Australian Industry Group

Right to Disconnect Term

Submission – Draft Term

(AM2024/14)

2 August 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 statement issued by Justice Hatcher, President of the Fair Work Commission (**Commission**) on 11 July 2024[1] (**Statement**) in relation to:

   (a) the variation of modern awards to include a right to disconnect (**RTD**) term, and the draft *'employee right to disconnect'* term (**Draft Term**) set out in Attachment A to the Statement; and

   (b) the Commission's intention not to make guidelines concerning the right to disconnect (**Guidelines**) prior to 26 August 2024.

2. This submission should be read in conjunction with Ai Group's submissions filed earlier in this proceeding on 20 May 2024 (Ai Group Initial Submission) and 11 June 2024 (Ai Group Reply Submission).

3. In summary, Ai Group's position in relation to the Draft Term is set out below. For ease of reference, we have collated the amendments to the Draft Term that reflect Ai Group's primary position outlined in this submission in a marked-up version of the Draft Term at **Attachment A**.

   (a) In relation to **sub-clause XX.1**:

      (i) Although we would contend that a mere reference to the operation of s.333M of the *Fair Work Act 2009* (Cth) (**Act**) should be sufficient to satisfy s.149F, we acknowledge that it is arguable that more is required by the provision. If this alternate argument is accurate, there may be some doubt as to whether the Draft Term does in fact provide for the exercise of an employee's RTD as set out in s.333M of the Act, as stated. To address this, we have proposed an amendment to sub-clause XX.3; and

[1] *Variation of modern awards to include a right to disconnect term* [2024] FWC 1818.

(ii) We have proposed an amendment to Note (b) and a new Note (e), to aide with clarity and understanding of the RTD;

(b) In relation to **sub-clause XX.3**: Ai Group raises a number of significant concerns as to how this clause may operate. Notwithstanding Ai Group's primary position being that the Draft Term should not replicate substantive aspects of the RTD, should the Commission be minded to create an award-derived RTD entitlement, Ai Group submits the entitlement should be in identical terms to that contained in ss.333M(1) and (2) of the Act, or in terms that are identical in their substantive effect. In essence, we strongly contend that the provision be amended to remove any obligation upon an employer and that it instead be reframed to reflect an employee entitlement, as is contemplated by the statutory scheme. We have proposed alternative wording for sub-clause XX.3 to achieve this.

(c) In relation to **sub-clause XX.4**: we have identified changes that should be made to the provision to reflect the different approach to clause XX.3, noting that the two provisions are interconnected. In case the Full Bench's approach to XX.3 is retained, we have also identified various difficulties with clause XX.4 being predicated on there being '*usual arrangements*' as to how an employer would make contact with employees who are being paid to stand-by, to notify the employee they are required to attend for or perform work. We have proposed the deletion of this aspect of sub-clause XX.4.

(d) In relation to **sub-clause XX.5**: we submit that as presently drafted, the clause may be interpreted as implying that an employer may be prevented from contacting, or attempting contact with, an employee outside of working hours for a reason other than an emergency roster change or recall to work. The primary proposal we have advanced to address this concern is to amend sub-clause XX.5, so as to remove any reference to specific award clauses in which contact, or attempted contact, is not prevented by either sub-clause XX.3 or the RTD provisions in the Act.

2. Ai Group agrees with the rationale for the Commission's intention not to publish Guidelines prior to 26 August 2024, particularly in the context of its intention as

outlined in the *Implementation report – right to disconnect*[2] to otherwise make guidance information and materials available.

[2] Fair Work Commission, *Implementation Report - Right to disconnect*, published on 19 July 2024 (**Implementation Report**).

2. SUB-CLAUSE XX.1 OF THE DRAFT TERM

3. Proposed sub-clause XX.1 of the Draft Term provides:

> **XX.1** Clause XX provides for the exercise of an employee's right to disconnect set out in section 333M of the Act.
>
> NOTE:
>
> (a) Section 333M provides that, unless it is unreasonable to do so, an employee may refuse to monitor, read or respond to contact, or attempted contact, from:
>
> (1) their employer outside of the employee's working hours,
>
> (2) a third party if the contact or attempted contact relates to, their work and is outside of the employee's working hours,
>
> (b) Section 333M(3) prescribes matters that must be taken into account in determining whether an employee's refusal is unreasonable.
>
> (c) Section 333M(5) provides that an employee's refusal will be unreasonable if the contact or attempted contact is required under a law of the Commonwealth, a State or a Territory.
>
> (d) Sections 333N and 333P provide for procedures for the resolution of disputes about whether an employee's refusal is reasonable and about the operation of section 333M.

4. Proposed sub-clause XX.1 is intended to be included in all modern awards.[3]

5. If the Commission is to proceed on the basis that, notwithstanding the position advanced in Ai Group's earlier submission, a mere reference to the RTD in the Act would not amount to an award term that provides for the exercise of the right; contrary to the statement in proposed sub-clause XX.1, there may be some doubt as to whether the Draft Term provides for the exercise of an employee's RTD as set out in s.333M of the Act.

6. As set out in the Ai Group Initial Submission, the Draft Term must provide for the '*exercise of*' the right set out in ss.333M(1) and (2).[4] The right referred to in these sections is the right of an employee to refuse to monitor, read or respond to contact, or attempted contact, from:

[3] Statement at [9].

[4] See Ai Group's Initial Submission at [9].

