15 (R. Mitchell ed., 1995).

Telstra offices. Telstra was to provide and maintain the equipment and software, and the homeworking employees were required to use this equipment solely for the purposes of Telstra. Telstra reserved the right to cease telework arrangements upon the giving of ten days' notice, and the Agreement also gave employees the right to cease teleworking on the giving of ten days' notice. However, Clause 8(d) did entitle Telstra to immediately terminate a teleworking arrangement "in the event of an employee unreasonably withholding their consent to management access to the employee at the home-based office, or a genuine health and safety issue, or a security issue, or a seriously disciplinary issue."

With the further deregulation of Australia's labor laws over the last five years, it is now more commonly the case that a teleworking agreement is embodied in a written contract of employment.[21] Either a new contract of employment will be signed, or else the existing employment contract will be varied through the addition of terms and conditions relating to the performance of home-based telework.[22] These terms and conditions are usually similar to those described in the Telstra Agreement, in that they specify the use of the employer's computer-based equipment, and grant the employer reasonable access to the home-based office of the employee. Sometimes, awards or collective agreements contain facilitative provisions that enable an employer and an employee to agree upon individual homeworking arrangements within the framework of the collective agreement or award. For example, clause 24.10 of the Australian Public Service Award 1998 provides:

> Home based employment may be used by agreement between the agency head and an employee to permit an employee to perform part of the ordinary weekly hours of duty at home.[23]

B. Telework and Employment Discrimination

An interesting question that recently came before the Victorian courts is whether teleworkers can utilize Australia's laws proscribing discrimination in employment to require the employer to agree to the

21. From our work as or with legal practitioners in Australia, we are aware that many home-based teleworkers are governed by detailed contracts of employment between themselves and their employer.

22. As to the distinction between varying an employment contract and substituting a new one, *see* Concut Pty. Ltd. v. Worrell, 176 A.L.R. 693 (2000) (Austl.).

23. Austl. Indus. Rel. Comm'n, Australian Industrial Registry Loose-leaf Consolidation, Australian Public Service Award 1998 (as varied to Dec. 11, 2000). *See* Austl. Pub. Sector & Broadcasting Union v. Minister for Industry, Technology and Commerce, 36 Austl. Indus. L.R. ¶ 186 (1994) (Austl. Indus. Rel. Comm'n).

employee performing the whole or portion of the job from home, and to agree to provide the employee with the necessary equipment to undertake this work.

Over the last 30 years, a series of overlapping Commonwealth and State laws have been enacted that forbid harassment or discrimination on the grounds of sex, race, disability, age, etc., with respect to employment and also the provision of accommodation and goods or services.[24] In several Australian States, the laws proscribing discrimination in employment have been expanded to cover discrimination of employees on the grounds of their caring responsibilities as parents and as carers of sick or other family members in need of care.[25]

Under these provisions, employers are forbidden to engage in acts of either direct or indirect discrimination. Direct or disparate treatment discrimination occurs when a person is treated less favorably because of that person's sex, disability, race, carer responsibilities, etc. The concept of indirect or adverse impact discrimination first took root in the United States[26] and has found its way into human rights legislation in Australia and throughout the common law world. In brief, indirect discrimination occurs when a requirement or condition, which may be facially neutral, has an adverse impact upon a person because of that person's sex, disability, race, carer responsibilities, etc.[27]

The Victorian case involved a Ms. Schou, who had been employed as a sub-editor of Hansard for the Parliament of the State of Victoria.[28] It was a term of her employment that when Parliament was in session she was to undertake her sub-editing duties from Parliament House. As Ms. Schou had a small child who suffered recurring bouts of illness, she requested that she be granted permission to undertake some of her sub-editing duties from her home, and requested her employer to supply her with a telephone modem and a fax machine so that she could do some work from home. When the employer failed to supply the equipment, Ms. Schou

24. *See*, *e.g.*, Sex Discrimination Act 1984 (Austl.); Anti-Discrimination Act 1977 (N.S.W.); Equal Opportunity Act 1995 (Vict.). For comment, *see* P. Bailey & A. Devereus, *The Operation of Anti-Discrimination Laws in Australia*, *in* HUMAN RIGHTS IN AUSTRALIAN LAW: PRINCIPLES PRACTICE AND POTENTIAL 292 (D. Kinley ed., 1998).

25. *See*, *e.g.*, Equal Opportunity Act 1995, § 6 (Vict.); Anti-Discrimination Act 1977, Pt. 4B (N.S.W.).

26. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

27. Waters v. Public Transport Corp., 173 C.L.R. 349, 392 (1991) (Austl.).

28. "Hansard" is the Anglo-Australian name for the published record of the proceedings of a Parliament.

resigned and brought proceedings asserting that she had been indirectly discriminated against on the grounds of her parental and carer responsibilities.

She argued that the term of her employment that she undertake sub-editing from Parliament House when Parliament was in session, although it was facially neutral, adversely impacted against persons with carer's responsibilities. Under the discrimination statute of the State of Victoria,[29] whose provisions are similar to most Australian discrimination laws, to succeed Ms. Schou had to show that in all the circumstances this term of employment was not reasonable. Her claim initially succeeded in the Victorian Civil and Administrative Tribunal. On review in the Supreme Court of Victoria, however, Justice Harper referred the matter back to the Tribunal on the ground that it had erred in law by focusing on the reasonableness of Ms. Schou's request to work from her home, as opposed to the reasonableness of the requirement that she undertake her sub-editing work from Parliament House when the Parliament was in session.[30]

It would seem from the judgment of Justice Harper that employees will have to adduce significant business practice evidence if they wish to establish that a condition of full-time attendance is not reasonable. In our view, His Honour adopted an unnecessarily narrow approach to indirect discrimination in overturning the Tribunal's decision. Nevertheless, when this matter was referred back to the Victorian Civil and Administrative Tribunal, Justice Duggan held that having regard to the work of the Hansard editors, in all the circumstances a requirement of full-time attendance was unreasonable and accordingly Ms. Schou's claim of discrimination succeeded.[31] As electronic technology improves, it will be even more difficult for employers to assert that full-time attendance is essential for the operations of their businesses. It is our view that it will be possible for many employees who have carer's responsibilities to show that it is not reasonable for their employers to refuse to permit them to perform some of their telework at home, and we have no doubt that the Australian courts and human rights tribunals will be called upon to address this issue again in the immediate future.

