Australian Industry Group

Right to Disconnect Term

Submission in Reply
(AM2024/14)

11 June 2024

AM2024/14 RIGHT TO DISCONNECT TERM

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] 10 May 2024[3] and 23 May 2024[4] in relation to the variation of modern awards to include a right to disconnect (**RTD**) term.

2. It relates to:

   (a) The Fair Work Commission audit of award-specific terms in modern awards which may impact on the RTD, published on 23 May 2024 (**Award Audit**);

   (b) A submission filed by the Australian Council of Trade Unions (**ACTU**) on 20 May 2024 (**ACTU Submission**);

   (c) A submission filed by the Australian Manufacturing Workers' Union (**AMWU**) on 20 May 2024 (**AMWU Submission**);

   (d) A submission filed by the Australian Services Union (**ASU**) on 21 May 2024 (**ASU Submission**);

   (e) A submission filed by the Australian Nurses and Midwifery Federation (**ANMF**) on 20 May 2024 (**ANMF Submission**);

   (f) A submission filed by the Construction, Forestry, Maritime, Mining and Energy Union (Manufacturing Division) (**CFMEU – Manufacturing Division**) on 20 May 2024 (**CMFEU – Manufacturing Division Submission**);

   (g) A submission filed by the Construction, Forestry and Maritime Employees Union (Construction & General Division) (**CFMEU – Construction & General**

[1] [2024] FWC 649 (**12 March Statement**).
[2] [2024] FWC 768 (**26 March Statement**).
[3] [2024] FWC 1235 (**10 May Statement**).
[4] [2024] FWC 132 (**23 May Statement**).

Division) on 21 May 2024 (**CFMEU – Construction & General Division Submission**);

(h) A submission filed by the Association of Professional Engineers, Scientists and Managers, Australia trading as Professionals Australia (**Professionals Australia**) on 20 May 2024 (**Professionals Australia Submission**);

(i) A submission filed by SA Power Networks on 20 May 2024 (**SA Power Networks Submission**);

(j) A submission filed by the Australian Chamber of Commerce and Industry (**ACCI**) on 20 May 2024 (**ACCI Submission**);

(k) A submission filed by the Pharmacy Guild of Australia (**Pharmacy Guild**) on 20 May 2024 (**Pharmacy Guild Submission**);

(l) A submission filed by the Australian Duck Meat Association Incorporated (**ADMA**) on 20 May 2024 (**ADMA Submission**); and

(m) A submission filed by the National Electrical and Communications Association (**NECA**) on 24 May 2024 (**NECA Submission**).

3. This submission should be read in conjunction with our earlier submission of 20 May 2024 (**May Submission**).

4. Whilst this submission is focused on responding to the Award Audit and submissions of other parties referred to above, the absence of a response to a particular contention by the ACTU, its affiliates or other party should not be taken by the Commission as indicating our agreement to or acceptance of the submission.

2. AI GROUP'S POSITION, IN SUMMARY

5. In broad terms, the submissions of the ACTU and various unions call for a misguided and inappropriate approach to the Full Bench's task in developing the RTD term, in so far as they urge the Full Bench to:

(a) Have significant regard to various information and materials referred to in the ACTU Submission[5] which should not be given any significant weight in the Full Bench's considerations associated with the development of the RTD term;

(b) Construe what is required by new s.149F of the *Fair Work Act 2009* (Cth) (**Act**) in a way that is ill-conceived and inconsistent with the usual principles of statutory interpretation; and

(c) Create a RTD term that would:

(i) Clearly traverse well beyond what is required by s.149F of the Act;

(ii) Operate inconsistently with the intention of the legislature (being limited to the creation of a RTD and protection of the exercise of that right) through implementing proposals that would result in:

(A) The imposition of positive obligations on employers to implement various measures tenuously associated with a RTD; and

(B) Regulating or restricting an employer from contacting (or attempting to contact) employees;

(iii) In some parts, replicate various aspects of s.333M of the Act which is clearly not '*necessary*' (in the sense of s.138) since it is already dealt with in the Act and which would also be contrary to the Modern Awards Objective (**MAO**) by imposing additional and unnecessary regulatory burden on employers); and

[5] See ACTU Submission at [8] – [26].

(iv) In other parts, purport to replicate aspects of s.333M with modifications which are confusing, misleading and/or potentially quite significant as to their effect (the inclusion of which would also be contrary to the MAO).

6. Various unions seek award-specific variations to the ACTU Draft Model Clause which, in effect, constitute claims for the expansion or substantive modification of existing award entitlements (including claims previously made and determined by the Commission) that are not relevant to the RTD term required by s.149F of the Act or which are certainly not necessary for the Commission to complete the statutory task imposed upon it by the legislative amendments giving rise to these proceedings.

7. Ai Group's primary view is that a case for these award-specific variations, or the overarching approach proposed by the ACTU, has not been made out so as to justify the implementation of the proposals.

8. Further, in the context of the current proceedings and timeframe for development of the RTD term, and given the sheer volume of award clauses identified in the Award Audit, such claims simply cannot be dealt with via a *'fair'* process or one in which the Commission is sufficiently informed by the evidence and submissions of all interested parties such as to be certain of what is *'necessary'* and to avoid unintended consequences. Nor can the Commission be satisfied that it can properly weigh the merits of the proposals in the context of what is, by necessity, an evidentiary vacuum. Implementing substantial amendments to awards which extend beyond those necessary to satisfy s.149F and that could have significant adverse impacts through what is, understandably, a somewhat truncated process would be reckless and inconsistent with the maintenance of a stable system.[6]

9. The role of the Commission in these proceedings is not to craft award terms that capture or in some way give effect to a vague notion of '*the spirit of Parliament's intention*'. The Commission is required to develop a clause which satisfies the

[6] As contemplated by s.134(1).

requirement of ss.12 and 149F and must ensure that any such clause is consistent with s.138 of the Act.

10. The position advocated by the ACTU and various unions will result in neither of these things and therefore, should be rejected.

3. THE AWARD AUDIT

11. The Award Audit was prepared by staff of the Commission and does not represent the concluded view of the Commission on any issue.

12. The Award Audit states:

> Commission staff have prepared this award audit of all 155 modern awards to assist in the requirement to vary modern awards to include a right to disconnect by 26 August 2024. This audit includes a targeted selection of 4 award provisions that are likely to impact on the development of the right to disconnect award term:
>
> 1. Spans of hours, including ordinary hours of work and arrangements for shiftwork.
> 2. Requirements for employers to contact or provide notice to employees.
> 3. Requirements for employees to be on call, recall to duty or remain on standby in readiness to return to duty.
> 4. Classifications that include manager or supervisory responsibilities.
>
> **Note:** the President's Statement of 12 March 2024 included a broader list of modern award provisions that may impact on the development of the right to disconnect award term (see Attachment A to the President's Statement). The targeted approach to this award audit outlined above is necessary to ensure compliance with the statutory timeframe to vary all modern awards by 26 August 2024.

13. We set out below some high-level observations regarding the four categories of award terms identified by Commission staff as likely to impact on the development of the RTD term.

14. For the reasons we explain further in this chapter, the Award Audit is illustrative of why it is not desirable or practical in the current proceedings to develop specific amendments to awards that address the wide range of award provisions that might conceivably have some impact upon or interaction with the RTD.

15. To adopt such an approach would create real potential for unintended consequences.

16. The difficulties presented by the sheer magnitude of potential award provisions that might be impacted by the RTD, is compounded by the RTD concept being a new phenomenon. Any assessment of how it will operate in different sectors and occupations is necessarily somewhat speculative.

17. The current proceedings also do not lend themself to such a process – which may potentially result in significant substantive changes to award terms - being able to be conducted in a '*fair and just'* way.

18. Accordingly, Ai Group submits that:

    (a) The current proceedings should be limited to determining a RTD term for modern awards, as narrowly conceived of in s.12 of the Act;

    (b) The RTD term should, as far as possible, be capable of applying across all industries and occupations, and in a very broad range of circumstances;[7]

    (c) The Commission should decline to adopt an approach that aligns with union calls for the development of a more expansive entitlement or changes to existing award terms, and instead adopt an approach that recognises that:

        (i) The Commission is not precluded from revisiting these provisions on its own motion at some point in the future, with the benefit of experience of the operation of the RTD term in awards and the new statutory scheme; and

        (ii) Interested parties that propose variations to any existing award clauses can make an application under s.158 of the Act, including providing a draft determination setting out the specific changes proposed. Such applications should be heard and determined in the usual manner by the Commission;

    (d) The Commission should release a draft RTD term and permit parties to advance submissions in response. This will enable engagement with industry over the practical impact of any proposal and the provision of informed submissions for the benefit of the Commission. Importantly, such a process may identify any necessary tailoring of the provision in the context of specific awards but should not limit parties to only advancing submissions regarding the drafting of the term. This will be the first opportunity for parties to respond to a Commission proposal. Such an approach is analogous to the approach adopted by the Commission in the development of delegates' rights terms.

[7] See also our May Submission at [29] – [30].

Categories of Award Terms Identified by the Commission as Likely to Impact On the Development of the RTD Term

19. Ai Group does not seek to make detailed submissions regarding the specific award terms referred to in the Award Audit, other than in the context of our response to award-specific proposals in Chapter 7 of this submission.

20. However, we make the following, high-level observations regarding the four categories of award terms identified by the Commission as likely to impact on the development of the RTD term.

