ARA SUBMISSION
RIGHT TO DISCONNECT DRAFT MODEL AWARD TERM

AUGUST 2024

INTRODUCTION

The Australian Retailers Association ('ARA') welcomes the opportunity to provide another submission to the Fair Work Commission ('FWC') in respect of the draft right to disconnect model term to be inserted into modern awards.

The ARA is the oldest, largest and most diverse national retail body. We represent a $420 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. Our members operate across the country and in all categories - from food to fashion, hairdressing to hardware, and everything in between. For this reason, we share a principal interest in the development and useability of multiple awards relative to retail, hospitality, restaurants, fast food, pharmacy, and hair and beauty sectors.

On the 20 May 2024, we filed our initial submission to the FWC in respect of the variation of modern awards to include a right to disconnect. Within this submission, we highlighted the need for the modern award term to be '*wholly reflective of the legislative provisions'*.[1] Following our initial submission, on the 11 June 2024, we filed our secondary submission, conveying clear concern that the model term should not broaden the legislative right and simultaneously, burden employers with overzealous and illegitimate legal obligations.[2]

Recognising the critical importance of maintaining reasonable workplace communications between employers and employees in the retail sector, we attended consultations with the FWC Full Bench on 19 June 2024, following the submission process.

During these consultations, we reaffirmed our position, alongside peer employer groups ACCI & AI Group, that the right to disconnect should not impose an obligation on employers to refrain from contacting staff.

The FWC has now published the draft right to disconnect model term to be inserted into modern awards by the 26 August 2024. Within this submission, we detail our principal comments and concerns regarding the draft model term as it relates to the retail industry, equipping the FWC with the knowledge to understand the practical effects of the draft term if it were to be adopted.

THE ARA PERSPECTIVE

We reaffirm the view, as consistent with our previous submissions, that the right to disconnect model term must be equitable, fair and should wholly reflect the legislation.

In alignment with this view, we believe that the right to disconnect model term should not defer from s333M & s333N of the Act. As such, we support the inclusion of provision XX.1 & XX.2, subject to non-substantive formatting amendments to XX.2, within the FWC draft model right to disconnect term.

Also consistent with our position, we assert that amendments should be made to XX.3, XX.4 & XX.5 of the FWC draft model term. These changes will ensure that necessary and reasonable workplace communications are preserved, and simultaneously, will safeguard employers and employees against erroneous, complex and vague modern award terms.

VARIATIONS SOUGHT AS TO THE DRAFT TERMS

As to XX.1: We are supportive of the inclusion of this provision within modern awards given its close alignment with the legislation and it's sensical and informative format. This provision does not interfere with award useability and provides clarity for employees and employers alike as to the operation of the right to disconnect as contained within s333M, s333N and s333P of the Act.

As to XX.2: This provision provides clarity as to the effective date of the right to disconnect. The only comments to be made in relation to this provision is the placement and phrasing of this provision.

Following the 26 August 2025, the right to disconnect is an entitlement readily available to all employees whether they are employed by large or small businesses. For this reason, with consideration to future award useability, once the effective date has passed, the information contained within XX.2 is no longer as relevant and as such, to enhance clarity, the most relevant right to disconnect terms should be front and centre.

Thereby, in keeping with the view expressed above, to promote award coherency, it would be preferred if this provision was reformed as a NOTE instead when considering the future context.

Additionally, upon revision of this section, clause XX.2 (b) seems to refer to the wrong effective date for small businesses. For the purposes of consistent language within modern awards, we also believe the phrasing within XX.2 (a) & (b) should be substantively the same.

Consistent with the above commentary, the ARA believes the following amendments should be made to Clause XX.2.

PROPOSED AMENDMENTS TO CLAUSE XX.2

Delete clause XX.2 and instead reform the substance of the provision as a NOTE at the end of the right to disconnect model term.

Amend clause XX.2 to read:

~~XX.2~~ NOTE: 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 this date ~~26 August 2024~~ and their employees.

As to XX.3: The ARA opposes the inclusion of this provision within the FWC model right to disconnect term.

We strongly oppose any provision that would, in practical application, limit an employer's ability to contact their workforce rather than provide for the employee right to 'switch-off' from workplace communications.

In solidarity with this view, we believe the insertion of XX.3 within modern awards (without amendments) should be rejected given the legislation does not include for a provision whereby an employer must not 'directly' or 'indirectly' interfere with an employee's right to disconnect. Consistent with this view, we believe that the language contained within XX.3 of the FWC draft model term will cause confusion among employers and employees trying to grapple with the meaning of what can be defined as directly or indirectly interfering.

Simultaneously, the ARA notes the FWC intention to exclusively outline the right to disconnect is a protected right. In keeping with our above commentary, and the identifiable purpose of XX.3 we submit the reformation of clause XX.3, like the below, would enhance award useability and clarity for employees and employers.

PROPOSED AMENDMENTS TO CLAUSE XX.3

Renumber clause XX.3 as XX.2.

Amend clause XX.3 to read:

~~XX.3~~ **XX.2** The right to disconnect amounts to a workplace right as defined within s341 of the Act and as such, an employer must not take adverse action against an employee for having proposing to exercise, or exercising, the right to disconnect.