29. Equal Opportunity Act 1995, § 9(1) (Vict.).
30. State of Victoria v. Schou, 3 Vict. R. 655 (2001) (Austl.).
31. Schou v. State of Victoria, [2002] VCAT 375 (May 24, 2002). *But see* Postcript, *infra*.

C. *Occupational Health and Safety Protection for Teleworkers*

Beginning in the 1970s, the Commonwealth and State parliaments have enacted a grid of occupational health and safety statutes,[32] generally based on the British Robens reforms of the 1970s.[33] These statutes place broad duties upon employers, controllers of premises, self-employed persons, and designers and manufacturers of plant and equipment to take care of the health and safety of persons at places of work, so far as is reasonably practicable.[34] These laws are supplemented by Commonwealth and State industrial codes of practice that more specifically define the obligations of employers with respect to various industries and occupations. A breach of the occupational health and safety statutes is a criminal offense that may lead to the imposition of a large fine upon the transgressor.

It is clear that employers are required to take care of the health and safety of their employees when they undertake work at a place of work. A place of work is defined broadly in the occupational health and safety statutes and would cover the home-based office of a teleworking employee.[35] However, there are no Australian curial precedents of which we are aware, where an employer has been prosecuted for breaching one of these statutes because of its failure to ensure the safety and health of an employee when working at home.

On the other hand, there have been decisions holding labor hire agencies liable for breaching the occupational health and safety statutes by failing to ensure the safety of a worker, when that worker is performing work at the premises of a client business. A useful illustration is the 1999 decision of the New South Wales Industrial Relations Commission in Court Session in the *Drake Industrial* case.[36] Drake Industrial hires out workers to "host" businesses. Although

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32. *See*, *e.g.*, Occupational Health and Safety Act 2000 (N.S.W.); Occupational Health and Safety Act 1985 (Vic); Occupational Safety, Health and Welfare Act 1986 (S. Austl.). For a brief history of the enactment of occupational health and safety laws in Australia, *see* PANEL OF REVIEW OF THE OCCUPATIONAL HEALTH AND SAFETY ACT 1983 (R. McCallum chair), FINAL REPORT, 9-23 (Workcover Auth. of N.S.W., 1997).

33. COMMITTEE ON HEALTH AND SAFETY AT WORK (Lord Robens chair), REPORT (Cmnd. 5034, 1972).

34. *See* Neil Gunningham, *From Compliance to Best Practice in OHS: The Roles of Specification, Performance and Systems-Based Standards*, 9 AUSTL. J. LAB. L. 221 (1996); Richard Johnstone, *Paradigm Crossed: The Statutory Occupational Health and Safety Obligations of the Business Undertaking*, 12 AUSTL. J. LAB. L. 73 (1999).

35. *See*, *e.g.*, Occupational Health and Safety Act 2000, § 4 (N.S.W.), which defines "place of work" as meaning "premises where persons work," and goes on to define "premises" as including any place including land, building, vehicle, vessel, aircraft, installation, etc.

36. Drake Personnel v. Workcover Auth. of N.S.W. (Insp. Ch'ng), 90 Indus. R. 432 (1999) (N.S.W. Indus. Rel. Comm'n); *see also* Swift Placements v. Workcover Auth. of N.S.W. (Insp. May), 96 Indus. R. 69 (2000) (N.S.W. Indus. Rel. Comm'n).

working at the host's premises, the workers are engaged and paid by Drake rather than the host, which accordingly is not their employer.[37] When a Drake-supplied worker was undertaking work at a host's premises, she injured her hand on an unsafe machine. The Industrial Relations Commission held that as her employer, Drake had breached its duty under the relevant occupational health and safety statute[38] by failing to ensure that the labor hire employee was safe when undertaking this work.

In our view, where an employee is undertaking telework in a home-based office and suffers injury because of some fault in equipment owned by the employer, it would be held that the employer had breached the relevant occupational health and safety statute by failing to safeguard the employee from risks. This is why when contracting with employees to undertake telework in their homes, it is essential for an employer to include a term whereby the employer may have reasonable access to the home-based office to check equipment, working conditions, and so on.

III. RESPONSIBILITY FOR HIGH TECHNOLOGY WORK TOOLS

As the Telstra Agreement quoted earlier in this report illustrates, it is possible for a collective agreement to allocate responsibility for the supply of computers or other equipment needed to perform work. In that instance, it was the employer who agreed to accept that responsibility, and in practice that would appear to be the normal arrangement in the context of employment relationships. It is rare in our experience for employers to insist on employees supplying their own computers, software, or other information technology, or on contributing to the cost of their supply, maintenance, or insurance, at least in relation to work performed at the employer's premises.[39]

Nevertheless, in the absence of any collectively bargained stipulation to the contrary, there is nothing to prevent employers insisting on including a term to such effect in an employment contract,

37. On this point, *see also* Mason and Cox Pty Ltd. v. McCann, 74 S. Austl.St.R. 438 (1999) (Austl.); Stewart, *supra* note 17, at 251–56.

38. Drake Industrial was convicted of breaching § 15 of the Occupational Health and Safety Act 1983 (N.S.W.), which has now been replaced by § 8 of the Occupational Health and Safety Act 2000 (N.S.W.).

