ARA REPLY SUBMISSION

VARIATION OF MODERN AWARDS TO INCLUDE A RIGHT TO DISCONNECT

JUNE 2024

EXECUTIVE SUMMARY

The Australian Retailers Association (ARA) welcomes the opportunity to provide another submission to the Fair Work Commission (FWC) in relation to varying modern awards to include a right to disconnect.

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 have a vested interest in multiple awards across retail, hospitality, restaurants, fast food, pharmacy, and hair and beauty.

On the 20 May 2024, the ARA filed its initial submission to the FWC on the right to disconnect terms to be inserted into all modern awards by the 26 August 2024. Since the ARA's initial submission, we have had the opportunity to review the recommendations put forth by other industry groups and interested parties.

In reviewing the position of our peer employer industry groups, we note alignment between the ARA and recommendations proposed by the Australian Chamber of Commerce and Industry (ACCI) and Australian Industry Group (AI Group).

However, we also note opposing views progressed by unions, most notably the Australian Council of Trade Unions (ACTU).

Within this submission, the ARA will respond directly to the proposals put forth by the ACTU, noting that the introduction of a right to disconnect term within modern awards should not further narrow or restrict necessary workplace communications between an employer and employee outside of work hours.

In addition to replying to the recommendations by other industry groups, we also have refined our recommendation, putting forth a draft model award term that would balance both employer and employee interests, without diminishing the legislative entitlement.

ARA DRAFT MODEL TERMS

In the ARA's initial submission, we provided recommendations that we believe should be reflected in the right to disconnect model term. In this submission-in-reply, we believe it would be helpful to provide a specific recommendation in relation to the model award term to avoid ambiguity.

This recommendation is made in alignment with the recommendations proposed by the ARA, ACCI & AI Group. We note that while AI Group has also proposed a specific model award term, which we would support. However, the ARA has also drafted the following model award term for consideration.

ARA DRAFT MODEL AWARD TERM

X. The right to disconnect

X.1 *The right to disconnect entitlement is provided for within s 333M (1) and (2) of the Act.*

X.2 *In determining whether the exercising of this right is unreasonable, without limitation as to the matters which may be taken into account, the matters set out within s 333M (3) of the Act must be taken into account.*

X.3 *For the avoidance of doubt, the exercising of this right will be considered unreasonable, if the contact or attempted contact is required under a law of the Commonwealth, a State or a Territory as set out by s 333M (5).*

NOTE: Disputes about the employee right to disconnect may be dealt with under clause X—Dispute resolution and/or under section s333N of the Act.

SUMMARY OF SUBMISSIONS

Across employer groups, there is clear alignment on the view that the right to disconnect modern award terms should not defer from the legislation, imparting further restrictions on workplace communications or creating additional complexity for employers in the interpretation and implementation of the legislation.

The ARA in our initial submission proposed that the award terms:

'Should be wholly reflective of s 333M & s 333N of the Fair Work Act 2009 (Cth).'[1]

ACCI in their initial submission put forth the recommendation that the model terms:

'Should replicate the expression of the right to disconnect conferred on employees under section 333M, and it should avoid prescribing any other specific requirements or entitlements.' [2]

AI Group proposed in their initial submission the following model terms to be inserted into all awards:

X. The right to disconnect

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

NOTE: The employee right to disconnect does not apply to a small business employer, or an employee of a small business employer, until 26 August 2025. 'Small business employer' has the meaning in section 23 of the Act. [3]

[1] ARA Submission I Variation of Modern Awards to include Right to Disconnect I LInk
[2] ACCI Submission I Variation of Modern Awards to Include a Right to Disconnect Term I Link
[3] AI Group I Right to Disconnect Term I Link

RESPONSE TO THE ACTU'S PROPOSED MODEL AWARD TERMS

The ARA notes the submission made by the ACTU and provides the following commentary.

