

ACCI Submission

Variation of Modern Awards to Include a Right to Disconnect Term

20 May 2024



Working for business.

Working for Australia.

Telephone 02 6270 8000 | Email info@acci.com.au | Website www.acci.com.au

Media Enquiries

Telephone 02 6270 8020 | Email media@acci.com.au

Canberra Office

Commerce House
Level 3, 24 Brisbane Avenue
Barton ACT 2600
Kingston ACT 2604

Melbourne Office

Level 3, 150 Collins Street
Melbourne VIC 3000

Perth Office

Bishops See
Level 5, 235 St Georges Terrace
Perth WA 6000

ABN 85 008 391 795
© Australian Chamber of Commerce and Industry 2023

This work is copyright. No part of this publication may be reproduced or used in any way without acknowledgement to the Australian Chamber of Commerce and Industry.

Disclaimers & Acknowledgements

The Australian Chamber of Commerce and Industry (ACCI) has taken reasonable care in publishing the information contained in this publication but does not guarantee that the information is complete, accurate or current. In particular, ACCI is not responsible for the accuracy of information that has been provided by other parties. The information in this publication is not intended to be used as the basis for making any investment decision and must not be relied upon as investment advice. To the maximum extent permitted by law, ACCI disclaims all liability (including liability in negligence) to any person arising out of use or reliance on the information contained in this publication including for loss or damage which you or anyone else might suffer as a result of that use or reliance.

INTRODUCTION

1. On 12 March 2024, the President issued a Statement commencing a process to vary all modern awards so that they include a right to disconnect term by 26 August 2024 (**President's Statement**).¹
2. The Australian Chamber of Commerce and Industry (**ACCI**) welcomes the opportunity to make submissions in relation to the Fair Work Commission's (**Commission**) process to vary modern awards to include a right to disconnect term.
3. These submissions outline:
 - a. The principles ACCI says should apply when the FWC is exercising its statutory function to include a right to disconnect term in modern awards (**Part I**); and
 - b. Examples of current industry and employer specific practices and considerations regarding the right to disconnect (**Part II**).
4. In summary, ACCI submits the following:
 - a. The Commission should prioritise constructing the modern award provision(s) to the extent necessary to give effect to the modern award objective and the object of the FW Act. ACCI asserts that any term which provides rights or imposes obligations beyond that which is explicated in the legislation would be incompatible with the modern awards objective which requires a minimum safety net of terms and conditions.²
 - b. The Commission should adopt flexibility as a guiding principle when constructing the modern award provision(s). The Commission should interpret this principle in a fair way and achieve consistency with the modern awards objective. The modern award provision(s) must consider that contact with employees extends beyond industry practices and can be unique to a particular workplace.
 - c. Furthermore, the modern award provision(s) should not have the effect of returning to rigidity within the workplace, to the disadvantage of employers and employees. Flexible working arrangements, both formal and informal are advantageous for both employers and employees and are underpinned by communication. Employees should be contactable after hours if the employer has accommodated their flexible work request.
 - d. The practical effect of a broad modern award provision is to protect employees and work alongside other provisions. The right to disconnect should not restrict business practices but should be exercised reasonably. ACCI argues that modern award provisions should not limit employer contact with employees.
 - e. The Commission has been tasked with developing non-binding guidelines to assist with the implementation of the right to disconnect. ACCI considers that education methods will be more

¹ President's Statement, *Variation of modern awards to include a right to disconnect term* (AM2024/14) (12 March 2024).

² Fair Work Act 2009, section 134.

valuable in effecting the right to disconnect than the imposition of a restrictive modern award provision(s). These guidelines might seek to comment on non-exhaustive considerations that might indicate refusal to monitor, read, or respond to work-related contact is unreasonable, while reiterating to readers that these considerations are subject to workplace-specific analysis.

