



# STATEMENT

*Fair Work Act 2009*

Sch 1, clause 111C—FWC to vary certain modern awards

## **Variation of modern awards to include a right to disconnect term**

(AM2024/14)

JUSTICE HATCHER, PRESIDENT

MELBOURNE, 12 MARCH 2024

*Variation of modern awards to include a right to disconnect term – Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 – commencing process to develop a right to disconnect award term and guidelines – draft timetable for comment.*

### **Introduction**

[1] Following the passage of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Closing Loopholes Act (No 2)), the *Fair Work Act 2009* (Cth) (FW Act) is amended effective from 26 August 2024 to include provisions concerning a ‘right to disconnect’.

[2] These amendments mandate the inclusion of a right to disconnect term within all modern awards which are to be effective from 26 August 2024 or, in the case of small businesses and their employees, 26 August 2025.<sup>1</sup> The amendments also stipulate that the Fair Work Commission must make written guidelines about the operation of new Division 6—Employee right to disconnect which is to be included in Part 2-9—Other Terms and Conditions of Employment of the FW Act. There is no legislative deadline for the making of the guidelines. However, given that the Commission intends to consult on both the guidelines and the model term, I have decided to progress the two processes together. This statement outlines the Commission’s approach to implementing these legislative changes and proposes a draft timetable for stakeholder consultation and engagement regarding the development of a right to disconnect term and the required guidelines.

### **Overview of changes**

[3] The amendments add a new Division 6—Employee right to disconnect to Part 2-9 of the FW Act, establishing a statutory right for employees to disconnect from work communications outside of normal working hours. This includes provisions for dispute resolution related to exercising this right and empowers the Commission to issue stop orders or otherwise deal with a dispute about the right. Additionally, all modern awards are required to incorporate a right to disconnect term by 26 August 2024, and the Commission is tasked with developing written guidelines about their operation.

[4] The key changes can be summarised as follows:

- A definition of the right to disconnect term has been inserted into the FW Act Dictionary (s 12). The definition provides that a right to disconnect term is a term in a modern award that provides for the exercise of an employee's rights set out in subsections 333M(1) and (2).
- New section 149F requires modern awards to include a right to disconnect term.
- New section 333M prescribes a protected right for eligible employees to 'disconnect'. The new section provides that an employee may refuse to monitor, read or respond to contact, or attempted contact, from an employer (or third party relating to their work) outside of the employee's working hours unless the refusal is unreasonable. This right is a workplace right within the meaning of Part 3-1, General Protections of the FW Act.
- New section 333N sets out the procedures and requirements that apply to the resolution of a dispute about the right to disconnect. Both employees and employers can seek the assistance of the Commission to deal with a dispute.
- New section 333P empowers the Commission to make orders to prevent an employee from unreasonably refusing contact, or to prevent an employer from taking action against an employee because the employee has reasonably refused contact but the employer believes the refusal is unreasonable, or to prevent an employer from continuing to require contact by the employee.
- New section s 333Q makes civil remedies available for contravention of an order under s 333P.
- New section s 333W requires the Commission to make written guidelines about the operation of Division 6.

[5] The new sections 333M, 333N and 333W inserted by the Closing Loopholes Act (No 2) are set out in full below:

**333M Employee right to disconnect**

- (1) An employee may refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable.
- (2) An employee may refuse to monitor, read or respond to contact, or attempted contact, from a third party if the contact or attempted contact relates to their work and is outside of the employee's working hours unless the refusal is unreasonable.
- (3) Without limiting the matters that may be taken into account in determining whether a refusal is unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:

- (a) the reason for the contact or attempted contact;
- (b) how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
- (c) the extent to which the employee is compensated:
  - (i) to remain available to perform work during the period in which the contact or attempted contact is made; or
  - (ii) for working additional hours outside of the employee's ordinary hours of work;
- (d) the nature of the employee's role and the employee's level of responsibility;
- (e) the employee's personal circumstances (including family or caring responsibilities).

