



AUSTRALIA | EMPLOYMENT | MARCH 2024

## AN EMPLOYEE'S RIGHT TO DISCONNECT

On 12 February 2024, the '*Closing Loopholes No. 2 Bill 2023*' was passed by the Federal Parliament, enacting a new employee right: the 'Right to Disconnect'. In this article, we examine the scope of the Right to Disconnect and how it may impact your business.

### The 'Right to Disconnect'

From 26 August 2024<sup>1</sup>, employees across Australia will have the right to disconnect from work (**Right to Disconnect**) under the Fair Work Act 2009 (Cth) (the **FW Act**) as amended by the Fair Work Legislation (Closing Loopholes No. 2) Act 2024 (the **Act**). Employees will be legally entitled to refuse to monitor, read or respond to contact and / or attempted contact<sup>2</sup> by their employer or by a third party (e.g. a client) outside their contractual working hours.

In practice, this means that employees will be entitled to ignore calls, emails, text messages and other forms of contact from their employer and clients, which are received before their working day commences and / or after it ends.

### A reasonable right

There is an exception to the Right to Disconnect: employees may not unreasonably refuse to respond to contact made outside their working hours.

An employee's refusal to engage with contact will be unreasonable if the contact is required under Commonwealth, State or Territory law.

Otherwise, the reasonableness of the refusal will be assessed with reference to a range of matters, including (but not limited to):

- the reason for contact;
- how the contact was made and the level of disruption it caused the employee;
- the extent to which the employee is compensated for out of hours contact (i.e. whether they are compensated for working additional hours or agreeing to remain 'on call' during evenings and weekends);
- the nature of the employee's role and their level of responsibility; and
- the employee's personal circumstances, including family or caring responsibilities.

### A workplace right

The Right to Disconnect will be a right protected under the 'General Protections' provisions of the FW Act.

Whilst employers may still **contact** their employees outside of their working hours, it will be unlawful for employers to take adverse action against an employee who lawfully exercises their Right to Disconnect, such as disciplining or dismissing the employee.

### Disputes: the role of the Fair Work Commission

The Fair Work Commission (**FWC**) will be empowered to deal with disputes regarding the Right to Disconnect, including disputes over whether the employee's refusal to monitor, read or respond to contact is unreasonable.

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<sup>1</sup> (Or an earlier date set by the Australian Government.)

<sup>2</sup> For ease, we refer to "contact and / or attempted contact" as "contact" throughout the remainder of this article.

If attempts to resolve the dispute between the employer and employee are unsuccessful, either party may refer the dispute to the FWC seeking orders regarding the dispute, including:

- an order that the employee stop unreasonably refusing to monitor, read or respond to contact outside their working hours;
- an order that the employer cease requiring an employee to be contactable outside of their working hours; or
- an order that the employer refrain from disciplining the employee because the employee has exercised, or is exercising, their Right to Disconnect.

Breach of an order made by the FWC in respect of Right to Disconnect disputes may attract civil penalties (i.e. a fine).

## Key take aways

Employers should take steps now to evaluate how the Right to Disconnect will affect their business, their ability to communicate with their employees and how they interact with their employees outside contractual working hours. This may include:

- considering whether to amend existing work practices, policies and contracts of employment in light of the forthcoming Right to Disconnect; and
- providing appropriate training to managers and employees about the scope and legal implications of the new right, and about the disputes process, in order to minimise the risk of claims.

Employers who require employees to be contactable after working hours on a regular basis, whether that contact is made by colleagues or by clients, will need to review and adapt their approach to employee communications, taking into account the protections afforded by the Right to Disconnect.

This article provides a high level overview of the Right to Disconnect. For more information, or if you would like advice about how your business can prepare for the Right to Disconnect, please contact the authors of this article or your usual HFW contact(s).

You can read our previous updates on recent amendments to the FW Act here:

- [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023](#)
- [Criminalising Wage Theft](#)
- [Regulated Labour Hire Reforms](#)
- [New Delegates' Rights Provisions](#)

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