21. *First*, the Award Audit condenses the list of award provisions identified as potentially impacting the development of the RTD term from eleven[8] to four. We observe that the covering note to the Award Audit explains that a '*targeted approach…is necessary to ensure compliance with the statutory timeframe to vary all modern awards by 26 August 2024*'.[9]

22. We concur with the view impliedly expressed in the above extract that it is not possible in the current proceedings to address a wide range of award provisions that might conceivably have some impact upon the RTD, and that a targeted approach is necessary.

23. However, it is equally not possible to address whether any changes are warranted to the very large number of award provisions in the above four areas in the current proceedings, if procedural fairness is to be preserved (which we address in more detail, below).

24. Further, until threshold issues going to matters such as the scope of the RTD term and any substantive entitlements contained therein are resolved, it is difficult to make any specific comments regarding consequential amendments to other award provisions that may be necessary.

Award Provisions Dealing with Span of Hours

25. *Second,* and in relation to the identification of award provisions that deal with '*span*

[8] Attachment A to the 12 March Statement.

[9] Award Audit on page 1.

of hours' being terms that the RTD '*could interact with…potentially by limiting work communications to within these specified hours*':[10]

(a) The RTD in s.333M(1) and (2) of the Act is expressed as a right to refuse contact or attempted contact (unless to do so would be unreasonable) where made by an employer or third party '*outside of the employee's working hours'* (our emphasis). An employee may well have '*working hours*' that are outside the '*span of hours*' in an award;

(b) With specific reference to the RTD '*limiting work communications'* to the award span of hours, the RTD that will be contained in s.333M of the Act does not have the effect of preventing or regulating any contact (including attempted contact) by an employer to an employee, whether such contact is within or falls outside the employee's '*working hours'* (which could be within or outside the award '*span of hours'* in the award) (see our further discussion of this at paragraph [88] below).

(c) Rather, the effect of s.333M(3) of the Act will be that the reasonableness of an employee's refusal of contact (or attempted contact) by their employer or a third party will be assessed taking into account that contact has been made outside the employee's working hours (which could be at a time that is within or outside the award span of hours).

Award Provisions Dealing with Employer Contact or Employer Notice Requirements

26. *Third,* and in relation to the identification of award provisions dealing with '*employer contact or employer notice requirements*',[11] Ai Group similarly submits that the RTD in ss.333M(1) and 2 of the Act is not expressed as preventing or regulating an employer from contacting, or attempting contact with, an employee outside their working hours, including but not limited to contact that is made (or notification given) pursuant to the requirements of an award.

[10] Award Audit at page 1; Attachment A to 12 March Statement on page 9.

[11] Award Audit at page 1.

27. The RTD term must not operate so as to expressly or impliedly impede an employer's ability to discharge notification or other contact requirements under an award – for example, by making effective notice conditional on an employee's availability to be contacted to accept the notice. To do so could operate to frustrate an employer's ability to comply with the award, or at a minimum, render an employer's ability to comply with the award conditional on the actions of its employees. Consequently, employers may be exposed to higher employment costs (via award penalties or loadings that may apply when the requisite notice is not provided) and/or potential civil penalties for non-compliance with the award. The development of an RTD term that operates in such a manner would be contrary to the MAO.[12]

Award Provisions Dealing with On Call, Recall to Duty, Standby and Telephone Allowance

28. *Fourth,* in the context of the analysis of '*on call, recall to duty, standby and telephone allowance',*[13] we note the observation that the RTD '*may influence recall to duty or on call provisions, for example by requiring guidelines of when an employee can be recalled to work or be contactable outside ordinary hours*'.[14] In response to this observation, and the identification of these provisions as being impacted by the RTD more broadly, Ai Group submits that:

    (a) For the reasons previously set out in our May Submission,[15] the RTD Guidelines should do no more than provide information and guidance.[16] Preferably, the RTD Guidelines should also clearly state that any guidance contained therein does not constitute the Commission's view on how the RTD would apply in a particular scenario, and that 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;

[12] Section 134(1)(f) of the Act.

[13] Award Audit at page 1.

[14] Award Audit at page 1; Attachment A to 12 March Statement on page 8.

[15] Chapter 7 of our May Submission

[16] May Submission at [47].

(b) Situations where an employee is:

(i) Contacted whilst on-call;

(ii) Recalled to work pursuant to award provisions which accommodate this; and/or

(iii) Contacted whilst paid for standing by or paid a telephone allowance

should all be considered examples of situations in which it is very likely, and ordinarily the case, that refusal of contact / attempted contact is unreasonable; and

(c) In Ai Group's submission, where an employee has a live entitlement under the award that is directed at compensating them for being contacted (and being contactable) outside their working hours, any refusal of contact is only likely to be reasonable (in the context of s.333M(3)(c) of the Act, in particular) in the rarest and most exceptional of circumstances. Such circumstances are likely to be limited to situations where there is a serious and unforeseen emergency, or some sudden incapacity of the employee, which significantly impairs the employee's ability to respond to the employer's contact.

29. Ai Group's primary submission is that the RTD term developed by the Commission should not - particularly at this early and emerging time for the RTD in Australia, and in the context of the confines of the process for development of the RTD term - contain any level of detail beyond that required by s.149F of the Act, such as to necessitate any clause-by-clause consideration of its interaction with existing provisions in awards.

30. Notwithstanding this, should the Commission be mindful to address the interaction between the RTD and existing award provisions dealing with on call, recall to work, standby and telephone allowance, Ai Group would be supportive of the inclusion of a clause which articulates an expectation such as that set out in paragraph [28](c) above.

31. Alternatively, there may also be merit in a clause that highlights that the existence of such terms would be a factor that would weigh generally against refusal being reasonable (for the purposes of the consideration of reasonableness that will be required under s.333M(3) of the Act).

Award Provisions Dealing with Manager or Supervisor Responsibilities

32. *Fifth,* in the context of award provisions dealing with '*manager or supervisor responsibilities*' Ai Group submits that having regard to s.333M(3)(d) of the Act in particular, any employee classified in a supervisory or managerial position, and/or entitled to an allowance payable for supervisory duties, is likely to provide justification for a refusal of contact (or attempted contact) being found unreasonable. Much will of course depend upon individual circumstances.

33. Ai Group refers to and repeats its submissions at paragraphs [29] – [31] above, in relation to this category of award clauses.

Potential for Unintended Consequences

34. The breadth of matters identified in the Award Audit is demonstrative of the importance of the Full Bench adopting a cautious and minimalist approach to the development of the RTD term.

35. In our May Submission we stated that 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, and to a broad range of situations.[17]

36. This position continues to be appropriate having regard to the Award Audit, which comprises some 126 pages of award terms and highlights the vast array of terms and conditions that would need to be carefully considered and assessed should the Full Bench adopt an award-specific approach to the development of an RTD term.

37. The lengthy and detailed list of award terms and conditions contained in the Award Audit supports our May Submission that the present proceeding does not lend itself to the parties filing evidentiary material regarding award specific issues or the

[17] May Submission at [29], [39] and [43].

ventilation of such matters in any detail (indeed, we note that no party has sought to file any such material or been either invited or permitted to do so).[18]

38. Varying spreads of hours, shift provisions, overtime provisions and classifications in awards, as a result of the current proceedings, would risk disrupting the businesses and employment arrangements of thousands of employers and their employees. Most of the award provisions in these areas are longstanding and varying them could have a major impact on business costs, productivity and employment security.

39. It would be inappropriate to develop an RTD term that has the effect of overriding award clauses dealing with long-established entitlements without an appropriate evidentiary footing upon which to proceed (and which, as we explain below, this process does not lend itself to).

40. Further, in Ai Group's submission a necessary part of the Full Bench's assessment of the impact of an employee's exercise of the RTD on any specific award entitlement (beyond the mere setting of the RTD term), will include reconsideration of how any of the identified beneficial entitlements may require modification such as to continue to operate as a '*fair and relevant safety net of terms and conditions*'.[19] As just one example, if an outcome of this process is an RTD term which permits or facilitates an employee who is in receipt of an on call allowance to refuse contact whilst on call, this would necessitate reconsideration of the amount of compensation an employee receives for being on call and the circumstances in which it is payable.

41. For these reasons, attempts to engage with the level of detail contained in the Award Audit within the confines of these proceedings, is prone to potential error and/or unintended consequences. The RTD term should be sufficiently high-level such as to avoid the need to do so. The term proposed by Ai Group in our May Submission is an example of such an approach.[20]

[18] May Submission at [29].

[19] Section 134(1) of the Act.

[20] May Submission at [41].

Procedural Fairness Considerations

42. Further, and as we touch on above, it is not possible to address whether any changes are warranted to the very large number of award provisions in the above four areas in the current proceedings, if procedural fairness is to be preserved.

43. Procedural fairness dictates that any such award variations are only made after all interested parties are given a fair opportunity to present evidence and submissions about the impacts of any proposed variations to the awards they are covered by. The timeframe and nature of the current proceedings do not provide such a fair opportunity.

44. Section 577 of the FW Act requires that the Commission perform its functions and exercise its powers in a manner that is '*fair and just*'. Section 578 of the Act requires that the Commission take into account '*equity*'. It would not be fair, just or equitable to amend spread of hours provisions, shift provisions, overtime provisions or classifications in awards, as a result of the current proceedings.

45. Accordingly, we propose that the scope of variations made to awards as a consequence of this proceeding should be limited to that which the title of the current proceedings suggests – namely, *'Variation of modern awards to include a right to disconnect term'.*

4. RESPONSE TO ACTU SUBMISSION REGARDING RELEVANT PRINCIPLES CONCERNING THE RIGHT TO DISCONNECT TERM

46. In this chapter, we respond to the various contentions made in the ACTU Submission regarding the principles relevant to the development of the RTD term.