39. Those (such as many academics) who choose to perform some of their work at home do often supply their own equipment for that purpose. But this often seems to be in default of the employer providing any funding for that purpose, as opposed to the imposition of a requirement that the employee purchase such equipment. To the extent that the equipment is used in connection with paid work rather than for purely private purposes, any expense involved will usually be deductible from the employee's taxable income.

though this is perhaps more likely to be a feature of a contract for services (or at least what is intended to be a contract for services). Where an organization contracts to have work performed by a person, and the organization desires to have that person characterized as an independent contractor rather than as an employee, it will frequently include a term obliging the person to supply and maintain any tools or equipment needed to perform the work. This is because, under the accepted "multi-factor" test for determining the status of a worker,[40] it has long been established that assumption of responsibility for supplying one's own equipment is one of the factors or "indicia" that point to a person being a contractor.

That said, the High Court has recently placed an important qualification on the relevance of this factor. The case concerned a company providing courier services, which was held to be vicariously liable for the negligence of a courier whom it engaged to make deliveries by bicycle. The courier was held to be an employee of the company, despite being engaged under a contract that purported to be a contract for services.[41] The majority judgment downplayed the significance of the fact that couriers working for the company were obliged to supply their own tools and equipment, noting that no great skill was required to operate the equipment in question, that "the capital outlay was relatively small" and that "bicycles are not tools that are inherently capable of use only for courier work but provide a means of personal transport or even a means of recreation out of work time."[42]

By the same token, it might be said that where a person whom an organization would prefer to treat as a contractor is required by their contract to supply their own computer equipment, this should not be regarded as a relevant factor in determining their employment status unless the equipment is particularly expensive and/or of a specialized nature. Most PCs these days are relatively cheap, after all, and are clearly capable of being used for all manner of recreational purposes.[43]

40. *See* Stevens v. Brodribb Sawmilling Co. Pty. Ltd., 160 C.L.R. 16 (1986) (Austl.); B. CREIGHTON & A. STEWART, *supra* note 1, ch. 7.3.

41. Hollis v. Vabu Pty. Ltd., 207 C.L.R. 21 (2001) (Austl.).

42. *Id.* at 44.

43. *Cf.* Redrock Holdings Pty. Ltd. v. Hinkley, 50 Intell. Prop. R. 565 (2001) (Vict. Sup. Ct.), where it was the worker, a computer programmer, who was endeavoring to argue that he was an independent contractor. His claim failed and he was held to be an employee, not least because here it was the company that was clearly responsible for supplying the equipment and software he needed.

IV. ELECTRONIC MONITORING OF TELEWORKERS

In Australia, there are no hard and fast restraints on employers monitoring the telework undertaken by employees either in home-based offices or at the employer's premises. In order to carry out monitoring, however, employers are required to abide by Australia's narrow privacy laws, those Commonwealth laws concerned with telephonic communications, and with any restrictions imposed by collective agreements. We shall examine these matters in turn.

A. Privacy Legislation

Until very recently, Australia's workplace privacy laws were distinctly under-developed,[44] especially in relation to the private sector. In 1988, the Commonwealth Parliament enacted a Privacy Act,[45] but this was initially confined to ensuring the privacy of personal and related information collected by Commonwealth public sector agencies. Some of the States have now passed their own privacy legislation,[46] while others have undertaken at an executive level to comply with the Information Privacy Principles set out in the Commonwealth Act,[47] but in each instance these measures still cover only public sector agencies.

As the pressures of globalization more tightly integrated the economy of Australia into the world economy in the 1990s, however, there were calls for the establishment of an effective privacy regime for the Australian private sector as well.[48] On April 12, 2000, a Bill was introduced into the Commonwealth Parliament to amend the Commonwealth Privacy Act and to extend its public sector regime to the Australian private sector.[49] The explanatory memorandum accompanying the Bill made it clear that the Commonwealth Government wished to establish private sector privacy legislation in order to enable Australia to fully participate in global electronic commerce that generally requires participating nations to have laws in

44. *See* R. McCallum & G.J. McCarry, *Worker Privacy in Australia*, 17 COMP. LAB. L.J. 13 (1996).

45. Privacy Act 1988 (Austl.).

46. *See* Privacy and Personal Information Protection Act 1998 (N.S.W.); Information Privacy Act 2000 (Vict.).

47. *See*, *e.g.*, http://www.archives.sa.gov.au/privacy/principles.html (South Australia).

48. *See*, *e.g.*, Moira Paterson, *Privacy Protection in Australia: The Need for an Effective Private Sector Regime*, 26 FED. L. REV. 371 (1998).

49. Privacy Amendment (Private Sector) Bill 2000 (Austl.). For comment, *see* P. Ronfeldt, *Workplace Relations and the Privacy Amendment (Private Sector) Bill 2000: Cautionary Remarks*, Australian Business Industrial conference on Workplace Privacy, Sydney (Nov. 10, 2000) (on file with the authors).

place to control the dissemination of personal information. The amendments to the Privacy Act were passed by the Commonwealth Parliament in December 2000 and came into force on December 21, 2001.

The new laws are detailed and complex in their application. They are primarily designed to protect personal information, and especially medical records, which are collected by private sector organizations. The Privacy Act sets out a series of National Privacy Principles (NPPs) with which private sector bodies must comply, unless they develop their own privacy code and have it approved by the Privacy Commissioner. The NPPs cover the collection, storage, use, disclosure, accuracy and security of personal information, access to personal information, issues of anonymity and data flow, and include special provisions in relation to "sensitive" information (information as to a person's race; political, religious, or philosophical beliefs; trade or industry membership; sexual preference; criminal record; and health). Breach of these principles can lead to a complaint being lodged with the Privacy Commissioner, who is empowered either to issue a restraining order or to award compensation to the complainant.

