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ABSTRACT

Australia is set to join the likes of several international jurisdictions by implementing its own statutory right to disconnect on 26 August 2024 for most employees (or 26 August 2025 for those working in small businesses). This article introduces Australia's new right to disconnect. It explains where the right sits in the broader context of Australia's employment law system. The right's rapid legislative development is traced, along with its proposed operation under Australia's key employment law statute, the Fair Work Act 2009 (Cth). The rationale for the right becoming part of Australian employment law is also explored.

Keywords: right to disconnect; Australia; employment law; statute.

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Introducing Australia's New Right to Disconnect

SUMMARY: 1. Introduction. – 2. Situating the Right in Australia's Employment Law System. – 3. The Right's Rapid Legislative Development. – 4. The Right as Defined by the FW Act. – 5. Resolving Disputes Concerning the Exercise of the Right. – 6. The Right's Rationale. – 6. Conclusion.

1. Introduction

This article examines a significant development in Australian employment law: the introduction of a statutory right to disconnect from 26 August 2024([1]), or from 26 August 2025 for those employees working in small businesses([2]). It presents a momentous legislative change for Australian employers and employees alike([3]). At long last, Australian employment law has caught up to the likes of other overseas jurisdictions where a right to disconnect has been prevalent for some time([4]). The right will present a unique and welcome opportunity for Australian employees to put down their digital devices outside their working hours, and to have the ability to fully escape their work, without fear of retribution. It will hopefully also see a curb to the significant amount of unpaid overtime worked by Australian employees each year, which has only been exacerbated further with the significant changes to employee working patterns since the commencement of the COVID-19 pandemic. Employee health and wellbeing are also predicted to dramatically improve by virtue of the right's introduction.

I will begin by explaining where Australia's new right to disconnect sits within the broader framework of Australian employment law in Part 1. With that understanding in mind, the discussion in Part 2 charts the relatively swift legislative development of the right up until the most recent passing of the Fair Work Amendment (Closing Loopholes No. 2) Act 2024 (Cth) ('Closing Loopholes No. 2 Act'), which operates to

([1]) That is, six months after the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (Cth) ('Closing Loopholes No. 2 Bill') received Royal Assent: Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (Cth) ('Closing Loopholes No. 2 Act') s 2(1).

([2]) That is, an employee employed by a «small business employer» that «employs fewer than 15 employees»: Fair Work Act 2009 (Cth) ('FW Act') s 23.

([3]) See, eg, Workplace Express, *Disconnect Right a "Momentous Societal Shift": Academic* (*Workplace Express*, 9 February 2024) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=1&selkey=63085&hlc=2&hlw=Disconnect+Right+a+%E2%80%9CMomentous+Societal+Shift%E2%80%9D%3A+Academic%E2%80%99&s_keyword=Disconnect+Right+a+%E2%80%9CMomentous+Societal+Shift%E2%80%9D%3A+Academic%E2%80%99&s_searchfrom_date=915109200&s_searchto_date=1716559140&s_pagesize=20&s_word_match=2&s_articles=1> accessed 24 May 2024.

([4]) See, eg, those overseas jurisdictions discussed in G. Golding, *The Right to Disconnect in Australia: Creating Space for a New Term Implied by Law*, *University of New South Wales Law Journal*, 2023, 46(2), 731 ss.

amend Australia's Fair Work Act 2009 (Cth) ('FW Act') to include the right, among other things([5]). Part 3 presents a more detailed precis of the legislative right, directly followed by Part 4's explanation of the step-by-step process to be followed in the event of a dispute arising out of an alleged infringement of the right. I then consider more closely the rationale behind the implementation of the right to disconnect in Australia in Part 5, highlighting why the right constitutes a necessary and welcome development in contemporary Australian employment law.

2. Situating the Right in Australia's Employment Law System

Having now introduced this article's content and scope, in this discussion, I move to provide a background to Australia's employment law system. This explanation is conducted with a view to allowing the reader to appreciate where the statutory right to disconnect is situated within Australia's broader employment law context. It introduces the reader to the overarching legislative context in which Australia's new right to disconnect now sits, providing context for what follows in Part 2 and beyond.

As mentioned from the outset, Australia's new right to disconnect has been brought about by the recent passing of the Closing Loopholes No. 2 Act by Australia's Federal Parliament. That Act is set to amend Australia's primary piece of employment law legislation, the FW Act, to include the new right under Part 2-9, Division 6 of the FW Act. Once operational, the right will apply to most Australian employees([6]).

By way of background, the FW Act is Australia's major employment law statute at the Federal level, covering most Australian employees and employers([7]). The FW Act is overseen, primarily, by Australia's Fair Work Commission ('FWC'), which is the country's national employment relations tribunal([8]). It assists in the creation of Modern Awards, approval of enterprise agreements, and the resolution of issues in the workplace([9]). For certain disputes arising under the FW Act, the Federal Circuit and

([5]) For a summary of the other changes, see, eg, Fair Work Commission ('FWC'), *Closing Loopholes in Acts: What's Changing* (*FWC*, 2024) <https://www.fwc.gov.au/about-us/closing-loopholes-acts-whats-changing> accessed 24 May 2024.

([6]) See, eg, K. Yuen - J. Tomlinson, *Profile of Employee Characteristics Across Modern Awards* (Research Report, FWC, 3 March 2023) <https://www.fwc.gov.au/documents/wage-reviews/2022-23/profile-of-employee-characteristics-across-modern-awards-2023-03-03.pdf> accessed 24 May 2024.

([7]) Most employees and employers are part of Australia's national workplace relations system and are therefore covered by the FW Act. However, for those working in state or local governments, they will be covered by the relevant state-based legislation. To take one example, those working for state and local governments in the state of South Australia will instead be covered by the Fair Work Act 1994 (SA).

([8]) See, eg, FWC, *About Us* (*FWC*, 2024) <https://www.fwc.gov.au/about-us> accessed 24 May 2024. For a comprehensive assessment of the FWC's role, and proposed future direction, see, eg, J. I. Ross AO, *Future Directions: Enhancing the Public Value of the Fair Work Commission*, *Journal of Industrial Relations*, 2016, 58(3), 402.

