

Australian Industry Group

Right to Disconnect Term

Submission
(AM2024/14)

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AM2024/14 RIGHT TO DISCONNECT TERM

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1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) is made in response to the Statements issued by Justice Hatcher, President of the Fair Work Commission (**Commission**), on 12 March 2024,¹ 26 March 2024,² and 10 May 2024³ in relation to the variation of modern awards to include a right to disconnect (**RTD**) term.
2. As a result of the *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* (Cth) (**Closing Loopholes No.2 Act**), the *Fair Work Act 2009* (**Act**) requires all awards be varied to include a RTD term, which will commence on 26 August 2024⁴ (although such terms will not apply to small businesses and their employees until 26 August 2025).⁵
3. The Closing Loopholes No.2 Act also varied the Act so as to require the Commission to make guidelines in relation to the operation of new *Division 6 – Employee right to disconnect*, which is to be included in Part 2-9 of the Act (**Guidelines**). There is no legislative deadline for the making of the Guidelines.⁶
4. The President has decided to progress the process of developing the RTD term and Guidelines together, and has issued directions for parties to lodge submissions dealing with both issues, including any award specific matters and the delayed operation for small business, by 12pm on 20 May 2024.⁷ Ai Group files this submission in accordance with those directions.

¹ [2024] FWC 649 (**12 March Statement**).

² [2024] FWC 768 (**26 March Statement**).

³ [2024] FWC 1235 (**10 May Statement**).

⁴ Clauses 111C(2) and (2) in Part 18, Schedule 1 of the Closing Loopholes No.2 Act. See also 12 March Statement at [2].

⁵ Clause 11D in Part 18, Schedule 1 of the Closing Loopholes No. 2 Act.

⁶ 12 March Statement at [2].

⁷ Pursuant to the timetable in the 26 March Statement at [3] and amended timetable in the 10 May Statement at [4].

2. RELEVANT LEGISLATIVE PROVISIONS

5. The following legislative provisions are of relevance to the RTD term that the Commission is required to include in awards, and the development of the Guidelines.

6. The Closing Loopholes No. 2 Act inserts into the Act new s.149F, which will state:

149F Right to disconnect

A modern award must include a right to disconnect term.

Note: **Right to disconnect term** is defined in section 12

7. Section 12 (The Dictionary) of the Act will include the following definition:

right to disconnect term means a term in a modern award that provides for the exercise of an employee's rights set out in subsections 333M(1) and (2).

Note: Section 333M deals with the right to disconnect.

8. A RTD term must *'provide for'* the exercise of an employee's rights set out in ss.333M(1) and (2) of the Act. The starting point as to what is required by the RTD term is the plain and ordinary meaning of the aforementioned definition in s.12 of the Act. The Macquarie Dictionary defines *'provide'* as a verb that means, *inter alia*, *'to afford'* and *'to arrange for or stipulate beforehand'*. Further, the phrase *'provide for'* is defined as *'to make arrangements for supplying means of support, money, etc', 'to supply means of support', and 'to cover; be applicable to: clause 7 provides for such an event'*.⁸

9. The term must provide for the *'exercise of'* the right set out in subsections 333M(1) and (2). The term does not need to, and it should not itself, create the right established under the legislation.

⁸ Macquarie Dictionary Online, accessed 18 May 2024.

10. Section 333M of the Act states:

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 12 the employee.

11. The requirement for the Commission to develop Guidelines is contained in the new s.333W which states:

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.
12. Section 149F falls within Part 2-3 (Modern Awards) of the Act. Accordingly, when the Commission is exercising its powers to vary modern awards to include a RTD term, the following matters are relevant:
- (a) The Commission ‘*must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions*’, taking into account the considerations set out in s.134(1) of the Act;⁹
 - (b) When taking those considerations into account, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question;¹⁰ and
 - (c) The Commission must ensure that modern awards ‘*include terms that it is required to include, only to the extent necessary to achieve the modern awards objective*’.¹¹

⁹ Section 134 of the Act.

¹⁰ 4 Yearly Review of Modern Awards – Penalty Rates Decision [2017] FWCFB 1001, [116] – [117].

¹¹ Section 138 of the Act.

