ARA SUBMISSION
VARIATION OF MODERN AWARDS TO INCLUDE A RIGHT TO DISCONNECT

MAY 2024

EXECUTIVE SUMMARY

The Australian Retailers Association (ARA) welcomes the opportunity to provide a 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 share a vested interest in the development and amendment of multiple awards.

The introduction of a right to disconnect term into awards is of particular interest to the retail sector, given the corresponding variation to employee entitlements, employer considerations and the potential risk that the award term will impose additional operational constraints and compliance obligations on retailers.

The ARA maintains that the right to disconnect will impose challenges, specifically within the retail sector, in navigating business needs and workforce requirements.

To limit, insofar as is possible, the ensuing adverse impacts on the retail sector, the ARA calls for the model term in awards to be wholly reflective of the legislative provisions.

This approach, which has been adopted by the FWC in the past, would ensure the legislative entitlement is enshrined within the award while also minimising the risk that the scope of the entitlement would be extended, or that the legislation and awards would be misaligned, creating greater award ambiguity.

The ARA reserves the right to make additional specific recommendations on the proposed draft terms and written guidelines at a later date.

BACKGROUND

Following the variation of the Fair Work Act 2009 (Cth) ('the Act') via the passage of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2*023 at section 149F, all awards must include a term for a right to disconnect by 26 August 2024.

To begin this process, President Hatcher issued a statement on 12 March 2024, with the proposed timetable for amending awards. As part of this process, interested parties are invited to provide submissions on the proposed right to disconnect, including award specific matters and the delayed operation for small businesses.[1]

[1] Fair Work Commission, Justice Hatcher, President Statement I Statement [2024] FWC 213.

RECOMMENDATIONS

Proposed term

The ARA proposes that the proposed term in awards should be wholly reflective of s333M & s333N of the Act.

We maintain that any variation to the wording of the legislation or the insertion of additional material would operate to create ambiguity, complexity, and potentially attract additional obligations for employers already encumbered by recent changes in legislative obligations.

Written guidelines

While the written guidelines created by the FWC are not a legislative instrument, they will likely provide greater detail on the operation of the right to disconnect.

To provide greater clarity to retailers trying to understand the operation of the newly introduced employee entitlement, it would be beneficial for the FWC to provide non-exhaustive list examples of the application of the right to disconnect and circumstances that amount to a *reasonable* or *unreasonable* disconnection by an employee. For instance, if an employer is looking to find a shift-cover as another staff member was unwell, and the employee contacted by the employer did not reply, understanding whether this would likely amount to an unreasonable disconnection is vastly important for business operations.

It would also be helpful for employers to have greater guidance as to how the right to disconnect provisions could reasonably be managed. This could be achieved by the written guidelines providing examples of specific model terms that can be used in employment contracts, and other actions employees and employers can take to comply with this entitlement.

The guidelines should also provide greater clarity as to how this entitlement should interact with other award provisions. For example, where award provisions require employees receive notification of rosters, whether it would be unreasonable, given the award obligation that's placed on the employer, for the employee not to reply.

The legislation sets out an employee may disconnect from workplace communications outside of the employee's working hours. However, this definition could create complexity as to how this right may operate given the nature of modern work practices and workplace arrangements. For instance, there are working relationships where employees have no set hours, and instead prefer a flexible approach to when work will be completed. For this reason, it would be beneficial for the written guidelines to explore the definition of working hours with examples.

The insertion and exploration of these considerations, ambiguities and definitions would provide greater detail as to the operation of the right to disconnect, aligning with s333W of the Act.

CONTEXT

Legislative provisions

The Act at section 333M, from 26 August 2024, will provide employees with a right to refuse to participate in workplace communications outside of the employee's work hours. The Act at section 333N, from 26 August 2024, will provide a channel to deal with disputes about an employee's right to disconnect.

The FWC must also make written guidelines as to the operation of the right to disconnect pursuant to the Act s 333W.

The Act s333M I Employee Right to Disconnect

(1) An employee may refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable.

