

1 February 2011



Mr. Mark Wilde
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Commonwealth Bank of Australia
Level 11, 201 Sussex St
Sydney NSW 2000

Email: mark.wilde@cba.com.au

Dear Mark,

RE: CBA's Social Media Policy

I am writing in respect to CBA's Social Media Policy that was introduced on 1 December 2010.

The FSU has a number of concerns with the policy as we believe it seeks to impose unreasonable restraints upon employees' use of social media channels and misrepresents employees' statutory rights and their contractual obligations to their employer.

The FSU has four areas of concern with the policy:

1. The policy does not properly reflect the contractual conditions of employment in that it goes beyond conduct that could legitimately be regarded as involving damage to the bank's reputation or interests.
2. The policy seeks to extend the scope of an employee's implied obligation of good faith and loyalty under the contract of employment.
3. The inclusion of terms and conditions of employment in the policy is unreasonable
4. The policy misrepresents employees workplace rights in that it does not acknowledge the statutory rights of employees under the Fair Work Act 2009 and Equal Opportunity legislation

Policy misrepresents contractual conditions

The FSU notes that the policy provides:

- a) employees must not allow any use of social media channels (such as facebook or blogs etc) to have an adverse impact on their work
- b) employees must not use social media channels to:
 - "comment on, post or store any information about Bank related matters (including, without limitation, information about dealings with customers, the terms and conditions

of your employment, other employees or contractors and information about the work being performed by the employee);

- Disparage or speak adversely about the Group, its customers, employees or contractors (including supporting others who do this by associating with them online);
 - Post or disclose information belonging to the Group (this includes any information relating to customers) which is not otherwise publically available:
- c) that employees may be engaging in appropriate conduct even when not discussing Group related matters
- d) an obligation on employees to immediately notify the bank if they become aware of inappropriate comment or a blog about the Group
- e) failure to comply with the policy is said to be a serious disciplinary matter and may result in disciplinary action including termination of employment

The FSU believes that the policy is so broad that it goes beyond conduct which the bank could legitimately claim involved damage to its reputation or interests and/or was such as to give rise to a concern about an employee's implied contractual obligation of good faith and loyalty.

The requirement that an employee "must not allow any use of social media channels" to have an adverse impact on their work is onerous and unreasonable as it suggests that they have the capacity to control other peoples use of such channels. The proposition that employees cannot "comment on, post or store any information about Bank related matters" or speak adversely about the Group severely restricts employees' freedom of expression.

A conversation about the colour of the tea cups at the workplace; who is winning the footy tipping competition or what day of the week CBA employees are permitted to wear casual clothes are examples of conversations that would constitute a breach the policy as it is currently worded. Similarly participation in a public debate about the four major banks increasing interest rates above the RBA increase or charging too much for their credit cards would also fall within the purview of the policy. Such conduct, whilst being a breach of the policy, would not constitute a breach of the employee's duty of good faith under the contract of employment and would not cause damage to the reputation or interest of the banks.

We believe the policy does not reflect the contractual employment conditions because not every criticism or adverse commentary of the employer will, objectively assessed, involve conduct that is destructive of the employment relationship and inconsistent with its maintenance. A breach of the policy does not necessarily involve a breach of the contractual obligation of good faith and loyalty and would not warrant disciplinary action. As such the policy is misleading and misrepresents employees' legal rights.

The policy also refers to the possibility that an employee might engage in inappropriate conduct that impacts on their employment even when not discussing Group related matters. The FSU has difficulty in understanding how conversations in social media channels that are not concerned with Group related matters can impact on the contractual obligations of employees or damage the bank's reputation or interests. This is a further misrepresentation of an employee's contractual obligations and an attempt by CBA to constrain employees' freedom of speech and expression.

Material posted by others – beyond contractual obligations

We refer to paragraph 4 of the policy which seeks to impose an obligation on employees to immediately notify their manager and the Media & Communications team if they become aware of the existence of a blog about the Group or “inappropriate or disparaging content and information stored or posted by others (including non-employees) in the social media environment” that may damage the Group or an “inappropriate comment” about the Group.

The FSU believes the imposition of an unqualified obligation on all employees to report to the bank blogs or “inappropriate comment” made by others, including non employees, goes beyond the scope of an employee’s obligations of good faith and loyalty implied under the contract of employment. To suggest that CBA employees should monitor and report on adverse comments to the bank constitutes an unreasonable requirement upon employees. The implied contractual obligation of an employee to obey a direction by the employer is subject the direction being reasonable. The obligation to monitor and report on material posted by others is clearly unreasonable and onerous and beyond the scope of the employee’s contractual obligations.

Employees’ terms and conditions of employment

The FSU rejects the proposition that employees should be prevented from using social media channels to comment on, post or store any information about their terms and conditions of their employment. Employees have a legitimate interest in participating in social media facilitated by the FSU in respect to their own terms and conditions of employment and conditions of employment generally within the industry. We believe such participation would not involve a breach of an employee’s implied duty of loyalty and good faith. Its inclusion in the policy is unreasonable and inconsistent with the statutory rights of employees under the Fair Work Act 2009.