Not all private sector employers are bound by the NPPs, however, because the Act exempts small businesses with an annual turnover of less than $3,000,000 (Aust.), except where they are specifically in the business of dealing with health information or distributing personal information for gain. It has been estimated that more than 90% of Australian businesses will be able to take advantage of this exemption, leading to criticism that the 2000 amendments will do relatively little in practice to improve the "dismal coverage" of Australian privacy laws.[50]

Interestingly, even where private sector employers come under the Privacy Act, any act or practice that is "directly related" to an employee record is exempted from the reach of the NPPs.[51] An employee record is defined to mean "a record of personal information relating to the employment of the employee" and includes information about the employee's health, terms of employment,

50. Graham Greenleaf, '*Tabula Rasa*': *Ten Reasons Why Australian Privacy Law Does Not Exist*, 24 U.N.S.W.L.J. 262, 264 (2001).

51. Privacy Act 1988, § 7B(3) (Austl.). For comment on this aspect of the legislation, *see* M.F.A. Otlowski, *Employment Sector By-Passed by the Privacy Amendments*, 14 AUSTL. J. LAB. L. 169 (2001).

training, and termination of employment.[52] However, where employees are engaged in telework, their employers will tend to hold a significant amount of personal information that arguably would not constitute an "employee record." For example, personal e-mails both sent and received by teleworking employees typically remain on the e-mail servers of their employers and can be accessed by network managers even after being "deleted" by the employees themselves. Employers can also usually keep track of their employees' Internet browsing habits.

As far as this kind of information is concerned, therefore, it will be essential for employers—or at least those employers covered by the Privacy Act—to ensure that they either comply with the NPPs or obtain approval of a privacy code. This is plainly going to require some degree of restraint on the part of employers, in terms both of the extent to which they monitor electronic communications and of the use to which they seek to put any information gathered in the course of such monitoring. As the Privacy Commissioner has observed, "while it is acknowledged that access to staff e-mails and browsing logs by system administrators may be required in certain circumstances, it is unlikely that pervasive, systematic and ongoing surveillance of staff e-mails and logs should be necessary."[53] For this reason (and for others to be explained shortly), employers are advised to develop and distribute policies with respect to the use that employees may make of employer e-mail or Internet systems, and also explain the steps that have been taken to ensure the privacy of any personal information contained on e-mail servers.[54]

B. Privacy Protection at Common Law

In 1937, the High Court rejected an attempt by the owner of the Victoria Park racecourse to prevent the defendants from erecting an observation platform on neighboring land and broadcasting information about the races conducted there.[55] Because of the "wide language" adopted by Chief Justice Latham in explaining why the

52. Privacy Act 1988, § 6(1) (Austl.). Oddly, the effect of the legislation is that no exemption is given in relation to information supplied by or relating to either unsuccessful job applicants or independent contractors.

53. Privacy Commissioner, *Guidelines on Workplace E-mail, Web Browsing and Privacy* (2000), *available at* http://www.privacy.gov.au/internet/email/index.html.

54. Dean Ellinson, *Employees' Personal Use of Their Employers' E-mail System*, 29 AUSTL. BUS. L. REV. 165 (2001); *see* Austl. Municipal, Administrative, Clerical & Services Union v. Ansett Austl. Ltd., 175 A.L.R. 173, 192 (2000) (Austl.).

55. Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor, 58 C.L.R. 479 (1937) (Austl.).

plaintiff had no cause of action,[56] "legislatures and law reform bodies have, for more than 50 years, proceeded on the footing that no enforceable general right to privacy exists in the law of this country."[57]

Thanks to the High Court's recent decision in *Australian Broadcasting Corp. v. Lenah Game Meats Pty. Ltd.*,[58] however, the way may now be open for the recognition of a new tort of intrusion into personal privacy. The plaintiff in the case was in the business of processing and selling possum meat for export. It wished to prevent the broadcast of a film of its slaughtering operations that had been taken by animal rights activists, using secret cameras allegedly installed in the plaintiff's abattoir following a break-in. For a variety of reasons, including the fact that the plaintiff was a corporation rather than a natural person, there was nothing demonstrably confidential about the filmed activities, and the defendant broadcaster had not been party to the illegal filming, the plaintiff's claim ultimately failed. But each of the judgments left open the possibility that the time might be ripe to recognize a tort of invasion of privacy, and the court pointedly declined to endorse the views expressed by Chief Justice Latham in the *Victoria Park* case.[59]

It remains to be seen whether the Australian judiciary takes up the invitation implicit in the *Lenah Game Meats* judgments. What is perhaps equally important, however, is the emphasis placed by each of the judges (albeit in varying ways) on the capacity of other, more established causes of action to protect privacy interests.

Of particular significance in the context of workplace surveillance is the extension of the equitable doctrine of breach of confidence to cover some categories at least of privacy invasion.[60] It is now well established that A may be liable not just for wrongfully using or disclosing information voluntarily imparted by B in confidence, including information of a personal and non-commercial nature,[61] but for stealing or misappropriating confidential information from B even

56. *Id.* at 495–96.

57. Austl. Broadcasting Corp. v. Lenah Game Meats Pty. Ltd., 208 C.L.R. 199, 277 (2001) (Austl.). *See*, *e.g.*, Cruise v. Southdown Press Pty. Ltd., 26 Intell. Prop. R. 125 (1993) (Austl.). *Cf.* Greg Taylor, *Why is There No Common Law Right of Privacy?*, 26 MONASH U. L. REV. 235 (2000).

58. 208 C.L.R. 199 (2001) (Austl.).

59. Justice Callinan went so far as to describe the "conservative views" of the majority in *Victoria Park* as having "the appearance of an anachronism, even by the standards of 1937," *id.* at 322.

