

ACCI Submission

Draft Modern Award Term for Right to Disconnect

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RESPONSE TO DRAFT MODEL TERM

1. As mandated by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth), the Fair Work Commission (**FWC**) is required to vary all modern awards to contain a right to disconnect term. On 12 March 2024, the FWC commenced a consultative process, which allowed interested parties to lodge submissions, and reply submissions on the proposed right to disconnect term and guidelines. The Australian Chamber of Commerce and Industry (**ACCI**) lodged initial submissions on 20 May 2024 and reply submissions on 12 June 2024. ACCI does not seek to amend its position in those submissions and continues to rely upon its position as communicated in those submissions. The FWC's consultative process also included a public consultation on 19 June 2024, which ACCI participated in.
2. On 11 July 2024, the FWC released a Statement¹ containing a draft right to disconnect term, developed specifically for the *Business Equipment Award 2020*. The Statement specified the draft term's proposed application to all other modern awards.
3. ACCI notes that the FWC have proposed a consistent term to be included in all modern awards, and that where required, 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. ACCI's position is that this is a sensible approach that will allow for evidence-based submissions on the operation of the right to disconnect, should the need arise for additional variations.
4. In its most recent Statement, the FWC has proposed that it will not seek to publish the legislatively required Guidelines at the same time it varies the modern awards to contain the right to disconnect term, as initially proposed. The FWC stipulates that it will be in a better position to make Guidelines once it has dealt with disputes concerning the operation of the right to disconnect. ACCI submits that this is a commonsense approach, especially as the FWC is under no legislative timeframe to publish the Guidelines. ACCI opines that the FWC will be in a better position to understand industry-specific concerns, and the practical implementation of the right to disconnect more broadly in workplaces after it has had the opportunity to adjudicate disputations.
5. The FWC have proposed a draft right to disconnect term comprising of five clauses. The FWC proposes that clauses 1-3 will be included in all modern awards. ACCI does not oppose clauses XX.1-2. Clauses XX.1-2 provide for the right to disconnect as it is provided for under the *Fair Work Act 2009* (Cth) (**FW Act**). ACCI, in its initial and reply submissions stated that such an approach is consistent with the modern awards objective and succeeds in implementing the minimum safety net required. ACCI provides its commentary with respect to proposed clauses XX.3, XX.4, and XX.5 below.

¹ Statement, *Variation of modern awards to include a right to disconnect*, (Fair Work Commission, AM2024/14, 11 July 2024).

Clause XX.3

6. Clause XX.3 provides that an employer must not directly or indirectly prevent an employee from exercising their right to disconnect. ACCI appreciates that clause XX.3 is a mechanism designed to protect the right to disconnect, however, proposes an alternative expression of that protection. ACCI's concerns with the draft clause is that it may be read inconsistently with other award terms and give rise to unnecessary disputation.

7. ACCI proposes that clause XX.3 is reworded to:

XX.3 *The right to disconnect set out in section 333M of the Act is a workplace right. An employer must not take adverse action against an employee for their exercise, or proposed exercise, of the right to disconnect.*

8. ACCI submits that this rewording of clause XX.3 aligns with the FWC's approach in clauses XX.1 and XX.2 where it aligns the right to disconnect with section 333M of the FW Act. ACCI further submits that by consistently applying the working of the FW Act, the right to disconnect is still protected, as is clearly the FWC's intention, but provides less scope for confusion as to the application of the right under the FW Act and under modern awards. ACCI also reiterates its reasoning from previous submissions where it stated that the legislation provides an adequate minimum safety net required under the modern awards objective.

9. The FWC have drafted clauses XX.4 and XX.5 for the *Business Equipment Award 2020*, and specifies that in certain circumstances, an equivalent term will be included in a modern award. For ease of reading, ACCI will provide the clauses, explain their applications, and address each clause.

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 to 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 a notification, of:*

- (a)** *an emergency roster change under clause 12.3(a)(iii); or*
- (b)** *a recall to work under clause 20.4.*

10. The FWC have proposed that in addition to clauses XX.1-3, modern awards would contain an equivalent to:
- (1) *subclause XX.4 **if** the award contains a standby allowance or payment provision 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.*

Clause XX.4

11. Clause XX.4 operates to establish a specific circumstance where an employee is unable to exercise their right to disconnect. In effect, the FWC's proposal stipulates that where an employee is being paid a stand-by allowance, or some such equivalent payment provision, they are required to monitor, read and respond to contact, or attempted contact from the employer.
12. ACCI agrees that an employee's receipt of a stand-by allowance, or equivalent payment provision, renders the exercise of the employee's right to disconnect as unreasonable. The wording of clause XX.4, ACCI submits, is not practically applicable in the workplace.
13. As clause XX.4 is currently drafted, the employer's contact must be to notify the employee they are required to attend and perform work. If the contact is not related to a requirement for the employee to attend and perform work, the current wording seems to permit an employee to exercise their right to disconnect for that contact. ACCI submits that an employee will only be able to canvass the nature of the communication by monitoring for and reading or responding to the communication, which they are being remunerated specifically to do, meaning subclause XX.4(c) has no practical utility.
14. Clause XX.4 also requires that contact from the employer must be in accordance with usual arrangements for such notification. ACCI submits that the inclusion of this criteria invites disputation around what constitutes the 'usual arrangements' of notifications, which is unnecessary. Where an award provides specific notification requirements, the employer will be required to adhere to those requirements. Where there are no specified requirements, an employer should be granted the managerial prerogative to determine the method of communication. ACCI submits that a commonsense approach is required. Where an employer requires an employee to commence work, it will not adopt an impractical or unorthodox method of communication. Such behaviour is counterproductive for both parties.
15. ACCI suggests that it may be more helpful for conversation around the method of communication to take place in the Guidelines that will be developed by the FWC. For example, it would be beneficial to encourage employers, where a method of communication is not mandated, to establish their own policy for communication. This allows for flexibility and change depending on methods that suit both the employer and employee.