Note: For the purposes of paragraph (c), the extent to which an employee is compensated includes any non-monetary compensation.

- (4) For the avoidance of doubt, each of the rights in subsections (1) and (2) is a workplace right within the meaning of Part 3-1.

Note: The general protections provisions in Part 3-1 also prohibit the taking of adverse action by an employer against an employee because of a workplace right of the employee under this Division.

- (5) For the avoidance of doubt, an employee's refusal to monitor, read or respond to contact, or attempted contact, from their employer, or from a third party if the contact or attempted contact relates to their work, will be unreasonable if the contact or attempted contact is required under a law of the Commonwealth, a State or a Territory.
- (6) For the avoidance of doubt, if:
  - (a) an employee is covered by an enterprise agreement; and
  - (b) the enterprise agreement includes a right to disconnect term that is more favourable to the employee than the rights in subsections (1) and (2);

the right to disconnect term in the agreement continues to apply to the employee.

### **333N Disputes about the employee right to disconnect**

- (1) This section applies if:
  - (a) there is a dispute between an employer and an employee because the employee has refused to monitor, read or respond to contact or attempted contact under subsection 333M(1) or (2) and:
    - (i) the employer reasonably believes that the refusal is unreasonable; or
    - (ii) the employer has asserted that the refusal is unreasonable and the employee reasonably believes the refusal is not unreasonable; or
  - (b) there is another dispute between the employer and the employee about the operation of section 333M.

#### *Workplace level discussions*

- (2) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level by discussions between the parties.

*Application to FWC to deal with dispute*

- (3) If discussions at the workplace level do not resolve the dispute, a party to the dispute may apply for the FWC to do either or both of the following:
  - (a) make an order under section 333P (orders to stop refusing contact or to stop taking certain actions);
  - (b) otherwise deal with the dispute.

*Representatives*

- (4) The employer or employee to the dispute may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of:
  - (a) resolving the dispute; or
  - (b) applying to the FWC to make an order under section 333P or otherwise deal with the dispute; or
  - (c) the FWC dealing with the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

**333W Guidelines**

- (1) The FWC must make written guidelines in relation to the operation of this Division.
- (2) Guidelines made under subsection (1) are not a legislative instrument.

**[6]** As the right to disconnect provisions were added to the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* by way of a non-Government Senate amendment, the Explanatory Memorandum does not include any information about the provisions. The mover of the amendment in the Senate explained that the provisions are intended to ‘rebuild the boundary around workers’ personal time and create a safeguard for that time’ and ‘reduce unpaid working time and wage theft’.<sup>2</sup>

**Current modern award terms which may impact the right to disconnect**

**[7]** Staff of the Commission have undertaken an initial analysis of modern award provisions that may potentially impact on the development of the right to disconnect award term and accompanying written guidelines. The analysis draws from the recently published [discussion paper](#) on work and care which was prepared and published as part of the Modern Awards Review 2023-24. The results of the staff analysis are set out at Attachment A to this statement.

**Proposed timetable for varying modern awards**

**[8]** There are currently 121 industry and occupational modern awards and a further 34 modern awards that include the *Australian Government Industry Award 2016* as well as enterprise modern awards and state reference public sector modern awards. As discussed above,

each of these 155 instruments must be varied to provide for a right to disconnect term by 25 August 2024.

[9] To accommodate this requirement and to ensure thorough stakeholder consultation and the effective implementation of the right to disconnect term in modern awards, the following draft timetable is proposed. In preparing the timetable, I have considered the draft timetable for the [Annual Wage Review 2023-24](#), the timetable for the [Modern Awards Review 2023-24](#) and the timetable for the [delegates' rights term modern award variation matter](#). As I noted in my [statement](#) about the Closing Loopholes Act (No 2) amendments dated 27 February 2024, a degree of overlap in the timetables is unavoidable given the strict legislative deadlines.