- f. ACCI submits that the expression of the right to disconnect in section 333M, or an expression of the right to disconnect that is similarly non-prescriptive, is sufficient and effective in balancing all the considerations before the Commission. Where industry specific considerations are needed, this should be achieved through award variation applications to avoid irrelevancies, complexities, or misunderstandings occurring in this process. There is a wealth of sector or industry specific evidence and considerations that would need to be analysed with respect to certain work which cannot be properly dealt with through this process.

PART I: PRINCIPLES

5. This part outlines the key principles which ACCI submits should guide the Commission in developing the right to disconnect term.

PRINCIPLE 1: THE MODERN AWARD PROVISION(S) SHOULD REFLECT THE RIGHT TO DISCONNECT AS PROVIDED BY SECTION 333M

6. Section 149F of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (**Amending Act**) necessitates that modern awards must include a right to disconnect term. Such a term, or terms, must provide for the exercise of an employee's rights set out in section 333M, specifically:

- (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.*

7. ACCI submits that the right to disconnect term 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. As canvassed, ACCI submits that providing rights beyond the minimum which has already been legislated controverts the very notion of the minimum safety net of terms and conditions which the modern awards objectives prescribe.³ This submission is predicated on the following considerations:

- a. As a term that will be included in a modern award, the right to disconnect term will be enforceable as a civil penalty provision under the Fair Work Act (**FW Act**). This means that care needs to be taken in mandating any rights that cannot easily or practicably be accommodated in all circumstances. Otherwise, employers of all sizes and from a range of industries could be subject to pecuniary penalties for failing to comply with terms that might not have been considered with the employer's circumstances in mind. A prescriptive right to disconnect term has the potential to curtail business operations by impeding on the employer's ability to contact its employees, or prescription of particular methods of contact in addition to those that exist in some modern awards. The right to disconnect conferred under section 333M currently does not impact an employer's ability to contact employees, rather enshrines the employee's right to elect not to engage with such contact.
- b. As noted in the President's Statement, the right to disconnect provisions are intended to '*rebuild to boundary around workers' personal time*'. At its core, the right to disconnect refers to an employee's right of choice regarding outside of hours communication relating to their employment, pending the contemplation of 'unreasonable refusal'. The right to disconnect term should not impose any additional prescriptions beyond the expression of section 333M to ensure that choice remains the foundation of communication between employee and employer, or any other third party making work-related contact.
- c. Helpfully, the President's Statement contains a table of modern award terms that may impact, or be impacted by, a new right to disconnect term. To ensure that terms of modern awards

³ Fair Work Act 2009, section 134.

maintain congruence, the right to disconnect term should not be prescriptive and should be consistent with the expression of the right to disconnect as provided by section 333M. The Commission is currently conducting a review of modern awards⁴ after a request made by the Hon. Tony Burke MP, Minister for Employment and Workplace Relations. A priority topic for the Commission is making the modern awards easier to use. By reiterating the expression of section 333M for the right to disconnect term, the Commission will advance the goal of simplifying modern awards, which is advantageous for both employers and employees.

8. Importantly, the right to disconnect contained in section 333M must be construed and given effect only to the extent necessary to enliven the purpose of the FW Act and the Amending Act. This has been clearly explored by the courts in its examination of section 138 of the Act, which states:

'A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.' (emphasis added).

9. The Federal Court clearly stated that:

*"The words "only to the extent necessary" in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond a minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4."*⁵(emphasis added).

10. As observed by President Hatcher, the Explanatory Memorandum does not provide any information regarding the right to disconnect.

11. An evaluative exercise is necessitated to balance the objects of Part 2-9 and the objects of the FW Act itself, as well as ensuring any terms meet the modern awards objective. The Commission's term(s) should therefore focus on the following (amongst other objectives listed in the statute):

- a. providing conditions that are flexible for business, promote productivity and economic growth for Australia's future;⁶
- b. ensuring that when making award terms, the Commission takes into account the needs of small and medium sized businesses;⁷
- c. the promotion of flexible modern work practices;⁸
- d. the promotion of efficient and productive performance of work;⁹

⁴ The Modern Awards Review 2023-24 (AM2023/21).