47. Ai Group disagrees with the ACTU's conceptualisation of the '*Relevant Principles*' applicable to the Full Bench's task of developing the RTD term summarised at paragraphs [6] – [7] of the ACTU Submission, together with its conclusions (at paragraphs [20] and [26] of the ACTU Submission) as to the nature and content of the RTD term having regard to such principles.

48. The ACTU Submission appears to conflate matters associated with the interpretation of the new statutory provisions that govern the content of an RTD term and what might be broader discretionary considerations open to the Commission so that it is not entirely clear (at least not us) whether they are asserting that a clause such as they have proposed is required because of the interpretation of the new statutory provisions, or because of some broader appeal to the desirability of implementing a clause that best achieves what they perceive to be in the intent of parliament in delivering a RTD.

49. Either way, the utility of such documents or developments referred to in paragraph [7] of the ACTU Submission in revealing either the proper interpretation of the new legislative provisions or as material that might otherwise guide the exercise of the Commission's discretion appears to be overstated.

50. The proposition that '*the purpose and intention of legislating the right to disconnect*', elicited from various sources identified by the ACTU, may '*guide the construction of the award term that will emerge from this process*'[21] is ill-conceived.

51. The task before the Commission is to craft award terms that satisfy the requirements of s.149F and meet the broader requirements of the content of a modern award, most critically s.138. The objects of the Act and the MAO are, of course, relevant

[21] ACTU Submission at [7].

considerations. Reliance on, or regard for, the matters identified in paragraph [7] of the ACTU Submission or the extracts from various extrinsic material elsewhere referenced in the ACTU Submission is of limited utility and likely an inappropriate distraction.

52. The principles of statutory construction are well known. The Commission's primary task is to give effect to s.149F (which contains the requirement for awards to include a RTD term) based on the ordinary meaning conveyed by the text of that provision, which includes the definition of '*right to disconnect term'* in s.12 of the Act.

53. When interpreting these provisions, the Commission is to prefer '*the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act*'.[22] The relevant '*object*' is that contained in s.3 of the Act, to which the Commission is also required to have regard when performing functions and exercising powers under Part 2-3 of the Act by virtue of s.578. In this particular context the Commission is not required, and nor would it be appropriate, to have regard to the '*purpose and intention of legislating the right to disconnect*' as purported to be revealed by documents such as parliamentary committee reports or statements of individual members of Parliament.[23] In developing the RTD term, the Commission is also to have regard to the MAO[24] and the extent to which any provisions for proposed inclusion in the RTD term are '*necessary*' to achieve the MAO.[25]

54. We make three further observations regarding the extensive references to extrinsic information and materials in the ACTU Submission.[26]

55. *Firstly*, the ACTU appears to contend that such materials are relevant to ascertaining the '*purpose and intention'* of the RTD that will be contained in s.333M of the Act, and that this in turn renders them relevant to guiding the development of the RTD term (as required by s.149F of the Act). The ACTU's approach appears to

[22] Section 15AA of the *Acts Interpretation Act 1901 (Cth)* (**Acts Interpretation Act**).

[23] ACTU Submission at [7].

[24] Section 134 of the Act.

[25] Section 138 of the Act.

[26] As referenced in the ACTU Submission at [8] – [23] inclusive.

conflate the RTD that will be contained in s.333M of the Act, with the requirement for an RTD term to be included in awards. The provisions, whilst each providing relevant context to the interpretation of the other,[27] are separate and distinct.

56. *Secondly*, to the extent there is any interpretive controversy regarding what is required by s.149F and s.12, we observe that extrinsic material is only relevant to confirm the ordinary meaning of the words in the Act, or when the provision is ambiguous or obscure or the ordinary meaning conveyed by the text would lead to a manifestly absurd or unreasonable result.[28]

57. In Ai Group's submission, both s.149 and the relevant definition in s.12 have a plain and ordinary meaning[29] that does not lead to an absurd or unreasonable result, nor contain any ambiguity. Accordingly, the use of any extrinsic material is limited to confirming the ordinary meaning of those provisions.[30]

58. In contrast, the ACTU concludes from its consideration of various items extraneous to the Act that:

> …the term that results from this process should be constructed that enables Australian workplaces to be organised so as to minimise the need to disrupt employees' lives when they are not working and protects employee well-being – which in turn will strengthen employee productivity while they are working. It is in the best interests of both employers and employers (sic) that the terms adopted in modern awards provides sufficient guidance on how these aims will be achieved.[31]

59. The ACTU Submission is not entirely clear, but appears to seek to ascribe, by resort to extrinsic materials, a meaning to s.149F (and the associated definition of '*right to disconnect term'* in s.12) of the Act which extends far beyond the ordinary meaning. Such an approach should be rejected.

60. *Lastly*, the ACTU relies on three decisions of the High Court of Australia in support of its assertion that regard must be had to the statutory purpose and context when

[27] Section 15AM(1)(a) of the Acts Interpretation Act.

[28] Section 15AB(1) of the Acts Interpretation Act.

[29] See our May Submission at [8] – [9].

[30] Section 15AB(1)(a) of the Acts Interpretation Act.

[31] ACTU Submission at [26].

interpreting the text of the statute.[32]

61. The cases cited by the ACTU do not provide a basis for any broad notions of purpose and context to be drawn from extraneous materials such as to attribute to the plain and ordinary words in ss.12 and 149 of the Act a meaning for which there is no support, and which extends well beyond, that which is evident from the plain words in the Act. Nor do the materials evidence the ordinary meaning of these provisions to be inconsistent with statutory purposes, or provide a reason to depart from the literal and ordinary meaning of the words.

62. It follows from the above that the information and materials referred to at paragraphs [8] – [26] inclusive of the ACTU Submission should not be taken into account in any significant way by the Full Bench for the purpose of development of the RTD term.

63. Further, the ACTU's contention regarding the nature and content of the RTD term – underpinned by its regard to such materials – is ill-conceived and as such, ought to be rejected.

[32] See footnote 1 of the ACTU Submission.

5. RESPONSE TO ACTU DRAFT MODEL CLAUSE

64. In this chapter, we respond to ACTU Draft Model Clause in Annexure A of the ACTU Submission.

65. We begin with the following high-level observations concerning the ACTU Draft Model Clause:

(a) The ACTU's prescriptive approach to the wording of the RTD term is predicated on '*set(ting) out with sufficient detail the bedrock of overarching principles and examples that would allow for an employer to approach the task of ensuring employees have access to the right to disconnect with sufficient certainty*'.[33] This approach is neither supported by, nor consistent with, the definition of '*right to disconnect term'* in s.12 of the Act, which must simply provide for the '*exercise of*' the right set out in subsections 333M(1) and (2) of the Act.[34]

(b) The ACTU has not (and nor have any of its affiliates) presented any compelling case as to why it is '*necessary*' to achieve the MAO for the RTD term to go beyond what the plain words of the Act require (as contended for by Ai Group, above), such as to justify the inclusion of the ACTU Draft Model Clause in awards pursuant to s.138 of the Act;

(c) The aspects of the ACTU Draft Model Clause that '*mimic*' or '*replicate*'[35] the RTD in s.333M of the Act[36] are patently *not necessary*, since they merely replicate an existing right;

(d) In Ai Group's submission it is arguable the ACTU Draft Model Clause is – by virtue of having deviated to such an extent from the requirements of s.149F and the relevant definition in s.12 of the Act - not a '*right to disconnect term*' at all and thereby, fails to meet the requirements of s.146F of the Act. Further, the additional detail in the ACTU Draft Model Clause (beyond that required by

[33] ACTU Submission at [28].

[34] May Submission at [9].

[35] ACTU Submission at [29] - [30].

[36] See sub-clauses 2 and 3 of the ACTU Draft Model Clause.

ss.149F and 12 of the Act) cannot be considered as '*incidental*'[37] or '*machinery*'[38] as contemplated by s.142. On this basis, the ACTU Draft Model Clause would be precluded by s.136(1) of the Act from being inserted into awards;

(e) The failings and pitfalls of the ACTU Draft Model Clause may be contrasted to the minimalist RTD term proposed by Ai Group, which is consistent with the MAO in so far as:

(i) This would enable any detail concerning the operation of the RTD to be discussed and agreed at a workplace level, thereby promoting flexible modern work practices;[39]

(ii) To the extent that the negotiation of additional detail may be embodied in an enterprise agreement, such an approach would likely have the effect of encouraging collective bargaining;[40] and

(iii) A brief-form clause is simpler and easy to understand,[41] and in turn places less regulatory burden on employers.[42]

(f) The minimalist RTD term proposed by Ai Group is clearly aligned to ss.149F and the definition in s.12 of the Act and would create no doubt as to its status as a '*right to disconnect term*' (as defined in the Act), which both satisfies the requirements of s.149F and is capable of being inserted into awards.

(g) Lastly, the detailed approach proposed in the ACTU Draft Model Clause gives rise to a need to consider how each proposed provision will operate in the context of the existing provisions of each of the 155 awards[43] into which the RTD term is required to be inserted. This includes industry and/or occupation

[37] Section 142(1) of the Act.

[38] Section 142(2) of the Act.

[39] Section 134(1)(d) of the Act.

[40] Section 134(1)(b) of the Act. See also support for this proposition in the ACCI Submission at [23] – [24].