(a) In the case of s.333M(1): an employer outside of the employee's working hours; and

(b) In the case of s.333M(2): 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.[5]

7. In contrast:

(a) Adopting the aforementioned logic; sub-clause XX.1 does not of itself provide for the exercise of the RTD set out in s.333M of the Act, but merely states that the Draft Term (referred to as a whole) does so;

(b) Sub-clause XX.2 provides only for the dates on which the Draft Term will commence applying to different categories of employers;

(c) Sub-clause XX.3 as presently drafted, places a prohibition on an employer from preventing (directly or indirectly) an employee from exercising their RTD under the Act. For reasons we more fulsomely explain in Chapter 3 of this submission, the imposition of such a constraint on employers goes well beyond the provision of the exercise of the RTD, and is inconsistent with the broader conceptualisation of the RTD scheme under the Act; and

(d) Sub-clauses XX.4 and XX.5 deal with what an employer is *not prevented from doing* in certain circumstances specified in those clauses. As such, they are directed towards the steps that an *employer* may or may not take.

8. To this end, we propose sub-clause XX.3 be amended to more clearly provide for the exercise of an employee's RTD as set out in s.333M of the Act, which in turn would align the Draft Term more closely with the statutory requirement for a RTD term as contained in ss.12 and 149 of the Act. We address the proposed amendment to sub-clause XX.3 in Chapter 3 of this submission.

[5] Sections 333M(1) and (2) of the Act, as inserted by the *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* (Cth).

9. Separate to this, in relation to Note (b) to sub-clause XX.1, we submit the words as shown in underline below should be inserted for greater consistency with the wording in s.333M(3) of the Act:

> (b) Without limiting the ~~Section 333M(3) prescribes~~ matters that may ~~must~~ be taken into account in determining whether an employee's refusal is unreasonable, section 333M(3) lists the matters that must be taken into account for this purpose.

10. In the absence of such clarification, the Note may cause confusion as to whether s.333M(3) is intended to be an exhaustive list of matters to be taken into account in determining whether an employee's refusal of actual or attempted contact is unreasonable. At the very least, it does not fulsomely explain the operation of s.333M(3).

11. Further, and in light of the changes we propose to the wording of sub-clause XX.3 of the Draft Term, we propose the following words be included as new Note (e) to proposed sub-clause XX.1 of the Draft Term:

> NOTE:
>
> (e) The general protections provisions in Part 3-1 of the Act prohibit the taking of adverse action by an employer against an employee because of the rights of an employee under sections 333M(1) and (2) of the Act.

12. The above wording is broadly modelled on the note found beneath s.333M(4) of the Act and is preferable to the existing proposed wording in so far as it does not create a substantive entitlement separate to the RTD in the Act, whilst still making information about the existing protections readily available in the award.

3. SUB-CLAUSE XX.3 OF THE DRAFT TERM

13. Proposed sub-clause XX.3 of the Draft Term provides:

> **XX.3** An employer must not directly or indirectly prevent an employee from exercising their right to disconnect under the Act.

14. Proposed sub-clause XX.3 is intended to be included in all modern awards.[6]

15. Ai Group has a number of significant concerns with proposed sub-clause XX.3, and contends that it should accordingly be replaced with the following, for the reasons set out below:

> XX.3 An employee may exercise the right to disconnect in accordance with sections 333M(1) and (2) of the Act.

16. ***First***, the clause proposed by the Commission is expressed so as to operate as a *prohibition* on *employers* with respect to conduct that would prevent an employee's exercise of the RTD under the Act. This clearly traverses well beyond what is required by s.149F of the Act (including the definition of '*right to disconnect term*' in s.12 of the Act), which is to *provide for the exercise of an employee's rights* as set out in ss.333M(1) and (2) of the Act. These subsections do not contain or contemplate any such restriction or prohibition on employers.

17. The Draft Term also goes well beyond the scheme of the Act which carefully (and, deliberately) does not impose any prohibitions, restrictions or obligations on employers. To that end, the Draft Term would subvert the legislature's intent.

18. ***Second***, the Act already contains a scheme for the protection of an employee's exercise of the RTD. Relevantly, s.333M(4) confirms that the right in ss.333M(1) and (2) is a '*workplace right*' within the meaning of Part 3-1 of the Act. Section 340 of the Act prohibits a person (which includes an employee's employer[7]) from taking adverse action against an employee '*to prevent the exercise of a workplace right by the other person*'.[8] For completeness, adverse action by an employer against an employee is also prohibited if taken because the employee

[6] Statement at [9].

[7] Section 342 of the Act.

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

has a workplace right, has or has not exercised a workplace right, or proposes or proposes not to (or has at any time proposed or proposed not to) exercise a workplace right.[9]

19. Thus, the scheme under Part 3-1 of the Act already affords employees extensive protections with respect to the exercise of the RTD. It is therefore not '*necessary*' for the Draft Term to contain a prohibition on an employer directly or indirectly preventing an employee's exercise of the RTD, since this protection already exists under the Act.

20. As we set out in the Ai Group Reply Submission,[10] the statutory instruction in s.149F of the Act is subject to s.138, 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*'.[11] Since the Commission is not *required* to include any prohibition on employers as part of the Draft Term, and nor is it *necessary* to do so, it follows that the inclusion of sub-clause XX.3 in modern awards would be contrary to s.138 of the Act.