⁵ *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, 23.

⁶ *Fair Work Act 2009*, section 3(a).

⁷ *Fair Work Act 2009*, section 3(g).

⁸ *Fair Work Act 2009*, section 134(d).

⁹ *Fair Work Act 2009*, section 134(d).

- e. the impact of the modern award provision(s) on business, including productivity and costs to the employer;¹⁰ and
 - f. that the modern award provision(s) are simple and easy to understand.¹¹
12. The above factors reinforce the need to ensure that the right to disconnect in 333M is given effect, but not beyond the extent that is necessary to support an employee's right to reasonably refuse to monitor, read or respond to contact from an employer or third party relating to their employment.
 13. ACCI submits that a broad expression of the right to disconnect, as in section 333M, is sufficient in achieving the modern awards objective. Should the Commission go beyond inserting terms necessary to meet these aims, then it is likely that such terms will sit inconsistently with the other objectives outlined above that also influence the exercise of the FWC's functions in this regard.

PRINCIPLE 2: CHOICE AND FLEXIBILITY ARE AT THE CORE OF THE RIGHT TO DISCONNECT

14. ACCI acknowledges that with technological advances, there are several connections to the workplace that operate both inside and outside of working hours. The effect of technology, in some circumstances, can distort the traditional start and finish times for work. Technological advances have also allowed for an unprecedented level of choice and flexibility, for both employers and employees. The modern award provision(s) should establish the right to disconnect without restricting flexibility and choice.
15. The right to disconnect seeks to create a 'basic enforceable right', the purpose of which is to 'rebuild the boundary around workers' personal time and create a safeguard for that time'.¹² The right to disconnect should seek to balance the protection of this boundary, but also to protect choice and flexibility, which ACCI submits should be a priority for the Commission when considering the modern award provision(s).
16. Flexibility is a principle that features in both the object of the FW Act,¹³ and the modern awards objective.¹⁴ ACCI observes that flexibility in this context represents an employee's choice to freely enter into hours of work which suit their needs and lifestyle, including any caring arrangement, and to have a genuine ability to elect to accept or reject contact outside those hours where it is reasonable for them to do so. For employers, flexibility is the pivotal capacity to make with contact employees outside of working hours, whether that be for a range of reasonable, practical circumstances, including but not limited to:
 - Asking them to work an additional shift or hours;
 - Asking them about tasks that were (or were not completed) during the course of their working hours;

¹⁰ *Fair Work Act 2009*, section 134(f).

¹¹ *Fair Work Act 2009*, section 134(g).

¹² Commonwealth, Parliamentary Debates, Senate, 8 February 2024, at 23 (Senator Barbara Pocock).

¹³ *Fair Work Act 2009*, section 3(a).

¹⁴ *Fair Work Act 2009*, section 134(d).