13. Section 578 of the Act requires that the Commission, when performing functions and exercising powers under Part 2-3 of the Act, must take into account the object of the Act.
14. Section 3 states that the object of the Act *'is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australia'* by means of the seven matters there listed. In the context of the insertion of a RTD term into awards, the following matters are particularly relevant: (our emphasis)
 - (a) *'Providing workplace relations laws that ... are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity...'*¹²
 - (b) *'Ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through ... modern awards ...'*¹³
 - (c) *'Enabling fairness and representation at work and the prevention of discrimination by ... providing accessible and effective procedures to resolve grievances and disputes ...'*; and
 - (d) *'Acknowledging the special circumstances of small and medium-sized businesses'*.¹⁴
15. Further, the following matters articulated in s.134(1) of the Act must be borne in mind:
 - (a) *'The need to promote flexible modern work practices and the efficient and productive performance of work'*,¹⁵

¹² Section 3(a) of the Act.

¹³ Section 3(b) of the Act.

¹⁴ Section 3(g) of the Act.

¹⁵ Section 134(1)(d) of the Act.

- (b) *'The likely impact of any exercise of modern award powers on business, including on productivity...'*¹⁶ and
- (c) *'The likely impact of any exercise of modern award powers ... the sustainability, performance and competitiveness of the national economy'*.¹⁷
16. As noted in the 12 March statement, the Explanatory Memorandum for the *Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023* does not include any information about the RTD provisions.¹⁸
17. The Government has published a *'Right to Disconnect Factsheet'*¹⁹ (**Factsheet**) which contains some additional material regarding (among other things) how it appears the right (including as encapsulated in any RTD term) is intended to operate. Relevantly, the Factsheet: (our emphasis)
- (a) Describes the RTD as a *'high level right'*.²⁰
- (b) States that *'[t]he right does not prohibit employers from contacting their employees, nor does it prevent employees from contacting one another, including across time zones'*;²¹
- (c) Clarifies that the factors that must be taken into account for the purposes of determining whether an employee's refusal to monitor, read or respond to contact is unreasonable are *'non-exhaustive'*.²² and
- (d) States that *'[t]here are no obligations that limit employers or others from contacting or attempting to contact employees – just protections for employees who reasonably switch off'*.²³

¹⁶ Section 134(1)(f) of the Act.

¹⁷ Section 134(1)(h) of the Act.

¹⁸ 12 March Statement at [6].

¹⁹ Australian Government, Department of Employment and Workplace Relations, [Right to Disconnect](#), March 2024.

²⁰ Factsheet at page 1.

²¹ Factsheet at page 1.

²² Factsheet at page 1.

²³ Factsheet at page 2.

18. With specific reference to the Commission’s development of the RTD term, the Factsheet states: (our emphasis)

The Fair Work Commission (the Commission) is required to vary all modern awards to include right to disconnect terms. This will give businesses and employees the opportunity to engage in the Commission’s consultation process to ensure the new terms reflect the realities of the occupation and industry.

19. The Commission’s 12 March Statement summarises the key changes as follows:

[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 6.²⁴

²⁴ 12 March Statement at [4].

20. The Full Bench should be mindful when making the RTD term that (as noted in the third bullet point above) the Closing Loopholes No.2 Act introduces an ‘*employee right to disconnect*’,²⁵ which is expressed to be a ‘*workplace right*’ within the meaning of Part 3-1 of the Act.
21. ‘*Workplace rights*’ are dealt with in Division 3 of Part 3-1 of the Act. Relevantly, s.340 of the Act states:

340 Protection

- (1) A person must not take adverse action against another person:
- (a) because the other person:
 - (i) has a workplace right; or
 - (ii) has, or has not, exercised a workplace right; or
 - (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
 - (b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) A person must not take adverse action against another person (the **second person**) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person’s benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4-1).

22. Section 341 of the Act deals with the meaning of ‘*workplace right*’, and relevantly provides:

Meaning of workplace right

- (1) A person has a workplace right if the person:
- (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
 - (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

²⁵ New s.333M of the Act, inserted by clause 97 of Part 8, Schedule 1 of the Closing Loopholes No. 2 Act.