21. We advance the above submission in circumstances where there is (of course) no evidence of employers taking action directly or indirectly to prevent employees from exercising the yet to commence RTD. As such, the Commission cannot be satisfied that the new term is necessary in any award. It may that a different conclusion is warranted, at a later time, depending upon the manner in which the new provisions are observed to operate in practice following their commencement. However, any view that proposed sub-clause XX.3 is necessary would, at present, be based purely upon speculation as to how the new RTD may operate in practice given it has not yet commenced.

22. ***Third***, the proposed prohibition on an employer '*indirectly*' preventing the exercise of the RTD is extremely vague and likely to cause significant uncertainty and as a corollary, is fraught with potential for disputation. To this end, sub-

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

[10] Ai Group Reply Submission at [31].

[11] Section 138 of the Act.

clause XX.3 is likely to be burdensome on employers[12] and difficult to understand in practice[13] and accordingly, contrary to the modern awards objective (**MAO**).[14]

23. ***Fourth***, an employer may not be in a position to understand – or even, control – how its actions may '*indirectly*' prevent an employee from exercising their RTD. For example, it may be the case that an employee's perception or belief about a particular situation in their workplace causes the employee to decide not to exercise their RTD pursuant to ss.333M(1) and/or (2) of the Act (and noting that employees retain a discretion as to whether they may or may not exercise the right, except where it would be unreasonable to do so). In such a case, it could be argued that the employer's action in creating or maintaining the situation that gave rise to the employee's belief or perception, '*indirectly*' prevented the employee from exercising their RTD; irrespective of whether the employer intended, or indeed, was even aware of this being the case. Such an outcome would result in intolerable unfairness for employers, particularly in the context of any breach of sub-clause XX.3 exposing the employer to penalties or other compliance measures. In the context of the MAO, it is critical that any award terms are capable of permitting an employer to take clear and identifiable steps to comply with the requirements, for the purpose of ensuring compliance.[15]

24. ***Fifth***, and further to the above point, sub-clause XX.3 is inconsistent with the approach to the employee RTD in the overall scheme provided for in the Act. In essence, the legislative scheme reflects an assumption that there may be circumstances where there is disagreement, or indeed disputation, over whether an employee's refusal to engage with contact outside of working hours is reasonable or whether an employer can undertake action which reflects an insistence upon such engagement. It consequently provides an avenue for such disputes to be ventilated at the workplace and before the Commission. Ultimately, it provides an avenue for it to resolved by the Commission.

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

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

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

[15] See ss.134(1)(f) and (g) of the Act.

25. The introduction of sub-clause XX.3 would, however, expose employers to penalties for the contravention of an award if they take action that is deemed to directly or indirectly prevent an employee from exercising their RTD under the Act. This would undermine the careful balance that has been struck under new Division 6 of Part 8 of the Act, so as to permit parties to ventilate disputed positions regarding an employee's exercise of the RTD firstly at a workplace level and if necessary, with the assistance of the Commission. Only if and once an order is made by the Commission pursuant to s.333Q of the Act is an employer or employee exposed to a potential civil penalty, should they breach the order.

26. ***Sixth***, the effect of our proposed sub-clause XX.3 is to create a substantive protection for employees in awards which will not differ substantively from that which is created under the legislation. Such an approach would nonetheless satisfy the statutory requirement for inclusion of a RTD term in awards and would also serve two broader purposes. First, it would raise awareness of the RTD. Secondly, it would be relevant to the Commission's assessment as to whether an enterprise agreement meets the '*better off overall test*'.[16] This will necessarily require an employer to address the RTD in any enterprise agreement, whether by directly providing for an equivalent protection (such that the factor may be considered a neutral consideration) or indirectly addressing its absence through more beneficial terms and conditions elsewhere in the terms of the enterprise agreement.[17]

27. Notwithstanding our primary position[18] that the Draft Term should not replicate substantive aspects of the RTD, Ai Group submits that should the Commission be minded to create an award-derived RTD entitlement, it should be in identical terms to that contained in ss.333M(1) and (2) of the Act, or in terms that are identical in effect. This necessitates a departure from the Commission's currently proposed framing of clause XX.3

[16] Section 186(2)(d) and Sub-division C of Division 4 of Part 2-4 of the Act.

[17] Per the 'global assessment' approach required pursuant to s.193A(2) of the Act.

[18] See Ai Group Initial Submission at [41] – [42].

4. SUB-CLAUSE XX.4 OF THE DRAFT TERM

28. Proposed sub-clause XX.4 of the Draft Term provides:

> **XX.4** Clause XX.3 does not prevent an employee from being required to monitor, read or respond to contact, or attempted contact, from the employer outside of the employee's working hours where:
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> **(a)** the employee is being paid the stand-by allowance under clause 20.5;
>
> **(b)** the employer's contact is to notify the employee they are required to attend or perform work; and
>
> **(c)** the employer's contact is in accordance with the usual arrangements for such notification.

29. It is noted that proposed sub-clause XX.4 has been developed with specific reference to the standby allowance provision in clause 20.5 of the *Business Equipment Award 2020* (**Business Equipment Award**),[19] and that the Commission intends for an equivalent sub-clause to be included in all modern awards that contain a standby allowance or payment provision, or equivalent.[20]

30. We also acknowledge that XX.4 is intended to limit the imposition upon employers that flows from the Commission's proposed clause XX.3. Our primary view is that clause XX.3 should not be included in awards and that clause XX.4 does not adequately address the various concerns we have raised about clause XX.3. Instead, we contend that clause should be either deleted or replaced with our proposed clause XX.3, and that clause XX.4 should be reframed so as to expressly deal with circumstances in which it will not be reasonable to refuse contact as contemplated by the RTD.