- Send meeting invitations and clarifying availability;
 - Complete urgent work tasks;
 - Ensuring customers' or clients' needs are fulfilled (where contact is made by a third party); Contact which is consistent with workplace policies.
17. In the absence of an Explanatory Memorandum, further insight can be derived from the mover of the amendment, and from the Parliamentary debate that ensued. Senator Barbara Pocock stipulates that employees who have a clear expectation (i.e. by way of contract, job description, additional allowances) to respond to communication outside of business hours will not be captured by the amendment.¹⁵ Furthermore, Senator Pocock stipulates that flexibility is a 'need' when considering the right to disconnect.¹⁶
18. In addition to those mechanisms already listed by Senator Pocock above, ACCI submits that it is imperative that a modern award term does not hinder the ability of employers to communicate clear expectations about after hours contact through workplace policies and procedures.
19. Section 333M has been constructed in such a way that enables employees to choose whether they engage with work-related communication outside of hours, so long as the refusal to do so is reasonable. An employee is not required to establish whether they will perpetually exercise their right to disconnect for all communication, rather at each instance of communication, or attempted communication, the employee can elect to exercise that right. Employees should not be the sole party with enjoyment of the choice and flexibility afforded under section 333M, and the right to disconnect at each instance of communication or attempted communication must be construed in light of any existing, clear expectations set out in job descriptions, workplace policies, employment contracts or other informal arrangements in place.
20. This is particularly pertinent to the notion that the purpose of modern awards is to provide a "fair and relevant minimum safety net of terms and conditions".¹⁷ The word 'fair' in this context is inextricable from a need to balance the perspectives of employers and employees fairly. This has been explored at length by the Expert Panel undertaking the Annual Wage Review.¹⁸ In ACCI's view, any term that would seek to impose one way flexibility and choice, or that creates an imbalance between the rights of employers and employees, would therefore be inconsistent with the modern awards objectives.
21. To that end, it is crucial that the modern award provision(s) should not seek to limit the method or means by which an employer communicates with its employees. To do so would severely curtail an employer's ability to conduct business, with notable detrimental impact on small and medium-sized businesses. Particularly for employers who engage employees on a casual basis, or who engage shift

¹⁵ Commonwealth, Parliamentary Debates, Senate, 8 February 2024, at 23 (Senator Barbara Pocock).

¹⁶ Commonwealth, Parliamentary Debates, Senate, 8 February 2024, at 24 (Senator Barbara Pocock).

¹⁷ Fair Work Act 2009, section 134.

¹⁸ [2022] FWCFB 2500 at [18].

workers and are reliant on a particular staffing level, the ability to contact employees is pivotal to their ability to conduct business.

22. Consideration should also be given to the impact of the modern award provision(s) on businesses that operate across time zones. Businesses may have employees, clients, customers, suppliers, and offices that all operate across different time zones, domestically and internationally. Businesses should not be prevented from engaging employees outside of their geographical location, or with availability outside of their core business hours due to a right to disconnect term that unnecessarily constrains communication.

PRINCIPLE 3: PARAMETERS FOR COMMUNICATION ARE BEST DETERMINED BY THE EMPLOYEE AND EMPLOYER

23. ACCI acknowledges that prior to the legislative amendments, the right to disconnect had been incorporated into a number of enterprise agreements, stipulating the parameters for employer communications with employees, including establishing any relevant remuneration for out-of-hours contact. ACCI submits that it is crucial for employers to retain the ability to negotiate the parameters for communication with their employees, outside of communication obligations that already exist, noting that the right to disconnect will form the foundation of such negotiations.
24. In circumstances where the right to disconnect has already been incorporated into enterprise agreements, the employer and employee negotiated and agreed on the term(s). This enables employers to incorporate a bespoke term that does not compromise the needs of their business, but still gives effect to the right to disconnect. The benefit of allowing the particulars of the right to disconnect in an enterprise agreement, or other such less formal arrangements between the employer and employee, is that the term can reflect the practical application in the workplace and is able to be worked out at the workplace level. A benefit of those particulars operating at a workplace level is that third party communication can be more effectively monitored and controlled.
25. The modern award provision(s) will be varied to include a right to disconnect term in 155 instruments. The term included in those instruments has the potential to impact over 1 million Australian businesses who engage employees, the vast majority of which are small businesses.¹⁹ ACCI suggests that the breadth of the term should be broad in consideration of the magnitude of businesses within an industry that it will impact, and in acknowledgement of the intricacies of individual businesses.
26. As noted above, at the time of moving the amendment, Senator Pocock reiterated the importance of flexibility and the notion that specific working conditions, as defined in an employment contract, would inform a determination of a reasonableness of an employee's refusal to engage with their employer outside of hours.²⁰ The purpose of right to disconnect does not seek to confine or restrict an employer's contact with its employees. Its purpose is to provide employees with the ability to

¹⁹ Australian Bureau of Statistics (Jul2019-Jun2023), [Counts of Australian Businesses, including Entries and Exits](#), ABS Website. Australian Small Business and Family Enterprise Ombudsman, *Number of Small Businesses*.

