



# STATEMENT

*Fair Work Act 2009*

Sch 1, cl 111C—FWC to vary certain modern awards

## **Variation of modern awards to include a right to disconnect term**

(AM2024/14)

JUSTICE HATCHER, PRESIDENT

SYDNEY, 11 JULY 2024

*Variation of modern awards to include a right to disconnect term – Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 – draft modern award term published for comment.*

[1] Following the passage of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth), the Fair Work Commission is required to vary all modern awards to include a right to disconnect term by 26 August 2024. The Commission is also required to make guidelines about the operation of the right to disconnect. There is no legislative deadline for the making of the guidelines.

[2] On 12 March 2024, I issued a [Statement](#)<sup>1</sup> commencing the process to make the right to disconnect term. In that statement, I provided an overview of the legislative changes relating to the right to disconnect and set out a draft timetable for the consultation and engagement process. The statement invited parties to provide submissions and feedback regarding the proposed draft timetable for varying modern awards by Wednesday, 20 March 2024.

[3] The statement also included at Attachment A an initial analysis of modern award provisions that may potentially impact on the development of the right to disconnect award term.

[4] On 26 March 2024, I issued a further [Statement](#),<sup>2</sup> following submissions from the Australian Industry Group and the Australian Council of Trade Unions, adjusting the timetable. Under the revised timetable, parties were invited to file submissions about the proposed right to disconnect term and any guidelines, including any award-specific matters and the delayed operation for small business employers, by Monday, 20 May 2024, and any reply submissions by Tuesday, 11 June 2024.

[5] The matter was then allocated to a Full Bench consisting of Vice President Asbury, Deputy President O’Neill, Commissioner McKinnon and myself.

[6] In a further [Statement](#)<sup>3</sup> on 10 May 2024, I noted that Commission staff were preparing a more detailed, award-specific audit of terms in modern awards which may impact the right to disconnect. I also made a minor adjustment to the timetable to allow parties to respond to the audit in their submissions in reply. The [award-specific audit](#)<sup>4</sup> was published on 23 May 2024.

[7] The Commission received 21 initial submissions and 25 submissions in reply in accordance with the timetable. All of the submissions have been published on the major cases page of the Commission's website. A public consultation was held on 19 June 2024 and the [transcript](#)<sup>5</sup> of this proceeding has also been published.

[8] Following the consultation process and taking into account the views of the peak councils and other interested parties received during that process, the Commission has developed a draft 'Employee right to disconnect' term. The draft term is set out at **Attachment A** to this Statement. The term has been developed for the *Business Equipment Award 2020*,<sup>6</sup> which award contains:

- A standby allowance provision (clause 20.5).
- A provision enabling emergency roster changes on 24 hours' notice (clause 12.3(a)(iii)).
- A provision establishing the terms and conditions to apply to a recall (or 'call-back') to work (clause 20.4).

[9] It is intended that, for other modern awards, the right to disconnect term would in all cases include subclauses XX.1, XX.2 and XX.3 of the draft term and would, in addition, contain an equivalent to:

- (1) subclause XX.4 if the award contains a standby allowance or payment provision or equivalent;
- (2) subclause XX.5(a) if the award contains a provision allowing for an emergency roster change on 48 hours' notice or less; and
- (3) subclause XX.5(b) if the award contains a recall to work provision or equivalent.

[10] It is contemplated that interested parties may make applications after 26 August 2024 to vary the right to disconnect term in individual modern awards to address the specific circumstances of particular industries and occupations.

[11] It is not presently the intention of the Commission to make guidelines concerning the right to disconnect prior to 26 August 2024. The Commission considers that it will be in a better position to make guidelines once it has dealt with at least some disputes concerning the operation of the right since this will allow it to have some understanding of the practical issues for which guidance may be required.

### **Next steps**

[12] Interested parties are to file any submissions concerning the draft term, and the view expressed in paragraph [11], by **12:00 pm (AEST) on Thursday, 1 August 2024**. Submissions should be sent to [awards@fwc.gov.au](mailto:awards@fwc.gov.au).

[13] Final determinations varying modern awards will be published by 23 August 2024. The determinations will commence operation on 26 August 2024 for employers other than small business employers, and on 26 August 2025 for small business employers consistent with clause 111D of Schedule 1 to the *Fair Work Act 2009* (Cth).



PRESIDENT

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**Attachment A – Draft right to disconnect clause – *Business Equipment Award 2020***

**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) 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.

**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.4** 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** 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.

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<sup>1</sup> [\[2024\] FWC 649](#).

<sup>2</sup> [\[2024\] FWC 768](#).

<sup>3</sup> [\[2024\] FWC 1235](#).

<sup>4</sup> [Right to disconnect award-specific audit](#).

<sup>5</sup> Transcript of proceedings, *Variation of modern awards to include a right to disconnect*, (Fair Work Commission, AM2024/14, 19 June 2024).

<sup>6</sup> [MA000021](#).