60. *See* M.L. Richardson, *Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law*, 19 MELB. U. L. REV. 673 (1994); H. Fenwick & G. Phillipson, *Confidence and Privacy: A Re-examination*, 55 CAMB. L.J. 447 (1996).

61. *See*, *e.g.*, Argyll v. Argyll, [1967] Ch. 302 (marital secrets); Coulthard v. South Australia, 63 S. Austl.St.R. 531 (1995) (Austl.) (private opinions expressed in meeting).

where there is no pre-existing relationship between the parties.[62] The British courts have extended this principle to cover situations where a person spies on or secretly films activities of a private and confidential nature, even if the means used (such as a powerful telephoto lens) are not unlawful in themselves.[63] This view was specifically adopted by Chief Justice Gleeson in *Lenah Game Meats*,[64] though he stopped short of endorsing the opinions expressed in a recent English Court of Appeal decision to the effect that the protection offered by the common law of confidentiality has now effectively created a right of personal privacy.[65]

In any event, what seems plain is that an employer would potentially be breaching confidence in relation to its workforce not only by conducting secret video or telephone surveillance, but by accessing personal information in the form of private e-mails or browsing logs without specific consent. This would be so even where the employer owned all the relevant equipment. If an employer has in practice allowed employees some measure of latitude in using such equipment for private purposes, those employees might reasonably assume that the confidentiality of their private communications would be respected. To infringe that confidentiality might be considered not only a breach of confidence in equity, but also a breach of the employment contract. This might be on the basis that the employer owes an implied duty of confidentiality, which is co-extensive with the equitable doctrine,[66] or that such action breaches the employer's implied obligation not to damage the relationship of "trust and confidence" between the parties.[67] Either way, the employer would potentially be liable to pay compensation for any harm suffered as a result of the unwarranted intrusion.

There would of course be situations where, even in the absence of express consent, the employer might be able to invoke some form of implied authority to scrutinize private communications or Internet

62. *See*, *e.g.*, Franklin v. Giddins, [1978] Q.R. 72.

63. *See*, *e.g.*, Helliwell v. Chief Constable of Derbyshire, [1995] 1 W.L.R. 804, 807 (Q.B.).

64. 208 C.L.R. 199, 224 (2001) (Austl.).

65. Douglas v. Hello! Ltd., [2001] 2 W.L.R. 992, 1025, 1036 (C.A.).

66. It is usually employees who are regarded as owing both an equitable and a contractual duty of confidence to their employers (*see* R. McCallum & A. Stewart, *Employee Loyalty in Australia*, 20 COMP. LAB. L. & POL'Y J. 155, 169–70 (1999)), but there is no reason in principle why the obligation should not be considered to be reciprocal in effect. *See*, *e.g.*, Slavutych v. Baker, 55 D.L.R. (3d) 224 (1975) (Austl. Sup. Ct.); Prout v. British Gas p.l.c., [1992] F.S.R. 351 (Patents County Ct.).

67. *See* McCallum & Stewart, *supra* note 66, at 159–60. *Cf.* J. Sempill, *Under the Lens: Electronic Workplace Surveillance*, 14 AUSTL. J. LAB. L. 111, 128–33 (2001), expressing skepticism as to the capacity of the implied duty of trust and confidence to provide a meaningful check on the power of employers to conduct surveillance in the workplace.

browsing—as, for instance, where the employer has reason to be concerned as to shirking of duties, or harassing a coworker. To the extent, too, that it is legitimate for an employer to monitor a teleworker's performance by conducting audits of the quality of their work, there may be situations where checks on business communications (such as e-mails to clients) may necessarily result in private communications being viewed as well. In such cases, what is crucial is that the employer be able to show that any access to such information is kept within reasonable limits, and that the information not be used for something other than the original purpose.

It should also be added that, if in the course of electronic monitoring, an employer discovered that an employee had been engaging in illegal or harmful activities, such as the downloading of child pornography or the sexual harassment of another person, they would be able to invoke a defense of justified disclosure to any action brought against them for breach of confidence or breach of the employment contract. Provided the information in question were disclosed only to an "appropriate authority" (such as the police in the case of criminal conduct), the public interest in such disclosure would override the employee's right to confidentiality.[68] This would be so even if the monitoring itself had originally been unlawful or inappropriate.

Nevertheless, it is suggested again that it will usually be in the interests of all concerned for employers to have clear, workable, and properly communicated policies that not merely set limits on employee use of employer-provided technology, but that alert workers to the extent to which their private communications may or may not be monitored.

C. Surveillance and Telecommunications Legislation

Although each Australian State and Territory in some way regulates the use of surveillance technology, most of the relevant legislation deals only with "listening devices."[69] Although some States have recently enacted statutes that deal with a broader range of surveillance devices, including video cameras,[70] none of these measures address the use by employers of computer or data

68. *See* McCallum & Stewart, *supra* note 66, at 174–78.
69. *See*, *e.g.*, Listening Devices Act 1972 (S. Austl.).
70. Workplace Video Surveillance Act 1998 (N.S.W.); Surveillance Devices Act 1999 (Vict.); Surveillance Devices Act 1998 (W. Austl.). Only the New South Wales statute is specifically directed to workplace surveillance. *See* Sempill, *supra* note 67.

surveillance.[71] Where an employer is electronically monitoring telework, therefore, there appear to be no State or Territory laws that specifically prohibit or restrict the use of computer surveillance technology.[72]

However, when employers are monitoring telework performed by employees in home-based offices, or indeed anywhere away from the employer's premises, such monitoring will almost certainly involve the use of public telephone lines. Under Commonwealth telecommunications law, it is an offense, punishable by a maximum two year term of imprisonment, to intercept any telecommunications.[73] The statute explains that "interception of a communication passing over a telecommunications system consists of listening to or recording, by any means, such a communication in its passage over that telecommunications system without the knowledge of the person making the communication."[74]