([9]) See, eg, FWC, n 8.

Family Court of Australia and the Federal Court of Australia will also have jurisdiction([10]). Appeals from those courts may, in certain circumstances, eventually be made to the High Court of Australia, so long as special leave to appeal is granted([11]).

The FW Act also contains Australia's National Employment Standards ('NES'), which are a collection of 12 basic minimum entitlements that must be provided to all Australian employees([12]). Broadly speaking, they cover matters like maximum weekly working hours, leave entitlements, and the right to request a flexible working arrangement, among other things([13]). Most Australian employees will also have further employment law rights contained under one of 122 Modern Awards([14]). These statutory-based instruments apply on top of the NES to set minimum terms and conditions of employment, depending on the occupation or industry in which an employee works([15]). Alongside the national minimum wage, Modern Awards form part of the safety net for employees in Australia's national workplace relations system([16]). The provisions of a Modern Award must not be contravened([17]).

One's employment may otherwise be covered by an enterprise agreement, which is a separate statutory-based instrument that covers certain employees and employers([18]). Enterprise agreements are formed on agreement between those employees covered by the agreement and their employer([19]). An enterprise agreement sets out the entitlements that an employer agrees to provide for those employees

([10]) See, eg, Federal Circuit and Family Court of Australia ('FCFCOA'), *Fair Work Overview* (*FCFCOA*, 2024) <https://www.fcfcoa.gov.au/gfl/fairwork-overview> accessed 24 May 2024; Federal Court of Australia ('FCA'), *Jurisdiction* (*FCA*, 2024) <https://www.fedcourt.gov.au/about/jurisdiction> accessed 24 May 2024.

([11]) See, eg, Federal Court of Australia Act 1976 (Cth) s 33. For an assessment of the High Court of Australia's latest decisions concerning employment status, see, eg, E. Schofield-Georgeson - J. Riley Munton, *Precarious Work in the High Court*, *Sydney Law review*, 2023, 45, 2, 219.

([12]) FW Act s 61(1).

([13]) FW Act s 61(2).

([14]) See, eg, Fair Work Ombudsman ('FWO'), *Awards* (*FWO*, 2024) <https://www.fairwork.gov.au/employment-conditions/awards> accessed 24 May 2024, noting that the FWO is Australia's workplace regulator tasked with monitoring, inquiring into, investigating, and enforcing compliance with Australia's workplace laws. For a detailed investigation into the FWO's enforcement capability, see, eg, J. Howe - T. Hardy - S. Cooney, *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012*, Report, University of Melbourne Centre for Employment & Labour Relations Law, 2014.

([15]) See, eg, FWO, n 14.

([16]) Ibid. See further, the useful overview of the minimum standards generated by the NES and Modern Awards in A. Stewart, *Stewart's Guide to Employment Law*, Federation Press, 2021, Ch 7.

([17]) FW Act s 45.

([18]) FWO, *Enterprise Agreements and Other Registered Agreements* (*FWO*, 2024) <https://www.fairwork.gov.au/employment-conditions/agreements#:~:text=Enterprise%20agreements%20and%20other%20registered,minimum%20employment%20terms%20and%20conditions> 24 May 2024.

([19]) Ibid. See further, the detailed summary of the enterprise agreement making process in Stewart (n 16) Ch 8.

covered by the agreement([20]). Once agreed upon at the workplace level, such agreements must be approved by the FWC before becoming operational([21]). The terms and conditions of an enterprise agreement must 'better off overall' than what they otherwise would have been, had the employee's employment remained covered by an applicable Modern Award([22]). As with Modern Awards, the provisions of an enterprise agreement must not be contravened([23]).

For employees earning over and above the high-income threshold, which is indexed yearly, and currently sits at $167,500 AUD([24]), they will have the benefit of being covered by the NES, but not a Modern Award or enterprise agreement([25]). Their employment terms and conditions will otherwise be dictated by their individual contract of employment, which may or may not be in writing (or perhaps not wholly in writing)([26]). For high-income earners, the terms and conditions of their employment cannot undercut the NES, though they can be more favourable([27]).

Nevertheless, for all «national system employees»([28]), regardless of whether they earn above the high-include threshold, the terms and conditions of their employment can be adjusted in accordance with their individual contract of employment, which may or may not be in writing (or at least not wholly in writing)([29]). For employees who are otherwise covered by a Modern Award or enterprise agreement, not only can their contract of employment not undercut the NES, but it also cannot provide for terms and conditions less favourable than those in the applicable Modern Award or enterprise agreement—whichever covers their employment([30]).

As will come to light throughout the remainder of this discussion, particularly in Part 3, Australia's legislative right to disconnect has now required Australia's FWC to amend each of the 122 Modern Awards to include a 'right to disconnect term'([31]). As such, those employees who are covered, or would otherwise be covered, by one of those

([20]) Ibid.

([21]) Provided the agreement meets the criteria set out in FW Act s 186.

([22]) The 'better off overall test' is set out under FW Act s 193.

([23]) FW Act s 50.

([24]) See, eg, FWO, *High Income Threshold Amounts* (*FWO*, 2024) <https://library.fairwork.gov.au/viewer/?krn=K600486> accessed 24 May 2024. See also FW Act s 382(b)(iii) and *Fair Work Regulations 2009* (Cth) reg 3.05 for calculations of the high-income threshold.

([25]) See, eg, FWO, *High Income Employees and Ending Employment* (*FWO*, 2024) <https://library.fairwork.gov.au/viewer/?krn=K600354> accessed 24 May 2024.

([26]) There is no requirement under the FW Act that a contract of employment must be in writing: see, eg, G. Golding, *Shaping Contracts for Work: The Normative Influence of Terms Implied by Law*, Oxford University Press, 2023, 18–9. However, the NES do provide that employees must be provided with a 'Fair Work Information Statement': FW Act s 61(2)(j).

([27]) FW Act s 61(1).

([28]) Ibid s 13.

([29]) See, eg, n 26.

([30]) FW Act s 61(1).

([31]) Ibid s 149F.