²⁰ Commonwealth, Parliamentary Debates, Senate, 8 February 2024, at 23 (Senator Barbara Pocock).

reasonably refuse that contact, particularly where such contact is not remunerated or provided for by way of an employment contract, current enterprise agreement, or other relevant framework, which should include workplace policies and procedures. The Commission should consider these comments in its construction of the modern award provision(s).

27. Technology has enabled unprecedented levels of flexible working, allowing for work to be conducted at various locations and times, pending agreement with between the employer and employee. These arrangements are particularly attractive to employees, especially those with caring responsibilities, and those looking for a more personalised work-life balance.
28. For example, a flexible work request from an employee to vary their working hours from 9am to 5pm to 7am to 3pm, for reasons such as caring responsibilities or simply that the arrangement suits their lifestyle better, is far more likely to be accepted by the employer if there is an understanding that in the event of an emergency, the employee is still contactable between 3pm and 5pm, despite it being outside of hours. While the employer does not have a general expectation that the employee will work outside of hours, there is an expectation that the employee will be willing to answer the phone in an emergency in exchange for their flexible and unique arrangement.
29. Flexible working arrangements are not limited to applications based on working hours. For example, an employee located in Sydney is seeking to relocate to Perth but does not want to seek new employment as they find their current work fulfilling. Their employer is based in Sydney and has the technological capability to support remote working for its employees. Its hours of business are 8am to 4pm. The employer's preference is also to retain the employee, however, it is only able to do so on the proviso that the employee is contactable for urgent matters during the business's operating hours. The employer is likely to approve the arrangement if there are no hinderances to contacting the employee. The alternative is that the employer is unable to support the employees move, which in turn would require the employee to seek alternative employment arrangements. Neither party benefits from a rigid approach to communication.
30. Less formal arrangements may also be impacted detrimentally by a restrictive and narrow view of the right to disconnect. In circumstances where an employer feels they can contact their employees if a work issue arises outside of hours and that the employees will respond, that employer will be more willing to allow employees to leave the workplace and attend to a personal matter for a few hours without requiring them to take leave. Employers and employees can thrive in flexible working environments, however, if employers are unable to contact their employees out of hours, this type of arrangement may no longer be facilitated.
31. While it is true that employees in the past were not as accessible to their employers outside working hours at the frequency they are today, it is also true that employees were expected to attend their specific workplace during specified working hours, and to remain there from commencement to close of business. This traditional rigidity of the workplace was a barrier to many workers, or prospective workers (particularly women, or those with carrying responsibilities), who are now able to thrive in the modern era with increased flexibility and greater focus on work-life balance.

32. The Commission should consider, when constructing the modern award provision(s), that it does not incidentally inhibit an employer's ability to continue to offer flexibility in working arrangements. It should not be reasonable for an employee to refuse contact after hours from an employer or a third party where that after hours contact has been caused by the employer accommodating an employee's flexible work request (whether formally or informally adopted).
33. ACCI submits that a modern award provision that seeks to impose additional limits, that builds upon the right to disconnect as expressed in section 333M, or that prescribes certain circumstances for communication between employers and employees would be beyond the extent necessary to achieve the modern award objective. The modern award provision(s) should not limit an employer's ability to forge relationships with its employees, allowing for increased flexibility for both parties. A prescriptive term does not allow for business flexibility and risks disproportionately impacting small and medium sized businesses.