- (c) is able to make a complaint or inquiry:
 - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
 - (ii) if the person is an employee—in relation to his or her employment.

Meaning of process or proceedings under a workplace law or workplace instrument

- (2) Each of the following is a process or proceedings under a workplace law or workplace instrument:
 - (a) a conference conducted or hearing held by the FWC;
 - (b) court proceedings under a workplace law or workplace instrument;
 - ...
 - (j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;
 - (k) any other process or proceedings under a workplace law or workplace instrument.

23. Section 342 of the Act goes on to define ‘*adverse action*’ for the purpose of s.340.

24. The significant protections that will be afforded to employees under the above provisions should be considered by the Full Bench when determining content of the new RTD term and what is necessary, in the sense contemplated by s.138.

3. RELEVANT CONSIDERATIONS

25. As noted earlier, the Commission must vary all awards to include a new RTD term and it must do this before 26 August 2024. The Commission has stated it intends to publish final determinations varying all modern awards on 23 August 2024.²⁶
26. In fulfilling this requirement, Ai Group submits that there are a number of important considerations that warrant the Commission adopting a cautious and conservative approach towards its task.
27. *First*, the Full Bench of the Commission has only limited time available to carry out the legislative requirement. As such, the present proceeding does not lend itself to the parties filing evidentiary material in support of their respective positions or otherwise ventilating detailed issues such as:
- (a) The circumstances in which there may be a need to contact employees outside of their work hours;
 - (b) The type of work performed by employees typically needing to be so contacted;
 - (c) Any measures in place relevant to the reasonableness of contact; and
 - (d) The impact that any restriction on contact (including attempted contact) may have at a workplace, in an industry or for the economy.
28. Indeed, the directions issued by the Commission for the filing of material do not contemplate the provision of evidence. This will necessarily limit the extent to which the Commission is in a position to take such matters into account. Accordingly, the Commission should adopt an approach that avoids prescriptive detail being introduced, in favour of a *'high level'* approach (consistent with the intended nature of the RTD, as described in the Factsheet and referred to at paragraph [17(a) above).

²⁶ In accordance with the amended timetable set out at [4] of the 10 May Statement.

29. *Second*, and relatedly, the legislative instruction applies in respect of all modern awards and therefore across all different sectors, industries and occupations covered by awards. For the reasons we set out in Chapter 4 of this submission, the Full Bench's task should be directed at the development of a new RTD term that is capable of applying across all industries and occupations. As stated above, the present proceeding does not lend itself to the parties filing evidentiary material regarding award specific issues or the ventilation of such matters in any detail.
30. *Third*, the RTD term to be included in all awards must be capable of applying in a very broad range of situations.
31. *Fourth*, the statutory instruction for the Commission to include a new RTD term in all awards remains subject to s.138 of the FW Act, in that the Commission must ensure that modern awards '*include terms that it is required to include, only to the extent necessary to achieve the modern awards objective*'.
32. It follows from this that the Commission should eschew any approach that results in a RTD term that might be viewed as desirable by some, but is not *necessary* for the purposes of achieving the modern awards objective. Any terms inserted into each award must be limited to those that are necessary, in the relevant sense.
33. *Fifth*, the concept of an employee right to disconnect is a new phenomenon. The Commission does not have any Australian jurisprudence to guide its task as to how a right to disconnect may best operate.
34. *Sixth*, the implementation of a standard clause across all or most awards is consistent with the objective of ensuring that the modern awards system is simple and easy understand²⁷.

²⁷ Section 134(1)(g) of the Act.

4. APPROACH TO AWARD SPECIFIC MATTERS

35. As set out at paragraph [29] above, the Full Bench's task should be directed at the development of a new RTD term that is be capable of applying across all different industries and occupations.
36. An attachment to the 12 March Statement set out a table containing provisions of modern awards identified by Commission staff as potentially impacting on the development of the new RTD term.²⁸ In the 10 May Statement, the President announced that Commission staff are currently preparing a more detailed, award-specific audit of terms in modern awards which may impact on the RTD, which is anticipated to be published in the week commencing 20 May 2024.²⁹ We will give consideration to any such research and the extent to which it may warrant a departure from our proposal for the development of a uniform RTD term reflecting a cautious or, put another way, minimalist approach.
37. In the event that, over time, parties and / or the Commission identify issues arising from the practical operation of the clause in the context of a particular modern award, it would of course be open to a party with standing to make an application to vary the award or for the Commission to initiate a proceeding of its own motion. This would, in our submission, be the more appropriate way of dealing with any such issues, in the circumstances.