As to XX.4 & XX.5: We endorse the substance of these provisions within the FWC model right to disconnect term conditionally, noting the FWC has drafted the provisions for inclusion within the Business Equipment Award 2020 with applicability to other awards, subject to further refinement relayed herein.

The ARA believes that Clause XX.4 is practical and sensical in nature given its operation is intended to limit the circumstances, where reasonable, that an employee can exercise their right to disconnect and for this reason, the provision should be further amended for applicability to a further range of relevant circumstances whereby an employer may require an employee to monitor, read or respond to contact.

We agree with the inclusion of XX.4 (a) & XX.4 (b) given that both provisions provide a sensible and equitable prescription of when an employee may not utilise the right to disconnect given the costly (financial and non-financial) ramifications for businesses.

However, as noted above, the current provision omits other relevant circumstances relative to other modern award provisions or workplace circumstances, by which, an employee should be required to monitor, read or respond to contact, or attempted contact, from an employer outside of working hours when regarding the nature of the agreed employment arrangement.

Moreover, given the unique characteristics of the retail sector, in that businesses depend on workforce participation, there are special contexts that sub-clause XX.4 must take into account to preserve award useability and ensure business sustainability is not compromised by way of an inability for employers to receive feedback, communication or confirmation from their workforce where required.

We also share concerns as to the inclusion of XX.4 (c) within the right to disconnect model award term. We do not quite understand the need for communications to be in the '*usual arrangements for such notifications'*.[4]

Secondly, there is clear uncertainty as to how the operation of this sub-clause can be assessed which impedes award useability and facilitates the risks of non-compliance and/or disputes that might arise by way of this provision.

For instance, there is a clear absence of definition as to what is meant by 'usual arrangements' and, lack of clarity as to the assessment of this. With these considerations in mind, we firmly believe that clause XX.4 (c) should not be included within the FWC right to disconnect model term to preserve award clarity.

As to clause XX.5, we affirm the position that the right to disconnect award terms should not give rise to employer obligations. While we note that, Clause XX.5 expressly states the conditions, relative to clause XX.3, that do not prevent an employer from contacting an employee, the phrasing of this provision seems to indirectly clarify that XX.3 gives rise to an employer obligation to not contact an employee outside of working hours.

As previously expressed, we believe the inclusion of clause XX.3, without the refinements listed above, within the model award term should be rejected. Consistent with this view, we believe the inclusion of the current phrasing within XX.5 is confusing for employees and employers alike, and thereby, should be amended.

Contrarily, we however believe the substance of XX.5 (a) & XX.5 (b) should be preserved, subject to minor amendments that relay the importance of employee's responding to an employer request of a recall to work or roster change. This is specifically important in consumer-facing service industries such as retail.

While we note that the FWC is still yet to publish written guidelines which will provide greater clarity as to the operation of the right to disconnect, we have observed, specifically within XX.4 & XX.5 of the FWC draft model term, that there has been an express intent to articulate some employment circumstances in which the right to disconnect cannot be exercised.

In keeping with this view and noting the feedback and concern from many of our members as to the realities of the retail sector that are omitted from express inclusion within the draft provision, we have put forward suggested amendments to the model term that would mitigate award ambiguity, corresponding compliance risks and adverse business ramifications.

Lastly, we believe it's important to mention that we have observed contrary industry views during the FWC consultations on the right to disconnect term relative to whether the right to disconnect imposes an employer obligation.

Despite significant opposition from employer groups, the Full Bench has still proposed a draft right to disconnect model term that restricts employer-employee contact under certain circumstances. '

Our stance on this matter is clear; however, we urge that if the Full Bench of the FWC adopts the alternative view, all ARA commentary on other potential amendments to other provisions be retained within the FWC model term.

In keeping with the above submissions, the ARA believes the following amendments should be made to clause XX.4 & XX.5.

PROPOSED AMENDMENTS TO CLAUSE XX.4 & XX.5

Delete XX.5 and amend XX.4 (renumbering as XX.3) to read:

~~Clause XX.3~~ **XX.3** The right to disconnect 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 in circumstances where, for example:

(a) the employee is being paid the stand-by allowance under clause 20.5;
(b) the employee has a split shift and is being paid the shift split allowance under clause X;
(c) the employee is being paid an annualised salary under X or has an offsetting arrangement which is paid in satisfaction of reasonable overtime rates of pay, and/or stand-by, recall to work and split-shift allowances;
(d) the employer's contact is to notify the employee they are required to attend or perform work; ~~(e)and the employer's contact is in accordance with the usual arrangements for such notification~~
(e) the contact or attempted contact relates to a roster change ~~under X.~~
(f) the contact is attempted contact is for the purpose of a recall to work ~~under clause X~~
(g) the employee has not showed up to work despite being rostered to work.
(h) the contact or attempted contact relates to checking on the employee's for the purposes of a well-being and/or welfare check.
(i) The contact or attempted contact relates to an urgent workplace investigation of which the employee is a party and/or has access to relevant information that would aid the progression or resolution of the investigation;or
(j) The contact or attempted contact is for the purposes of supporting an employee to access leave and/or discuss arrangements to return to work where the employee is on unpaid leave, sick leave, workers compensation, parental leave or family & domestic leave.

Thank you again for the opportunity to provide a submission to the FWC in respect of the FWC draft right to disconnect model term.

Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.