Modern Awards, will soon have a right to disconnect as a minimum condition of their employment. As mentioned, the terms and conditions of a Modern Award must not be contravened, which means that a right to disconnect term must be adhered to([32]). Having now considered the broader Australian employment law landscape in which the right to disconnect is to be situated, the following discussion considers the right's relatively rapid development in that context.

3. The Right's Rapid Legislative Development

The time taken to implement a statutory right to disconnect under Australia's FW Act was surprisingly quick. The very first suggestion of a possible right to disconnect in Australian Federal Parliament came through the introduction of a Private Member's Bill by the Leader of the Australian Greens and Member for Melbourne, Adam Bandt MP; the Fair Work Amendment (Right to Disconnect) Bill 2023 (Cth) ('Right to Disconnect Bill'). Mr Bandt introducing it to the Australian House of Representatives, and having it read a second time, on 20 March 2023.

Before then, the only major suggestion of the potential for a right to disconnect had been made during February 2022 by the Australian Council of Trade Unions, which had recommended that such a right become a component of a Working from Home Charter of Rights – a document created on behalf of Australian unions in direct response to the prevalence of working from home conducted during the COVID-19 pandemic and since([33]) Apart from that proposed charter, the only other suggestion for the potential for a legislative right to disconnect was made in an academic article published in early 2023([34]). Aside from that legislative option, that same article explored the potential for the right to become part of workplace policy documents applicable in individual workplaces([35]), enterprise agreements([36]), Modern Awards([37]), the National Employment Standards([38]), an express term in an individual's contract of employment([39]) or even a necessary term implied by law into the class of contracts of employment([40]).

([32]) Ibid s 45.

([33]) Australian Council of Trade Unions, *Working from Home Charter* (*ACTU*, 2022) <https://www.australianunions.org.au/wp-content/uploads/2021/01/ACFrOgC5hWP2shJOsnYAE9E3N2bsiRy4-gu9BYM5lrpopeSolUA0J1TzkFED4JwK8obZjV2dUCQeDwoz-WiAPRDqijRHjFrx1NihO71kSg5ehVjU1KZyjdex9NIWAlziPFjEOrJbd3-RAeeU9peU.pdf> accessed 24 May 2024.

([34]) See, eg, Golding (n 4).

([35]) Ibid 745–6.

([36]) Ibid 747–8.

([37]) Ibid 748–50.

([38]) Ibid.

([39]) Ibid 746.

([40]) Ibid 750–5.

It was, nevertheless, the Right to Disconnect Bill, which served to open the gateway to the legislative right to disconnect now present in Australian labour law. In advocating for that Bill, Mr Bandt referred to the Final Report of the Australian Federal Parliament's Senate Select Committee on Work and Care, which had described the problematic nature of 'availability creep' and the negative impact that was continuing to have on Australian employees(41). That Senate Select Committee had also made the important recommendation of a legislative right to disconnect at Recommendation 23 of its Final Report(42).

The Right to Disconnect Bill set out to prohibit employers from contacting their employees outside of their hours of work, including during periods of leave, except where the reason for the contact was an emergency or genuine welfare matter, or if the employee was in receipt of an availability allowance for the period during which the contact occurred(43). The Bill also sought to protect employees from needing to «monitor, read or respond to emails, telephone calls or any other kind of communication» from their employer outside their working hours (including during periods of leave), save for periods in which they were to be paid an availability allowance(44). Accordingly, «availability allowance» was defined as being «for a period' and constituting 'an allowance for being rostered, or otherwise directed by an employer, to remain available to perform work during the period»(45).

In terms of operation, this right was envisaged as becoming part of Australia's NES, despite that only becoming clear from the Right to Disconnect Bill's Explanatory Memorandum, but not the text of the Bill itself(46) Indeed, the Bill itself made it appear that the right would instead function as a standalone right, which was not the intention. It was not made apparent from the text of the Bill as to how the proposed right would interact with other components of the FW Act, or other industrial instruments like Modern Awards or enterprise agreements. Eventually, despite this quite substantial early development, the Right to Disconnect Bill lapsed, and was removed from being further considered and debated by Federal Parliament(47).

(41) Senate Select Committee on Work and Care, *Final Report* (Parliament of Australia, March 2023) 189 [8.135].

(42) Ibid.

(43) Fair Work Amendment (Right to Disconnect) Bill 2023 (Cth) ('Right to Disconnect Bill') Sch 1, s 64A(1).

(44) Ibid s 64A(2).

(45) Ibid s 64A(3).

(46)Explanatory Memorandum, Fair Work Amendment (Right to Disconnect) Bill 2023 (Cth) (Parliament of Australia, 2023).

(47) Parliament of Australia, Parliamentary Business: Fair Work Amendment (Right to Disconnect) Bill 2023 (Cth)' (*Parliament of Australia*, 2023) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6982> accessed 24 May 2024.

All was not lost for the right to disconnect, however. The Australian Greens were soon successful in having the right included as part of the Australian Labor Party's amendments to the FW Act by way of inclusion into the Closing Loopholes No. 2 Act([48]). The Australian Labor Party had already successfully passed the earlier Fair Work Amendment (Closing Loopholes) Act 2023 (Cth) on 14 December 2023, which made an initial tranche of amendments to the FW Act([49]). However, the Australian Labor Party needed the support of the Australian Greens, along with other independent politicians, to pass its second round of amendments under the Closing Loopholes No. 2 Act([50]) Therefore, rather than having the right to disconnect operational by virtue of its original Right to Disconnect Bill, the Australian Greens were instead successful in leveraging a deal with the Australian Labor Party to have the right included as part of the Closing Loopholes No. 2 Act as part of negotiations during early February 2024([51]).

It so happened that, in the meantime, the right's introduction had received further legislative support from a Senate Inquiry into the proposed Closing Loopholes No. 2 Act. Relevantly, the Senate Inquiry Report indicated that([52]):

«Modern awards and enterprise agreements should incorporate a compliant right to disconnect term and the Fair Work Commission should be empowered to make "stop orders" if a dispute cannot be resolved at the workplace level».