(2) An employee may refuse to monitor, read or respond to contact, or attempted contact, from a third party if the contact or attempted contact relates to their work and is outside of the employee's working hours unless the refusal is unreasonable.

(3) Without limiting the matters that may be taken into account in determining whether a refusal is unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:

(a) the reason for the contact on attempted contact;

(b) how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;

(c) the extent to which the employee is compensated:

(i) to remain available to perform work during the period in which the contact or attempted contact is made; or

(ii) for working additional hours outside of the employee's ordinary hours of work;

(d) the nature of the employee's role and the employee's level of responsibility.

(e) the employee's personal circumstances (including family or caring responsibilities).

Note: For the purposes of paragraph (c), the extent to which an employee is compensated includes any non-monetary compensation.

(4) For the avoidance of doubt, each of the rights in subsections (1) and (2) is a workplace right within the meaning of Part 3-1.

Note: The general protections provisions in Part 3-1 also prohibit the taking of adverse action by an employer against an employee because of a workplace right of the employee under this Division.

(5) For the avoidance of doubt, an employee's refusal to monitor, read or respond to contact, or attempted contact, from their employer, or from a third party if the contact or attempted contact relates to their work, will be unreasonable if the contact or attempted contact is required under a law of the Commonwealth, a State or a Territory.

(6) For the avoidance of doubt, if:

(a) an employee is covered by an enterprise agreement; and

(b) the enterprise agreement includes a right to disconnect term that is more favourable to the employee than the rights in subsections (1) and (2);

the right to disconnect term in the agreement continues to apply to the employee.

The Act s333 N I Disputes about the employee right to disconnect

(1) This section applies if:

(a) there is a dispute between an employer and an employee because the employee has refused to monitor, read or respond to contact or attempted contact under subsection 333M(1) or (2) and:

(i) the employer reasonably believes that the refusal is unreasonable; or

(ii) the employer has asserted that the refusal is unreasonable and the employee reasonably believes the refusal is not unreasonable; or

(b) there is another dispute between the employer and the employee about the operation of section 333M.

Workplace level discussions

(2) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level by discussions between the parties.

Application to FWC to deal with dispute

(3) If discussions at the workplace level do not resolve the dispute, a party to the dispute may apply for the FWC to do either or both of the following:

(a) make an order under section 333P (orders to stop refusing contact or to stop taking certain actions);

(b) otherwise deal with the dispute.

Representatives

(4) The employer or employee to the dispute may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of:

(a) resolving the dispute; or

(b) applying to the FWC to make an order under section 333P or otherwise deal with the dispute; or

(c) the FWC dealing with the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

The Act s333 W I Written Guidelines

(1) The FWC must make written guidelines in relation to the operation of this Division.

(2) Guidelines made under subsection (1) are not a legislative instrument

FWC Summary Statement

The FWC released a statement on the 12 March 2024 summarising the legislative changes as follows:

> *The amendments add a new Division 6—Employee right to disconnect to Part 2-9 of the FW Act, establishing a statutory right for employees to disconnect from work communications outside of normal working hours. This includes provisions for dispute resolution related to exercising this right and empowers the Commission to issue stop orders or otherwise deal with a dispute about the right. Additionally, all modern awards are required to incorporate a right to disconnect term by 26 August 2024, and the Commission is tasked with developing written guidelines about their operation.*[2]

FWC President's Statement

Justice Hatcher, President of the FWC, noted after the Closing Loopholes No.2 Act received Royal Assent:

> *The Closing Loopholes No. 2 Act reforms are significant, and the successful implementation of these reforms will require extensive consultation with diverse stakeholders, subject matter experts and interested persons. It will be our priority to establish case management processes that are easy for users to understand and navigate, are clearly communicated, minimise the regulatory burden and are fit for purpose.*[3]

RATIONALE

Limitation of Time

The FWC is under tight time constraints to introduce a right to disconnect into all awards by 25 August 2024. Given there is barely two months between filing of submissions and the FWC determinations coming into effect, there is limited time for award specific provisions to be drafted across 121 industry and occupational awards and a further 34 modern awards.

