

In just under a month, the new employee right to disconnect provisions introduced by the *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) (Closing Loopholes No. 2 Act) will come into operation. Employers need to be proactive and take steps to prepare for changes within their business arising from this new right. This may include updating employment contracts, implementing right to disconnect policies and educating managers, both in Australia and overseas, about how to balance commercial realities with an employee's right to disconnect.

## The Right Explained

As widely publicised, Minister for Employment and Workplace Relations Tony Burke has done a deal with the cross benchers to introduce a new "employee right to disconnect" via the Closing Loopholes No. 2 Act. The Closing Loopholes No. 2 Act was passed by Parliament on 12 February 2024 and amends the *Fair Work Act 2009* (Cth) (FW Act) by inserting a new Division 6, Part 2-9 – Right to Disconnect. From 26 August 2024, the FW Act will provide workers with a legislative right to refuse to respond to contact from their employer outside of work hours – unless the refusal is unreasonable.

"In Australia, you're meant to be paid when you're working," Mr. Burke stated. Employees now have the right to "not monitor, read or respond" to contact from their employer (or work-related contact from third parties), such as emails and phone calls, outside of their paid working hours, without fear of disciplinary action or punishment at work.

When considering whether a refusal is reasonable, it will be necessary to consider all of the following:

- The reason for the contact or attempted contact
- How the contact is made and the level of disruption it causes
- The extent to which the employee is compensated to remain available (such as an on-call allowance) or to work reasonable additional hours outside their ordinary hours of work
- The nature of the employee's role and level of responsibility

- The employee's personal circumstance
- If the contact or attempted contact is required under law

If the unpaid outside-of-hours contact remains ongoing, or results in a dispute between the employee and employer, then the employee can seek the intervention of the Fair Work Commission (FWC) and ask for a "stop order". If the employer does not comply with the stop order, the FWC will be empowered to make any order it considers appropriate (other than issuing a fine).

If an employer contravenes an order of the FWC, then the employer can be subject to a civil remedy penalty (it has been confirmed that such breaches will not attract criminal penalties).

The right to disconnect will become a workplace right for the purposes of the general protections provisions contained in Part 3-1 of the FW Act, meaning that employees will be protected from adverse action being taken against them because they exercised their right to disconnect.

## Changes to Modern Awards

The Closing Loopholes No. 2 Act also requires that modern awards must include a term that provides for the exercise of an employee's right to disconnect. On 11 July 2024, the FWC published the [draft right to disconnect term](#) to be inserted into modern awards (Draft Term). The final determination varying modern awards is scheduled to be published by 23 August 2024 and commence operation on 26 August 2024.

Once the final determination is published, employers will need to review the employment arrangements of any award-covered employees and may need to take additional steps to ensure compliance with the provision.

Further, while not legislative, the FWC is also required to make written guidelines in relation to the operation of the new right to disconnect provisions. However, it appears that the guidelines will not be published any time soon, with the FWC stating: "It is not presently the intention of the Commission to make guidelines concerning the right to disconnect prior to 26 August 2024. The Commission considers that it 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."

## FWC Implementation Report

On 19 July 2024, the FWC published an [Implementation Report](#) outlining its plans to implement the new stop order jurisdiction for the right to disconnect.

In summary, the FWC proposes to undertake the following:

- Develop new case management processes supported by FWC staff, based on the current antibullying stop order jurisdiction
- Develop new forms for lodging applications related to the right to disconnect and update existing general protections forms to accommodate the new workplace right
- Create a new FWC benchbook for the right to disconnect
- Undertake engagement activities, including sharing resources with the Fair Work Ombudsman and the Department of Employment and Workplace Relations, and engaging key stakeholders and peak bodies

The FWC will publish detailed information about its right to disconnect functions on its website before 26 August 2024. The FWC also intends to provide additional specific information and education materials for small business as the jurisdiction develops.

## APS Commission Guidance

On 29 July 2024, the Australian Public Service Commission published [new guidance](#) on the implementation and operation of the right to disconnect in the public sector. Although the document is meant to be for the public service, it provides useful guidance and practical recommendations that all employers can consider in preparing for the new right.

## Takeaways

Actions that employers should consider and start to take before the commencement of the right to disconnect provisions include:

- Reviewing employment contracts to check if hours of work and remuneration clauses are adequate to protect the employer with respect to this development
- Reviewing remuneration packages and bonuses to ensure that employees who are required to remain available after working hours are adequately compensated
- Job mapping and ensuring position descriptions are updated and drafted to adequately reflect the requirements of the position
- Considering the operational impacts of the changes, particularly in relation to employees under flexible working arrangements, employees who work across different time zones, and award-covered employees
- Updating policies and procedures to reflect the changes, and ensuring managers and HR officers undergo proper training and are made aware of their obligations
- Informing employees in different time zones of how this right will impact their work with Australian colleagues
- Preparing for employee general protections claims alleging that adverse action was taken against them because they asserted their right to disconnect

Our Labour & Employment team can assist and advise on queries regarding the right to disconnect. For example, we have been assisting employers with the following in preparation for the commencement of the new provisions:

- Updating contracts of employment to ensure there is clarity regarding the reasonableness of an employee's right to disconnect (bearing in mind their position and duties)
- Preparing memorandums to workers outside Australia notifying them of the new right to disconnect in Australia and outlining how they should interact with Australian workers as a result
- Preparing right to disconnect policies, which include "tips and tricks" to assist employees be able to exercise their right to disconnect

## Authors



**Nicola Martin**  
Partner, Sydney  
T +61 8248 7836  
E [nicola.martin@squirepb.com](mailto:nicola.martin@squirepb.com)



**Erin Kidd**  
Director, Sydney  
T +61 8248 7837  
E [erin.kidd@squirepb.com](mailto:erin.kidd@squirepb.com)



**Grace Kim**  
Associate, Sydney  
T +61 8248 7849  
E [grace.kim@squirepb.com](mailto:grace.kim@squirepb.com)