31. If the Full Bench is against us on the removal of the currently proposed clause XX.3, we agree that a provision such as XX.4 should be inserted into awards but contend that it should be amended to address the concerns we identify below.

32. As we set out in the Ai Group Reply Submission, the intention of the legislature when making new Division 6 of Part 2-9 of the Act, was limited to the creation of

[19] Statement at [8].

[20] Statement at [9](1).

a RTD and protection of the exercise of that right.[21] Sub-clause XX.4(c), coupled with subclause XX.3, would operate inconsistently with this intention by, in effect, regulating an employer's contact with employees.

33. The legislature was deliberate in its efforts to implement a scheme that did not adopt the above approach, which would fundamentally undermine the carefully constructed scheme of the Act.

34. Having regard to both the construction of the statutory scheme and our deep engagement in the processes related to the development of the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2024 (Cth) and its passage through Parliament, the envisaged purpose of the award clause was that it would provide *guidance* on the operation of the RTD, rather than impose any obligation on an employer. This could include, for example, an articulation of when it would be or would not be, appropriate for the employee to refuse contact.

35. The Commission's proposed clause XX.5, combined with our proposed clause XX.3, does this and in so doing *'provides for the exercise of the entitlement'* as relevantly contemplated by the Act. There is no need for the Commission's proposed clause XX.3 and XX.4.

36. The Draft Term should be directly targeted at the actions of an employee, rather than those of an employer. Indeed, as we have sought to emphasise, the effective creation of a prohibition on contacting an employee rather than the mere establishment of a capacity to refuse contact is the antithesis of what the was intended to be achieved through the new scheme.

37. Ai Group proposes that sub-clause XX.4(c) be deleted from the Draft Term. Together with the consequential amendments arising from the changes proposed to sub-clause XX.3, Ai Group submits that sub-clause XX.4 should be amended as follows:

> **XX.4** Neither clause XX.3, nor the provisions of the Act referred to in clause XX.3, ~~does not~~ prevent an employer from requiring an employee to monitor, read or respond

[21] Ai Group Reply Submission at [5](c).

to contact, or attempted contact, from the employer or third parties outside of the employee's working hours where:

(a) the employee is being paid the stand-by allowance under clause 20.5;

(b) the employer's contact is to notify the employee they are required to attend or perform work; and

(c) the employer's contact is in accordance with the usual arrangements for such notification.

38. It would not be reasonable for an employee to refuse contact in the above limited circumstances. That is, we contend that the Commission can be confident when all of the above three circumstances have been met that it would be consistent with the operation of the statutory RTD for the employer to expect engagement from an employee upon contact or attempted contact.

39. Turning to the detail of clause XX.4 as proposed by the Commission (in case the Commission's approach to XX.3 is retained), we observe that sub-clause XX.4 is predicated on there being '*usual arrangements*' as to how an employer would make contact with employees who are being paid to stand-by, to notify the employee they are required to attend for or perform work. However, the Business Equipment Award neither stipulates any arrangements as to how employers are to contact employees, nor that an employer must establish any such '*usual arrangements*'. Further, this is not a common feature of stand-by clauses in awards more broadly.

40. Accordingly, the practical effect of proposed sub-clause XX.4(c) may be to require employers to establish '*usual arrangements*', and to then only use this method of contact in relation to the relevant employees. It is entirely unclear whether this will be workable in practice. Further, it is unclear why an employer should be limited to contacting an employee in circumstances where this was consistent with usual arrangements. Indeed, where such contact was made only in unusual or infrequent circumstances it may be more reasonable than it occurs than when it is frequent. Given there is no evidence before the Commission about relevant practices in industry, the Commission could not be satisfied that the limitation on the operation of clause XX.4 that flows from the operation of clause XX.4(c) is warranted.

41. We acknowledge that clause XX.4(c) does not itself prevent an employer from requiring an employee to engage with relevant contact outside of the context contemplated by the provisions. Nonetheless, in practice, the existence of the provision will undoubtedly lead many to potentially erroneously think that contact which is not in accordance with usual arrangements is prohibited by clause XX.3.

42. If the Full Bench retains its proposed approach to XX.3, the Commission's proposed XX.4(c) should be deleted.

5. SUB-CLAUSE XX.5 OF THE DRAFT TERM

43. Proposed sub-clause XX.5 of the Draft Term provides:

> **XX.5** Clause XX.3 does not prevent an employer from contacting, or attempting to contact, an employee outside of working hours to notify the employee, in accordance with the usual arrangements for such notification, of:
>
> **(a)** an emergency roster change under clause 12.3(a)(iii); or
>
> **(b)** a recall to work under clause 20.4.

44. As we set out in detail in the Ai Group Reply Submission, the statutory RTD does not operate to regulate or restrict an employer from contacting, or attempting to contact, employees *in any circumstance*.[22]

45. Sub-clause XX.5 as presently drafted may be interpreted as implying that an employer may be prevented from contacting, or attempting contact with, an employee outside of working hours for a reason other than an emergency roster change or recall to work.

46. In **Attachment B** to this submission, we have identified various other clauses in a range of awards which may either expressly or impliedly permit or require an employer to contact, or attempt to contact, employees and which do not fall within the circumstances of sub-clause XX.5(a) or (b). These include, by way of a non-exhaustive list, clauses which:

    (a) Permit an employer to make roster changes at short notice (but not due to an emergency) which in some awards, may also attract penalty payments where a specified minimum period of notice is not provided;[23]

[22] Ai Group Reply Submission at [5](c)(ii), [25](b), [26]-[27].