For this reason, it is understandable that the FWC would prefer a uniform approach to the introduction of a right to disconnect across all 155 industrial instruments.

Modern Award Objectives

The Act s134 outlines the modern award objectives which imparts a responsibility upon the FWC to ensure the modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions by taking into account a number of considerations. [4] These considerations, insofar as are relevant, must be considered in the decision-making process of award variations.[5]

Importantly, these considerations regard a myriad of factors including:

- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

[2] FWC President's Statement I Statement [2024] FWC 213
[3] FWC President's Statement I President's statement – Fair Work Legislation Amendment (Closing Loopholes No. 2) (fwc.gov.au)
[4] Fair Work Act 2009 (Cth)- Sect 134 I FAIR WORK ACT 2009 - SECT 134 The modern awards objective (austlii.edu.au)
[5] National Retail Association v Fair Work Commission (2014) 225 FCR 154 [56].

- the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

With the introduction of the right to disconnect terms, the FWC must carefully consider the corresponding impact on businesses, award complexity and any impact on the national economy.

The importance of language

The introduction of the right to disconnect terms into Awards poses risks to increasing award complexity and extending employer obligations.

The language selected for the right to disconnect term in awards should be identical to s333M & s333N of the Act. The changing or insertion of terms or language will likely lead to complexities as to the correct interpretation or application of entitlements: further polluting legislative complexities.

This should be avoided at all costs for the purposes of unaffected award useability and preserved business viability. Any suggested deviation, by other industry groups, from the legislative provisions should be scrutinised and cautiously regarded by the FWC against the modern award objectives.

History of replicating legislation within modern awards

The FWC commission has previously shown an inclination to the adoption and integration of legislative provisions within the modern awards. This practiced approach has been detailed in the table below and reflects the reinforcement of NES rights, that are referenced in modern awards but that are not expanded upon. For the purposes of clarity, please note:

- General Retail Industry Award [MA000004] ('GRIA')
- Fast Food Industry Award [MA000003] ('FFIA')
- Restaurant Industry Award [MA000119 ('RIA')

Legislative Provision	Entitlement	Clause within the GRIA	Clause within the FFIA	Clause within the RIA
s65 of the Act	Flexible Working Arrangements	Clause 6 *Requests for flexible working arrangements are provided for in the NES.*	Clause 6 *Requests for flexible working arrangements are provided for in the NES.*	Clause 6 *Requests for flexible working arrangements are provided for in the NES.*
s66A-66E of the Act	Casual Conversion	*Clause 11.5* *Offers and requests for conversion from casual employment to full-time or part-time employment are provided for in the NES.*	*Clause 11.5* *Offers and requests for conversion from casual employment to full-time or part-time employment are provided for in the NES. See sections 66A to 66M of the Act.*	*Clause 11.6* *Offers and requests for conversion from casual employment to full-time or part-time employment are provided for in the NES.*

s67-79 B of the Act	Parental leave	Clause 30 *Parental leave and related entitlements are provided for in the NES.*	Clause 24 *Parental leave and related entitlements are provided for in the NES.*	Clause 27 *Parental leave and related entitlements are provided for in the NES.*

The preservation of flexibility

The right to disconnect imparts an entitlement for an employee to, if not unreasonable, disconnect from workplace communications and sets out the relevant factors for assessing the meaning of unreasonable.

With the legislative entitlement being introduced into modern awards, it is imperative to understand all the reasons the model award clause should replicate the legislation. While there are many reasons as to why this should be the case, among them is employee flexibility.

This entitlement will no doubt pose challenges to effective communication within a workforce, but it can also work to inhibit an employers ability to facilitate flexibility for employees. In circumstances whereby an employee may request to change shifts on short notice, the ability for an employer to find shift covers would be challenging when faced with a non-responsive workforce.

The introduction of the entitlement was opposed by many industry groups given the fact that where an employer can, evidenced through workplace policies and enterprise agreements, they will work with an employee to ensure they have time away from work and opportunities to disconnect from workplace communications. The employee-employer relationship notably reflecting much needed discretion and flexibility as to how workplaces communicate.