PRINCIPLE 4: THE COMMISSION SHOULD AVOID CREATING FURTHER COMPLEXITY AND INTERACTION ISSUES BETWEEN PROVISIONS WHICH ALREADY DEAL WITH AFTER HOURS CONTACT

34. Commission staff have helpfully included a table at Attachment A of the President's Statement which summarises existing modern award terms that may impact a new right to disconnect term. In doing so they highlight an existing complex-web of industry-specific requirements and obligations relevant to after-hours contact. These include, but are certainly not limited to, the following:
 - a. Overtime provisions and rest periods after overtime provide a framework for remuneration of work performed outside of ordinary or rostered hours. Overtime provisions already balance interactions between ordinary or rostered hours, the span of hours, days work, rest periods between shifts, type of employment and time off in lieu (**TOIL**) provisions. The right to disconnect may be an additional impact on overtime provisions depending on the type of contact, who makes the contact, and whether there is an expectation or requirement for response to that contact.
 - b. Similar to overtime provisions, reasonable additional hours provisions are included in some modern awards and relate to work outside of ordinary hours. For those employees that are not covered by a modern award with respect to reasonable additional hours, section 62 of the FW Act provides a legislative framework, including that an employee can refuse to work unreasonable additional hours. The right to disconnect term will interact with reasonable additional hours, as presumably, employers may need to contact an employee outside of hours to request that reasonable additional work is performed.
 - c. Depending on the nature of out of hours contact, the right to disconnect term may interact with minimum payment periods, particularly where that contact is a request for an employee to recommence work.

- d. Recall to duty provisions may be impacted by the right to disconnect term. Those provisions often require employees who are outside of their ordinary working hours to return to the workplace, or to recommence work. The right to disconnect may impact how employees are contacted to return to work, and whether there is a reasonable expectation for the employee to respond to contact recalling them to duty.
 - e. The right to disconnect term may impact on-call, or on-call-like provisions. Usually, those provisions are enlivened on the premise that while an employee is on call, they are expected to respond to communication that is work-related. However, the right to disconnect may give rise to a requirement for clarification on how, or to what extent, on-call provisions remunerate for work-related communication after hours.
 - f. Many modern awards contain provisions that relate to hours worked by employees, including broken shifts, span of hours, maximum daily hours, and averaging of hours. The right to disconnect will likely interact with these provisions and give rise to considerations of when employees may be contacted, and what implications any contact, depending on its nature, will have on the calculation of hours performed by the employee.
 - g. Changes to rosters occur frequently, and often, the way they are communicated is provided for in modern awards. The right to disconnect term may interact with how roster changes are communicated with employees, especially where confirmation of a shift change is required.
35. These existing, overlapping requirements already pose complications for employers and employees to navigate in practice. The Commission regularly hears disputes between employers and unions on interaction issues for these types of provisions now, and before a new right to disconnect term is introduced which could potentially create further complexity.
36. ACCI submits that the Commission should not seek to resolve the issues identified above in drafting a new right to disconnect term. This task would require a substantially different term to be drafted for each modern award, which the Commission would not have time to undertake within the existing timetable. It is a task which ACCI respectfully submits would also ultimately fail considering the complexity of the interaction issues and the fact that the Commission could not satisfy itself of all practical consequences which would arise, particularly before the laws have come into effect.
37. In drafting the new right to disconnect provision, ACCI submits that the Commission should not draft a different term in each modern award to deal with those identified interaction issues and should instead draft a term which is non-prescriptive to avoid creating further complexity and interaction issues. It should allow maximum flexibility for employers and employees to work through practical issues at the workplace level.