[23] See for example, Clause 17.2(c) of the *Airline Operations- Group Staff Award 2020*; Clause 15.5(b) of the *Black Coal Mining Industry Award 2020*; Clause 13.2(h) of the *Electrical Power Industry Award 2020*.

(b) Require at least 48 hours' notice of the requirement to work shiftwork,[24] or define a *'rostered shift'* as a shift of which the employee has had at least 48 hours' notice;[25]

(c) Permit changes to the start and finish time of a shift at any time by mutual agreement between an employer and an employee;[26]

(d) Permit an employer to require an employee to work on a rostered day off (**RDO**) in certain circumstances, on provision of not less than 48 hours' notice;[27]

(e) Permit substitution of another day for an RDO, in various unexpected or emergency situations;[28]

(f) Permit an employer to require or direct an employee to start work without a specified break (of typically 10 or 8 hours) between shifts or work periods, in circumstances where a penalty will apply;[29]

[24] See for example, Clause 17.1(f) of the *Building and Construction General On-site Award 2020*; Clause 23.1 of the *Plumbing and Fire Sprinklers Award 2020*.

[25] See Clause 2.3 of the *Electrical, Electronic and Communications Contracting Award 2020*; Clause 24.1(f) of the *Food, Beverage and Tobacco Manufacturing Award 2020;* Clauses 2 and 33.2(iv) of the *Manufacturing and Associated Industries and Occupations Award 2020*; Clause 22.1(d) of the *Road Transport and Distribution Award 2020*.

[26] See for example, Clause 26.4(b) of the *Clerks – Private Sector Award 2020*.

[27] See for example, Clause 16.6(a) of the *Building and Construction General On-site Award 2020*.

[28] See for example, Clause 14.5(b) of the *Clerks – Private Sector Award 2020*; Clause 13.8(d)(i) of the *Electrical, Electronic and Communications Contracting Award 2020*; Clause 15.6(l) of the *General Retail Industry Award 2020*; Clause 17.2 of the *Textile, Clothing, Footwear and Associated Industries Award 2020*; Clause 13.4(d) of the *Storage Services and Wholesale Award 2020*.

[29] See for example, Clause 14.4(b) of the *Cleaning Services Award 2020*; Clause 14.7(b)(ii) of the *Electrical Power Industry Award 2020*; Clause 23.10(c) of the *Food, Beverage and Tobacco Manufacturing Award 2020; Clause 32.12(d) of the Manufacturing and Associated Industries and Occupations Award 2020;* Clause 21.4(c) of the *Road Transport and Distribution Award 2020;* Clause 28.3 of the *Social, Community, Home Care and Disability Services Industry Award 2010*; Clause 18.5(b)(ii) of the *Textile, Clothing, Footwear and Associated Industries Award 2020*; Clause 24.12(c) of the *Vehicle Repair, Services and Retail Award 2020*; Clause 21.4 of the *Storage Services and Wholesale Award 2020.*

(g) Differentiate an employee's entitlement for relief duty depending on whether the employee receives less than 2 days' notice, or 2 or more days' notice, of the requirement;[30]

(h) Differentiate an employee's entitlement to meal allowance depending on whether the employee was notified the previous day (or earlier), or with 24 hours' notice, of the requirement to work overtime;[31]

(i) Provide compensation for telephone or remote support or remote work (in circumstances where it may be inferred the employee has been contacted for the purpose of requesting or authorising such support);[32]

(j) Provide for one day's notice of termination (or one day's pay to be paid) where an employer terminates the employment of a daily hire employee;[33]

(k) May provide for an employee not to start work in the case of inclement weather (in which case, an employer may necessarily need to communicate this to the employee);[34]

(l) Permit a transfer of shifts on short notice as an alternative to standing an employee off, in certain circumstances;[35] and

[30] See for example, Clause 20.8(c)(i) of the *Airline Operations- Group Staff Award 2020.*

[31] See for example, Clause 16.2(b) of the *Black Coal Mining Industry Award 2020*; Clause 15.5 of the *Children's Services Award 2010;* Clause 17.10(a) of the *Cleaning Services Award 2020*; Clause 19.5 of the *Clerks – Private Sector Award 2020*; Clause 18.5(a) of the *Electrical, Electronic and Communications Contracting Award 2020*; Clause 20.3(a) of the *Food, Beverage and Tobacco Manufacturing Award 2020*; Clause 19.2(a) of the *General Retail Industry Award 2020;* Clause 26.3(a)(i) of the *Graphic Arts, Printing and Publishing Award 2020*; Clause 30.3(c)(ii), first two bullet points, of the *Manufacturing and Associated Industries and Occupations Award 2020*; Clause 19.2(a) of the *Vehicle Repair, Services and Retail Award 2020.*

[32] See for example, Clause 20.7 of the *Business Equipment Award 2020*; Clause 18.2(c) of the *Professional Employees Award 2020*; Clause 25.10 of the *Social, Community, Home Care and Disability Services Industry Award 2010.*

[33] See for example, Clause 9.1(a) of the *Building and Construction General On-site Award 2020*; Clause 9.3 of *the Plumbing and Fire Sprinklers Award 2020*.

[34] See Clause 24.5 of the *Building and Construction General On-site Award 2020*.

