



Fair Work  
Commission

# Implementation Report

## Right to disconnect

---



# Contents

|   |    |
|---|----|
| Contents .....  | 2  |
| Implementation Report – right to disconnect .....                                   | 3  |
| Introduction .....  | 3  |
| (I) Overview of the Commission’s right to disconnect functions.....                 | 6  |
| The right to disconnect .....   | 6  |
| Disputes about the right to disconnect.....   | 7  |
| Stop orders.....  | 8  |
| Dealing with disputes in other ways .....   | 9  |
| General protections provisions .....  | 9  |
| (II) Implementation of the right to disconnect functions .....                      | 11 |
| Right to disconnect case management .....   | 11 |
| Forms and correspondence .....  | 12 |
| Performance measures .....  | 12 |
| Resources .....   | 13 |
| Engagement .....  | 14 |
| Feedback .....  | 15 |
| ATTACHMENT A: Workflow for stop orders and/or disputes.....                         | 16 |
| ATTACHMENT B: Proposed case management process for stop orders and/or disputes..... | 17 |



Fair Work  
Commission



# Implementation Report – right to disconnect

---

## Introduction

1. This Implementation Report discusses functions that will be conferred on the Fair Work Commission (Commission) related to the new employee right to disconnect under Part 8 of Schedule 1 to the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Closing Loopholes No. 2 Act).
2. The amendments commence on 26 August 2024, but do not apply to an employer that is a small business employer on commencement, or to an employee of such an employer, until 12 months after commencement.
3. Part 8 of the Closing Loopholes No. 2 Act inserts a new Division 6—Employee right to disconnect in Part 2-9 of the *Fair Work Act 2009* (FW Act), which:
  - establishes a new employee right to disconnect, which is a workplace right for the purposes of Part 3-1 of the FW Act (s.333M),
  - provides for the Commission to deal with a dispute between an employee and their employer about the right to disconnect, including by issuing a stop order and/or otherwise dealing with the dispute (in addition to the Commission’s functions under the general protections provisions in Part 3-1) (ss.333N-333V), and
  - requires the Commission to make written guidelines in relation to the operation of Division 6 (s.333W).
4. Part 8 also inserts a new section 149F into the FW Act, which requires that modern awards include a



right to disconnect term<sup>1</sup> and applies in relation to any modern award in operation on or after commencement. The Commission must, by the day before commencement, make a determination varying modern awards to contain a right to disconnect term.

5. In a [statement](#) issued on 27 February 2024 setting out the Commission’s approach to implementation of its new functions under the Closing Loopholes No. 2 Act, the President of the Commission said:

the Commission remains steadfast in its commitment to implementing the changes in an open and transparent way and with the needs of our users at the heart of the design of our services.<sup>2</sup>

6. The President noted that the new right to disconnect function will require significant case management support to be established prior to implementation and that an implementation report in relation to the new stop order jurisdiction would be published. This report gives effect to that commitment and is intended to support engagement and consultation with stakeholders about implementation of the provisions.
7. On 12 March 2024, the President issued a further statement commencing a major case ([AM2024/14](#)) to deal with the creation of a right to disconnect modern award model term and guidelines. The case has been allocated to a Full Bench consisting of the President, Vice President Asbury, Deputy President O’Neill and Commissioner McKinnon. The President of the Fair Work Commission released a statement on 11 July 2024 [\[2024\] FWC 1818](#) detailing that the Commission had developed a draft ‘Employee right to disconnect’ term following an extensive consultation process and taking into account the views of peak councils and other interested parties. The draft term is set out in Attachment A of that statement.
8. Accordingly, this implementation report does not cover the development of the right to disconnect modern award term and guidelines.

---

<sup>1</sup> This is defined in section 12 of the FW Act as “a term in a modern award that provides for the exercise of an employee’s rights set out in subsections 333M(1) and (2)”.

<sup>2</sup> President’s Statement 27 February 2024 at [7]; see also President’s Statement [20 December 2023](#) in relation to implementation of functions arising from *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* and the President’s Statement of [8 December 2022](#) in relation to implementation of changes arising from the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*.