Statutory rights and protections

Participation in FSU social media channels

The policy misrepresents employees’ entitlements as it fails to acknowledge the statutory rights and protections afforded employees under the Fair Work Act 2009.

The Fair Work Act confers rights on employees to be members of Unions. We refer firstly to the objects of the Act as section in section 3(e) which states:

“3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians by:

(e) enabling fairness and representation at work and the prevention of discrimination by recognizing the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing accessible and effective compliance mechanisms; “

We also refer to the General Protections and its object as set out in section 336 of the Act:

- “(a) *to protect workplace rights;*
- (b) *to protect freedom of association by ensuring that persons are:*
 - (i) *free to become, or not become, members of industrial associations; and*
 - (ii) *free to be represented, or not represented, by industrial associations; and*
 - (iii) *free to participate, or not participate, in lawful industrial activities;*
- © *to provide protection from workplace discrimination;*
- (d) *to provide effective relief for persons who have been discriminated against, victimized or otherwise adversely affected as a result of contravention of this Part.”*

A person must not take adverse action against another person because the other person engages, or has at any time engaged or proposed to engage, in industrial activity (s.346(b)). Industrial activity includes to organize or promote a lawful activity for, or on behalf of an industrial association; to encourage or participate in a lawful activity organized or promoted by an industrial association or to represent or advance the views, claims or interests of an industrial association (s.347).

The General Protections and freedom of association provisions confer a right on Union members and persons to participate in lawful industrial activity. Such activity includes their participation in social media channels facilitated by the FSU in respect to their terms and conditions of employment and those in the industry generally. The policy does not acknowledge this right as it fails to exempt such conduct from its coverage.

By failing to exclude this conduct the FSU believes the bank’s policy misrepresents the rights employees’ have under the Act. Further we believe that the statement that such conduct could result in disciplinary action including termination of employment contravenes section 346 of the Act which prohibits a person from taking or threatening to take adverse action against a person engaging in industrial activity.

FSU Workplace Representatives

The FSU believes that the bank’s social media policy also offends the General protection and freedom of association rights that apply to FSU workplace representatives. In carrying out their duties FSU workplace representatives in CBA are carrying out lawful industrial activities and have the protections of the Act.

We further submit that the policy contravenes the workplace rights of workplace representatives. Under section 341 of the Fair Work Act a person has a workplace right if the person has a role or responsibility under a workplace instrument. Workplace representatives in CBA have a role under the *Commonwealth Bank Enterprise Agreement 2010*.

We refer to clause 27.1 of the Agreement which confers on the FSU Workplace Representative the right, subject to the operational needs of the business, to reasonable and sufficient time and access to existing facilities at the workplace during working hours to enable them to attend to their duties as provided in the FSU Rules. The FSU Rules provides for the appointment of workplace representatives for the purpose of furthering or protecting the Union’s industrial interests and their duties include encouraging interest and discussion in Union affairs in his/her workplace.

The social media policy seeks to restrict the ability of workplace representatives to carry out their role within the workplace. In threatening to take disciplinary action if the policy is breached involves a contravention of section 340 of the Act which prohibits a person from taking or threatening to take adverse action against another person who has a workplace right or proposes to exercise a workplace right.

The FSU also believes the bank's policy contravenes section 345 of the Act in that it makes a false and misleading representation of the workplace rights of FSU workplace representatives. It does so by not exempting from the policy their role and responsibilities.

Unfair Dismissal Protections

The policy also fails to recognize the rights of employees against being unfairly dismissed. The Fair Work Act provides that the dismissal of an employee must not be harsh, unjust or unreasonable (Part 3-2).

For the reasons outline above the FSU believes that in implementing this policy the bank is seeking to impose unreasonable restraints on employees' use of social media channels. Failure to comply with the policy is said to be a serious disciplinary matter which may result in the termination of employment. However just because the policy says an employee must not speak adversely about the bank, does not mean that doing so necessarily involves conduct justifying dismissal. Not all conduct that is contrary to the policy will entitle the bank to terminate the employment of an employee. As such it misrepresents an employee's rights under the Act not to be unfairly dismissed from their employment.

Discrimination

The FSU also believes that the policy is inconsistent with an employee's right not to be discriminated against on the basis of their political views or activities. The policy seeks to restrain an employee's ability to express his or her views in social media forums. This has the potential of prohibiting a person's right to express their political views and participate in political activities using these forums. We believe such prohibition is contrary to a person's right under equal employment legislation not to be discriminated against on the grounds of political conviction.

The FSU seeks an urgent meeting with you to discuss these issues and request that CBA desist from implementing the policy until our concerns are addressed.

Yours sincerely,



Wendy Streets
Director Campaign & Bargaining (Melbourne)
& CBA Executive Officer