Australian Government
Department of Employment and Workplace Relations

Fair Work Amendment Bill 2024

Submission from the Department of Employment and Workplace Relations to the Senate Education and Employment Legislation Committee

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Overview

On 15 February 2024, the Australian Government introduced the Fair Work Amendment Bill 2024 (the Bill) to the Parliament. The Bill proposes to amend section 675 of the Fair Work Act to ensure that a person does not commit an offence if that person contravenes a Fair Work Commission order made under the right to disconnect provisions introduced to the *Fair Work Act 2009* (Fair Work Act) by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (CL No. 2 Act).

The right to disconnect provisions in the CL No. 2 Act did not explicitly include criminal penalties, but an interaction with section 675 of the Fair Work Act made it necessary to make a further amendment to rule out criminal penalties. On 8 February 2024, the Government sought leave in the Senate to move an amendment to the CL No. 2 Act to prevent the contravention of a Fair Work Commission order about the right to disconnect being an offence, but leave was not granted.

This submission sets out the intended operation of the provisions in the Bill and the current operation of section 675 of the Fair Work Act. An outline of the right to disconnect provisions in the CL No. 2 Act, introduced to that Act by way of an amendment moved by the Australian Greens, is at **Attachment A**. Relevant background information regarding the right to disconnect, including consideration in previous Senate inquiries, is at **Attachment B**.

Fair Work Amendment Bill 2024

The Bill proposes to amend the Fair Work Act to insert a new paragraph (fa) to subsection 675(2), which would exempt contraventions of Fair Work Commission orders about the right to disconnect from being an offence under subsection 675(1).

The amendment in the Bill would commence at the same time as the right to disconnect provisions in the Fair Work Act, being **26 August 2024** (noting the right to disconnect provisions will not commence for small business employers and their employees for a further 12 months, being 26 August 2025, although the amendment in the Bill will apply for all employers from 26 August 2024).

Section 675 of the Fair Work Act

Section 675 of the Fair Work Act (set out in full at **Attachment C**) deals with contraventions of Fair Work Commission orders.

Subsection 675(1) provides that a person commits an offence if the Fair Work Commission has made an order under the Fair Work Act, and a person to whom that order applies engages in conduct that contravenes the order. If a person commits an offence by contravening a Commission order, they may be subject to a criminal penalty (up to 12 months' imprisonment), unless an exception under subsection 675(2) applies.

Subsection 675(2) provides that certain Fair Work Commission orders are exempt from the operation of subsection 675(1). This means that if a person contravenes an exempted order, they will not be liable to a criminal penalty.

Section 675 has existed in the Fair Work Act since its enactment in 2009,[1] with a similar provision also contained in the previous *Workplace Relations Act 1996* (Workplace Relations Act).[2] The provisions derive from 'contempt of court' provisions, and the Workplace Relations Act was amended in 2006 to repeal a generic 'catch all' contempt provision and include more details about the kind of conduct that would constitute contempt (and be subject to criminal sanctions).[3] At that time, the Workplace Relations Act also expressly provided that non-compliance with specified orders (those being orders relating to awards and registered organisations) were exempt from being an offence.[4]

Over time, this general approach to regulating 'contempt' has been retained, and the list of exceptions has been supplemented to reflect changes to the Fair Work Commission's jurisdiction and the kinds of orders it is empowered to make.

The department is unaware of any case in which the enforcement of section 675 by the courts has led to the imposition of a criminal penalty since the commencement of the Fair Work Act in 2009.

The amendment in the Bill

The Bill would amend subsection 675(2) of the Fair Work Act to provide that contravening an order made by the Fair Work Commission about the right to disconnect would not be an offence under subsection 675(1).

The Bill will ensure that the right to disconnect provisions operate as intended, by providing that the treatment of Fair Work Commission orders about the right to disconnect is consistent with the treatment of other Commission orders listed under subsection 675(2), including stop sexual harassment orders and stop bullying orders.[5]

The Bill reflects the Government's clear intention that there should be no criminal penalty associated with contravention of a Fair Work Commission order about the right to disconnect. The right to disconnect's dispute resolution framework encourages discussions between parties at the workplace level, with enforceable orders from the Commission only becoming available when those discussions are unsuccessful.

[1] See Explanatory Memorandum, Fair Work Bill 2008, p 381 [2529]-[2532].
[2] *Workplace Relations Act 1996* (Cth) s 814 (following amendments made to that Act in 2006).
[3] Ibid s 814(3).
[4] Ibid s 814(3)(a).
[5] Fair Work Act ss 675(2)(ia), (j).