²⁸ Attachment A to the 12 March Statement.

²⁹ 10 May Statement at [3].

5. DELAYED OPERATION FOR SMALL BUSINESSES

38. As noted at Chapter 2 of this submission, the RTD (including RTD terms in awards) will not commence operating in relation to small business employers and their employees until 26 August 2025.
39. In the context of the RTD term proposed by Ai Group (as set out in Chapter 6 of this submission), this could be identified through the simple operation of a note within the RTD term.
40. Further, as set out in Chapter 7 of this submission, we also propose that the operation of the RTD provisions in relation to small business is a matter that may be usefully addressed as part of the Guidelines.

6. PROPOSED RIGHT TO DISCONNECT TERM

41. In order to satisfy the new s.149F of the Act, Ai Group proposes the following term be inserted into all awards:

X. The right to disconnect

X.1 An employee may exercise the right to disconnect pursuant to sections 333(1) and (2) of the Act.

NOTE: The employee right to disconnect does not apply to a small business employer, or an employee of a small business employer, until 26 August 2025. 'Small business employer' has the meaning in section 23 of the Act.

42. The proposed clause would satisfy s.149F. Further, it would do so in a way that does not create a separate award-derived RTD. This is important because:

- (a) Section 149F does not require the creation of a separate award derived right that replicates the right afforded under ss.333(1) and (2) of the Act;
- (b) An award-derived right that operates in parallel to (and in effect, duplicates) the right provided under the Act cannot be said to be *necessary* for the purposes of s.138 of the Act; and
- (c) The proposed approach would be consistent with that which is typically adopted by the Commission in the context of award terms concerning subject matters that are dealt with, in substance, by the Act.³⁰

43. Further, having regard to the matters set out in Chapter 3 of this submission, the proposed clause is appropriate since:

- (a) It is capable of applying across all industries and occupations;
- (b) It is capable of application to a broad range of situations; and
- (c) The implementation of a standard clause across all or most awards is consistent with the objective of ensuring that the modern awards system is simple and easy understand.

³⁰ E.g. the right to request flexible working arrangements, termination of employment, redundancy and various forms of leave.

7. THE GUIDELINES

44. Section 333W(1) makes it clear that the Guidelines required to be made by the Commission must be in relation to the operation of the new Division 6 of Part 2-9 of the Act.³¹ Accordingly, the Guidelines may include information in relation to:
- (a) The operation of the RTD (contained in Subdivision A of Part 2-9);
 - (b) Disputes about the RTD (as dealt with in Subdivision B);
 - (c) Orders able to be made by the Commission in determining a dispute about the RTD (in accordance with Subdivision C); and
 - (d) The other ways in which the Commission may deal with disputes (in accordance with Subdivision D).
45. Further, there may be utility in explaining how the RTD provisions operate in relation to small business employers and their employees (including but not limited to the definition of '*small business employer*').
46. Section 333W(2) makes it clear that the Guidelines are not a legislative instrument. Accordingly, it would be useful for the Guidelines to contain an introductory statement (similar to those contained within the Commission's various '*benchbooks*') that addresses the:
- (a) Intended purpose of the Guidelines; and
 - (b) Fact that the Guidelines are not a legislative instrument.
47. In particular, it should be made clear that the Guidelines do nothing more than to provide information and guidance. Specifically, the Guidelines should expressly state that any guidance therein does not constitute the Commission's view as to how the RTD would apply to a particular scenario. The Guidelines should clearly

³¹ Section 333W(1) states '*The FWC must make written guidelines in relation to the operation of this Division*' (our emphasis).

state that ultimately, any application of the RTD must be considered on a case by case basis, having regard to the specific facts and circumstances of the matter.

48. It is important that the Guidelines are written in 'plain English'.