*Proposed draft timetable*

<b>Date</b>	<b>Proposed consultation</b>
<b>2-3 May 2024</b>	Consultations with peak councils
<b>20 May 2024</b>	Parties to lodge submissions on proposed right to disconnect term and guidelines, including any award specific matters and the delayed operation for small businesses.
<b>3 June 2024</b>	Parties to lodge submissions in reply
<b>17-21 June 2024</b>	Consultation sessions with interested parties
<b>15 July 2024</b>	Draft award terms published by the Commission for comment
<b>1 August 2024</b>	Comments on draft award terms due
<b>23 August 2024</b>	Final determinations varying modern awards published
<b>26 August 2024</b>	Determinations come into operation (except small business)
<b>26 August 2025</b>	Determinations come into operation for small business

[10] The proactive approach outlined above in the proposed draft timetable aims to facilitate a comprehensive and inclusive consultation process, ensuring that all stakeholders have the opportunity to contribute to the development and implementation of the right to disconnect term in modern awards.

[11] Any comments on the draft proposed timetable should be sent to [awards@fwc.gov.au](mailto:awards@fwc.gov.au) by **12:00 pm (AEDT) on Wednesday, 20 March 2024**.

[12] I propose to issue a further statement in the week commencing 25 March 2024 either confirming or adjusting the timetable based on the comments received. Regarding the making of written guidelines, I propose to issue further information after considering submissions from interested parties (due on 20 May 2024 under the draft timetable).

**Allocation to a Full Bench**

[13] Once the timetable has been finalised, this matter will be allocated to a Full Bench consisting of myself, Vice President Asbury, Deputy President O'Neill and Commissioner McKinnon.



PRESIDENT

# Attachment A – FWC staff analysis of modern award provisions that may impact on a right to disconnect term

## Modern award terms that may impact on a right to disconnect

*This document has been prepared by staff of the Fair Work Commission to assist parties in relation to the variation of modern awards to include a right to disconnect term and the making of guidelines to support the new term. The document does not represent the concluded view of the Commission on any issue.*

In table 1, Commission staff have identified modern award provisions that may impact on the development of a new modern award term on a right to disconnect and accompany written guidelines. The analysis draws from the recently published [discussion paper on work and care](#), as part of the [Modern Awards Review 2023-24](#), and is intended to serve as a starting point for discussions with interested parties.

The modern award provisions identified are considered in the context of the newly inserted section 333M(3) of the *Fair Work Act 2009* which sets out when an employee's refusal to connect with an employer outside of work hours may be unreasonable. As per section 333M(3), modern award provisions must contemplate how and why contact is made, the level of disruption it causes, how employees are compensated to remain available, the nature of employee's role and their personal circumstances.

Table 1 – Existing modern awards terms that may impact a new right to disconnect term		
Modern award provision	Detail of Modern Award Provision	Potential relationship between the modern award provision and the Right to Disconnect
<b>Overtime provisions and rest periods after overtime</b>	Overtime provisions are designed to compensate employees who perform work outside their ordinary or rostered hours. The payment of overtime ultimately depends on unique interactions between ordinary or guaranteed hours, the span of hours, days worked, type of employment, rest periods between shifts and TOIL provisions.	The introduction of the RTD may impact overtime provisions by potentially limiting the hours during which an employee is expected to work or be available for work communications.
<b>Reasonable additional hours</b>	The <i>Fair Work Act 2009</i> (Cth) s 62 prohibits an employer from requiring or requesting an employee to work unreasonable additional hours. The work and care discussion paper identified 9 out of 25 modern awards analysed as including reasonable overtime provisions.	The inclusion of the RTD in modern awards may interact with 'reasonable additional hours' as outlined in s 62 of the FW Act and within specific modern awards. The RTD may necessitate consideration of what is reasonable in the context of after hours work and availability.
<b>Minimum payment periods</b>	Minimum payment terms (also referred to as minimum engagement terms) may be prescribed to particular employees. Minimum payment periods vary according to employment type, role or assignment and specify the minimum period of time employees can work and the minimum payments to which they are entitled.	The RTD could impact the interpretation and application of minimum payment periods, particularly for work outside of regular hours.
<b>Recall to duty provisions, including minimum payment periods</b>	When recalled to duty, employees are generally entitled to overtime rates or minimum payment periods. Some modern awards refer to this as call-outs, return to duty or call-back arrangements.	The RTD may influence recall to duty provisions, for example by requiring guidelines and examples of when an employee can be asked to return to work, particularly outside of regular hours.
<b>On call</b>	Some modern awards make specific provision for employees to be on call and where this happens, employees are generally paid for being ready to work during times	The RTD may impact 'on call' arrangements, for example by requiring clarification on when an employee must be available to work outside their normal work hours.