PART II: INDUSTRY SPECIFIC PRACTICES AND CONSIDERATIONS

38. ACCI submits that this process should be constrained to drafting a term for insertion to all modern awards. Sector specific concerns cannot be appropriately dealt with in this process due to the very significant amount of evidence and considerations that would be required to be presented to accurately to implement a term that deals with specificities in each industry. This is particularly relevant given the short timeframe within which this process must be completed.
39. It would be more appropriate for the Commission to implement a draft term that does not venture beyond what the legislation outlines, and where greater detail or particular considerations are needed then an application for an award variation should be implemented following commencement on 26 August 2024.
40. The following discussion is a means to demonstrate the immense difficulties and impracticalities which would be associated with developing a term that journeys away from a broad term for all modern awards into industry specific concerns.
41. Businesses assert their expectations of employees through various means, including employment contracts and workplace policies and procedures, all of which must comply with the relevant legislation and applicable modern award or enterprise agreement. Furthermore, many of these means are not only unique to specific industries, but specific workplaces. It is important to note that not all work-related contact outside of ordinary hours is insidious, as often employers and employees have adopted general practices that are supported by, and work for both parties, and that guide third party interactions.
42. It should be recalled that the right to disconnect only goes to out of hours contact. There is already an existing legal framework which deals with instances where out of hours contact leads to additional work by the employee, including that the employee may refuse to work unreasonable excess hours.²¹ It is accepted that employers, where reasonable to do so, may request that their employees work additional hours. It is logical to assume that to make such a request of an employee, an employer will, from time to time, need to, and should be allowed to, contact employees outside of their ordinary working hours. The right to disconnect term should not hinder the well-established notion of 'reasonable additional hours', which has its basis in contract law, under statute, and under the Modern Award system.
43. The Commission should consider the implication of the right to disconnect term in light of the recent amendments to the FW Act. Which stipulate that employers may face criminal prosecution for underpayments. The right to disconnect term should not leave employers vulnerable to unanticipated legal action where it is unclear how the term interacts with the provisions already in place.
44. It is critical to note that employers relying on the ad-hoc availability of employees are prevalent in the vast majority of industries and vary in size. Staffing issues can arise from employees utilising their leave entitlements or rescinding their prior availability, unforeseen increases in business traffic or

²¹ *Fair Work Act 2009* (Cth), section 62.

demand, and ad-hoc or urgent work. These businesses can be reliant on communication with their employees outside of hours, and it important that their ability to contact those employees is not limited by the modern award provision(s). Often this contact does not require the employee to engage in work outside of hours, rather if they are so inclined, to merely confirm their future availability to work. It should be noted that often employees are enthusiastic for additional opportunities to work and are eager to accept offers for shifts where business needs arise. A right to disconnect term that prevents communication regarding availability could be harmful for employees and employers alike.

45. The Commission should seek to strike a balance between allowing employees to exercise their right to disconnect, and allowing business to ensure their operations are not compromised by imposing restrictions around this type of contact.
46. However, in some industries such necessities regarding contact about ad-hoc availabilities or surge demand may not exist. Hence, any attempt to elucidate or prescribe processes in the term for those industries where such detail might be relevant may result in irrelevances or superfluous complexities for other industries.
47. ACCI resubmits therefore that the Commission restrain itself to a draft term that simply provides for the terms contained in the legislation and allow sector-specific concerns to be dealt with via award variation applications at a later time. Such an approach would further enable greater evidence and more accurate consideration of specificities required.
48. Many industries and employers have already embedded methods within the workplace that serve to uphold the right to disconnect. Examples of such methods and provisions follow.

ADDITIONAL REMUNERATION, INCLUDING 'ON-CALL' OR 'CALL-BACK' PROVISIONS

- a. Many awards already contain provisions that address circumstances where employers may be required to contact employees outside of hours and when employees are expected to respond to that contact. These provisions have various names (for example, 'on-call', 'call-back', 'standby'), but all broadly refer to circumstances outside of an employees rostered or normal hours and are required to respond to any communication from an employer. An employee may be remunerated by way of an allowance, overtime payment or TOIL. Some employers require 'reasonable additional hours' from their employees and provide remuneration in recognition of this expectation.
- b. Many industries and employers heavily rely on the ability to contact some of their employees outside of hours for urgent and ad hoc. Specific examples include:
 - i. Many plumbing businesses operate and 'on-call' roster, so out of hours contact is managed and balanced. The *Plumbing and Fire Sprinklers Award 2020 (PFS Award)* establishes 'call-back' provisions that remunerate employees accordingly.
 - ii. Businesses in the automotive industry will require their employees respond to ad hoc work outside of hours. The *Vehicle Repair, Services and Retail award 2020 (VRSR Award)*

contains provisions relating to 'standby' and 'call-back' which means that employees are remunerated accordingly for their requirement to respond to contact from their employer.