With that support in mind, on 7 February 2024, the final text of the Fair Work Amendment (Closing Loopholes No. 2) Bill (Cth) ('Closing Loopholes No. 2 Bill') was presented to the Australian Senate to be read a second time, with the second and third readings agreed to a day later, on 8 February 2024. Not long after, the Closing Loopholes No. 2 Bill was passed by both Houses of Parliament on 12 February 2024. It received Royal Assent on 26 February 2024, and is now set to become operational six months from that date, and 12 months later for small business employees([53]).

During parliamentary debate, the Bill received substantial support from Australian Greens' Senator Barbara Pocock who recognised that Australia was now on par with «[a]lmost 20 other countries», and that enshrining the right into the FW Act

([48]) P. Karp, R*ight to Disconnect from Work Laws Set to Pass Australian Parliament after Deals with Crossbench*, *The Guardian (Australia)*, 7 February 2024) <https://www.theguardian.com/australia-news/2024/feb/07/australia-right-to-switch-off-laws-industrial-relations-changes-labor-greens> accessed 24 May 2024.

([49]) See, eg, FWC (n 5).

([50]) D. Marin-Guzman, *Burke and Crossbench Near Deal on Right to Disconnect*, *Casuals*, in *Australian Financial Review*, 6 February 2024) <https://www.afr.com/work-and-careers/workplace/burke-backs-no-fines-for-bosses-who-contact-staff-after-hours-20240206-p5f2r9> accessed 24 May 2024.

([51]) D. Marin-Guzman, *Crossbench and Greens Seal Deal on Workplace Changes*, in *Australian Financial Review*, 7 February 2024) <https://www.afr.com/work-and-careers/workplace/workers-to-get-right-to-ignore-after-hours-calls-from-bosses-20240207-p5f313> accessed 24 May 2024.

([52]) Senate Education and Employment Legislation Committee, *Report into the Fair Work Legislation Amendment (Closing Loopholes No 2) Bill 2023 [Provisions]*, Parliament of Australia, February 2024, 56 [2.188]–[2.194].

([53]) Closing Loopholes No. 2 Act s 2(1).

would mean that Australia was simply «playing catch-up with the rest of the world … It is good for workers, good for their kids, good for their mental health, good for our communities and also good for our productivity»([54]). Separately, Independent Senator David Pocock reflected that the right «strikes the right balance, where it is a right for the employee to not have to respond if they think it's unreasonable, if they're not being paid for that time»([55]).

Despite that support, it would be remiss not to mention that the passing of the Closing Loopholes No. 2 Bill was not without substantial opposition from the Australian Liberal Party, as well as representatives from employer groups([56]). For example, as part of debate surrounding the Bill, Liberal Senator Michaelia Cash, suggested that the right would make it «harder to do business»([57]). Likewise, Australian Chamber of Commerce and Industry ('ACCI') Chief Executive, Andrew McKellar, suggested that the right was a «triumph of stupidity over common sense»([58]). He also envisaged that the right's introduction would amount to «the final step in Australia becoming a banana republic»([59]). Separately, in a submission to the abovementioned Senate Inquiry on the Closing Loopholes No. 2 Bill, the ACCI advocated that the right would constitute an instrument which would «do more harm than good, including for employees»([60]). The right's introduction was also touted in the media as the «end of flexibility»([61]), and something which would be entirely unsuitable for multinational

([54]) Commonwealth of Australia, *Parliamentary Debates* (House of Representatives, 7 February 2024) 101 (B. Pocock).

([55]) Ibid 109 (D. Pocock).

([56]) See, eg, A. Fowler, *Truth About Proposed "Right to Disconnect" Law that Too Many Aussies are Ignoring*, *News.com.au*, 9 February 2024) <https://www.news.com.au/finance/work/at-work/truth-about-proposed-right-to-disconnect-law-that-too-many-aussies-are-ignoring/news-story/ac8ff1540196578f8e4ce96bc2302482> accessed 24 May 2024; L. Grassby, *ACCI Chief Andrew McKellar Says "Right to Disconnect" from Work Provisions in Labor's IR Reforms "Don't Make Sense" for Many Businesses* (*Sky News*, 7 February 2024) <https://www.skynews.com.au/australia-news/politics/acci-chief-andrew-mckellar-says-right-to-disconnect-from-work-provisions-in-labors-ir-reforms-dont-make-sense-for-many-businesses/news-story/71c161f3a7ca4514eb5cd78861fe27bd> accessed 24 May 2024.

([57]) Commonwealth of Australia, *Parliamentary Debates*, (House of Representatives, 7 February 2024) 17 (Michaelia Cash).

([58]) L. Grassby, *ACCI Chief Andrew McKellar Says "Right to Disconnect" from Work Provisions in Labor's IR Reforms "Don't Make Sense" for Many Businesses*, cit.

([59]) D. Marin-Guzman, *Right to Disconnect, Casual Carve-outs Part of IR Talks* (*Australian Financial Review*, 1 February 2024) <https://www.afr.com/work-and-careers/workplace/right-to-disconnect-casual-carve-outs-part-of-ir-talks-20240131-p5f1e5> accessed 24 May 2024.

([60]) Australian Chamber of Commerce and Industry ('ACCI'), *Fair Work Legislation Amendment (Closing Loopholes No 2) Bill 2023: Supplementary ACCI Submission*, 2023, 9 [2.13].

([61]) See, eg, E. Black, *Right to Disconnect Dismissed as "A Step Back" for Flexibility*, *Australian Financial Review*, 28 July 2023, <https://www.afr.com/work-and-careers/workplace/right-to-disconnect-dismissed-as-a-step-back-for-flexibility-20230728-p5ds07> accessed 24 May 2024.

employers(62). Arguments suggesting that the right was unsuitable for those working in the legal profession were made(63), with the added suggestion that junior lawyers who wanted to get ahead in their careers should ignore the right altogether(64). It was therefore somewhat predictable that when asked if he would take a promise to repeal the new right to disconnect to the next Australian federal election, Leader of the Opposition, Peter Dutton MP, responded unquestionably, saying, «Yes, we will»(65).