Attachment A

Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024

Senate Education and Employment Legislation Committee Inquiry

The department has been monitoring the right to disconnect as a policy issue during this term of government. The department has provided advice to Government on the Senate Select Committee on Work and Care interim report (18 October 2022, Recommendation 4) and final report (9 March 2023, Recommendation 23), as well as the Australian Greens' private member's bills (Fair Work Amendment (Right to Disconnect) Bill 2023 and Fair Work Amendment (Right to Disconnect) Bill 2023 [No. 2]).

On 4 September 2023, the Government introduced the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Closing Loopholes Bill) to the Parliament. As introduced, the Closing Loopholes Bill included measures in relation to casual employment, closing the labour hire loophole, the regulation of the road transport industry and the gig economy, and the introduction of a wage theft offence.

On 7 September 2023, the Senate referred the Closing Loopholes Bill to the Senate Education and Employment Legislation Committee (the committee) for inquiry and report.

On 7 December 2023, the Senate agreed to divide the Closing Loopholes Bill, pass the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (CL Act), and determine that the committee's inquiry be confined to the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (CL No. 2 Bill).

Media statements about the passage of the CL Act noted that a legislated right to disconnect was being considered in the context of the CL No. 2 Bill, with the Minister for Employment and Workplace Relations, the Hon Tony Burke MP, stating,[6]

> The Government is also working constructively with the crossbench to deliver an agreed amendment which would provide Australian workers with a right to disconnect from unreasonable contact from their employer outside of work hours.

During the inquiry into the Closing Loopholes measures, the committee held 7 public hearings and reported receiving 178 submissions.[7] The committee's final report noted that,[8]

> [2.189] There was broad agreement amongst contributors to the committee's inquiry that one aspect of work life balance that needs to be protected in the modern industrial context is the right to disconnect from our workplaces outside regulated hours. The intensification of workloads in sectors such as teaching or policing is frequently cited as a contributory factor in staff recruitment and retention.

[6] The Hon Tony Burke MP, 'Closing Loopholes' (Media release, 7 December 2023) <https://ministers.dewr.gov.au/burke/closing-loopholes>.
[7] Senate Education and Employment Legislation Committee, *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 [Provisions]* (Report, February 2024) p 10 [1.43].
[8] Ibid p 56 [2.189].

In its final report, the committee recommended that the CL No. 2 Bill be amended to legislate a right to disconnect in the Fair Work Act, supporting the development of clear expectations about contact and availability in workplaces.[9]

On 8 February 2024, the Australian Greens moved amendments that were supported by the Government to introduce a legislated employee right to disconnect in the Fair Work Act.

On 12 February 2024, the CL No. 2 Bill, including the right to disconnect provisions, passed both Houses of the Parliament and was given the Royal Assent on 26 February 2024.

How the right to disconnect in Part 2-9 will operate

The employee right to disconnect

The high-level right to disconnect will provide employees with the right to refuse to monitor, read or respond to contact, or attempted contact, from their employer outside of the employee's working hours, unless the refusal is unreasonable.[10] The employee right to disconnect also applies to work-related contact, or attempted contact, from a third party.[11]

The right to disconnect will inform how employers and employees interact outside of working hours. The right **does not** prohibit employers from contacting their employees, nor does it prevent employees from contacting one another, including across time zones. Rather, the employee right to disconnect allows employee to refuse to monitor, read or respond to contact, or attempted contact outside of working hours, when an employee is not expected to be working and is not paid to be working, so long as doing so is not unreasonable. In determining whether an employee's refusal to monitor, read or respond to contact, or attempted contact, is unreasonable, the following must be taken into account (though these are not the only matters that may be considered):[12]

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

The right to disconnect will be a workplace right for the purposes of the general protections in the Fair Work Act.[13] This means a person (including an employer) must not take adverse action against an

[9] Ibid p 58 [2.195]. For completeness, the final report also included recommendations from Senator David Pocock.
[10] CL No. 2 Act sch 1, pt 8, item 97, proposed s 333M(1).
[11] Ibid s 333M(2).
[12] Ibid s 333M(3).
[13] Ibid s 333M(4).

employee because the employee has a right to disconnect, or has exercised, or proposes to exercise, the right to disconnect.[14]

