

THE RIGHT TO DISCONNECT: FINDING THE RIGHT 'OFF SWITCH' FOR EMPLOYERS AND EMPLOYEES

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The right to disconnect has been recognised in Australia following the passage of the Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024 (Cth). In short, the right allows employees to refuse to read or respond to communications from their employer or third parties about work outside of working time. This article will critique the adequacy of the model chosen by the Australian Parliament by reference to the rationale for implementing the right to disconnect and whether there are alternative mechanisms in Australia which are sufficient to achieve the same outcomes.

I INTRODUCTION

In 1999, Guy Standing wrote:

Every period of economic reconstruction, associated with major technological change and the renewed pursuit of flexibility, has eventually induced a counter-movement to provide new systems of social protection compatible with new structures and processes.¹

Despite that quote being made about 25 years ago, it describes the topic of this article well. During the COVID-19 pandemic there was a forced rise in remote working arrangements and digital technologies became more widely used as part of this transition.² While constant connection was already an emerging issue, the pandemic increased the prevalence of workers remaining connected to their work beyond their standard hours by reading and responding to messages.³ Essentially,

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¹ Guy Standing, *Global Labour Flexibility: Seeking Distributive Justice* (Macmillan Press, 1999) 50.

² Mihaela Marica, 'Considerations on the Protection of Teleworkers, in Light of the Current European Regulations: Elements of Comparative Law' (2022) 12(4) *Juridical Tribune* 509, 510; Mauro Pucheta and Ana Cristina Ribeiro Costa, 'Going Beyond the Right to Disconnect in a Flexible World: Light and Shadows in the Portuguese Reform' (2022) 51(4) *Industrial Law Journal* 967, 968; Tyler Jochman, 'Effects on Employees' Compensation under the Right to Disconnect' (2021) 22(2) *Marquette Benefits & Social Welfare Review* 209, 209.

³ Olga Chesalina, 'The Legal Nature and the Place of the Right to Disconnect in European and in Russian Labour Law' (2021) 9(3) *Russian Law Journal* 36, 37.

many modern employees never disconnect from their workplace, leading to burnout and stress.⁴ As French politician Benoît Hamon explained:

Employees physically leave the office, but they do not leave their work. They remain attached by a kind of electronic leash — like a dog. The texts, the messages, the emails — they colonise the life of the individual to the point where he or she eventually breaks down.⁵

On 26 February 2024, the *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) ('*Closing Loopholes Act No 2*') received royal assent.⁶ Within the *Closing Loopholes Act No 2* was a right to disconnect. From 26 August 2024 most employees — except employees of small business employers who had to wait until 26 August 2025⁷ — can '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'.⁸ This also extends to messages from third parties.⁹

Internationally several countries implemented legislation to recognise a right to disconnect prior to Australia, including France,¹⁰ Italy,¹¹ Portugal,¹² and Spain¹³ amongst many others.¹⁴ These countries have implemented a variety of types of legislation to recognise the right to disconnect, including soft approaches that involve encouraging negotiations and hard approaches prohibiting out-of-hours communication.¹⁵

The principal aim of this article is to evaluate whether the right to disconnect model implemented by the *Closing Loopholes Act No 2* is adequate by reference to the reasons why that right was implemented.

⁴ Marica (n 2) 515; Productivity Commission, *Working from Home* (Research Paper, September 2021) 39.

⁵ Hugh Schofield, 'The Plan to Ban Work Emails out of Hours', *BBC News* (online, 11 May 2016) <<https://www.bbc.com/news/magazine-36249647>>.

⁶ *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) s 2.

⁷ *Ibid* sch 1 item 308, inserting *Fair Work Act 2009* (Cth) sch 1 cl 111D ('FW Act').

⁸ *FW Act* (n 7) s 333M(1).

⁹ *FW Act* (n 7) s 333M(2). I invite readers interested in a more comprehensive history of Australia's journey to a legislative right to disconnect to see Gabrielle Golding, 'Unwinding Australia's New Right to Disconnect' (2024) 37(2) *Australian Journal of Labour Law* 201, 202–7.

¹⁰ *Code du travail* [Labour Code] (France) art L2242–17.

¹¹ *Legge 22 maggio 2017*, n. 81 [Law No 81 of 22 May 2017] (Italy) art 19(1).

¹² *Código do Trabalho* [Labour Code] (Portugal) art 199.º-A ('Portuguese Labour Code').

¹³ *Ley Orgánica 3/2018, de 5 de Diciembre, de Protección de Datos Personales y garantía de los derechos digitales* [Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights] (Spain) art 88.

¹⁴ See Gabrielle Golding, 'The Right to Disconnect in Australia: Creating Space for a New Term Implied by Law' (2023) 46(2) *UNSW Law Journal* 728, 731–3 ('The Right to Disconnect in Australia').

¹⁵ See generally Tina Weber and Oscar Vargas Llave, *Right to Disconnect: Exploring Company Practices* (Research Report, Eurofound, 9 September 2021).