4. The Right as Defined by the FW Act

With the right to disconnect soon to come into operation in Australia because of the above legislative development, I turn now to discuss the right's legislative operation under the amended FW Act. The discussion in this Part considers the right as defined by the FW Act. An explanation of the dispute resolution procedure set out under the FW Act follows afterwards in Part 4.

It has already been mentioned in Part 1 that Australia's new legislative right to disconnect is contained under Part 2-9, Division 6 of the FW Act by reason of the Closing Loopholes No. 2 Act, which amends the Act to insert those new provisions. Under s 12 of the FW Act, there also now exists a new definition of «right to disconnect term», which is defined to mean «a term of a modern award that provides for the exercise of an employee's right set out in subsections 333M(1) and (2)». All Modern Awards must contain a right to disconnect term(66), and the FWC is currently taking steps to update each of the 122 Modern Awards to ensure that occurs in time for the right's commencement(67).

Looking more closely now at s 333M(1) of the FW Act, the right to disconnect is expressed as follows:

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(62) See, eg, E. Black, *Right to Disconnect "A Real Challenge" for Global Firms: Woodside*, *Australian Financial Review*, 12 February 2024, <https://www.afr.com/work-and-careers/workplace/right-to-disconnect-a-real-challenge-for-global-firms-woodside-20240212-p5f43s> accessed 24 May 2024.

(63) See, eg, M. Bailes, *Sir Humphrey Would be Pleased with this Legislation*, *InDaily*, 7 March 2024, <https://www.indaily.com.au/opinion/2024/03/07/sir-humphrey-would-be-pleased-with-this-legislation> accessed 24 May 2024.

(64) See, eg, E. Dudley, *Gen Z Lawyers Warned Over "Silly" Disconnect Rule*, *The Australian*, 18 February 2024) <https://www.theaustralian.com.au/nation/careerending-gen-z-lawyers-warned-against-right-to-disconnect-laws/news-story/ec0ea35b8c333c99e9c85eb9a30a768a> accessed 24 May 2024.

(65) Australian Associated Press, *Coalition Would Overturn Right-to-Disconnect Legislation, Peter Dutton Says*, *The Guardian (Australia),* 11 February 2024, <https://www.theguardian.com/australia-news/2024/feb/11/coalition-would-overturn-right-to-disconnect-legislation-dutton-says> accessed 24 May 2024.

(66) FW Act s 149F.

(67) *President's Statement* [2024] FWC 649 (FWC); FWC, *Variation of Modern Awards to Include a Right to Disconnect* (*FWC*, 2024) <https://www.fwc.gov.au/hearings-decisions/major-cases/variation-modern-awards-include-right-disconnect> accessed 24 May 2024.

«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».

This same right to disconnect applies to communications that an employee may receive from a third party([68]), which may include, for example, a client or customer of their employer. If an enterprise agreement contains a right to disconnect which is more beneficial than that under ss 333M(1) and (2), then that more favourable right will prevail([69]). Only national system employees covered by the FW Act will hold the right. Independent contractors therefore do not stand to benefit from it.

There are factors set out under s 333M(3) which must be taken into account when determining whether «contact, or attempted contact» under ss 333M(1) and (2) is unreasonable. Those matters are are:

1. the reason for the contact or attempted contact;
2. how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
3. the extent to which the employee is compensated:
    - 3.1 to remain available to perform work during the period in which the contact or attempted contact is made; or
    - 3.2 for working additional hours outside of the employee's ordinary hours of work;
4. the nature of the employee's role and the employee's level of responsibility;
5. the employee's personal circumstances (including family or caring responsibilities).

In assessing reasonableness of contact, or attempted contact, it must also be noted that if the contact in question is required by a law of the Commonwealth, state, or territory, then that will not be considered unreasonable([70]).

When looking more closely at s 333M, the focus of the right to disconnect is on an employer or third party's contact, or attempted contact, «outside of the employee's working hours». As already mentioned in Part 1, it is possible that employees may not be covered by a Modern Award, yet they may well be expected to be responsive to work-related communications outside working hours. If that is the case, then their agreed working hours according to the contract of employment will be of particular importance, and even more so where there is a dispute regarding the employee's exercise of their right to disconnect. There is still uncertainty as to the way an Award-free employee's contracted working hours ought to necessarily inform their 'working hours' in accordance with s 333M. This challenge will no doubt be further exacerbated for those Award-free employees hired without being subject to a written contract of

([68]) FW Act s 333M(2).
([69]) Ibid s 333M(6).
([70]) Ibid s 333M(5).

employment, or if such a contract does exist, where that contract does not contain an express term stipulating their working hours at all.

It is also worth mentioning that the right set out under s 333M constitutes a 'workplace right' pursuant to Part 3-1 of the FW Act. What this means is that an employee is left with the option of separately bringing an 'adverse action' claim as against their employer on the basis that they have, used, not used, proposed to use, or proposes not to use that workplace right([71]). Under the general protections provisions of the FW Act([72]), there are several substantial remedies and penalties for adverse action([73]). It could, therefore, be considered unlawful adverse action (thereby exposing their employer to those substantial remedies and penalties) if an employee were dismissed because of lawfully exercising or proposing to exercise their s 333M right to disconnect.

Separate from a claim of adverse action, the Closing Loopholes No. 2 Act amendments also expressly leave open the potential for an employee to bring an action as against their employer for the same conduct pursuant to the Work Health and Safety Act 2011 (Cth) ('Model Act') and its state-based equivalents([74]). Under the Model Act, an employee could still, for example, bring a claim against their employer (as a person conducting a business or undertaking), suggesting that their employer has breached their duty of care owed to them([75]). This breach would occur, presumably, by reason of an employer creating a psychosocial hazard through constant contact with the employee outside of their working hours([76]). As a person conducting a business or undertaking for Model Act purposes, an employer obliged to eliminate psychosocial risks, or is that is not reasonably practicable, then they are obliged to minimise them insofar as it is reasonably practicable([77]). If such a claim was successfully brought, then the available remedy would be available from under the Model Act([78]). A contravention of a duty under the Model Act has the potential to amount to a criminal offence([79]), attracting a sentence of imprisonment for up to five years for individuals, should the offence be considered reckless([80]). At the time of writing, maximum penalties range between

([71]) Ibid s 342.