[35] See Clause 24.3(f) of the *Food, Beverage and Tobacco Manufacturing Award 2020.*

(m) Permit an employer to redirect an employee or cancel a shift where a client cancels within seven days of a booked service.[36]

47. It is imperative that the Draft Term does not operate so as to expressly or impliedly impede an employer's ability to discharge notification to employees, or otherwise impede any other contact which may be required or contemplated under an award for the operation of an entitlement; indeed, an award term that operates in such a manner would be inconsistent with the MAO.

48. Accordingly, and together with the consequential amendments arising from the changes proposed to sub-clause XX.3, Ai Group proposes sub-clause XX.5 of the Draft Term be amended as follows:

> **XX.5** Neither Clause XX.3 nor the provisions of the Act referred to in Clause XX.3, ~~does not~~ prevent an employer from contacting, or attempting to contact, an employee outside of working hours. ~~to notify the employee, in accordance with the usual arrangements for such notification, of:~~
>
> ~~**(a)** an emergency roster change under clause 12.3(a)(iii); or~~
>
> ~~**(b)** a recall to work under clause 20.4.~~

49. In the alternative, should the Commission be minded to retain sub-clause XX.5 in a form which refers to specific circumstances in which an employer is not prevented from contacting, or attempting to contact, an employee Ai Group submits that:

(a) the words '*,in accordance with the usual arrangements for such notification,*' should be deleted as they are predicated on the basis of there being '*usual arrangements'* for notifying employees of roster changes and/or for recalling employees to work (and in respect of which we rely upon our submission in response to the same wording in proposed sub-clause XX.4(c) of the Draft Term, at paragraphs [39] – [41] (inclusive) above;

(b) sub-clause XX.5 should be adapted so as to clarify that neither contact, nor attempted contact, is prevented by either sub-clause XX.3 or the sections

[36] Clause 25.5(f)(ii) of the *Social, Community, Home Care and Disability Services Industry Award 2010*.

of the Act referred to therein in relation to every clause in each award which either expressly permits or impliedly requires for its operation, contact to be made or attempted by an employer. This would include but not be limited to the types of clauses identified in Attachment B to this submission.

50. Ai Group submits that its primary proposal is preferable, in so far as it is expressed simply and in a manner that is easy to understand.[37] Further, by avoiding the need to reference any specific clauses in the award within which the Draft Term will operate, it may be less likely to give rise to the need for parties to make applications to vary the RTD Term in individual modern awards after 26 August 2024, which is desirable in the context of a stable modern awards system.[38]

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

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

6. THE GUIDELINES

51. This chapter of our submission responds to the view expressed by the Commission at paragraph [11] of the Statement that it does not presently intend to make the Guidelines prior to 26 August 2024.

52. As noted in an earlier statement issued on 12 March 2024[39], the RTD provisions to be inserted in the Act do not contain any requirement with respect to the timing for making the Guidelines. Whilst the President initially expressed an intention to progress the Guidelines at the same time as the Draft Term, the legislation does not compel the Commission to do so.[40]

53. In the Ai Group Initial Submission, we had proposed that the Guidelines do nothing more than to provide information and guidance[41] and proposed a number of subject areas.[42] We note that the Commission has now foreshadowed in its Implementation Report that it will publish detailed information on the Commission's website before 26 August 2024; which, based on the list of content areas, appears to include the majority of those previously proposed by us.[43] Further, the Commission intends to prepare specific information and education materials for small business as the jurisdiction develops.[44]

54. In light of the Commission's proposed approach to provision of information (together with the proposed development of a Benchbook)[45] in lieu of Guidelines being available to parties regarding the operation of Division 6 of Part 2-9 of the Act, Ai Group agrees with the view expressed by the Commission that their development may best be deferred until such time as there has been adequate ventilation and consideration of the practical and legal aspects of the jurisdiction's operations. Ai Group maintains its position that, once developed,

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[39] *Variation of modern awards to include a right to disconnect term* [2024] FWC 649 (**12 March Statement**) at [2].

[40] 12 March Statement at [2].

[41] Ai Group Initial submission at [47].

[42] Ai Group Initial Submission at [44].

[43] Implementation Report at [40] – [41].

[44] Implementation Report at [47] – [48].

[45] Implementation Report at [42] – [43].

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, and 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.[46]

55. The purpose and utility of the Guidelines in light of the preparation of a Benchbook may also warrant consideration.

[46] Ai Group Initial submission at [47].

7. CONCLUSION

56. For the reasons outlined in this submission, Ai Group urges the Commission to adopt changes to the Draft Term as set out in Attachment A to this submission which reflect our primary position.

57. Whilst Chapter 5 and Attachment B of this submission contains some analysis of the key awards in which Ai Group has an interest that are impacted by proposed sub-clause XX.5 of the Draft Term, Ai Group respectfully submits it would be appropriate for the Commission to review all impacted awards (as identified in the audit of award-specific terms in modern awards which may impact on the RTD, published on 23 May 2024) and publish individual award variations in draft with provision for interested parties to review and make any comments, prior to the variations being finalised (and particularly so should it retain sub-clause XX.5 in any form other than as proposed by Ai Group as its primary position).

XX. Employee right to disconnect

XX.1 Clause XX provides for the exercise of an employee's right to disconnect set out in section 333M of the Act.