[41] Section 134(1)(g) of the Act.

[42] Section 134(1)(f) of the Act.

[43] As identified in the Award Audit, at page 1.

specific modifications,[44] as well as potentially, identification of awards for which the ACTU Draft Model Clause may be wholly unsuitable and an alternative clause required.[45] Indeed, numerous ACTU affiliates have expressed support for the ACTU Draft Model Clause with industry/award specific variations.[46] As we stated in our May Submission, the directions issued by the Commission relevant to the development of the RTD term permit neither the time, nor an appropriate process, for such issues to be properly considered.[47]

66. We turn now to consider the merits of each of the proposed terms of the ACTU Draft Model Clause.

67. **Sub-clause 1** of the ACTU Draft Model Clause is as follows:

> 1. This clause is to be read in conjunction with other clauses in this Award.

68. The ACTU contends that sub-clause 1 is intended to assist to resolve potential conflict between the RTD term and other provisions in an award.[48] A preferable approach is to avoid the need for provisions in any RTD term (including but not limited to the ACTU Draft Model Clause) dealing with such conflict, by instead adopting a brief-form RTD term (such as the one proposed by Ai Group). In any event, it is unclear what the effect of sub-clause 1 would be or how it is intended to alter the ordinary approach to interpreting an award.

69. **Sub-clause 2** of the ACTU Draft Model Clause is as follows:

> 2. An employee has the right (**Right to Disconnect**) to:
>
> a. disconnect from work, including by not monitoring or reading contact or attempted contact and communications from the employer when they are not working; and

[44] ACTU Submission at [3]b. and [27].

[45] ACTU Submission at [3]c. and [27].

[46] See AMWU Submission at [5]; ANMF Submission at [9]; CFMEU – Construction & General Division Submission at [5]; CFMEU – Manufacturing Division Submission at [7] – [8]; Professionals Australia Submission at [1] and NTEU Submission at [5].

[47] May Submission at [27] – [28].

[48] ACTU Submission at [38]d.

b. not respond to, or engage with, work related communications including emails, texts, telephone calls, messages, video calls or sending or reviewing other messages when they are not working.

unless doing so is unreasonable.

70. The ACTU submits that the ACTU Draft Model Clause '*essentially replicates*' s.333M(1) of the Act '*while providing some clarification on the exercise of the right*'.[49] In relation to the aspects of sub-clause 2 that mimic s.333M(1), we refer to our earlier submission at paragraph [65(c) above.

71. In relation to the assertion that sub-clause 2 '*provides some clarification'* of s.333M(1) of the Act, we observe that the clause goes well beyond this by substantially altering the right in a number of material ways:

(a) Sub-clause 2 states that *'An employee has the right (Right to Disconnect) to: a. disconnect from work…; and b. not respond to, or engage with, work related communication…unless doing do is unreasonable'* (our emphasis) whereas s.333M(1) of the Act states an employee '*may refuse'* to do certain things *'unless the refusal is unreasonable'*. In Ai Group's submission, the latter is directed towards protecting an employee who has elected to exercise a right to disconnect, where that decision is reasonable. Sub-clause 2 of the ACTU Draft Model Clause misconceives s.333M(1) as presupposing '*disconnection*' as the default employee position, with such right to be withdrawn only where its exercise is unreasonable;

(b) The RTD in ss.333M(1) and (2) of the Act concerns contact or attempted contact with an employee '*outside of the employee's working hours'*. Sub-clause 2 instead refers to contact '*when they are not working'*. It is not clear why different wording is adopted by the ACTU, or what the implications (intended or unintended) of this may be;

(c) Sections 333M(1) and (2) of the Act concern the refusal of an employee to '*monitor, read or respond to contact, or attempted contact'* (our emphasis). This is an exhaustive description of the actions of employees protected under

[49] ACTU Submission at [30].

these sub-sections. In contrast, sub-clause 2a. of the ACTU Draft Model Clause protects an employee who '*disconnects from work*', which is defined in a non-exhaustive manner as including '*monitoring*' and '*reading*', while sub-clause 2b. refers to '*not respond(ing) to'* contact but also adds '*or engage with'*;

(d) Sections 333M(1) and (2) are directed at an employee's response to '*contact, or attempted contact'*. In contrast, proposed sub-clause 2a. refers to '*contact or attempted contact and communications*' while sub-clause 2b. uses the term '*work related communications'* with a list of seven non-exhaustive items included in its meaning.

72. Further, sub-clause 2 is expressed using language that is less precise than is used in s.333M(1) of the Act and which is also likely to be a source of ambiguity or confusion. For example, sub-clause 2 introduces the term '*work related communications*' which is not elsewhere defined in the ACTU Draft Model Clause nor in the Act.

73. The ACTU's proposed departure from the approach adopted under the legislation will introduce substantial uncertainty into awards and undoubtedly cause confusion – not clarity - in relation to the RTD in the Act.

74. More critically however, the extent of the departures from ss.333M(1) and (2) of the Act in sub-clause 2 have the effect of providing for something other than the exercise of an employee's rights set out in those sub-sections. As such, the ACTU Draft Model Term is not a '*right to disconnect term'* as defined in s.12 of the Act and it follows, may not satisfy the requirements of s.149F of the Act if inserted into awards.

75. **Sub-clause 3** of the ACTU Draft Model Clause is as follows:

> 3. Without limiting the matters that may be taken into account in determining whether a refusal is unreasonable for the purposes of clause X.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 specifically 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).

f. Whether the employee is on approved leave or another authorised absence.

g. Whether the employer has taken all reasonably practicable steps (including making adequate staffing arrangements and planning for workplace fluctuations) to eliminate or minimise the need to contact workers when they are not working.

76. The ACTU describes proposed sub-clause 3 as '***essentially replicating'*** the indicia of unreasonableness set out in s.333M(3) of the Act, with two amendments – being the insertion of sub-clauses 3(f) and (g) for which there is no equivalent in s.333M(3) of the Act.[50]

77. These amendments in fact identify only two of four changes made in the '*replication*' of s.333M(3) in sub-clause 3. The other two changes are:

(a) Insertion of the word '*specifically*' in sub-clause 3(c) which does not appear in s.333M(3)(c); and

(b) Removal of the '***Note'*** immediately below s.333M(e) of the Act which states that '*For the purposes of paragraph (c), the extent to which an employee is compensated includes any non-monetary compensation*'.

78. The combined effect of the inclusion of the word '*specifically*' and of the decision to not include the '*Note*' may result, in practice, in a narrower consideration of the concept of '*compensation*' being applied by readers of the award than that which is actually is required by the Act. It may result in the creation of a RTD entitlement under awards that is different to that which operates under the legislation. It may also mean that the requirement of s.12 of the Act is not satisfied. In any event, these

[50] ACTU Submission at [31] – [32].

departures from the approach adopted under the legislation are not justified (or even acknowledged) by the ACTU and as such should not be entertained.

79. As to the merits of proposed sub-clauses 3(f) and (g), the ACTU attempts to justify them on the basis that they are '*common sense additions that entirely capture the spirit of Parliament's intention*'.[51] We reject the ACTU's reliance on materials extraneous to the Act as permitting any basis for reading into the Act words that Parliament itself did not see fit to include. In any event, the role of the Commission in these proceedings is not to craft award terms that capture or in some way give effect to a vague notion of '*the spirit of Parliament's intention*'. The Commission is required to develop a clause which satisfies the requirement of ss.149F and 12 and must ensure that any such clause is consistent with s.138.

80. Further, introducing points of difference between s.333M(3) of the Act and sub-clause 3 is prone to cause uncertainty and confusion regarding the operation of the RTD. It is also entirely unnecessary to do so, since s.333M(3) is expressed as not limiting the matters that may be taken into account in determining whether a refusal of contact (or attempted contact) is reasonable.

81. The impact of the additional subclauses is also unclear. The proposed provision does not make clear what should be made of the fact that the employee is on approved leave or an authorised absence. It is too simplistic to assume or even suggest that such leave or absence will always justify refusal of any relevant contact. For example, an employer may permit an employee to take a period of paid (or unpaid) and authorised leave beyond the minimum statutory entitlements on the understanding that they be contactable to some degree to facilitate this. Absence from work on such a beneficial arrangement ought not be viewed as necessarily weighing in favour of a refusal of the foreshadowed contact being reasonable.

82. Proposed sub-clause 3(g) is deeply misguided. It fails to recognise that some roles require an employee to be contactable outside of normal working hours. Indeed, this is commonly recognised and regulated through awards and enterprise agreements. The new legislative amendments do not prohibit this and thus it should

[51] ACTU Submission at [33].

not be necessary to require consideration of the matters identified in 3(g) in all instances. In any event, paragraph 3(a) already requires a broad consideration of the reason for the contact or attempted contact.

83. In relation to the aspects of sub-clause 3 that simply replicate s.333M(3) of the Act, we refer to our earlier submission at paragraph [65(c) above.

84. With respect to paragraph [35] of the ACTU Submission, we rely on our earlier submissions at paragraphs [54] – [63] (inclusive), above.

85. **Sub-clause 4** of the ACTU Draft Model Clause is as follows:

> 4. The employer will implement measures to ensure, as far as is reasonably practicable, that an employee is not contacted by phone, electronic communication or other means when the employee is not working. Such measures will include informing managers, supervisors, and (to the extent practicable) third parties that they cannot expect responses to communications when the employee is not working.