([72]) Ibid Part 3-1.

([73]) Ibid ss 539, 545, 546 and 570. There is also a risk of a costs order, and FW Act s 375B sets out the circumstances in which the FWC can make costs orders against parties in general protections matters. Orders under that section can only be made if a party has made an application in accordance with FW Act s 365.

([74]) Ibid s 333R.

([75]) Safe Work Australia ('SWA'), *Job Demands* (*SWA*, 2024) <https://www.safeworkaustralia.gov.au/safety-topic/managing-health-and-safety/mental-health/psychosocial-hazards/job-demands> accessed 24 May 2024.

([76]) Ibid.

([77]) Work Health and Safety Act 2011 (Cth) ('Model Act') s 17(a).

([78]) Ibid s 17(b).

([79]) Ibid Part 2, Division 5.

([80]) Ibid s 31.

$500,000 to $3 million AUD for corporations, and $50,000 to $600,000 AUD for individuals([81]).

5. Resolving Disputes Concerning the Exercise of the Right

Apart from the articulation of the right pursuant to s 333M, the FW Act now contains a dispute resolution procedure, which operates with a view to resolving complaints by both employees and employers concerning the exercise of that right. That procedure contains six key stages, each of which are explained in turn below. At the time of writing, the FWC is also yet to release a guideline regarding this process, which it is bound to do by virtue of s 333W of the FW Act.

Stage 1

From the outset, an employer or employee can raise a dispute regarding contact or attempted contact pursuant to s 333M(1) or (2)([82]). Practically speaking, this may involve an employee raising a dispute with their employer about unreasonable contact by their employer or a third party that has occurred outside their working hours. It may otherwise concern an employer raising a dispute regarding their employee purportedly unreasonably refusing contact outside their working hours.

Stage 2

Next, a discussion needs to occur at the workplace level with a view to trying to resolve any such dispute as articulated in Stage 1([83]).

Stage 3

If the dispute is not resolved at the workplace level at Stage 2, then an employer or employee can apply to the FWC for a stop order, such that an order be sought that the offending behaviour by either the employer or employee 'stop'([84]). Should the matter concern defence, national security, or certain covert operations, then the FWC may refuse to deal with the dispute([85]).

Stage 4

If an application for a stop order is made, then the FWC is obliged to deal with it in accordance with s 333P. Section 333P(1) sets out the factors and employee or employer need to satisfy in order to invoke the FWC to make a stop order in respect of the dispute in accordance with s 333P(2). Legal representation is not guaranteed when

([81]) Ibid ss 30–34.
([82]) FW Act s 333N(1).
([83]) Ibid 333N(2).
([84]) Ibid s 333N(3).
([85]) Ibid ss 333S and 333T.

making this kind of application, and will be decided on application to the FWC in accordance with s 333N(4).

If an employer makes an application for a stop order, the FWC must be satisfied that the employee has made an unreasonable refusal in relation to their employer's contact, or attempted contact(86). There must also remain a risk that their unreasonable refusal will continue. Where an employee applies for a stop order, the FWC needs to be satisfied that their refusal of contact, or attempted contact is not unreasonable(87). There should also be a risk that their employer will take disciplinary action against them because of their belief that their refusal is unreasonable, or that they are requiring the employee to monitor, read or respond to contact or attempted contact, notwithstanding the employee's refusal. Should the employer consider an employee's application to be frivolous or vexatious(88), then it is open to the employer to apply to the FWC to have the matter handled expeditiously and efficiently(89). Should such an application be made, the FWC must then communicate its decision to the parties in a timely manner(90).

Stage 5

The FWC must then make an order with respect to an application for a stop order by an employer or employee(91). It has broad powers available to it under s 333P when requested to make such an order. When an application is made by an employer, the FWC can make stop orders «to prevent the employee from continuing to unreasonably refuse to monitor, read or respond to contact or attempted contact»(92). On the other hand, if an application is made by an employee, then the FWC can make stop orders 'to prevent the employer from taking action'(93), or «to prevent the employer from continuing to require the employee to monitor, read or respond to contact or attempted contact»(94). Separate from these stop orders, the FWC can also deal with the dispute in other ways it deems appropriate (eg, requiring that the parties take part in conciliation or arbitration regarding their dispute)(95). Any orders made pursuant to s 333P must not be contravened (96).

Stage 6

In the event that an order made pursuant to s 333P is, in fact, contravened, then the party impacted by the contravention, an industrial association (eg, a trade union), or an inspector of the Fair Work Ombudsman, can apply to a court of competent

(86) Ibid s 333P(1)(a).
(87) Ibid s 333P(1)(b)(i) and (ii).
(88) Ibid s 333P(5)(a).
(89) Ibid.
(90) Ibid s 333P(5)(b).
(91) Ibid s 333P(2).
(92) Ibid s 333P(2)(a).
(93) Ibid s 333P(2)(b).
(94) Ibid s 333P(2)(c).
(95) Ibid s 333V.
(96) Ibid s 333Q.

jurisdiction. When making such an application, the party impacted by the contravention can seek compensation, injunctive relief, or civil penalties against the party in breach([97]). It is worth noting that civil penalties in this context can be costly up to $18,780 (or 60 penalty units) per contravention for an individual, $93,900 (or 300 penalty units) per contravention for a company with less than 15 employees, or $469,500 (or 1,500 penalty units) per contravention for a company with 15 employees or more([98]). The court will then be tasked with not looking to the reasons behind the FWC's stop order under s 333P, but rather, determining whether the FWC's order, in and of itself, has been contravened. Given that the penalties for such contraventions have the potential to be quite substantial, that weight serves as a major deterrent against an order being made in the first place. Even where a stop order is made, the potential penalties act to encourage parties not to contravene it.

