AUSTRALIAN INDUSTRY
GROUP

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The Executive Director
Australian Law Reform Commission
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Dear Executive Director

Re: Serious Invasions of Privacy in the Digital Era, Issues Paper 43

The Australian Industry Group (Ai Group) welcomes the opportunity to comment on the Australian Law Reform Commission (ALRC) Issues Paper 43, *Serious Invasions of Privacy in the Digital Era* (Issues Paper).

Ai Group is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries. The businesses which we represent employ more than 1 million employees.

Ai Group has an interest in the Issues Paper in so far that it deals with workplace surveillance laws and the issue of employer requests for access to private social media accounts (see paragraph 151, 179 and 180 of the issues paper). Our comments in respect of the Issues Paper are limited to these two discrete areas.

The Issues Paper refers to the workplace surveillance laws in place in a number of State and Territory jurisdictions. While these workplace surveillance laws are not uniform between the States and Territories, we have not identified any problems arising from these laws. Nonetheless, uniformity would be desirable for employers.

Workplace surveillance is becoming increasingly important as workplaces become more attune to technological advancements. These advancements are contributing to efficiency and productivity improvements for employers and employees, for example enabling employees to work from home or remotely and GPS tracking systems that identify the most efficient route to a delivery or service destination.

Advances in technology have contributed to the growth in social media use by Australian workplaces. Social media at the workplace is used in multiple capacities. For example it can be used by the employer as an advertising/marketing tool and to connect with consumers and customers more broadly. Social media is also used by employees in their capacity as an advocate for the company for which they work (for example, an employee's role may include marketing/communications duties), or used by employees to connect with family, friends and colleagues. While the latter is

sometimes viewed as being 'personal', the social media interaction can occur at work, on technological devises provided by the employer and/or be publically accessible. This type of activity often blurs work and personal life. It must be acknowledged by the ALRC that in these circumstances, the employer should continue to maintain its right to lawfully monitor the use of technology by employees while performing work (including outside of discrete work hours), and while using technological devises provided by the employer, and that the employer has the same right as any member of the public to view publically available information.

Reports of employees using social media as a forum to discuss their workplace in a derogatory fashion are not uncommon and cases have been dealt by the Fair Work Commission whereby employees, dismissed for making derogatory comments about their employer or workplace on social media, have made claims for an unfair dismissal remedy.

In a recent case before the Fair Work Commission, the Full Bench referred to derogatory, offensive and discriminatory statements or comments made on Facebook that refer to matters in the workplace:

> "*[25] The posting of derogatory, offensive and discriminatory statements or comments about managers or other employees on Facebook might provide a valid reason for termination of employment. In each case, the enquiry will be as to the nature of the comments and statements made and the width of their publication. Comments made directly to managers and other employees and given wide circulation in the workplace will be treated more seriously than if such comments are shared privately by a few workmates in a social setting. In ordinary discourse there is much discussion about what happens in our work lives and the people involved. In this regard we are mindful of the need not to impose unrealistic standards of behaviour and discourse about such matters or to ignore the realities of workplaces.*
>
> *[26] In the present case, the series of Facebook conversations in which the comments were made were described by the Commissioner as having the flavour of a conversation in a pub or cafe, although conducted in electronic form. We do not agree altogether with this characterisation of the comments. The fact that the conversations were conducted in electronic form and on Facebook gave the comments a different characteristic and a potentially wider circulation than a pub discussion. Even if the comments were only accessible by the 170 Facebook "friends" of the Applicant, this was a wide audience and one which included employees of the Company. Further the nature of Facebook (and other such electronic communication on the internet) means that the comments might easily be forwarded on to others, widening the audience for their publication. Unlike conversations in a pub or cafe, the Facebook conversations leave a permanent written record of statements and comments made by the participants, which can be read at any time into the future until they are taken down by the page owner. Employees should therefore exercise considerable care in using social networking sites in making comments or conducting conversations about their managers and fellow employees.*"[1]
>
> (Emphasis added)

[1] *Linfox Australia Pty Ltd v Glen Stutsel* [2012] FWAFB 7097

In addition to the comments above, an employee's implied duty of fidelity and good faith cannot be ignored and is directly relevant in cases where an employee breaches this duty by engaging in conduct which is inconsistent with the continuation of their employment. It is imperative that employers maintain the right to legitimately discipline or direct employees for conduct occurring on social media that has a negative effect at the workplace, for example, criminal offences, violence, bullying, harassment or discrimination, conduct that brings the employer into disrepute, conduct that damages the reputation and/or interests of the employer, or conduct that damages the relationship between the employee and the workplace.

The issues paper identifies that some employers (or prospective employers) use social medial to assess candidates for work, education and other opportunities and it suggests that a privacy threat may be triggered if an employer or another individual makes unconscionable use of his or her position of advantage or power by requesting or demanding access to an individual's private social media accounts, for example, requiring passwords or similar information.

Ai Group is of the view that employers (including prospective employers), as with any member of the public, should not be prevented from viewing information on a person's social media account that is public in some capacity. Ai Group would not endorse the use of coercive conduct to require that a person provide passwords to their social media account with the purpose of accessing information which the employer is not otherwise capable of viewing because that information is securely private (for example, a private message between people which cannot be viewed by a larger mass of people, replicated or forwarded).

Despite this, Ai Group has not identified any instances of employers engaging in such coercive conduct. Given that Ai Group has not identified a live issue to be occurring, we not convinced that further regulation is necessary to prohibit this conduct. Sufficient protections for employees already exist under the *Fair Work Act 2009* (FW Act). For example, if an employee is dismissed by their employer for failing to provide a social media password, that employee will have a likely remedy available under the FW Act's unfair dismissal laws. Also as of 1 January 2014, workers (including employees and contractors) will have access to protection from workplace bullying under the FW Act. The key advantage of these courses of action is that each case is assessed on its own merits, taking into account the position and circumstances of the individual parties involved. A blanket regulatory approach, as foreshadowed by paragraph 180 of the issues paper, is heavy handed and would lead to unintended and problematic consequences in the workplace.

Yours sincerely

Stephen Smith
Director – National Workplace Relations