Fair Work  
Commission

9. This report is divided into two sections. The first outlines the new right to disconnect and provisions establishing the Commission's functions in relation to right to disconnect disputes. The second section outlines the actions the Commission proposes to take in implementing these functions.
10. People and organisations with an interest in the Commission's new functions relating to the right to disconnect are invited to comment on anything in this implementation report and the draft materials prepared by the Commission. Feedback can be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **Friday 2 August 2024**.



## (I) Overview of the Commission's right to disconnect functions

### The right to disconnect

11. The right to disconnect is set out in Subdivision A of new Division 6 of Part 2-9 of the FW Act:

#### **333M 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 or 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



Fair Work  
Commission

- (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.

## Disputes about the right to disconnect

12. Subdivisions B to D of Division 6 of Part 2-9 provide for the Commission to deal with disputes about the right to disconnect, if an application is made under section 333N(3) by either party to the dispute.

13. Section 333N(1) sets out the circumstances in which an application can be made:

### **333N 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.

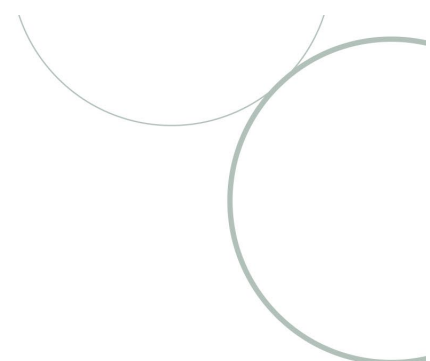
#### *Workplace level discussions*

(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.

14. Before an application can be made to the Commission under section 333N(3), the employer and employee must try to resolve the dispute through workplace level discussions. If these discussions do not resolve the dispute, the employer or the employee may apply to the Commission under section 333N(3) 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.

15. Section 333N(4) provides that either party may appoint a person or industrial association to provide support or representation for the purposes of resolving the dispute, applying to the Commission, or the Commission dealing with the dispute, subject to section 596 of the FW Act.



## Stop orders

16. Subdivision C of Division 6 of Part 2-9 sets out the Commission's powers to make stop orders in relation to the right to disconnect. Section 333P provides:

### **333P Orders to stop refusing contact or to stop taking certain actions**

- (1) If an application made under subsection 333N(3) includes an application to make an order under this section and the FWC is satisfied that either or both of the following apply:
  - (a) an employee has unreasonably refused to monitor, read or respond to contact or attempted contact for the purposes of subsection 333M(1) or (2) and there is a risk the employee will continue to do so;
  - (b) an employee's refusal to monitor, read or respond to contact or attempted contact for the purposes of subsection 333M(1) or (2) is not unreasonable and there is a risk that the employer will:
    - (i) take disciplinary or other action against the employee because of the employer's belief that the refusal is unreasonable; or
    - (ii) continue to require the employee to monitor, read or respond to contact or attempted contact despite the employee's refusal to do so;

then the FWC may make an order under subsection (2).
- (2) The FWC may make any order it considers appropriate (other than an order requiring the payment of a pecuniary amount):
  - (a) if the FWC is satisfied that the circumstance set out in paragraph (1)(a) applies—to prevent the employee from continuing to unreasonably refuse to monitor, read or respond to contact or attempted contact; or
  - (b) if the FWC is satisfied that the circumstance set out in subparagraph (1)(b)(i) applies—to prevent the employer from taking the action; or
  - (c) if the FWC is satisfied that the circumstance set out in subparagraph (1)(b)(ii) applies—to prevent the employer from continuing to require the employee to monitor, read or respond to contact or attempted contact.
- (3) The FWC must:
  - (a) start to deal with an application, to the extent that it consists of an application for an order under this section, within 14 days after the application is made; and
  - (b) deal with the application as soon as is reasonably practicable after the FWC starts to deal with it.
- (4) Despite subsection (2), the FWC may dismiss an application made under subsection 333N(3), to the extent that it consists of an application for an order under this section, if the FWC considers that the application:
  - (a) is frivolous or vexatious; or
  - (b) might involve matters that relate to:





Fair Work  
Commission

- (i) Australia's defence; or
  - (ii) Australia's national security; or
  - (iii) an existing or future covert operation (within the meaning of section 12E of the Work Health and Safety Act 2011) of the Australian Federal Police; or
  - (iv) an existing or future international operation (within the meaning of section 12E of the Work Health and Safety Act 2011) of the Australian Federal Police. Note: For another power of the FWC to dismiss an application, see section 587.
- (5) If an employer considers an application made under subsection 333N(3) (the original application) to be frivolous or vexatious, the employer may apply to the FWC:
- (a) to have the original application dealt with expeditiously and efficiently; and
  - (b) a decision on the original application communicated by the FWC to the parties to the dispute in a timely way.

17. Section 333Q provides that a person to whom a section 333P order applies must not contravene a term of the order. This is a civil remedy provision. The remainder of Subdivision C deals with the application of the *Work Health and Safety Act 2011* and actions prejudicial to Australia's defence or national security.

## Dealing with disputes in other ways

18. Subdivision D of Division 6 of Part 2-9 provides for the Commission to deal with disputes in other ways. Section 333V provides:

### **333V Dealing with disputes in other ways**

If an application made under subsection 333N(3) for the FWC to deal with a dispute does not consist solely of an application for an order under section 333P:

- (a) the FWC must deal with the dispute; and
- (b) if the parties notify the FWC that they agree to the FWC arbitrating the dispute—the FWC may deal with the dispute by arbitration.

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion (see subsection 595(2)). See section 333P if the application also includes an application for an order under that section.

## General protections provisions

19. The rights in new sections 333M(1) and (2) are workplace rights for the purposes of Part 3-1 of the FW Act. Section 340 of the FW Act prohibits a person taking adverse action against another person because of a workplace right.



Fair Work  
Commission

20. Section 365 provides for an application to be made to the Commission to deal with a dismissal dispute involving an alleged contravention of Part 3-1. Applications to deal with non-dismissal disputes can be made under section 372.



## (II) Implementation of the right to disconnect functions

21. This section of the report outlines the Commission's plans to implement the new right to disconnect functions, including proposed case management processes, information and education resources and engagement activities.
22. As outlined in the President's [statement](#) issued 27 February 2024, Vice President Asbury has been appointed to oversee the implementation of the Closing Loopholes changes.

### Right to disconnect case management

23. The right to disconnect disputes jurisdiction will require new case management processes and will be supported by Commission staff. The proposed model is based on the current anti-bullying jurisdiction the Commission has already successfully integrated into its processes.
24. A workflow graphic for applications made under section 333N(3) is attached at **Attachment A**. A graphic of the proposed case management process is at **Attachment B**.
25. Initially all right to disconnect stop order and dispute matters will be allocated to the President. The President will constitute a Full Bench to preside over early applications in order that authoritative guidance is available to the Commission's stakeholders and Members.
26. In the longer term, these matters will be allocated to Members in line with the current regional allocation process. All matters concerning the right to disconnect stop orders and disputes will be dealt with only by Members at this stage.
27. Once a matter is allocated to a Member, the Member will decide how to deal with the matter, including any preliminary or jurisdictional issues. This includes any application by an employer under s.333P(5) to have the application dealt with expeditiously and efficiently. Where an application is made for a stop order under s.333P, Members will have a broad discretion to deal with the application, including listing the matter for a conference or a hearing (see section 590 of the FW Act). Where an application is not solely for a stop order (see s.333V), the Commission must deal with the dispute in accordance with s.595(2) and may arbitrate only by consent.
28. The email address [wdt@fwc.gov.au](mailto:wdt@fwc.gov.au) will be available for parties to file documents with the Commission and to contact case managers prior to Member allocation.



Fair Work  
Commission

29. A new results framework will be developed in the Commission's case management system to process applications.
30. General protections matters dealing with adverse action in relation to the right to disconnect will be allocated to Members through the regional allocation process, as is the current process for matters lodged under existing general protections provisions.