NOTE:

(a) Section 333M provides that, unless it is unreasonable to do so, an employee may refuse to monitor, read or respond to contact, or attempted contact, from:

(1) their employer outside of the employee's working hours,

(2) a third party if the contact or attempted contact relates to, their work and is outside of the employee's working hours,

(b) Without limiting the ~~Section 333M(3) prescribes~~ matters that may ~~must~~ be taken into account in determining whether an employee's refusal is unreasonable, section 333M(3) lists the matters that must be taken into account for this purpose.

(c) Section 333M(5) provides that an employee's refusal will be unreasonable if the contact or attempted contact is required under a law of the Commonwealth, a State or a Territory.

(d) Sections 333N and 333P provide for procedures for the resolution of disputes about whether an employee's refusal is reasonable and about the operation of section 333M.

(e) The general protections provisions in Part 3-1 of the Act prohibit the taking of adverse action by an employer against an employee because of the rights of an employee under sections 333M(1) and (2) of the Act.

XX.2 Clause XX applies from the following dates:

(a) 26 August 2024—for employers that are not small business employers on this date and their employees.

(b) 26 August 2025—for employers that are small business employers on 26 August 2024 and their employees.

~~**XX.3** An employer must not directly or indirectly prevent an employee from exercising their right to disconnect under the Act.~~

XX.3 An employee may exercise the right to disconnect in accordance with sections 333M(1) and (2) of the Act.

XX.4 Neither Clause XX.3, nor the provisions of the Act referred to in Clause XX.3, ~~does not~~ prevent an employer from requiring an employee to monitor, read or respond to contact, or attempted contact, from the employer outside of the employee's working hours where:

(a) the employee is being paid the stand-by allowance under clause 20.5;

(b) the employer's contact is to notify the employee they are required to attend or perform work; and

(c) the employer's contact is in accordance with the usual arrangements for such notification.

XX.5 Neither Clause XX.3 nor the provisions of the Act referred to in Clause XX.3, ~~does not~~ prevent an employer from contacting, or attempting to contact, an employee outside of working hours. ~~to notify the employee, in accordance with the usual arrangements for such notification, of:~~

~~**(a)** an emergency roster change under clause 12.3(a)(iii); or~~

~~**(b)** a recall to work under clause 20.4.~~

Attachment B

Relevant Modern Award Provisions for clauses XX.4 and XX.5 of the Draft RTD Term

	Award	Clause XX.4 (standby allowance or payment provision or equivalent)	Clause XX.5(a) (provision allowing for an emergency roster change on 48 hours' notice or less)	Clause XX.5(b) (recall to work provision or equivalent)	Additional clauses which may expressly or impliedly permit or require contact / attempted contact
1.	*Airline Operations – Ground Staff Award 2020*	Clause 24.4 – Standing by	N/A	Clause 24.3 - Recall	Clause 17.2(c) – Shiftwork rosters Clause 20.8(c)(i) – Relief duty
2.	*Black Coal Mining Industry Award 2020*	Clause I.2 – Stand-by allowance for Mines Rescue Service Employees	N/A	Clause 21.8 – Call-back Clause 21.9 – Call-back less than four hours	Clause 15.5(b) – Changes to rosters Clause 16.2(b) – Meal allowance
3.	*Building and Construction General On-site Award 2020*	N/A	N/A	Clause 17.2(o) – Call outs Clause 29.5 – Recall to work overtime	Clause 9.1(a) – Termination of daily hire employee Clause 17.1(f) – Notice to work shiftwork Clause 16.6(a) – Requirement to work on a day that is an RDO Clause 24.5 – Inclement weather
4.	*Business Equipment Award 2020*	Clause 20.5 - stand-by allowance	Clause 12.3(a)(iii) – emergency roster change	Clause 20.4 – call-back	Clause 20.7 – Technical service/support
5.	*Children's Services award 2010*	N/A	Clause 10.4(d)(ii) – emergency roster change (part-time employee)	N/A	Clause 15.5 – Meal allowance

	Award	Clause XX.4 (standby allowance or payment provision or equivalent)	Clause XX.5(a) (provision allowing for an emergency roster change on 48 hours' notice or less)	Clause XX.5(b) (recall to work provision or equivalent)	Additional clauses which may expressly or impliedly permit or require contact / attempted contact
			Clause 21.7(b)(ii) – emergency roster change		
6.	*Cleaning Services Award 2020*	N/A	Clause 13.6(d) – Rostering	Clause 19.6 – call back Clause 19.7 – call back for non-cleaning purposes	Clause 14.4(b) – Breaks between shifts Clause 17.10(a) – Meal allowance
7.	*Clerks – Private Sector Award 2020*	N/A	N/A	Clause 21.5 – Return to duty	Clause 14.5(b)– substitution of RDO in an emergency Clause 19.5 – Meal allowance Clause 26.4(b) – Shiftwork changes to start and finish time
8.	*Electrical Power Industry Award 2020*	Clause 13.5 – Availability duty and duty officer	N/A	Clause 13.3 – Recall Clause 13.4 – Call-out	Clause 13.2(h) – change in shift or roster with 48 hours' notice or less Clause 14.7(b)(ii) – resume work without 10 hour rest
9.	*Electrical, Electronic and Communications Contracting Award 2020*	Clause 20.6 – Availability for duty	N/A	Clause 20.5 – Call-back	Clause 2.3 – Rostered shift Clause 13.8(d)(i) – substitution of RDO in emergency circumstances Clause 18.5(a) – Meal allowance

