Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment Bill 2024

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This submission is made in my capacity as an expert in employment law and workplace relations. I wish to make three short points about the Fair Work Amendment Bill 2024 (**the Bill**), which proposes to amend the provisions on the right to disconnect added to the *Fair Work Act 2009* (**FW Act**) by Part 8 of Schedule 1 to the *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024*.

Supporting the right to disconnect

I would first like to reiterate and briefly expand upon the support for the concept of a right to disconnect that I expressed to the Committee when giving evidence on the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023. This is a timely reform which, without imposing unduly or unfairly upon employers, should provide an opportunity and an incentive for both organisations and workers to reflect upon and (where appropriate) moderate the demands that are increasingly placed upon employees to perform work or attend to work-related tasks outside their normal working hours.

The new provisions in Division 6 of Part 2-9 of the FW Act, which will take effect in August 2024, or a year later for small businesses, do not prevent employers, clients or co-workers from seeking to contact employees with work-related information or queries. They simply give employees a basis for refusing to access, read or respond to any such contact, where it is reasonable to do so, and provide mechanisms for resolving any disputes over that issue. The new rights should allow workers to draw a firmer line between their work and personal lives, or to set limits on how much out-of-hours contact is reasonable, or to limit the circumstances in which they are expected to perform uncompensated tasks for their employer.

Importantly, there is no suggestion of any one-size-fits-all rule. What is reasonable will differ from job to job, and situation to situation, according to the factors to which reference is made in section 333M(3). In addition, the Fair Work Commission (**FWC**) will have the role of ensuring that each modern award has a term providing for the exercise of the new right. As I suggested to the Committee when asked about how a right to disconnect might be designed, that should enable more detailed and, where appropriate, sector-specific

guidance to be offered as to when it might be reasonable to refuse or not respond to contact, or the compensation that might be offered for an employee to be available outside of working hours or (where relevant) to perform additional work.

Supporting the proposed amendment in Schedule 1

The only way in which an employer could be held criminally liable under section 675 of the FW Act for failing to respect an employee's right to disconnect would be if they chose to flout an order from the FWC directing them to stop insisting on a particular type of response from an employee, or not to take disciplinary or other action against an employee in connection with a refusal to monitor or respond to communications. And there would have to be a prosecution for doing that. Nevertheless, remote as that possibility might be, it is appropriate to add right to disconnect orders to the long list of exceptions that already appear in section 675(2). That will ensure that, consistently with the approach taken in relation to similar types of FWC order, the remedies available for non-compliance would be civil rather than criminal.

An additional amendment on the effect of award terms

There is one additional change to the right to disconnect provisions that I would suggest. As mentioned, modern awards will be required by a new section 149F of the FW Act to contain a term regulating the exercise of the right to disconnect. But nothing appears to be said in the new Division 6 of Part 2-9 about the legal effect of such a term. It may be inferred, even if it is not explicitly stated, that employers or employees who comply with the award term can argue that they are acting in accordance with the requirements of section 333M. But even if that is correct, it may only be true for employers and employees to whom the relevant award *applies*. That will not be the case for anyone covered by the award, but to whom an enterprise agreement or workplace determination currently applies in place of the award.

One way to resolve any uncertainty about this is to adopt an approach similar to the new provisions on workplace delegates' rights, which were added to the FW Act by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*. Sections 149E and 205A of the FW Act require both modern awards and enterprise agreements to include a term regulating the exercise of the rights afforded to workplace delegates by section 350C. Section 350C(4) expressly provides that:

> The employer of the workplace delegate is taken to have afforded the workplace delegate the rights mentioned in subsection (3) if the employer has complied with the delegates' rights term in the fair work instrument that applies to the workplace delegate.

What I propose is that an equivalent provision be added to section 333M. However, because it is only awards that are required to have a term on the right to disconnect, and not

necessarily enterprise agreements, it would be appropriate to frame any new provision by reference to persons *covered* by an award, just as section 333F(1)(h) does in recognising award-based exceptions to the limitations in section 333E on fixed or contingent term employment. What I suggest is that a new subsection be added to section 333M as follows:

> (4A) 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:
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> (i) the contact or attempted contact complies with any requirements in a right to disconnect term in a modern award that covers the employee; and
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> (ii) the employee's refusal is not in accordance with any requirements in such a term.