The right to disconnect provisions also contain safeguards to ensure that Australia's defence, national security and certain Australian Federal Police (AFP) operations, are not prejudiced. The provisions will not require or permit an action if it would, or reasonably could, be prejudicial to Australia's defence, national security, or an existing or future covert operation or international operation of the AFP.[15]

The Fair Work Commission is required to make written guidelines about the right to disconnect,[16] to assist employees and employers of all sizes to understand their rights and obligations under these provisions. These guidelines must be made by the time the provisions commence, which for many will be **26 August 2024**. This is also the date by which modern awards must be updated by the Commission to include a right to disconnect term.[17]

However, and importantly, for small business employers and their employees, these provisions do not commence until **26 August 2025**. This extended commencement date will provide small business with additional time to become familiar with the right to disconnect provisions.

Disputes about the right to disconnect

The right to disconnect provisions provide a clear pathway for dispute resolution if disagreement arises between an employer and an employee about how rights and obligations apply.

The dispute resolution provisions apply where there is a dispute between an employer and an employee about the operation of the right to disconnect, or if the employee has refused to monitor, read or respond to contact, or attempted contact, and either the employer reasonably believes that the refusal is unreasonable, or the employee reasonably believes that their refusal is not unreasonable.[18]

Parties must first attempt to resolve a dispute at the workplace level through discussions.[19] If these discussions do not resolve the dispute, either party may apply to the Fair Work Commission for a stop order, or for the Commission to otherwise deal with the dispute.[20] If an application does not only consist of an application for a stop order, the Commission must deal with the dispute as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion. Parties may also consent to arbitration.[21]

Fair Work Commission stop orders

The Fair Work Commission will be empowered to make orders to stop an employee from refusing contact or to stop an employer from taking certain action. Providing the Commission with the power

[14] Fair Work Act s 340.
[15] CL No. 2 Act sch 1, pt 8, item 97, proposed s 333S.
[16] Ibid s 333W.
[17] Ibid s 149F.
[18] Ibid s 333N(1).
[19] Ibid s 333N(2).
[20] Ibid s 333P(1)-(2).
[21] Ibid s 333V(b).

to make stop orders about the right to disconnect is consistent with the Commission's powers in relation to the existing stop bullying and stop sexual harassment jurisdictions in the Fair Work Act.[22]

If a party to a dispute makes an application to the Fair Work Commission for a stop order, and:

- the employee has unreasonably refused to monitor, read or respond to contact (or attempted contact) – the Commission may make an order to prevent the employee from continuing to refuse the contact.
- the employee's refusal to monitor, read or respond to contact (or attempted contact) is not unreasonable, and there is a risk the employer will take disciplinary or other action against the employee because the employer believes the refusal is unreasonable – the Commission may make an order to prevent the employer taking that action.
- the employee refusal to monitor, read or respond to contact (or attempted contact) is not unreasonable, and the employer is requiring them to monitor, read to respond to contact – the Commission may make an order preventing the employer from continuing to require the employee to monitor, read or respond to the contact.[23]

The Fair Work Commission must start to deal with an application for a stop order within 14 days and deal with the application as soon as is reasonably practicable after this process has commenced.[24]The Commission will also be able to dismiss frivolous or vexatious applications, or applications involving matters relating to Australia's defence, national security or certain AFP operations.[25]

If an employer considers an application to be frivolous or vexatious, they may apply to the Fair Work Commission to have the matter dealt with 'expeditiously and efficiently',[26] to ensure the timely resolution of disputes. A person who contravenes a term of a stop order that applies to them may be liable for a civil penalty.[27]

[22] Fair Work Act Pts 6-4B, 3-5A.
[23] CL No. 2 Act sch 1, pt 8, item 97, proposed ss 333P(1)-(2).
[24] Ibid s 333P(3).
[25] Ibid s 333P(4)
[26] Ibid s 333P(5).
[27] Ibid s 333Q; see Fair Work Act s 539.

Attachment B

Background on the right to disconnect

The concept of a right to disconnect has been a subject of public policy debate for several years.[28] The concept emerged from concerns about the impact of technology and 'availability creep,' and that employees feel obligated to engage in work-related activities outside of their ordinary working hours.

Internationally, several countries have introduced a form of a right to disconnect, including (for example) France and Italy in 2017,[29] Spain in 2018,[30] Ireland in 2021,[31] and Portugal in 2022.[32] In France, employers with 50 employees or more must negotiate agreements with unions for a right to disconnect from technology after working hours. Portugal has legislated a 'right to a rest period'; placing the burden on the employer to not contact an employee outside of working hours.