86. The ACTU describes sub-clause 4 as being '*designed to provide detail to employers about how the right to disconnect will be implemented'*,[52] and as not creating additional obligations on employers.[53] In the ACTU's submission, the sub-clause *'gives life to the intention of Parliament'*, and assists employers to avoid confusion or being led into error regarding their obligations under the Act.[54] Further, protective provisions such as sub-clause 4 are required to avoid the risk of the right to disconnect '*going unfulfilled'*.[55]

87. We wholly reject the contention in the ACTU Submission, above. Self-evidently, the clause reaches beyond the mere provision of detail. It is clearly traversing beyond what is required by s.149F. An RTD term is one that provides for the exercise of an employee's rights under ss.333M(1) and (2) of the Act[56] - nowhere in those sub-sections of s.333M – or elsewhere in s.333M or new Division 6 of Part 2-9 of the

[52] ACTU Submission at [36]a.

[53] ACTU Submission at [37].

[54] ACTU Submission at [37].

[55] ACTU Submission at [37].

[56] Definition of '*right to disconnect term*' in s.12 of the Act.

Act more broadly – is there any positive obligation on an employer to implement such measures.

88. Nor is doing so consistent with the intention of the legislature. The statutory RTD is concerned with the right of an employee to '*disconnect*' from work, and the protection of the exercise of that right. The scheme in the Act does not regulate or restrict contact, or attempted contact, by an employer nor otherwise impose positive duties on employers.

89. Section 333M will create entitlements (not obligations on employers). In essence, ss.333M(1) and (2) will create workplace rights that are protected by the general protections provisions of the Act. Proposed sub-cause 4 is fundamentally different in nature. Crucially, it is not a term that provides for the exercise of an employee's rights as set out in s.333M(1) and (2) and as such, does not validly form part of right to disconnect term as contemplated by s.12 of the Act.

90. Proposed sub-clause 4 would create positive obligations on employers in the RTD term, a breach of which would expose employers to civil penalties. In contrast, Parliament specifically adopted an approach to the development of the RTD entitlement that did not give rise to the imposition of civil penalties (save for in the context of non-compliance with Commission orders).[57] Proposed sub-clause 4 is entirely out of step with s.333M of the Act. The ACTU has not justified such a radical departure from the legislative scheme.

91. Whether or not an employer implements the types of measures referred to in proposed sub-clause 4 may still be a factor able to be taken into account in determining whether a refusal under ss.333M(1) and (2) is reasonable.[58] As such, the fact that the RTD term does not include such an obligation will not pose any risk to s.333M operating as intended.

92. **Sub-clause 5** of the ACTU Draft Model Clause is as follows:

[57] Section 333Q of the Act will state that a person to whom an order under s.333P of the Act applies must not contravene a term of the order, and s.539 of the Act will include new Item 10E identifying s.333Q as a civil remedy provision. In contrast, s.333M will not operate as a civil remedy provision.

[58] Per section 333M(3) of the Act, which is expressed as a non-exhaustive list of matters.

5. The employer must advise the employee of their Right to Disconnect and the measures to be taken under Clause 4 above, prior to the implementation of those measures. If an employer is developing a policy on the Right to Disconnect, it must consult workers, their Workplace Delegates and their Employee Organisation.

93. Proposed sub-clause 5 is similarly described by the ACTU as a '*protective provision*'.[59] It seeks to impose two positive obligations on employers – to '*advise*' and to '*consult*'. Ai Group is opposed to sub-clause 5 for the same reasons set out at paragraphs [87] – [91] inclusive.

94. **Sub-clause 6** of the ACTU Draft Model Clause is as follows:

6. An employee must not be subjected to any form of disciplinary action or other detrimental or adverse action because the employee:

   a. exercises;

   b. proposes to exercise; or,

   c. can or may exercise the Right to Disconnect.

95. Sub-clause 6 is unnecessary and inappropriate. As we explained in our May Submission, the RTD is a '*workplace right'* within the meaning of Part 3-1 of the Act, and the significant protections that will be afforded to employees as a consequence should be considered by the Full Bench when determining the new RTD term and what is *'necessary'* in the sense contemplated by s.138 of the Act.[60]

96. Sub-clause 6 effectively duplicates protections contained s.340(1) of the Act, however adopts wording variations which are likely to cause confusion as to the meaning and significance of those differences.

97. In addition to not being necessary, proposed sub-clause 6 would also be contrary to achieving a simple and easy to understand system of awards[61] and would increase the regulatory burden on employers.[62]

98. It is not clear what the basis would be of the Commission's power to include a term about the subject matter of sub-clause 6. Regulation of disciplinary action or

[59] ACTU Submission at [36]b. and [37].

[60] May Submission at [20] – [24] inclusive.

[61] Section 134(1)(g) of the Act.

[62] Section 134(1)(f) of the Act.

adverse action does not fall within the scope of s.139 of the Act and the proposed clause is arguably beyond the scope of an RTD term as contemplated by s.12 of the Act.

99. **Sub-clause 7** of the ACTU Draft Model Clause is as follows:

> 7. The provision of a mobile phone, laptop computer or other electronic device to an employee does not mean an employee is on-call or expected to be available outside their working hours. The employee is not required to provide personal contact information for the purposes of being contactable or conducting work for the employer outside their ordinary working hours or rostered working hours or during periods of approved absence.

100. The ACTU describes proposed sub-clause 7 as a '*protective provision*'.[63] The first sentence of proposed sub-clause 7 is unnecessary and nonsensical. The mere provision of items (without more) could not establish the points identified in it. The significance of an employee being in receipt of a mobile phone, laptop or other electronic device may be relevant to the assessment of whether refusal of contact outside of working hours is reasonable. It may, for example, form part of the compensation an employee receives for remaining available to perform work and it may be a measure that weighs in favour of refusal of relevant contact being unreasonable.

101. The second sentence of proposed sub-clause 7 is contrary to the operation of the RTD scheme in the Act, in so far as it is designed to impede an employer's ability to contact, or attempt contact, with an employee outside of their hours of work. We refer to and rely upon our earlier submission at paragraph [88] above, in response to this aspect of sub-clause 7.

102. It is not clear that the Commission would have power to include the second sentence in awards. It is not within the scope of s.139 of the Act or the definition of a RTD term in s.12 of the Act.

103. **Sub-clause 8** of the ACTU Draft Model Clause is as follows:

> 8. An employee's Right to Disconnect, does not diminish any rights and/or entitlements the employee may have under any other clause/s of this award.

[63] ACTU Submission at [36]c. and [37].

104. The Commission should reject this simplistic proposal.

105. It is not possible to fully respond to the merits of this proposal in isolation of an understanding of what form a RTD term established by the Commission will take.

106. Exercise of a RTD by an employee who (for example) is in receipt of an on-call allowance or other entitlements directed at compensating them for being available to be contacted and/or for responding to contact, necessarily warrants rebalancing of such entitlements. This is entirely appropriate, where the practical effect of an employee's exercise of the RTD negates the existence of the burden on the employee or the disability they face which is sought to be compensated for by the entitlement. Of course, if an employee is paid an allowance pursuant to the award in recognition of their being contactable and they become uncontactable because of the exercise of their right, they are disentitled to payment of the allowance. The ACTU wants to have its cake and eat it too.

107. **Sub-clause 9** of the ACTU Draft Model Clause is as follows:

> 9. The Right to Disconnect does not prevent an employer from making, or attempting to make, contact with an employee that is required to be made (or attempted) in order to comply with an obligation under this Award, the FW Act or the WHS Act; however, an employee may exercise their Right to Disconnect with respect to such contact.

108. We oppose sub-clause 9, as it is framed.

109. For the reasons outlined earlier in this submission at paragraph [88], the RTD in the Act does not regulate or restrict an employer's contact or attempted contact of an employee <u>for any reason</u>. Yet the form of expression used by the ACTU infers that contact or attempted contact for reasons other than compliance with the award, the Act or a WHS Act is prevented (or at the least could foreseeably be misconstrued as providing this).

110. The last sentence arguably overstates the capacity of an employee to exercise their RTD. It is also directly inconsistent with s.333M(5) of the Act, which deems refusal of contact or attempted contact by an employee that is made by the employer due to a requirement under a law of the Commonwealth, a State or Territory to be unreasonable.

6. RESPONSE TO OTHER PARTIES' SUBMISSIONS REGARDING THE RIGHT TO DISCONNECT TERM

111. In this chapter, we respond to the contentions made by parties (other than the ACTU) regarding the principles relevant to the development of the RTD term.

6.1 ASU Submission

112. Paragraph [5] of the ASU Submission calls for the implementation of the following four principles in all awards:

- Employee (sic) should have a right to disconnect from work regardless of the industry that they work in;
- Employees should not be subject to adverse consequences, such as disciplinary action, for reasonably refusing contact outside of working hours;
- Employees should be protected from being pressured by employers and third parties to be constantly connected or available to their employers; and
- Employers should make fair arrangements to deal with out-of-hours work through on-call or stand-by rosters.

113. In response to the first three bullet points, Ai Group submits that it is not '*necessary*' (in the sense required by s.138 of the Act) for the RTD term (or for that matter, the provisions of any award more broadly) to deal with these matters since they are matters that will be dealt as part of new Division 6 of Part 2-9 of the Act. Accordingly, they should not form part of the RTD term developed by the Commission.