## Forms and correspondence

31. The Commission is developing several new forms so that applicants can lodge applications related to the right to disconnect:
32. The proposed new forms are as follows:
  - Form Fxx- Application for the Commission to deal with a dispute about the employee right to disconnect
  - Form Fxx – Response to an application to deal with a dispute about the employee right to disconnect
  - Form Fxx- Notification of agreement for arbitration of a right to disconnect dispute
33. Each of these forms will be designed to reduce complexity and regulatory burden, drawing on user experience and using plain language. The forms are simpler so that they are easier for parties to use. They also direct parties to relevant information on the Commission's website.
34. There will also be changes to the existing general protections forms to accommodate the new workplace right to disconnect.
35. Correspondence to parties that is sent during the case management process will also use plain language. Using plain language throughout these pieces of correspondence helps parties understand the Commission's processes and minimises the confusion and anxiety that many people feel when they are involved in a legal case.

## Performance measures

36. A new performance measure specific to stop order applications has been introduced under the Closing Loopholes No. 2 Act.



37. Section 333P(3) requires the Commission to start to deal with an application, to the extent that it consists of an application for a stop order, within 14 days after the application is made. This aligns with the timeliness benchmarks for both sexual harassment and anti-bullying stop order applications.
38. The Commission may 'start to deal with an application' through the initial staff contact as part of the case management process or by a Member dealing with the matter, for example by making inquiries about an application, requiring the provision of information under s.590 of the Fair Work Act, or by holding a conference.
39. The 14-day performance measure only applies to applications under s.333N(3)(a) for an order to stop refusing contact or to stop taking certain actions and will be incorporated into the Commission's regular performance reporting. The Commission's existing performance measures will apply to dispute applications to the extent that they do not relate to stop orders, and to general protections applications involving the right to disconnect.

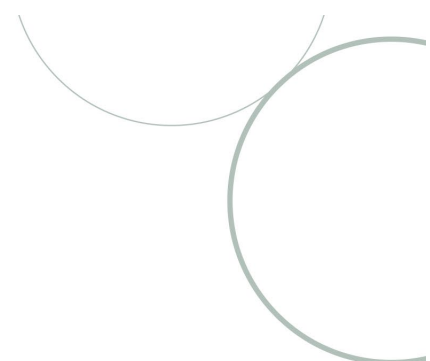
## Resources

### Website information

40. Detailed information on the Commission's functions with respect to right to disconnect disputes will be available on the Commission's website before 26 August 2024, with updates made as the jurisdiction commences.
41. Content will include:
  - What is the right to disconnect
  - What applications can be made to the Commission
  - Who can apply
  - How we deal with disputes
  - Hearings and conferences
  - Costs against parties
  - Case management
  - Commission processes and resources



Fair Work  
Commission



### **Right to Disconnect Benchbook**

42. The Commission will create a new benchbook for the right to disconnect, including details of relevant case law as it develops, and guidance for parties and their representatives.
43. Once finalised the benchbook will be published to the Commission's website.

### **Amendments to the Fair Work Commission Rules 2024**

44. The Rules will be amended to deal with applications to deal with disputes about the right to disconnect. This will predominantly include changes to service requirements in Schedule 1 of the Rules for the new forms being developed.
45. The Rule amendments will be made and published as soon as possible after commencement, taking into account the need for consultation.

## **Engagement**

46. The Commission is committed to consulting with affected persons, businesses and organisations as we implement these new functions. Actions will include:
  - sharing information resources with the Fair Work Ombudsman
  - sharing information resources with the Department of Employment and Workplace Relations on a fortnightly basis
  - engaging with key stakeholders and peak bodies
  - public consultation measures including LinkedIn posts, website content, subscriber notices, process animations and the publication of this or other implementation reports.

### **Small business**

47. As outlined above, the amendments commence on 26 August 2024, but do not apply to an employer that is a small business employer on commencement, or to an employee of such an employer, until 12 months after commencement (being 26 August 2025).
48. The Commission intends to prepare specific information and education materials for small business as the jurisdiction develops.