Prior to the CL No. 2 Act provisions, the Fair Work Act did not explicitly provide for a right to disconnect, however the Act contained adjacent protections for workers such as maximum weekly hours (section 62) and requests for flexible work arrangements (section 65). Some industrial instruments also had rules and entitlements to increase work-life balance protections or provide compensation for contact outside of working hours.

Some Australian workers already have an express right to disconnect or similar provision in their enterprise agreement. The *Victoria Police (Police Officers, Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2019* includes a right to disconnect setting out that employees are not generally required to read or respond to emails or phone calls outside their effective working hours.[4] The *University of Technology Sydney Staff Agreement 2021* includes a right to disconnect setting out that staff are not generally expected to respond to telephone, email or similar contact outside of their ordinary hours of work.[5]

The Senate Select Committee on Work and Care heard evidence from stakeholders that a right to disconnect could support workers to manage their work and care responsibilities. In both its interim report (18 October 2022, Recommendation 4) and final report (9 March 2023, Recommendation 23), the Senate Select Committee on Work and Care recommended the Government consider amendments to deliver an enforceable right to disconnect under the National Employment Standards.

On 20 March 2023, Mr Adam Bandt MP introduced a private member's bill in the House of Representatives seeking to include a right to disconnect in the National Employment Standards. On 27 March 2023, Senator Barbara Pocock introduced the same into the Senate. The House bill was

[28] See, e.g., discussion of international examples in Gabrielle Golding, 'The right to disconnect in Australia: Creating space for a new term implied by law' (2023) 46(2) *University of New South Wales Law Journal* 728.
[29] France: Law No 2016-1088 of 8 August 2016 on Labour, Modernisation of Labour Relations, and Securement of Career Paths, art L2242-17 of the *Code du travail* (Labour Code); Italy: Law No 81 of 22 May 2017, Measures for the Protection of Non-entrepreneurial Autonomous Work and Measures to Encourage Flexible Adaptation as to Times and Places of Subordinate Work, art 19(1).
[30] Spain: Organic Law 3/2018, of December 5, on the Protection of Personal Data and Guarantee of Digital Rights, art 88.
[31] Ireland: Workplace Relations Commission, 'Code of practice for employers and employees on the right to disconnect', 2021 (available at: www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf).
[32] Portugal: Law No 83/2021, 6 December, art 199, amending the Portuguese Labour Code.

removed from the Notice Paper on 17 October 2023. The proposed entitlement stated that an employer must not contact an employee outside of the employee's hours of work unless the reason for the contact is an emergency or genuine welfare matter; or the employee is in receipt of an availability allowance for the period.

Attachment C

675 Contravening an FWC order

(1) A person commits an offence if:

(a) the FWC has made an order under this Act; and

(b) either of the following applies:

(i) the order applies to the person;

(ii) a term of the order applies to the person; and

(c) the person engages in conduct; and

(d) the conduct contravenes:

(i) a term of the order referred to in subparagraph (b)(i); or

(ii) the term referred to in subparagraph (b)(ii).

(2) However, subsection (1) does not apply to the following orders:

(aa) an order under subsection 65C(1) (which deals with arbitration of disputes relating to requests for flexible working arrangements);

(ab) an order under subsection 76C(1) (which deals with the extension of periods of unpaid parental leave);

(a) an order under Part 2-3 (which deals with modern awards);

(b) a bargaining order;

(c) a scope order;

(d) an order under Part 2-6 (which deals with minimum wages);

(e) an equal remuneration order;

(f) an order under Part 2-8 (which deals with transfer of business);

(g) an order under Division 6 of Part 3-3 (which deals with the suspension or termination of protected industrial action);

(h) a protected action ballot order, or an order in relation to a protected action ballot order or a protected action ballot;

(i) an order under Part 3-5 (which deals with stand down);

(ia) an order under Part 3-5A (which deals with sexual harassment in connection with work);

(j) an order under Part 6-4B (which deals with workers bullied at work);

(k) an order under Part 6-4C (which deals with the Coronavirus economic response).

Penalty: Imprisonment for 12 months.

(3) Strict liability applies to paragraphs (1)(a) and (b).

Note: For strict liability, see section 6.1 of the *Criminal Code*.