<b>Table 1 – Existing modern awards terms that may impact a new right to disconnect term</b>		
<b>Modern award provision</b>	<b>Detail of Modern Award Provision</b>	<b>Potential relationship between the modern award provision and the Right to Disconnect</b>
	outside their usual shifts, often at short notice. Some modern awards refer to this as availability for duty or being on standby. These provisions can include the times when an employee must be reachable by phone or able to come into work.	
<b>Telephone allowance*</b>	Some modern awards require an employee to install or maintain a telephone for the purpose of being on call, whereby the employer will refund those installation costs and subsequent charges.	The RTD may impact modern awards which provide for the payment of a telephone allowance. This interaction may be particularly relevant when an employee has both personal and work phones and when and how communication occurs.
<b>Broken shifts or the requirement to work continuously</b>	Some modern awards provide for broken shifts or split shifts, referring to a shift that is broken into multiple parts by an unpaid break. Broken shifts can generally be worked over a maximum span of hours and sometimes only apply to certain employees. Some modern awards provide that shifts must be worked continuously.	The RTD may impact broken shift provisions or provisions requiring work hours to be continuously, this may require consideration on when an employee is considered 'off work'.
<b>Span of hours</b>	Span of hours or spread of hours refers to the time of day when employees can be rostered to work their ordinary hours, generally without attracting additional penalty rates or overtime.	The RTD could interact with existing span of hours provisions, potentially by limiting work communications to within these specified hours.
<b>Maximum daily hours</b>	The span of hours and maximum daily hours may interact with and affect overtime rates and other clauses relating to work, remuneration and penalties.	The RTD could interact with existing maximum daily hours provisions, potentially by limiting work communications to within this span of hours.
<b>Averaging of hours</b>	While all modern awards provide for some flexibility with mutual agreement, some awards permit standard ordinary	Many awards provide at least one period in which ordinary hours can be averaged which should be considered in context

Table 1 – Existing modern awards terms that may impact a new right to disconnect term		
Modern award provision	Detail of Modern Award Provision	Potential relationship between the modern award provision and the Right to Disconnect
	hours to be worked over an extended period as an alternative to working a set number of hours each week. This arrangement is called averaging of hours and is provided for under <i>Fair Work Act 2009</i> (Cth) s 63.	of a RTD, specifically employees being provided with predictable off duty periods.
<b>Changes to rosters</b>	All modern awards include a model consultation clause about changes to rosters or hours of work per <i>Fair Work Act 2009</i> (Cth) s 145A. The model clause requires employers to consult on proposed changes to the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic, or unpredictable. Variations to rosters may occur for several reasons, such as operational needs of the employer, staff availability or unforeseen circumstances.	Notice time for changes to rosters varies significantly between modern awards. Some modern awards may expect employees to be ‘available’ to connect regarding work during their days off, leave or rest periods with little notice. Some awards specifically prohibit employers rostering employees to work outside nominated available hours other than by agreement.

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<sup>1</sup> Clause 111D of Schedule 1 to the FW Act provides that the right to disconnect amendments do not apply in relation to an employer that is a small business employer on the day of commencement, or an employee of that employer, for a period of 12 months beginning on that day.

<sup>2</sup> Commonwealth, *Parliamentary Debates*, Senate, 8 February 2024, at 23 (Senator Barbara Pocock).