



DECISION

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
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT O'NEILL
COMMISSIONER MCKINNON

SYDNEY, 23 AUGUST 2024

Variation of modern awards to include a right to disconnect term – right to disconnect term finalised – final determinations issued for 155 modern awards.

[1] On 12 March 2024, this matter was initiated by the Commission in accordance with the requirement in clause 111C(2) of Schedule 1 to the *Fair Work Act 2009* (Cth) (FW Act) for the Commission to vary all modern awards to include a right to disconnect term by 26 August 2024. The statutory background was explained in a statement issued by the presiding member on the same date.¹ A Full Bench was constituted to deal with this matter. The Full Bench has received and considered proposals and submissions from interested parties and conducted a consultation hearing on 19 June 2024.² The process has also involved a detailed audit of existing award terms that may relate to the right to disconnect.³ Interested parties were also invited to comment on that audit.

[2] On 11 July 2024, the Commission published a draft right to disconnect term for the *Business Equipment Award 2020*. In an accompanying statement, the presiding member explained the intended operation of the draft term, including how it would be adapted across all modern awards.⁴ Parties were given until 1 August 2024 to comment on the draft term. A few parties sought and received an extension of time in which to do so. By 2 August 2024, the Commission had received 18 submissions in relation to the draft term.

[3] The Full Bench has considered the submissions received. We have determined not to make any fundamental changes to the draft term, which is intentionally minimalist in nature reflecting the novelty of the right to disconnect and the likelihood that future variations to the term in particular awards will be necessary once the issues affecting specific industries and occupations are better understood. However, we have decided to make the following drafting changes in response to particular matters raised in the submissions:

- We have added an additional paragraph to the explanatory note following clause XX.1 which explains that the general protections provisions in Part 3-1 of the FW Act prohibit the taking of adverse action by an employer against an employee because of the employee's rights under s 333M.

- We have modified the drafting of paragraph (b) of clause XX.4 to remove an unintended limitation on an employer's capacity to contact an employee in receipt of an award stand-by allowance in respect of the stand-by.
- We have deleted paragraph (c) of clause XX.4 because difficulty in identifying what, if any, are the employer's 'usual arrangements' for notifying employees may complicate or confuse the operation of the clause.
- We have slightly redrafted clause XX.5 to make clear that the clause, where included in an award because of the existence of a short-notice roster change or call-back provision, is not intended to be exhaustive as to the circumstances in which an employer may contact or attempt to contact an employee outside of the employee's working hours. It should be noted that clause XX.5 is also not intended to prescribe whether the employee's right to disconnect applies in the circumstances described in the clause.⁵

[4] Additionally, we have inserted a note in the form of a table at the end of existing dispute resolution clauses to alert readers to s 333N, which when operative will prescribe a procedure for resolving disputes about an employee's right to disconnect. This table incorporates existing notes about the statutory dispute resolution procedures for the entitlements to request flexible working arrangements and extensions to unpaid parental leave.

[5] The determinations varying all modern awards to include a right to disconnect term are issued together with this decision. In most awards, the term is added as a stand-alone clause immediately following the hours of work clause. In a small number of awards which have multiple hours of work provisions for different streams of employees, the clause will be inserted into Part 1 of the award.

[6] In accordance with clause 111C(3) of Schedule 1 of the FW Act, the variations will take effect on 26 August 2024.

[7] The Commission intends to undertake a review of the right to disconnect terms in modern awards approximately 12 months after the terms take effect. This will give parties the opportunity to raise any practical difficulties which they perceive have arisen in the operation of the terms either generally or in particular industries or occupations. This does not of course prevent any party with standing to do so from applying to vary the terms in particular awards pursuant to s 158 of the FW Act prior to that review.

[8] We confirm that we do not intend to make guidelines concerning the right to disconnect at the present time.⁶ We consider that the Commission 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.



PRESIDENT

Attachment A: Right to disconnect term for the *Business Equipment Award 2020*

12A. Employee right to disconnect

12A.1 Clause 12A provides for the exercise of an employee’s right to disconnect under 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) lists 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) Section 333N provides for the resolution of disputes about whether an employee’s refusal is unreasonable and about the operation of section 333M.
- (e) The general protections in Part 3-1 of the Act prohibit an employer taking adverse action against an employee because of the employee’s right to disconnect under section 333M of the Act.

12A.2 Clause 12A 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.

12A.3 An employer must not directly or indirectly prevent an employee from exercising their right to disconnect under the Act.

12A.4 Clause 12A.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; and
- (b) the employer’s contact is to notify the employee that they are required to attend or perform work or give other notice about the stand-by.

12A.5 Clause 12A.3 does not prevent an employer from contacting, or attempting to contact, an employee outside of the employee’s working hours in circumstances including to notify them 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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¹ [\[2024\] FWC 649](#).

² [Transcript, 19 June 2024](#).

³ [\[2024\] FWC 1362; Fair Work Commission staff modern awards audit](#) (23 May 2024).

⁴ [\[2024\] FWC 1818](#).

⁵ The clause as it will be inserted into the *Business Equipment Award 2020* is at Attachment A to the decision.

⁶ See [\[2024\] FWC 1818](#) at [11].