	Award	Clause XX.4 (standby allowance or payment provision or equivalent)	Clause XX.5(a) (provision allowing for an emergency roster change on 48 hours' notice or less)	Clause XX.5(b) (recall to work provision or equivalent)	Additional clauses which may expressly or impliedly permit or require contact / attempted contact
10.	*Food, Beverage and Tobacco Manufacturing Award 2020*	Clause 23.12 – Standing by	N/A	Clause 23.11 – Call back	Clause 20.3(a) – Meal allowance Clause 23.2(b) – Unrelieved shiftwork on rostered day off Clause 23.10(c) – Resumption of work without 10 hour break Clause 24.1(f) – Rostered shift Clause 24.3(f) – Transfer of shift on short notice as alternative to standing employee off
11.	*General Retail Industry Award 2020*	N/A	Clause 10.10(a) – Changes to regular pattern of work by employer - emergency	Clause 19.11 – Recall allowance	Clause 10.6(b) – changes to regular pattern of work by agreement (part-time employees) Clause 15.6(l) – substitution of rostered day off Clause 15.9(d) – changes to rosters due to unexpected operational requirements – full-time employees Clause 15.9(g)&(h) – roster change for part-time

	Award	Clause XX.4 (standby allowance or payment provision or equivalent)	Clause XX.5(a) (provision allowing for an emergency roster change on 48 hours' notice or less)	Clause XX.5(b) (recall to work provision or equivalent)	Additional clauses which may expressly or impliedly permit or require contact / attempted contact
					employee, one-off non-emergency event Clause 19.2(a) – Meal allowance
12.	*Graphic Arts, Printing and Publishing Award 2020*	Clause 30 – Stand-by for work	Clause 13.10(d) – roster changes with 48 hours' notice Clause 13.10(e)- roster changes without 48 hours' notice	Clause 29 – Call-back	Clause 26.3(a)(i) – Meal allowance Clause 28.3(b) – Overtime work on a Saturday or Sunday – minimum engagement/payment
13.	*Manufacturing and Associated Industries and Occupations Award 2020*	Clause 32.14 – Standing by	N/A	Clause 32.13 – Call-back Clause 57.6 – Call backs	Clauses 2 and 33.2(iv) – Rostered shift Clause 30.3(c)(ii) – Meal allowance Clause 32.3 – Unrelieved shiftwork on rostered day off Clause 32.12(d) – Rest period after overtime Clause 57.4(a) – Meal allowance (vehicle manufacturing employees)
14.	*Plumbing and Fire Sprinklers Award 2020*	Clause 17.2 – On-call – fire sprinkler fitter employee	N/A	Clause 17.1 – Service work – fire sprinkler fitter employee	Clause 9.3 – Notice of termination for daily hire employees

	Award	Clause XX.4 (standby allowance or payment provision or equivalent)	Clause XX.5(a) (provision allowing for an emergency roster change on 48 hours' notice or less)	Clause XX.5(b) (recall to work provision or equivalent)	Additional clauses which may expressly or impliedly permit or require contact / attempted contact
				Clause 22.2 – Call-back	Clause 15.5(b) – Requirement to work on rostered day off Clause 23.1 – Shiftwork
15.	*Professional Employees Award 2020*	N/A	N/A	N/A	Clause 18.2(c) – Payment for overtime (remote work)
16.	*Road Transport (Long Distance Operations) Award 2020*	N/A	N/A	Clause 13.7 – Call back	Clause 13.5(e) – changing RDOs with 48 hours' notice Clause 13.5(f) – changing RDO's (other circumstances)
17.	*Road Transport and Distribution Award 2020*	Clause 21.7 – Standing-by	N/A	Clause 21.6 – Call-back	Clause 13.7(a)(i) – changing RDOs with 48 hours' notice Clause 21.4(c) – Rest period after overtime Clause 22.1(d) – Rostered shift Clause 22.2(d) – Alteration of shiftwork rosters Clause 22.6 – Transfer to existing shift rosters Clause 22.7(b) – Transfer of day worker to or from shiftwork

	Award	Clause XX.4 (standby allowance or payment provision or equivalent)	Clause XX.5(a) (provision allowing for an emergency roster change on 48 hours' notice or less)	Clause XX.5(b) (recall to work provision or equivalent)	Additional clauses which may expressly or impliedly permit or require contact / attempted contact
18.	*Social, Community, Home Care and Disability Services Industry Award 2010*	N/A	Clause 25.5(d)(ii) – rosters changed at any time due to shift swap or emergency	Clause 20.11 – On call allowance Clause 25.10 – Remote work Clause 28.4 – Recall to work overtime	Clause 25.5(f)(ii) – client cancellation within 7 days of the service, employer may redirect the employee or cancel the shift Clause 25.10 – Remote Work Clause 28.3 – Rest period after overtime
19.	*Storage Services and Wholesale Award 2020*	N/A	Clause 20.5 – Setting and alteration of shift roster	Clause 23 – Call-back	Clause 13.4(d) – Rostered days off – substitute days Clause 21.4 – Rest period after overtime
20.	*Textile, Clothing, Footwear and Associated Industries Award 2020*	N/A	Clause 24.2(e) & 30.3(f) - change of shift without notice	Clause 28.9 – Call back	Clause 17.2 – Substitution of rostered day off Clause 18.5(b)(ii) – Minimum break before or after overtime
21.	*Vehicle Repair, Services and Retail Award 2020*	Clause 24.7 – Standing by	N/A	Clause 24.8 – Call-back (general) Clause 24.9 – Call-back (breakdowns etc)	Clause 19.2(a) – Meal allowance Clause 24.12(c) – Minimum break between shifts