While the legislation has passed, there is concern that the introduction of this entitlement into modern awards, if not considered carefully, could work to further narrow the assessment for an unreasonable disconnection, and in doing so, further restrict an employer’s ability to cultivate flexibility for their workforce.

For this reason, any proposed change to award terms should be considered in the context of the employer and employee relationship and sustaining the preservation of workplace flexibility.

Small business considerations

The ARA recognises that small businesses have received an extension of time, till the 26 August 2025, for the right to disconnect terms to apply, noting that the definition of small business within the Act must be met to meet this exemption.

The ARA supports the decision to provide small businesses an exemption of time to prepare for these changes given the lack of resources, reduced business capabilities and stricter business operations often experienced or necessitated by these types of operations. However, correspondingly, we think it important to note that 97.3% of retailers can be defined as small businesses[6] despite not meeting the unique definition put forth by the Act.

[6] Australian Business Statistics 2024 I Australian Business Statistics 2024 | Money Matchmaker®.

The point the ARA would like to highlight is two-fold:

- For those small businesses that can meet the requirements for the delayed operation of the right to disconnect terms, the new entitlement will undoubtably create further complexity and restrictions on already fragile businesses.
- Many small businesses, that miss out on meeting the definition acknowledged by the Act, will have very minimal time to prepare for these changes, and will still face the adverse consequences on business operations, facilitated by the right to disconnect.

For this reason, to mitigate the risk of causing even more harm for small business retailers that further amendments would pose, the legislative provisions should be preserved and copied within modern awards with the exclusion of refinements.

Retail considerations

The retail industry is pre-dominantly customer-centric in nature; this means that retailers require workforce planning to maintain customer demand and satisfaction.

The right to disconnect provides for, more or less, an assessment on a case-by-case basis as to whether an employee's refusal to connect outside of work is reasonable.

Factoring in the nature of retail operations, in no way can it be in contention that retailers require open lines of communication with their workforce to navigate staff absences, plan rosters and ensure the continued viability of business operations.

The ARA's view, stemming from these crucial considerations, is that the legislative provisions have detailed the crux of the entitlement which still allows for an employer to communicate with an employee, noting the employee does retain the right to reasonably refuse.

For this reason, regarding the unique needs of the retail industry, an award term replicates, but does not depart from, the legislative provisions would be an optimal result amidst adverse circumstances.

Limiting the conflict with other provisions

Outlined within President Hatcher's statement on 12 March 2024, the FWC staff have undertaken an analysis of the modern award provisions that may impact a right to disconnect. Within all awards, it is evident that there will be a form of ambiguity as to the relationship between this new entitlement and the operation of other provisions with awards (rostering, overtime etc).

Replicating the legislative provisions within modern awards would ensure no further ambiguity on the interaction between the right to disconnect and other award terms is imparted. Similarly, this would prevent the further pollution of award usability which could arise through added, altered or changed language.

While we understand that some industry groups may wish to pursue specifics with the right to disconnect model award terms, this can be pursued at a later day through independent application to the FWC.

For the reasons outlined above, and to reduce the real risk of award ambiguity and reduced useability, the model award terms should reflect the legislation wholly.

CONCLUSION

The inclusion of a right to disconnect provision in awards holds significant implications for the retail industry, impacting employee entitlements, employer obligations.

The ARA maintains that this provision will create challenges and complexities for retailers as businesses strive to balance operational needs and workforce requirements within a workforce that can readily disconnect.

For this reason, the ARA advocates for the risk to the retail sector to be mitigated by allowing for no real deviation from the legislative provisions. This is the best way of minimising compliance risks associated with a measure that already presents significant operational challenges.

This would safeguard the employee entitlement to disconnect and correspondingly, balance retailer interests of preserving an engaged and sustainable workforce.

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The ARA thanks the FWC for the opportunity to participate in this consultation process. Any queries in relation to this submission should be directed to policy@retail.org.au.