It has been suggested that where the employer has not obtained the consent of a home-based employee before monitoring that employee's e-mail communications, the employer could well be in breach of this provision.[75] Indeed on a broad reading of some of the definitional provisions in the legislation, it may apply not only to messages sent through external lines, but to communications within a workplace using a local area network.[76] In any event, the critical issue is whether the "listening" or "recording" has been done "without the knowledge of the person making the communication." It could be argued that when contracting to undertake telework at a home-based office that is connected to the employing undertaking by the public telephone lines, or indeed simply when using an employer-provided e-mail service, an employee must be taken to have known that monitoring might take place and to have impliedly consented to such

71. The Victorian statute does regulate the use of any "data surveillance device" (defined in § 3(1) as "any device capable of being used to record or monitor the input of information into or the output of information from a computer"), but only on the part of law enforcement officers. Surveillance Devices Act 1999, §§ 9, 12 (Vict.).

72. For proposals to broaden the scope of surveillance regulation and address the issue of workplace privacy in a more comprehensive manner, *see* NEW SOUTH WALES LAW REFORM COMMISSION, SURVEILLANCE: AN INTERIM REPORT, Report 98 (2001); VICTORIAN LAW REFORM COMMISSION, WORKPLACE PRIVACY, Issues Paper (2002).

73. Telecommunications (Interception) Act 1979, § 7(1) (Austl.).

74. *Id.* § 6(1).

75. M. Dixon, *Emerging Issues in Industrial Relations: Employers, Employees and IT Systems—A Pandora's Box*, Industrial Relations Society of Queensland Annual Conference, Gold Coast, Australia, Nov. 2000 (on file with the authors).

76. James Tealby, *E-mail & Privacy at Work*, 10 J. L. & INFO. SC. 207, 215–20 (1999). The author goes on to suggest that even the mere storage (or caching) of messages may technically constitute an "interception" within the meaning of the legislation.

monitoring. As against that, however, many employees may in practice be unaware of the potential for electronic monitoring that necessarily exists with any e-mail system.[77]

No prosecution with respect to employer monitoring has been brought under these provisions, and this is why this aspect of the Commonwealth telecommunications laws is untested. However the very existence of the interception provisions is another reason why it would be prudent to obtain the written consent of the employee to occasional monitoring by the employer.

D. Collectively Bargained Restraints on Monitoring

From our researches, it appears to have been relatively rare to date for collective agreements to address the issue of the monitoring of telework and electronic communications.[78] One example, however, is to be found in an agreement recently negotiated at Macquarie University, which provides that:[79]

> Reasonable personal use of University-provided e-mail and web is an accepted aspect of working life at the University. Web and e-mail communication by University staff will be free of surveillance unless the Head has reasonable cause to suspect that a staff member is using electronic communications for personal purposes such that the staff member may have engaged in misconduct or serious misconduct.

Here is another example, this time from a local council agreement:[80]

> The employer undertakes that e-mail will not be routinely read or monitored. E-mail will be monitored and retrieved only if the employer is legally obliged to do so or has reasonable cause to believe that an employee has committed a criminal offence or serious disciplinary offence. In these situations, e-mail will be monitored and retrieved in consultation with a union representative or employee selected representative unless the matter is deemed as an emergency and could result in a malfunction of the system.

It is reasonable to assume that, as awareness of the potential for employer monitoring grows, and as (larger) employers move to

77. *Id.* at 219.

78. By contrast, the issue of video surveillance of workplaces has attracted rather more attention. *See,* Sempill, *supra* note 67, at 118, n.37.

79. Macquarie University Enterprise Agreement 2000–2003, PR900404, cl. 13.03.37 (Austl. Indus. Rel. Comm'n 2001).

80. Maroondah City Council Enterprise Agreement No. 4, 2001, PR906657, cl. 18 (Austl. Indus. Rel. Comm'n 2001).

comply with the new privacy legislation discussed above, these kinds of provisions will become more common.

V. MISUSE OF EMPLOYER-PROVIDED ELECTRONIC FACILITIES

The legal principles covering employee misuse of employer information technology are relatively straightforward.[81] If the employer communicates a policy that sets clear limits on computer use, and this is infringed, the employee will most likely have breached the employment contract. This may be on the basis that the policy itself has become incorporated into the contract; but even if it has not, the employee will almost certainly have breached the obligation, implied into every employment contract, to obey all lawful and reasonable directions issued by the employer.[82]

Even if no express policy has been articulated, or at least none that covers the misuse in question, the employer will often be able to assert a breach of the employee's implied duties to act with good faith and fidelity, and not to diminish the trust and confidence inherent in the employment relationship.[83] The following, we suggest, would in most instances breach those duties:

- excessive personal use of computers, printing facilities, e-mail or the Internet during working time;
- electronic harassment of coworkers;
- illicit copying of software for personal use; and,
- circulation of highly derogatory and offensive comments about supervisors or managers.

The employer's usual response in such cases would be to dismiss the employee, or alternatively to impose some lesser disciplinary action such as a reprimand, fine, or suspension without pay.[84] Where the employer opted for dismissal, there would be various avenues open to the employee to challenge that action. The most obvious would be to lodge a claim under the unfair termination laws to which

81. *See* B. Creighton & C. Fenwick, *Australia*, *in* THE EVOLVING EMPLOYMENT RELATIONSHIP AND THE NEW ECONOMY 1, 16–21 (R. Blanpain ed., 2002).

82. *See* R. v. Darling Island Stevedore & Lighterage Co. Ltd.; Ex parte Halliday & Sullivan, 60 C.L.R. 601, 621-622 (1938) (Austl.).

83. *See* McCallum & Stewart, *supra* note 66, at 158–60.