16. ACCI has also considered that other mechanisms of remuneration for work outside of a stand by allowance, or equivalent, may give rise to an expectation that an employee is available for contact outside of hours. It is reasonable, where an employee is being paid additionally to accommodate ad hoc business requirements, that an employer may require that employee to monitor, read or respond to communication.
17. ACCI proposes that clause XX.4 be reworded to the below expression, and will address subclauses XX.4(c) and (d) in further in the submission.

XX.4 *Clause XX.4 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 the employee:*

- (a) is being paid the stand-by allowance under clause 20.5,*
- (b) is in receipt of additional remuneration for the purpose of completing reasonable additional hours;*
- (c) receives an emergency roster change under clause 12.3(a)(iii); or*
- (d) receives a notification regarding a recall to work under clause 20.4*

Clause XX.5

18. ACCI is concerned that the wording of clause XX.5 creates unnecessary confusion. By stipulating that clause XX.3 does not prevent an employer from contacting an employee, there is an insinuation that there may be occasions where an employer is prevented from contacting an employee. Based on the wording of the draft term, there does not appear to be any intent on the part of the FWC to prevent an employer from contacting an employee. ACCI submits that the apparent intent of the FWC was to include specific reference to occasions where an employer may be required to provide notification to an employee, such as in the event of an emergency roster change or a recall to work. It is indisputable that an employer is permitted to contact an employee in these circumstances.
19. ACCI submits then that clause XX.5 is superfluous and need not be included in the draft term, however, ACCI also acknowledges the FWC's desire to specifically reference emergency roster changes and recall provisions. ACCI's position is that where a business utilises emergency roster changes and recall provisions, it is reasonable for an employer to require an employee to monitor communication so that they can fulfil the duties of their employment. ACCI submits that these provisions are not foreign to employees, and that there is an expectation that those provisions may be enlivened during the employment relationship.
20. Ensuring adequate attention is given to recall provisions and emergency roster changes is pivotal to the operation of a business and ensures that an employee can undertake all elements of their duties. To appropriately address this necessity, ACCI proposes that clause XX.5 is removed, and recall and emergency roster change provisions are addressed in clause XX.4

21. If the FWC is not inclined to remove clause XX.5 in its entirety, ACCI submits that these provisions would be more appropriately referenced in the following way:

XX.5 *Where an employer contacts, or attempts to contact, an employee with a notification regarding an emergency roster change under clause 12.3(a)(iii), and that notification is compliant with the notification requirements, the employer is considered to have met their notification obligations.*

XX.6 *Where an employer contacts, or attempts to contact, an employee with a notification regarding a recall to work under clause 20.4, and that notification is compliant with the notification requirements, the employer is considered to have met their notification obligations.*

22. ACCI considers that its approach achieves the same purpose as the FWC intended but avoids any confusion regarding an employer's ability to contact, or attempt contact with its employees. If there are no notification requirements, for example, if there is no specification for notice period or method of communication, ACCI suggests that '*and that notification is compliant with the notification requirements*' may be removed from the proposed clause.

23. ACCI submits that its approach is a commonsense approach. Where an employee accepts work with an employer in circumstances where they are likely to be subject to emergency shift changes or being recalled to work, they understand that there is a level of monitoring of employer contact required. ACCI also suggests that employers have likely made this clear to employees upon their commencement and have likely given those employees an expectation of frequency.

24. The right to disconnect term should not call into question the operation of award terms that already exist. The FWC have stipulated that it may, by way of application or its own prerogative, vary modern awards after 26 August 2024 addressing the specific circumstances of particular industries and occupations. ACCI reiterates its support of this approach, as the FWC will be able to deliberate over evidence-based industry- or occupation specific issues.

25. ACCI considers that future considerations for the FWC will likely entail whether it is reasonable for an employee to exercise their right to disconnect in the event of an emergency roster change or a recall to work. ACCI submits that while the FWC will be able to deliberate 'reasonableness' in these matters, what should not be contentious is that the employer, pending their compliance with award provisions, has fulfilled their notification obligations.

26. ACCI has suggested the deletion of reference to any 'usual arrangements' for communication. As previously canvassed, ACCI submits that the inclusion of this criteria invites disputation around what constitutes the 'usual arrangements' of notifications, which is unnecessary, and relies on its reasoning above. ACCI also considers that its proposed approach is inclusive of methods of communication, where mandated, and renders the inclusion of any reference to 'usual arrangements' largely unhelpful.



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