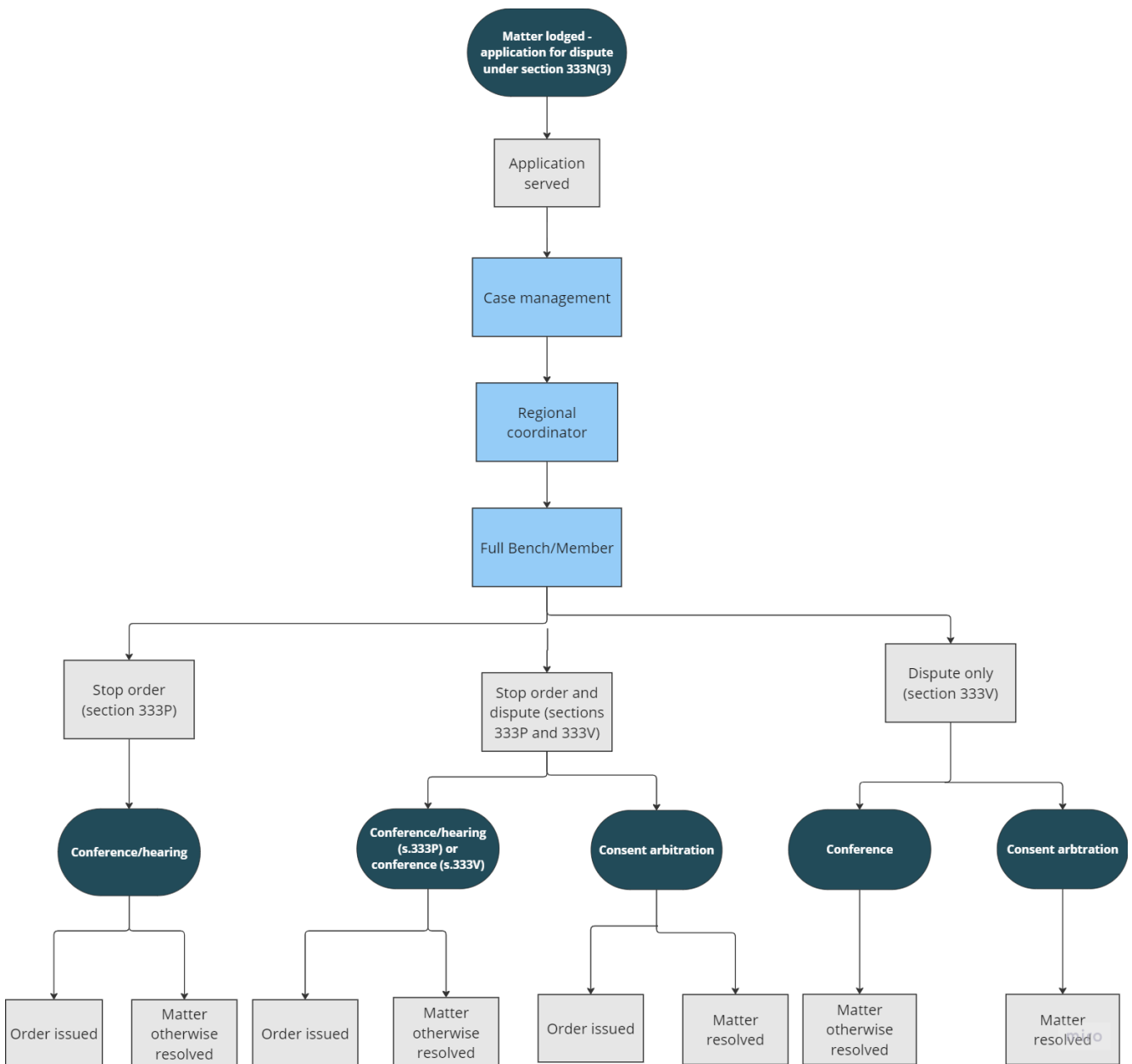
Fair Work  
Commission

## Feedback

49. Members of the public are invited to comment on the Commission's plans for engagement or anything else contained in this Implementation Report.
50. Feedback can be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **Friday 2 August 2024**.



# ATTACHMENT A: Workflow for stop orders and/or disputes







# ATTACHMENT B: Proposed case management process for stop orders and/or disputes