84. Most private sector employers in Australia are not in fact legally empowered to fine a worker or impose a suspension, though in practice such unlawful disciplinary action is frequently accepted without challenge. *See* A. Stewart, *Discipline at the Workplace,* 5 CORP. & BUS. L.J. 257 (1992).

reference has previously been made,[85] alleging that the dismissal was in all the circumstances "harsh, unjust or unreasonable" and seeking either reinstatement or an award of compensation. In one such case, a bank employee successfully challenged his dismissal for storing offensive material on his computer. The tribunal ruled that although the applicant had breached the bank's Internet and Email Usage Policy by storing "dirty" cartoons and jokes sent to him by e-mail, the relatively trivial nature of the offense did not warrant dismissal.[86] In other cases, by contrast, dismissals for the storage of pornographic or sexually-explicit material have been upheld regardless of the degree of offensiveness. This has been on the basis that the employer not only had a strict policy against the downloading or retention of such material, but had taken reasonable steps to draw it to the employee's attention (for example through the use of a "pop-up screen" on the employee's computer).[87]

What might cause particular problems for an employer seeking to justify a dismissal for breach of a policy on computer misuse would be evidence that it had been inconsistent in enforcing that policy in the past.[88] Similarly, any suggestion that the dismissed employee had been singled out because of some particular characteristic might result in the employer breaching anti-discrimination or victimization legislation. The *Ansett* case,[89] to be discussed in the next section of the report, illustrates this pitfall. The employer might also be in difficulty where the employee was alleged to have breached work rules in disseminating legitimate complaints about the employer or some aspect of its operations, especially where the information in question revealed wrongdoing on the part of the employer.[90]

Besides taking disciplinary action, the employer might also sue the employee to recover damages for any loss suffered as a result of breach of the employment contract, though in practice this would be rare. One possible situation would be where the employee's actions

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85. *Supra* notes 9 & 10.

86. Wilmott v. Bank of W. Austl. Ltd., (2001) C03013 of 2001 (W. Austl. Indus. Rel. Comm'n 2001).

87. *See*, *e.g.*, Toyota Motor Corp. v. Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union, (2000) Print T4675 (Austl. Indus. Rel. Comm'n 2000); Lewis v. Toyota Motor Corp., (2001) PR901843 (Austl. Indus. Rel. Comm'n 2001); Micallef v. Holden Ltd., (2001) PR900664 (Austl. Indus. Rel. Comm'n 2001); Massoud v. Sitel Corp. Austl. Pty Ltd. [2001] NSWIRComm 218 (2001). *Cf.* Harrington v. Philip Morris Ltd., (2002) PR915206 (Austl. Indus. Rel. Comm'n 2001).

88. *Cf.* Bostik (Austl.) Pty. Ltd. v. Gorgevski, 36 Fed. Ct. R. 20 (1992) (Austl.).

89. Austl. Municipal, Administrative, Clerical & Services Union v. Ansett Austl. Ltd., 175 A.L.R. 173 (2000) (Austl.).

90. *See* McCallum & Stewart, *supra* note 66, at 173–79.

had resulted in the employer incurring liability to a third party: for instance, for infringement of a software license, or for compensation paid to a harassed coworker.[91] In such a case, the employer's insurer might well insist on proceedings being instituted against the worker. A further situation in which litigation might be contemplated is where workers who create a computer program or some other form of intellectual property, using equipment supplied by the former employer, leave the employment taking with them that intellectual property.[92] In that instance, the employer might well seek injunctive relief and/or pecuniary or proprietary remedies not just against the ex-employee, but against any third party who had assisted in exploiting the intellectual property in question.[93]

VI. USE OF THE EMPLOYER'S TELECOMMUNICATION FACILITIES TO ACCESS WORKERS AND WORKER SUPPORT ENTITIES

Australian law does little to confer any positive rights on trade unions to communicate with their members, or on workers to access information from unions or appropriate government agencies. The main exception is that, in each jurisdiction, there is a statutory right for authorized union officials to enter workplaces to hold face-to-face discussions with members and/or to investigate possible breaches of awards or collective agreements. Such rights of entry are subject to various limitations, which typically include a requirement to give advance notice to the employer, and to confine any discussions with members to breaks from work.[94] They do not extend to any right of

91. At common law, an employer is vicariously liable for any wrong committed by an employee during the course of his or her employment. This can apply even where the employee is acting in deliberate disregard of the employer's instructions, provided there is still a sufficient nexus to the employment. *See* J. MACKEN, P. O'GRADY, C. SAPPIDEEN & G. WARBURTON, LAW OF EMPLOYMENT 361–68 (5th ed. 2002). Some statutes, such as those dealing with sexual harassment in the workplace, expressly impose liability on the wrongdoer's employer, at least where the employer has not taken reasonable steps to prevent the conduct in question. *See*, *e.g.*, Gilroy v. Angelov, 181 A.L.R. 57 (2000) (Austl.). On the other hand, it is less likely that an employer could be sued by a third party for publishing a defamatory statement communicated by an employee using the employer's Web site or e-mail system, so long as the employer neither knew nor should have known that the communication was likely to be defamatory. *See* Ellinson, *supra* note 54, at 168.

92. Intellectual property created in the course of employment usually belongs to the employer, in the absence of agreement to the contrary. *See*, *e.g.*, Copyright Act 1968, § 35(6) (Austl.).

93. *See*, *e.g.*, Redrock Holdings Pty. Ltd. v. Hinkley, 50 Intell. Prop. R. 565 (2001) (Vict. Sup. Ct.), a case that illustrates the difficulty in some instances in distinguishing between work done in the course of employment and work done in a "private" capacity.