- iii. Businesses in the energy industry are responsible for providing a critical service and product to Australian consumers. On occasions, critical events do occur, and employees are contacted to resume working outside of hours. Some employees in this industry are covered by modern award terms that contain 'on-call' and 'call-back' provisions, including relevant remuneration. Other employees are provided TOIL or are contractually obliged to perform 'reasonable additional hours'.
- c. ACCI notes that where there is a clear requirement for an employee to respond to contact, that they will not be captured by the Amending Act. The right to disconnect term should be constructed in consideration of that notion.

EXPECTATION MANAGEMENT AND INFORMAL AGREEMENTS

- d. Employers adopt a commonsense approach to communication with employees by providing clear explanations of the nature of their business in contract, position descriptions, and workplace policies and procedures. Where employees are not covered by an award, many employers adopt a similar method of addressing work or contact that occurs out of hours by utilising TOIL, or other remuneration mechanisms, for example site or regional managers.
 - e. When employees are onboarding, particularly where those employees are engaged on a casual basis, they are advised that they are likely to be contacted by their employer to advise of additional shifts. Those employees are not required to respond to that contact and are able to use discretion to determine which instances of contact they would like to engage with. ACCI are advised that employees are reminded of their discretion in employer communications, for example, some retailers include an explicit reminder in the footers of emails.
 - f. Employers in service industries, particularly those providing services in the disability sector, have commenced educating their clients on the rights of their employees. This is a proactive step that assists businesses in managing the demands of their clients and the reasonable expectations of their workforce.
 - g. It is important to note that many employers engaged in business covered by an award have constraints or prescriptions of what methods of communication are acceptable, some of which require a minimum of acknowledgement on the part of an employee. It is crucial that the right to disconnect term dovetails with provisions already in existence.
49. In addition to the above considerations, ACCI has received examples of employer contact with employees that may be impacted by the right to disconnect:
- a. Shift workers are frequently contacted by their employer and colleagues to canvas their availability for additional shifts. Often these shifts arise out of an unexpected availability. In

these circumstances, it is imperative that employers and employees are not limited in the ways in which they communicate with one another.

- b. Some employers are legislatively obligated to complete urgent work immediately. For example, State and Territory legislation states that urgent or emergency repairs must be actioned within a limited time frame.²² Urgent repairs are required on an ad-hoc basis, and frequently outside of hours. Typically, employers will operate an on-call roster, or similar strategy, to address this requirement.
 - c. On some work sites, for example mine sites, mobile phones are not allowed. In some circumstances, employers are then only able to contact employees outside of hours.
 - d. Where an employee does not present at their expected or rostered time, often employers will attempt contact with that employee to ensure their safety.
50. An important consideration for the Commission in drafting the modern award provision(s) is that while ACCI have provided an overview of some industry practices, this is not a perspective that is nuanced enough to grant the Commission oversight of the individual practices of businesses. While ACCI is pleased to be able to provide industry insight, it would be remiss not to mention that individual businesses have individual needs, and the right to disconnect will impact many of those businesses.
51. Keeping these variances in mind, ACCI submits that the Commission implement a minimalist term, consistent with the modern awards objective, that imposes the rights and obligations associated the legislative provisions but leaves the clarification of greater detail to specific award variation applications at a later time. Without such an approach the FWC may unintendedly create significant complexities across differing industries that may nonetheless require award variation applications where sectors require extrication from award complexity or irrelevancies created by a draft term that was overly prescriptive or attempted to address sector-specific concerns.

²² *Residential Tenancies Act 1997 (ACT)*, section 59; *Residential Tenancies Act 1987 (WA)*, section 43; *Residential Tenancy Act 1997 (Tas)*, section 33; *Residential Tenancies Act 1997 (Vic)*, section 72.



**Australian
Chamber of Commerce
and Industry**