It is worth mentioning that deliberate non-compliance with a s 333P stop order could ostensibly expose the offending party to a criminal offence pursuant to s 675 of the FW Act which carries a maximum penalty of 12 months' imprisonment([99]). However, after discovering this potential immediately after the Closing Loopholes No. 2 Act was passed, the Australian Labor Party has since taken steps to remove the potential for a criminal penalty in such instances through its introduction of the Fair Work Amendment Bill 2024 (Cth)([100]). That legislation would operate to further amend the FW Act beyond what has already occurred by pursuant to the Closing Loopholes No. 2 Act. At the time of writing, while that further amending legislation has not yet been passed, it has been indicated by the Australian Labor Party that its enactment will occur as soon as possible([101]). Had this last-minute amendment attempt not occurred, then it may otherwise have resulted in the unprecedented outcome of a contravening party facing a criminal penalty for either sending an email to an employee outside of their working hours despite a stop order being made, or in the case of an employee, facing a criminal penalty in the event of continued unreasonable refusal of contact, or

([97]) Ibid Part 4-1; see especially, ss 539, 545 and 546.

([98]) From 1 July 2023, a penalty unit amounts to $313: see, eg, Crimes Act 1914 (Cth) s 4AA; Crimes (Amount of Penalty Unit) Instrument 2023.

([99]) See, eg, Explanatory Memorandum, 'Fair Work Amendment Bill 2024 (Cth)' (Parliament of Australia, 2024) 4 [17].

([100]) See, eg, P. Karp, *Right to Disconnect Bill Passes Senate But Needs Urgent Fix to Remove Criminal Penalties for Employers* (*The Guardian (Australia)*, 8 February 2024) <https://www.theguardian.com/australia-news/2024/feb/08/right-to-disconnect-bill-passes-senate-but-needs-urgent-fix-to-remove-criminal-penalties-for-employers> accessed 24 May 2024; Workplace Express, *Bill to Axe RtD Criminal Penalties Sure to Pass*, *Workplace Express*, 19 March 2024) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=1&selkey=63214&hlc=2&hlw=%E2%80%98Bill+to+Axe+RtD+Criminal+Penalties+Sure+to+Pass%E2%80%99&s_keyword=%E2%80%98Bill+to+Axe+RtD+Criminal+Penalties+Sure+to+Pass%E2%80%99&s_searchfrom_date=915109200&s_searchto_date=1716559140&s_pagesize=20&s_word_match=2&s_articles=1> accessed 24 May 2024.

([101]) Karp (n 100).

attempted contact outside their working hours. Such a penalty would have clearly been disproportionate to the conduct that was otherwise the subject of a stop order.

6. The Right's Rationale

Having now explained where Australia's new right to disconnect is situated in the country's broader employment law context, along with how the right is defined, and how the dispute resolution mechanisms surrounding it operate, I take this opportunity to rationalise its necessity in Australia. Despite some notable opposition to the right's introduction as already articulated above in Part 2, there exist six main reasons as to why right remains an essential feature of Australia's employment law landscape. I take the opportunity to articulate those reasons here. After all, a 2022 survey conducted by the Centre for Future Work, showed that 84 per cent of Australians in employment had already expressed support, even strong support, for a federally legislated right to disconnect([102]).

First, the right brings Australia into line with the vast number of other international jurisdictions, which already have a right to disconnect([103]). In fact, Australia's legislative right to disconnect is more prescriptive than that in France, for example. Australia has extended its right to disconnect beyond the requirement to negotiate a policy about the right at the workplace level—as is the case in France. Australia's right applies more broadly to those employees working in its national system whose employment is covered by a Modern Award. In France, however, the requirement of employers to negotiate a policy about the right to disconnect extends only to those workplaces with 50 employees or more([104]). As such, it might be said that Australia's right to disconnect is more expansive and broader reaching. However, I would counter that suggestion by acknowledging that Australia's right to disconnect has come into existence in a different time following the beginning of the COVID-19 pandemic, as well as in the context of an already highly regulated employment law system.

Secondly, the right stands to place limits on the substantial amount of unpaid work performed by Australian employees, which has undoubtedly been exacerbated by constant electronic connectivity. It is especially problematic that during 2023, Australian

([102]) E. Littleton - L. Raynes, *Call Me Maybe (Not): Working Overtime and a Right to Disconnect in Australia*, Report, Centre for Future Work at the Australia Institute, 2022.

([103]) Golding (n 4) 731–5.

([104]) Ibid 782, citing *Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels* [Law No 2016-1088 of 8 August 2016 on Labour, Modernisation of Labour Relations, and Securement of Career Paths] (France) JO, 9 August 2016, 145, noting that in France, the right to disconnect is now codified into article L2242-17 of the Code du travail.

employees were found to have worked 5.4 hours unpaid on average each week([105]). The net result of that unpaid overtime was a loss of $131 billion AUD in unpaid wages during the same year([106]). This result has occurred despite the FW Act already containing a provision for «maximum weekly hours», subject to «reasonable additional hours»([107]). Indeed, there is little clarity on what «reasonable additional hours» truly means, leaving the potential for overwork wide open([108]). The right to disconnect will now place a necessary limit on the potential for the performance unpaid overtime once employees have the capability to switch off from work without fear of being reprimanded for doing so.

Thirdly, the distinction between an employee's work and private life is often difficult to draw. It is anticipated that the right to disconnect will serve to clarify the boundary between when an employee's work life ends, and their private life begins. This newly defined boundary will be especially useful for employers who owe their employees a duty of care wherever they perform work—even if that occurs at home, or elsewhere outside the workplace([109]) It will operate to place sensible limits on an employer's duty of care([110]).

Fourthly, it is anticipated that employees will become increasingly productive while at work because of the right's operation. The right will encourage greater levels of productivity, making a similar impact to the four-day work week([111]) Hopefully, too, employers will see the benefit of their employees being left with a greater sense of physical and mental wellbeing, job satisfaction, lower turnover([112]), as well as a decreased

([105]) F. McDonald, *Short Changed: Unsatisfactory Working Hours and Unpaid Overtime, Report*, Centre for Future Work at the Australia Institute, 2023, 5, 14 and 20.

([106]) Ibid 5 and 20.

([107]) FW Act ss 62(1)–(3).

([108]) See, eg, the limited example in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2015) 230 FCR 298 (FCA); [2015] FCA 100, [173], where it was merely stated that «[w]hat is "reasonable" is necessarily assessed on a case-by-case basis, by reference to the employee's circumstances and the employer's business in accordance with the terms of s 62(3) of the Act».