114. Specifically:

(a) In response to the *first bullet point*: Part 2-9 of the Act applies to national system employers and employees.[64] There are no industry-based restrictions in the Act in relation to the types of employees who may exercise the RTD contained in s.333M of the Act. Accordingly, it is not a case where an award term may operate to supplement the categories of employees to whom the

[64] Section 322 of the Act.

right is available having regard to any 'gaps' in coverage of the legislative entitlement. Such a provision would have no practical work to do;

(b) To the extent that the first bullet point seeks to suggest that capacity of every employee to exercise their RTD irrespective of the industry (or occupation) they work in the principal is misguided and unsustainable. Clearly there will be some roles in which contact outside of working hours is a necessary and inherent part of the job;

(c) In response to the *second bullet point*: Section 333M(4) states clearly that the RTD in ss.333M(1) and (2) is a '*workplace right'* for the purpose of Part 3-1 of the Act. As such, employees who have a RTD and exercise it reasonably, will already be entitled to protection from '*adverse action'* pursuant to s.340 of the Act.[65] It is not necessary to replicate this protection in awards, since it is already enshrined in the Act. Indeed, to do so would be contrary to the MAO by increasing (unnecessarily) the regulatory burden on employers;[66] and

(d) In response to the *third bullet point*: building upon paragraph [114](c) above, the protection afforded to employees under Part 3-1 of the Act with respect to the RTD provides an employee with protection where they have the RTD, exercise the RTD and/or propose to exercise the RTD;[67] and also protects them from adverse action designed to prevent the exercise by an employee of the RTD.[68] The RTD relates to contact (including attempted contact) by both an employer[69] and third parties.[70] These protections would clearly encompass protection from being *'pressured'* to be constantly connected or available, being the concern identified by the ASU in the third bullet point. It is therefore not necessary to include this in the RTD term and would be contrary to the MAO to do so, for the same reasons set out at paragraph [114](c) above.

[65] See our May Submission at [20] – [24] inclusive.

[66] Section 134(1)(f) of the Act.

[67] Section 340(1)(a) of the Act.

[68] Section 340(1)(b) of the Act.

[69] Section 333M(1) of the Act.

[70] Section 333M(2) of the Act.

115. We reject the proposal in the fourth bullet point as being necessary or appropriate, for the reasons we set out at paragraphs [87] – [91] above in relation to sub-clause 4 of the proposed ACTU Draft Model Clause.

116. The parts of the ASU Submission dealing with case studies and a recent survey conducted by the ASU[71] are of no relevance to the construction of s.149F (and the relevant definition in s.12) of the Act with respect to the nature or development of the RTD term required to be included in awards. We refer to Chapter 4 of our submission.

6.2 CFMEU MANUFACTURING DIVISION SUBMISSION

117. We refer to paragraph [11] of the CFMEU Manufacturing Division Submission.

118. We reject the proposition that the RTD contains a '*default position, such that communications with employees (in whatever form) occur primarily and substantively in employees' work time'*.[72] The RTD in s.333M of the Act imposes no constraints on whether, nor when or how, an employer may contact or attempt to contact an employee outside of their working hours. Rather, it is concerned with an employee's right to refuse contact outside of their working hours where to do so would not be unreasonable.

119. We also reject any call for the imposition on employers of positive obligations to institute arrangements which '*support and facilitate*' the operation of the RTD. We refer to and rely on our earlier submissions at paragraphs [85] – [91] above.

6.3 ACCI SUBMISSION

120. We refer to the ACCI Submission at paragraphs [7] – [13] inclusive.

121. Ai Group agrees with the proposition that the RTD term should not provide for rights of employees or impose obligations on employers beyond what will be in the Act.[73]

[71] ASU Submission at [6] (including case study immediately above) to [9] (and case study immediately following).

[72] CFMEU Manufacturing Division Submission at [11].

[73] ACCI Submission at [4]a. and [7].

122. However, we disagree with ACCI's proposal for the RTD term to be expressed in the same terms as s.333M of the Act.[74] For the reasons set out in Chapter 6 of our May Submission[75], the RTD term should simply refer to (and not duplicate) the RTD in ss.333M(1) and (2) of the Act (nor any other part of s.333M).

123. We refer to the ACCI Submission at paragraphs [21] - [22].

124. Ai Group agrees that it is important the RTD term does not limit the '*method*' or '*means*' by which an employer communicates with its employees, [76] or communication from different time zones.[77]

125. However, in Ai Group's submission, it is not just limits on *'method'* or *'means'* of contact that would be inappropriate but at a broader level, any attempt to limit attempted or actual communication (including but not limited to when, frequency, mode of contact etc). As we have fulsomely explained earlier in the submission, the RTD is predicated on the protection of reasonable employee responses to refuse or not respond to contact by their employer or third parties outside their working hours. There is no basis for construing the RTD as permitting or requiring any restriction on an employer's actions with respect to contact (including attempted contact) of employees outside their working hours.

6.4 ARA SUBMISSION

126. In response to the proposal on page 2 of the ARA Submission that '*the proposed term in awards should be wholly reflective of s333M & s333N of the Act*', and its submission on page 8 that in the context of '*the unique needs of the retail industry, an award term replicates* (sic)*, but does not depart from, legislative provisions would be an optimal result…*' we refer to and rely upon paragraph [122] above.

127. Ai Group agrees with the merits of a uniform RTD term being included in awards, as proposed at page 5 of the ARA Submission.

[74] ACCI Submission at [4]f., [7] and [13].

[75] May Submission at [41] – [43] inclusive.

[76] ACCI Submission at [21].

[77] ACCI Submission at [22].

6.5 PHARMACY GUILD SUBMISSION

128. We refer to the Pharmacy Guild Submission at paragraphs [9] – [11].

129. We rely upon our submissions at paragraphs [123] – [125] above, in response to the submission of the Pharmacy Guild that the RTD term should not seek to limit the '*means or method'* by which an employer or third party communicates with an employee.

130. We refer to paragraphs [10] – [11] of the Pharmacy Guild Submission. Whilst Ai Group agrees in principle with the notion of a brief-form RTD term, we submit that the term should not replicate any part of s.333M, but rather, simply make reference to ss.333M(1) and (2) as required by s.149F of the Act.[78]

6.6 NECA SUBMISSION

131. We refer to the first bullet point in the NECA Submission.

132. To the extent that contact such as that described by NECA may be *'required'* under WHS (or other) legislation, it would appear that s.333M(5) of the Act will operate so as to deem any refusal of contact or attempted contact as unreasonable. To the extent such contact may be desirable (but fall short of being *'required'*) in our submission the refusal to be contacted on time-critical safety matters would be strong justification for the refusal being considered unreasonable in the context of s.333M(3) of the Act.

133. In any event, in Ai Group's submission it is not necessary to include a term in awards *'allowing'* employers to contact (or attempt to contact) employees should such situations arise. As we explain earlier in our submission, this is because the RTD in the Act does not operate to restrict an employer from doing so.

6.7 SA POWER NETWORKS SUBMISSION

134. We refer to the SA Power Networks Submission, and the desire expressed for draft award terms that provide clarity on reasonable reasons for contact, the appropriate

[78] See our May Submission at [42].

extent to which employees should be compensated, and the nature of the roles/levels of responsibility where contact is appropriate.[79]

135. It is not appropriate for the RTD term to deal with '*reasonable reasons for contact'*. The RTD in s.333M of the Act is framed in terms of the reasonableness (or otherwise) of an employee's refusal of contact or attempted contact by their employer or a third party. There is no basis in s.149F of the Act for the RTD term to prescribe the *'reasonable reasons'* as to why an employer or third party may make or attempt such contact.

136. In relation to the proposal that the RTD term address '*the extent to which employees should be compensated'*, we refer to and rely upon our submissions at paragraphs [28] – [31] above.

137. In relation to the proposal that the RTD term deal with '*the nature of the roles/levels of responsibility where contact is appropriate*' we refer to and rely upon our submissions at paragraphs [32] – [33] above.

[79] SA Power Submission on page 2.

7. RESPONSE TO AWARD-SPECIFIC PROPOSALS

7.1 Response to AMWU Submission

138. In the AMWU Submission, various amendments to award provisions dealing with overtime are proposed. Ai Group's position on these amendments is set out below.

Clauses Dealing with 'Time Off for Overtime Worked' and 'Rest Break After Overtime'

Generic Amendments

139. In Schedule A of its submission, the AMWU proposes the following generic amendment to clauses dealing with '*time off for overtime worked'*:

- Insert additional subclause at an appropriate place:

  (x) Any time off taken by an employee under this Clause is to count as approved leave for the purposes of the Right to Disconnect at Clause x.x.

140. The AMWU submission also proposes the following amendment to '*rest break after overtime'* clauses:

- Insert additional subclause at an appropriate place:

  (x) Any rest break taken under this Clause is considered approved leave for the purposes of the Right to Disconnect at Clause X.X of this Award.

141. It is unnecessary and inappropriate for an award clause to characterise certain time spent by an employee away from the workplace as approved leave for the purposes of any RTD term.

142. Section 22 of the Act distinguishes between periods of '*paid leave*, '*unpaid leave'*, '*paid authorised absences'* and '*unpaid authorised absences'*, with consequences for the calculation of '*service*' and '*continuous service'* for various purposes under the Act. The meaning of a '*paid authorised absence'* and an '*unpaid authorised absence*' were considered by a Full Bench of the Commission in *Appeal by WorkPac Pty Ltd* – [2012] FWAFB 3206.

143. Whether a particular period of time which an employee spends away from the workplace is appropriately characterised as '*paid leave*', '*unpaid leave'*, a '*paid authorised absence*', an '*unpaid authorised absence'*, or none of these, will depend upon the type of absence.