94. *See*, *e.g.*, Workplace Relations Act 1996, Pt. IX Div. 11A (Austl.); Industrial Relations Act 1996, c. 5, Pt. 7 (N.S.W.). Prior to the enactment of the federal provisions in 1996, most

electronic communication, whether with or without the employer's support.[95]

It is of course open to any union to obtain an employer's agreement to its e-mail system, Web site, or bulletin board being used for the dissemination of union-related information. The two collective agreements quoted earlier in relation to the monitoring of e-mails also provide examples of such bargained access:

> Reasonable union-related use of University-provided e-mail and web access is an accepted aspect of working life at the University. There will be no surveillance by the University of e-mail or web communication with University staff initiated from the Union offices or officers at the University or off-campus, or from a staff member of the University to those offices or officers.[96]
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> . . .
>
> The Unions and its representatives will have access to Council's e-mail system for union purposes, to send and receive e-mails both internally and externally. An accredited union representative shall be permitted to send e-mail communications to all employees, subject to consultation with Council and this right being exercised reasonably and in accordance with technical requirements. Employees have the right to use the corporate e-mail system to communicate with their union and its representatives.[97]

It seems likely that unions will increasingly press to have these kinds of guarantees included in collective agreements, especially in the aftermath of a recent case involving the former airline Ansett that attracted considerable public attention. Ansett had established a number of "joint work groups" with unions to negotiate and implement improvements in productivity and efficiency. After a particularly acrimonious meeting of one such group, Ansett breached agreed protocol by e-mailing staff an update on the outcome of the meeting, without first showing it to the union representatives. The Australian Services Union responded by formulating its own bulletin, which was highly critical of management. This was distributed to union members (though not other staff) by one of its delegates, Ms.

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federal awards provided for considerably more extensive rights of entry. Such provisions are no longer enforceable. Workplace Relations Act 1996, § 127AA (Austl.).

95. Note that Australian law has not traditionally sought to impose any obligation to bargain in good faith, from which a right of communication might be implied in the context at least of collective bargaining; although industrial relations legislation in Western Australia has recently been amended to include such an obligation: Industrial Relations Act 1979, §§ 42B–42D (W.Austl.).

96. Macquarie University Enterprise Agreement 2000–2003, PR900404, cl. 5.01.03 (Austl. Indus. Rel. Comm'n 2001).

97. Maroondah City Council Enterprise Agreement No. 4, 2001, PR906657, cl. 18 (Austl. Indus. Rel. Comm'n 2001).

Gencarelli, using Ansett's internal e-mail system. Ansett management, furious both with the tone of the bulletin and with the fact that it had not been cleared with them first, conducted a brief investigation and then dismissed Gencarelli. The stated ground was that she had breached company policy by using the e-mail system for something other than "authorised lawful business activities."

In response to the dismissal, the union initiated proceedings against Ansett under the "freedom of association" provisions in the federal labor statute. It alleged that Ansett had dismissed Gencarelli for a prohibited reason, that being her status as a union delegate.[98] Under the statute, Ansett could escape liability only by establishing that Gencarelli's role as a union delegate was not one of the motivating factors in her dismissal. In the result, Justice Merkel of the Federal Court held that Ansett could not discharge that burden, and that the dismissal was accordingly unlawful.[99] He found that, despite its claims to the contrary, management's real objection was not to the use of its e-mail system as such, but to the content of the bulletin. Gencarelli had previously used e-mail to communicate with members without objection, and in any event a report on the outcome of a joint work group meeting clearly constituted an "authorised lawful business activity" under the terms of the company policy.

While the facts of the case are striking, and illustrate the danger for employers in seeking to "target" union delegates, it is important to appreciate the limits of the decision. As the judge himself emphasized, his judgment should not be taken to "suggest that union delegates have any general authorization to distribute union material using their employer's e-mail or IT system."[100] The union conceded in this case that Gencarelli had previously been warned by management for putting union material on the company bulletin board, though it successfully argued that any restriction imposed at the time did not apply to e-mails sent to the specific addresses of members. Had Ansett imposed a blanket ban on all union use of its internal communication systems, and then sought to enforce it, the result would almost certainly have been different. Provided such a policy did not obviously discriminate against union members (for example, by banning union communications, but allowing all manner of other

98. *See* Workplace Relations Act 1996, §§ 298K(1)(a), 298L(1)(a) (Austl.). For background on these provisions, *see* McCallum & Stewart, *supra* note 66, at 181-182.

99. Austl. Municipal, Administrative, Clerical & Services Union v. Ansett Austl. Ltd., 175 A.L.R. 173 (2000) (Austl.).

100. *Id.* at 192.

non-business information to be disseminated), it is hard to see what comeback the union would have had.

Finally under this heading, it should be noted that while employees do not have a positive right as such to access information from government agencies or tribunals about their entitlements under labor laws, it would be an unwise employer who dismissed a worker for using the employer's facilities to obtain such information. This is because statutory provisions of the kind invoked in the *Ansett* case also prohibit workers being victimized for seeking to enforce their rights under awards or agreements, or for initiating or participating in legal proceedings against their employers.[101]

POSTSCRIPT

Since this article was originally submitted by the authors in November 2002, there have been a number of significant developments affecting what is written here, some of which may be briefly mentioned. On the legislative front, the New South Wales government has announced plans to regulate all forms of covert surveillance in the workplace, including monitoring of e-mails and Internet use; while the federal government is in the process of reviewing the "employee records" exemption in the Privacy Act 1988 (*supra*, text at notes 51 and 52). In terms of caselaw, the most notable decision is perhaps *State of Victoria v. Schou* [2004] VSCA 71 (30 April 2004), in which the Victorian Court of Appeal, regrettably in our view, overturned the second Tribunal decision (*supra*, text at note 31) and dismissed Ms. Schou's complaint of discrimination.

101. *See* McCallum & Stewart, *supra* note 66, at 180-183.