As to 1	This provision is overly prescriptive and unnecessary.
As to 2 (a) & (b)	The insertion of the phrase 'when they are not working' to replace the phrase contained within the legislation 'outside of the employees working hours' expands the entitlement beyond that conferred by the Act. For instance, this language gives rise to the fact that an employee may not be able to be recalled back to work while on break. This would present operational challenges for small businesses such as retailers, restaurants and cafes that employ a small workforce. The insertion of the right to 'not respond to, or engage with, work related communications' strays from the terminology within the legislation and overcomplicates the interpretation of the right to disconnect. The insertion of the language 'work related communication' to replaces 'contact' also strays from the legislation, and in doing so, could create further ambiguity and/or further restrict workplace interactions.
As to 3 (c)	This section, and corresponding provision, omits any reference to the fact that compensation includes 'non-monetary compensation' pursuant to s 333M (3) of the Act. This proposed model award fails to provide clarity as to the interpretation of 'compensation' and will lead to unnecessary disputes between employers and employees.
As to 3 (f)	The legislation s 333M (3) provides a list of mandatory matters that must be taken into account when determining whether an employee's refusal is unreasonable. If legislators believed the matter as to 'whether an employee is on approved leave or another authorised absence' **must** be taken into account, they would have prescribed this within the legislation. The insertion that this additional matter **must** be taken into account wrongfully expands the operation of the legislative entitlement. As s333M (3) of the Act already provides a mechanism for other matters that may be taken into account, the insertion of another matter that must be taken into account is also unnecessary.
As to 3 (g)	As above, the legislation s 333M (3) provides a list of mandatory matters that must be taken into account when determining whether an employee's refusal is unreasonable If legislators believed the matter as to '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', they would have prescribed this is the legislation. Additionally, this provision is indirectly placing greater obligations on employers to implement measures to avoid contact, which the legislation does not seek to cover. As s333M (3) of the Act already provides a mechanism for other matters that may be taken into account, the insertion of another matter that must be taken into account is also unnecessary.

As to 4 & 5	The insertion of these provisions unduly poses obligations on employers that are contrary to the purpose of the legislative entitlement. The right to disconnect is an employee entitlement to disconnect, but it does not restrict employers from contacting employees. This is evidenced by the Government's *Right to Disconnect Factsheet*, which states 'there are no obligations that limit employers or others from contacting or attempting to contact employees – just protections for employees who reasonably wish to switch off'.[4] Additionally, the obligations this proposed provision is seeking to impose on employers is contradictory to the legislation. Employers, especially small business employers, do not have the time, capacity or resources to implement the proposed measures nor should they be required to do so, given that the purpose of this legislation is not to place restrictions on workplace communications. In developing workplace policies, employers will often consult with employees. However, the ARA fails to see how the legislative right to disconnect extends to regulating the process of business implementing workplace policies. This proposed obligation is not backed by legislation, nor is it necessary or relevant to include within awards.
As to 6	The inclusion of the general protections within modern awards is not necessary. For instance, personal/carers leave is a workplace right covered by the general protections but there is no prescription as to this relationship within modern awards.[5] To do so is overcomplicating award provisions, which inhibits award useability.
As to 7	The right to disconnect does not factor in whether the technology on which the employer is trying to contact the employee is business-owned. Therefore, the inclusion of this provision is irrelevant and unnecessary. The prescription that the employee is 'not required to provide personal 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' is not workable, given the genuine need that employers have to contact employees from time-to-time. The right is for the employee to disconnect from contact, if not unreasonable, but it does not translate to meaning an employer cannot contact an employee. Additionally, the right extends to the disconnection not being unreasonable, in alignment with s 333M (5).
As to 9	This provision articulates '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 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'. However, this provision would create a restriction on employers that they cannot contact their employees outside of work hours unless the contact is required under a law or workplace instrument. The right to disconnect, does not prohibit an employer from contacting an employee – for any reason - as previously explored. This provision would also be explicitly contrary to the Act s 333M (5).

[4] Australian Government. Right to Disconnect I Link
[5] Fair Work Commission I Meaning of Workplace Right I Link

CONCLUSION

The right to disconnect term to be introduced into modern awards is one subject to heavy debate among industry groups. To balance both employer and employee interests and prevent the wrongful modification of the entitlement, it is important for the model clause to wholly replicate and reflect the legislation. This will ensure that the risk of ambiguity within the model award terms is minimised, and simultaneously, safeguard award and entitlement useability.

In alignment with this view, we support the recommendations put forth by our industry peers ACCI and AI Group. Simultaneously, we support the new-to-be introduced modern award entitlement should reflect the ARA's draft right to disconnect model clause.

The ARA thanks the FWC for the opportunity to make a submission. Any queries can be directed to policy@retail.org.au.