144. It is unclear whether '*time off for overtime worked'* would be appropriately characterised as '*paid leave'* or a '*paid absence'*.

145. However, there is no doubt that when an employee has a 10-hour rest break after overtime and the relevant 10-hour period falls outside the employee's ordinary hours, the time is not '*leave*' or an '*absence*'. It is simply time that the employee is spending away from the workplace.

146. The AMWU's proposed approach of deeming time that an employee spends away from the workplace as '*approved leave'*, when such time is not a recognised category of leave (such an annual leave or personal/carer's leave), is not appropriate. Such an approach would potentially disturb the operation (or application) of section 22 of the Act and most likely have other unintended consequences. At the very least it would likely give rise to confusion and unwarranted complexity.

147. For the above reasons, the AMWU's proposed generic clauses dealing with '*time off for overtime worked'* and '*rest break after overtime'* should be rejected.

148. For the same reasons, the AMWU's proposed amendments to the following award provisions, as set out in Schedule B of the AMWU Submission, should be rejected:

    (a) *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**): proposed new clauses 32.8(l), 32.12(g), 57.1(c) and 57.5;

    (b) *Graphic Arts, Printing and Publishing Award 2020* (**Graphic Arts Award**): proposed new clause 28.9(k);

    (c) *Food, Beverage and Tobacco Manufacturing Award 2020* (**FBT Award**): proposed new clause 23.7(k) and 23.10(f); and

(d) *Vehicle Repair, Services and Retail Award 2020* (**Vehicle Award**): proposed new clause 24.6(e) and 24.12(d).

Clauses Defining 'Reasonable Overtime'

Generic Amendments

149. In Schedule A of its submission, the AMWU proposes the following generic amendment to clauses dealing with *'reasonable overtime'*:

- Insert additional subclause at an appropriate place

(x) The employee's right to disconnect from work outside regular working hours

150. The *'reasonable overtime'* clauses in awards can be traced back to the Australian Industrial Relations Commission's *Working Hours Case*[80] in 2002.

151. Various modern awards retained the model provisions that were inserted into many pre-modern awards as a result of the *Working Hours Case*.

152. These modern award provisions were recently reviewed in the *4 Yearly Review of Modern Awards – Plain language redrafting – Reasonable overtime*[81] proceedings. The model award clause determined by the Commission in the proceedings remains appropriate and there is no need to amend it. To the extent that the RTD may have any relevance to the model award clause, the issue is adequately dealt with through the following existing paragraph (j) in the clause:

(j) any other relevant matter.

153. For the above reasons, the AMWU's proposed generic amendments to '*reasonable overtime'* clauses should be rejected.

154. For the same reasons, the AMWU's proposed amendments to the following award provisions, as set out in Schedule B of the AMWU Submission, should be rejected:

[80] (2002) 114 IR 390.

[81] [2018] FWCFB 6680.

(a) Manufacturing Award: proposed new clause 32.9(c)(x); and

(b) Graphic Arts Award: proposed new clause 28.1(c)(x).

Clauses Dealing with Call Back for Overtime

Generic Amendments

155. In Schedule A of its submission, the AMWU proposes the following two generic amendments to clauses dealing with *'call back after overtime'*:

- Insert after any Award provision that requires an employee to hold themselves in readiness for work

  "and is paid as such in accordance with Clause X.x

- Insert additional subclause at the end of this clause:

  (x) Unless an employee is receiving payment to hold themselves in readiness for a call back to work (under this clause or Clause x.x in this Award), the employee is entitled to exercise their right to disconnect under Clause X.X of this Award.

156. The first of the above proposed variations ignores the fact that stand-by provisions in awards invariably include compensation for time spent by employees holding themselves in readiness to return to work. Examples are:

(a) The following clause in the Manufacturing Award:

> **32.14 Standing by**
>
> Subject to any custom prevailing at an enterprise, where an employee is required regularly to hold themselves in readiness to work after ordinary hours, the employee must be paid standing by time at the employee's ordinary hourly rate for the time they are standing by.

(b) The following clause in the *Telecommunications Services Award 2020*:

> **20.9 Stand-by**
>
> (a) An employee who is required to remain in readiness for a return to work outside their normal working hours will be paid an allowance of 20% of the ordinary hourly rate for their classification for each hour they are required to stand by.
>
> (b) While receiving the appropriate overtime rate, the stand-by allowance will not be paid.

157. Therefore, the first of the abovementioned amendments proposed by the AMWU is unnecessary.

158. The second of the AMWU's amendments is dealt with below in relation to clauses 32.13(h) and 57.6(d) in the Manufacturing Award. For similar reasons, this proposal should be rejected in all awards.

159. The AMWU's proposed amendments to various specific award clauses are addressed below.

AMWU's Proposed Amendments to Clause 32.13(c) in the Manufacturing Award

160. The AMWU's proposed amendment to clause 32.13(c) is:

> 32.13(c) Where an employee is required to regularly hold themselves in readiness for a call back and is paid as such under Clause 32.14 they must be paid for a minimum of 3 hours work at the appropriate overtime rate~~, subject to clause 32.14 which deals with the conditions for standing by~~.

161. The proposed amendment to clause 32.12(c) would disturb the operation of clause 32.14 (Standing By) in the award. Clause 20.9 recognises that some employers have longstanding existing arrangements in place which operate in lieu of the payment of the penalty rate prescribed in the clause.

162. Accordingly, the AMWU's proposed amendment is not justified.

163. This issue is discussed in more detail below in the section dealing with the AMWU's proposed amendment to clause 32.14(a) in the Manufacturing Award.

AMWU's Proposed New Clauses 32.13(h) and 57.6(d) in the Manufacturing Award

164. The AMWU's proposed new clauses 32.13(h) and 57.6(d) in the Manufacturing Award are:

- 32.13(h) Unless an employee is receiving payment to hold themselves in readiness for a call back (either under this Clause or Clause 32.14), the employee is entitled to exercise their right to disconnect under Clause X.X of this Award.

- 57.6(d) Nothing in this clause prevents an employee from exercising their right to disconnect to being called back to work.

165. The proposed new clauses are unnecessary and unwarranted for the following reasons:

(a) The proposed new clauses conflict with numerous reasonable arrangements that are in place within workplaces under which employees are contacted and offered the opportunity to work overtime, for example:

(i) When a breakdown occurs, and urgent maintenance is needed;
(ii) When emergency service workers and/or other workers are needed in emergencies; and/or
(iii) When employees on a particular shift call in sick at the last minute and there is a need for a certain number of qualified staff members to be in attendance to meet regulatory, safety or other requirements (e.g. midwives in a labour ward, nurses at an aged care facility, or childcare workers at an early education centre);

(b) In many circumstances, the AMWU's proposed new clauses would conflict with s.333M of the Act because this statutory provision recognises that *'the reason for the contact or attempted contact'* and *'the nature of the employee's role'* are relevant in determining whether an employee has a RTD; and

(c) Section 333M of the Act (as supplemented by the Commission's RTD term, that is being developed), adequately deal with the right of an employee to disconnect.

AMWU's Proposed New Clause 29.6 in the Graphic Arts Award

166. The AMWU's proposed new clause should be rejected for the reasons set out above regarding clauses 32.13(h) and 57.6(d) in the Manufacturing Award.

AMWU's Proposed Amendment to Clause 23.11(a) in the FBT Award

167. The AMWU's proposed amendments should be rejected for the reasons set out above regarding clause 32.13(c) in the Manufacturing Award.

AMWU's Proposed New Clause 23.11(f) in the FBT Award

168. The AMWU's proposed new clause should be rejected for the reasons set out above regarding clauses 32.13(h) and 57.6(d) in the Manufacturing Award.

AMWU's Proposed New Clause 24.8(d) in the Vehicle Award

169. The AMWU's proposed new clause should be rejected for the reasons set out above regarding clauses 32.13(h) and 57.6(d) in the Manufacturing Award.

Clauses Dealing with 'Standing By' or 'On Call'

Generic Amendments

170. In Schedule A of the AMWU Submission, the AMWU proposes the following generic amendments to clauses dealing with *'standing by'* or *'on call'*:

- Delete the following words (or words to that effect in a clause) "Subject to any custom of the enterprise where an employee is regularly" and insert the following words in its place "If an employee is"
- Insert the following additional sub-clauses:

  (x) The employer will inform the employee of the length of time they will be required to hold themselves in readiness to work before such period of time commences.

  (y) An employee will not be entitled to exercise their right to disconnect under Clause X.X of this Award while they are being paid standing by time.

171. The first of the above proposed amendments is addressed below in relation to clause 32.14(a) in the Manufacturing Award. For similar reasons, the proposed amendments should be rejected in all awards.

172. The second of the above proposed amendments is addressed below in relation to clauses 32.14(b) and (c). For similar reasons, the proposed amendments should be rejected in all awards.

AMWU's Proposed Amendments to Clause 32.14(a) in the Manufacturing Award

173. The AMWU's proposed amendments to clause 32.14(a) are:

32.14 Standing by

(a) ~~Subject to any custom prevailing at an enterprise, where~~ If an employee is required ~~regularly~~ to hold themselves in readiness to work after ordinary hours, the employee must be paid standing by time at the employee's ordinary hourly rate for the time they are standing by.

174. The AMWU's proposal to remove the words *'Subject to any custom prevailing at an enterprise'* in the Manufacturing Award is an attempt to achieve an outcome that an individual employee covered by the Manufacturing Award applied for in 2019 (AM2019/20).