([109]) See, eg, G. Golding, *Coronavirus and Directing Employees to Work from Home: Examining an Employer's Duty of Care*, *Labour Law Down Under*, 21 April 2020, <https://labourlawdownunder.com.au/?p=825> accessed 24 May 2024.

([110]) See, eg, K. Neilson, *Busting 4 Myths About the Right to Disconnect Legislation* (*HRM Online*, 9 April 2024) <https://www.hrmonline.com.au/section/legal/4-myths-right-to-disconnect-legislation/#:~:text=Myth%20%232%3A%20This%20rule%20only%20extends%20to%20employers&text=Essentially%2C%20it's%20the%20exact%20same,services%20to%20clients%20and%20customers> accessed 24 May 2024.

([111]) See, eg, 4 Day Week Global, *4 Day Week Global 2023 Australasia Pilot Program Report*, Report, 4 Day Week Global, 2023; M. Marozzi, *Australian Companies that Trialled Four-day Work Week Haven't Looked Back, Report Finds*, *Australian Broadcasting Corporation*, 16 June 2023, <https://www.abc.net.au/news/2023-06-16/australian-companies-trialled-four-day-work-week continue/102479770> accessed 24 May 2024.

([112]) See, eg, Senate Select Committee on Work and Care, *Interim Report* (Parliament of Australia, October 2022) 108 [6.39].

chance of 'quiet quitting'(113)—as in, where employees do the bare minimum to retain their employment, but deliberately avoid going above and beyond in their role.

Fifthly, the right carries the potential to positively impact other areas of Australian employment law. Even before it has commenced operation, the forthcoming right has begun to make a noticeable impact in other areas of Australian employment law. It has already been used in a Sessional Member's reasoning in the New South Wales Personal Injury Commission, as a means of supporting a finding that an employer's repeated contact with an employee during their sick leave was unreasonable(114). Sessional Member Diana Benk ordered the employer in question to pay its impacted employee 10 months' backpay and ongoing workers' compensation after finding that a supervisor's contact with the employee was «excessive and inappropriate»(115). The Sessional Member rationalised her decision based on the new legislative right to disconnect now being a matter of «national importance»(116).

The approaching right to disconnect has separately been used by the National Tertiary Education Union ('NTEU') as a means of advocating for better pay and conditions for academic staff in universities(117). The NTEU has accordingly urged the FWC to ensure that casual, fixed-term, and continuing academics are not required to respond to student emails outside 8:00 am and 6:00 pm on weekdays, or one hour before or after teaching, unless they are remunerated for that additional time(118). With these developments in mind, it is anticipated that the ripples of the forthcoming right to disconnect will be felt further beyond the right itself, potentially infiltrating other areas of Australian labour law, even beyond workers' compensation in New South Wales and the pay and conditions for academic staff in Australian universities.

Sixthly, and perhaps most importantly, the introduction of the right will serve to decrease Australian employees' otherwise exceedingly high levels of stress, overwhelm,

(113) See, eg, M. Humphrey-Jenner, *Quiet Quitting: The Burnout Phenomenon Hitting Business*, *UNSW Newsroom* 17 August 2022) <https://www.unsw.edu.au/newsroom/news/2022/08/quiet-quitting-burnout-phenomenon-hitting-business> accessed 24 May 2024.

(114) See, eg, D. Marin-Guzman, *Case Shows How Right to Disconnect Law Could "Bleed into Compo Claims"*, (*Australian Financial Review*, 6 May 2024) <https://www.afr.com/work-and-careers/workplace/case-shows-how-right-to-disconnect-law-could-bleed-into-compo-claims-20240506-p5fp8q#:~:text=Case%20shows%20how%20right%20to,could%20'bleed%20into%20compo%20claims'&text=A%20tribunal%20has%20invoked%20the,liable%20for%20workers'%20compensation%20payments.> accessed 24 May 2024.

(115) Ibid.

(116) Ibid.

(117) See, eg, D. Marin-Guzman, *Academics Seek Pay for Emails Out of Hours, Australian Financial Review*, 20 May 2024, <https://www.afr.com/work-and-careers/workplace/academics-push-pay-claim-in-right-to-disconnect-20240520-p5jf2q> accessed 24 May 2024.

(118) Ibid.

and burnout([119]). Being constantly connected through digital devices, coupled with drastic changes to work patterns following the commencement of the Coronavirus pandemic has seen a steep rise in 'availability creep'([120]) The result has been Australian employees feeling as though they must be always 'on', even outside their working hours, to manage their ever-growing workloads([121]). It is hoped that the right to disconnect will quell the effects of 'availability creep' and see an overall positive impact on employee mental health and wellbeing.

7. Conclusion

By way of conclusion, this article has endeavoured to explain Australia's new right to disconnect in detail, describing its place in Australia's broader employment law framework. At the time of writing, the right is still to commence operation. It therefore remains a case of 'watch this space' to monitor the right's future efficacy and utility. The right to disconnect's swift legislative development, its definition under the FW Act, as well as the dispute resolution procedure attached to complaints made regarding it have been examined. Last, but by no means least, the rationale behind the right was considered. That consideration uncovered six prevailing arguments in favour of the right's utmost necessity in Australian employment law.

In particular, the right will bring Australia into line with other jurisdictions around the world, which already have the benefit of a statutory right to disconnect. It will hopefully see a decline in the sheer volume of unpaid overtime performed by Australian employees and serve to delineate more clearly between an employee's work and private life. The right's existence may also serve to guide and shape the development of other facets of Australian labour law. Employers will stand to benefit from having a more productive and enthusiastic workforce because of the right. Above all else, the ever-increasing levels of stress, overwhelm and burnout experienced by Australian employees will hopefully be curbed by the right's introduction.

([119]) See, eg, ACTU, *Safe Work Australia Report Shows Why Right to Disconnect is So Important*, Media Release, 27 February 2024.

([120]) Senate Select Committee on Work and Care (n 112) 108 [6.38].

([121]) See, eg, ibid.

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