175. In that matter, both Ai Group and the AMWU submitted that there was no reason to depart from the reasoning of the Full Court of the Industrial Relations Court in *Logan v Otis Elevators* [1999] IRCA 4.

176. There remains no reason for such a departure.

177. In a decision of 26 November 2020, ([2020] FWC 6233) Commissioner Bissett accepted the arguments of Ai Group and the AMWU in the proceedings and rejected the application.

178. A comprehensive account of the history of the Manufacturing Award provision can be found at paragraphs [32] to [47] of Ai Group's Reply Submission of 17 July 2020 in the proceedings.

179. The RTD is not inconsistent with clause 32.14 in the Manufacturing Award. There are various longstanding arrangements in operation amongst the employers covered by the Manufacturing Award that are permitted by the wording that the AMWU is seeking to have deleted, including various stand-by allowances and loaded rate arrangements that are provided to employees instead of the penalty rate in clause 32.14.

180. Disturbing the provision in the Manufacturing Award would also have adverse implications for many enterprise agreements which include alternative standing by provisions, as highlighted by the decision of Gregory C in *Re Cummins South Pacific Pty Ltd - Laverton Enterprise Agreement 2018* [2019] FWCA 1245.

181. The AMWU's proposed amendments to clause 32.14 should be rejected.

AMWU's Proposed New Clauses 32.14(b) and (c) in the Manufacturing Award

182. The AMWU has proposed the following new clauses 32.14(b) and (c) in the Manufacturing Award:

> 32.14(b) The employer will inform the employee of the length of time they will be required to hold themselves in readiness to work before such period of time commences.
>
> 32.14(c) An employee will not be entitled to exercise their right to disconnect under Clause X.X of this Award while they are being paid standing by time.

183. Clause 32.14(b) is unnecessary. In most cases, employees would be well aware of the amount of time they are required, or likely to be required, to hold themselves in readiness to work. However, circumstances sometimes change, or are unclear at the time when an employee commences standing-by. An employer will not always know precisely how long an employee will need to stand-by. It would be unfair and inappropriate to expose an employer to a penalty for breaching the Manufacturing Award in such circumstances.

184. There is no evidence that the existing longstanding provisions in clause 32.14 of the Manufacturing Award are not operating effectively.

185. The AMWU's proposed paragraph 32.14(c) simply states the obvious and is therefore unnecessary. Section 333M of the Act recognises that the extent to which an employee is compensated to remain available to perform work during the period in which the contact or attempted contact is made, is relevant when determining whether an employee has a RTD.

AMWU's Proposed New Clauses 30.2 and 30.5 in the Graphic Arts Award

186. The AMWU's proposed new clauses should be rejected for the reasons set out above regarding clauses 32.14(b) and (c) in the Manufacturing Award.

AMWU's Proposed Amendment to Clause 23.12(a) in the FBT Award

187. The AMWU's proposed amendments should be rejected for the reasons set out above regarding clause 32.14(a) in the Manufacturing Award.

AMWU's Proposed New Clauses 23.12(b) and (c) in the FBT Award

188. The AMWU's proposed new clauses should be rejected for the reasons set out above regarding clauses 32.14(b) and (c) in the Manufacturing Award.

AMWU's Proposed New Clauses 24.7(b) and (d) in the Vehicle Award

189. The AMWU's proposed new clauses should be rejected for the reasons set out above regarding clauses 32.14(b) and (c) in the Manufacturing Award.

7.2 Professionals Australia Submission

190. In its submission, Professionals Australia seeks the inclusion of a span of hours in the *Professional Employees Award 2020* (**Professionals Award**).

191. The hours of work provisions in the Professionals Award were recently substantially varied after long running and vigorously contested proceedings during the 4 Yearly Review of Modern Awards. As a result of the proceedings, employers and employees covered by the Professionals Award lost a great deal of the flexibility that was previously provided for under the hours of work provisions in the Professionals Award.

192. It is not in anyone's interests for the hours of work provisions to be made even less flexible for employers and employees.

193. The Professionals Award sets out specific rates and penalties for work performed at particular times of the day and week. A specific spread of hours is not needed. The same approach is adopted in the *Miscellaneous Award 2020*.

194. Employees covered by the Professionals Award have university qualifications. Accordingly, paragraph 333M(3)(d) of the Act, which refers to *'the nature of the employee's role and the employee's level of responsibility'*, will often be particularly relevant when assessing reasonableness for the purposes of assessing the RTD of an employee covered by the Professionals Award.

195. Professional Australia's proposal should be rejected.

7.3 CFMEU – Construction & General Division Submission

196. The CFMEU Construction & General Division proposes three changes to the ACTU Draft Model Clause, which it proposes be inserted in the *Building and Construction General On-site Award 2020* (**Construction Award**), *Joinery and Building Trades Award 2020* (**Joinery Award**) and *Mobile Crane Hiring Award 2020* (**Mobile Crane Award**).

197. We address each of its proposals below, and otherwise rely on our earlier submissions in relation to the ACTU Draft Model Clause.

Modification to the ACTU Draft Model Clause – Notice of Start Time, Work Location

198. The CFMEU Construction & General Division Submission proposes that an additional clause (sub-clause X.3(h)) be included in the ACTU Draft Model Clause, as follows:

> (h) whether the contact or communication is reasonably necessary to give the employee information that the employee must have in order to perform work (for example, the address of a work site, or the employee's start time, for a particular shift).[82]

199. We acknowledge the union's recognition of the practical necessity for some contact with employees outside of their working hours. Nonetheless, we refer to and rely upon our earlier submissions regarding sub-clause 3 of the ACTU Draft Model Clause at paragraphs [75] – [84].

200. Further, we submit that proposed sub-clause X.3(h) is not necessary since the list of considerations in s.333M(3) of the Act is non-exhaustive, and the matter raised by the CFMEU – Construction & General Division can be taken into account without its inclusion in the RTD term.

201. In our submission, there would be strong justification for characterising an employee's refusal of contact (or attempted contact) as unreasonable where it was made by their employer to provide information required by the employee to be able to perform work.

[82] CFMEU Construction & General Division Submission at [14]; see also [7] – [9] inclusive.

Modification to the ACTU Draft Model Clause – Payment for Working When RTD May be Exercised

202. The CFMEU Construction & General Division Submission proposes an additional clause (new sub-clause X.5) be included in the ACTU Draft Model Clause, as follows:

> X.5 An employee who is required to monitor, read, respond to, or otherwise engage with contact or communication from their employer, or a third party in relation to their employment, in circumstances where the employee may otherwise exercise the Right to Disconnect in accordance with this clause, will be paid for all time spent engaging with the contact or communication in accordance with clause X.X - Payment for working overtime, with a minimum payment of 3 hours.

203. The Construction Award, Joinery Award and Mobile Crane Award already include provisions concerning re-call (including minimum payment periods),[83] as well as (in the Mobile Crane Award only) for standing by.[84] The proposed clause appears to be predicated on some right of employees to be compensated for not exercising their RTD. In reality, the above proposal is a claim to expand upon the existing monetary entitlements in the relevant awards for standing-by/on call, recall and overtime work. The CFMEU Construction & General Division has advanced no merit case in support of any such expansion of entitlements under the relevant awards. In Ai Group's submission the proposal should be rejected.

204. Insofar as the CFMEU General & Construction Division expresses support for the CFMEU Manufacturing Division's position on this issue,[85] we refer to and rely on our earlier submissions in response to same at paragraphs [117] – [119] above.

Ensuring Workers are Compensated when Required to Stand By

205. In response to paragraph [13] of the CFMEU Construction & General Division Submission, we refer to and rely upon our earlier response to the AMWU Submission at paragraphs [173] – [181] above.

[83] Construction Award, clauses 17.2(o) and 29.5; Joinery Award, clause 24.5; and Mobile Crane Award, clause 22.9.

[84] Mobile Crane Award, clause 22.9(b).

[85] CFMEU Construction & General Division Submission at [10] – [11].

7.4 ANMF Submission

206. The ANMF submits that '*the capacity for an employer to recall an employee to work who is not on call …requires curtailing*'.[86] For reasons explained earlier in this submission, Ai Group strongly opposes any construction of the RTD in s.333M(1) and (2) of the Act, and any RTD term, that is directed at '*curtailing*' any contact or attempted contact of an employee by their employer.

207. To the extent the ANMF expresses support for sub-clause X.3(g) of the ACTU Draft Model Clause as a *'fix'* to its concern in the context of the *Nurses Award 2020*,[87] we refer to any rely upon our response to the ACTU Submission at paragraphs [75] – [84] above.

7.5 ADMA Submission

208. The ADMA Submission proposes specific amendments to the *Pastoral Award 2020* to address three identified concerns.[88]

209. At a high level, Ai Group submits that a preferable approach is for the RTD term to simply provide for the exercise of an employee's rights under ss.333M(1) and (2), thereby avoiding the need for any award-specific adjustments such as that proposed by the ADMA.

210. For completeness, we note that where contact with an employee is made or attempted:

    (a) For reasons that concern animal welfare; and/or

    (b) In circumstances where an employee is in receipt of above-award remuneration or an annual salary that is intended to recognise and compensate for the need to be contactable and able to be recalled outside their working hours

[86] ANMF Submission at [16].

[87] ANMF Submission at [18] – [23].

[88] ADMA Submission at pages 2 and 3.

such factors are likely to weigh heavily against the exercise of an employee's RTD as being reasonable.