This article focuses on the right to disconnect now enshrined in the *Fair Work Act 2009* (Cth) ('FW Act'). That right only applies to national system employees,¹⁶ however, similar considerations could be applied to non-national system employees covered by the state-based legislative equivalents to the FW Act in non-referring states, who do not presently have a right to disconnect.¹⁷

Part II briefly summarises the reasons why the right to disconnect has been recognised for the purposes of evaluating whether the model chosen will achieve its purposes. Part III discusses whether pre-existing mechanisms in Australia could achieve the same outcomes as a right to disconnect. Part IV draws on prior discussions to evaluate the adequacy of the Australian right to disconnect. This will include a view on an alternative 'right to request disconnection' model. Part V provides concluding remarks.

II THE RATIONALE FOR THE RIGHT TO DISCONNECT

Gabrielle Golding considers the four reasons why the right to disconnect was implemented were to: (1) reduce stress, burnout, and overwhelm; (2) reduce unpaid work from constant connectivity; (3) provide clarity on the divide between an employee's working and private life; and (4) boost productivity.¹⁸

In addition to Golding's points, the Senate Select Committee on Work and Care first recommended the right to disconnect in March 2023 in the context of an expectation of constant connection having an unjustifiably disproportionate negative effect on those providing unpaid care.¹⁹

For completeness, I will also briefly analyse the argument that a right to disconnect will reduce flexibility in the workplace, which appears to be the main grievance against the new legislative right.

A Psychological Impacts of Constant Connection

Golding's finding on review of various studies was that more time spent monitoring work emails and on information and communications technology ('ICT') generally can lead to stress, increased anxiety and a general decrease in

¹⁶ A national system employee is any employee — except those on vocational placements — employed by a national system employer: *FW Act* (n 7) s 13. National system employers mainly include constitutional corporations, the Commonwealth, and employers in referring states: *FW Act* (n 7) ss 14, 30D, 30N. Except for Western Australia, the definition of national system employer includes nearly all non-government employers in Australia: see generally Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 7th ed, 2021) 35–48.

¹⁷ That is those employees still covered by the: *Industrial Relations Act 1979* (WA); *Fair Work Act 1994* (SA); *Industrial Relations Act 2016* (Qld); or *Industrial Relations Act 1984* (Tas).

¹⁸ Golding, 'Unwinding Australia's New Right to Disconnect' (n 9) 213–6.

¹⁹ Senate Select Committee on Work and Care, Parliament of Australia, *Final Report* (Report, 9 March 2023) 119 [6.44]. See also Andrew Pakes, 'Right to Disconnect: A Guide for Union Activists' (Guide, Prospect, 21 May 2021) 5.

the health and wellbeing of employees.²⁰ For example, CW Von Bergen and Martin S Bressler suggest that constant connection leads to a lack of balance between work and non-work, causing ‘poorer quality of life and decreased life satisfaction, psychological strain, depression, anxiety, and alcohol abuse’, and relationship difficulties with partners and children.²¹

In a more recent and highly on-point study, Hiroki Ikeda et al found longer time on work-related communication outside of working hours was associated with increased fatigue and worse ‘psychological detachment before bedtime’.²² Further, another recent study found ‘significant adverse brain structural differences’ when overworked employees were compared to non-overworked employees.²³

Golding also notes studies illustrating that excessive mobile phone usage can lead to an addiction.²⁴ These studies are relevant as employees are frequently connected to work by receiving communications through their mobile phones.

While some weight must be given to the minor inconsistencies of the studies,²⁵ overall, I agree with Golding that the empirical studies justify that constant connection to ICT can cause negative psychological effects.

B Constant Connection Leads to Underpayment

The second rationale for implementing the right to disconnect is that the distinction between working and rest time has been blurred, leading to availability creep where employees may not be remunerated for all work performed.²⁶ Responding to a text or email may only take a couple of minutes, but cumulatively responding to multiple texts or emails over time can result in a significant amount of unrecognised work.²⁷

Whether underpayment is a relevant rationale for the right to disconnect is not so straightforward in my view. To determine the validity of this argument it

²⁰ Golding, ‘The Right to Disconnect in Australia’ (n 14) 738–40.

²¹ CW Von Bergen and Martin S Bressler, ‘Work, Non-Work Boundaries and the Right to Disconnect’ (2019) 21(2) *Journal of Applied Business and Economics* 51, 54 (citations omitted).

²² Hiroki Ikeda et al, ‘Effects of Work-Related Electronic Communication during Non-Working Hours after Work from Home and Office on Fatigue, Psychomotor Vigilance Performance and Actigraphic Sleep: Observational Study on Information Technology Workers’ (2023) 80(11) *Occupational & Environmental Medicine* 627, 630.

²³ Wonpil Jang et al, ‘Overwork and Changes in Brain Structure: A Pilot Study’ (2025) 82(3) *Occupational & Environmental Medicine* 105, 109.

²⁴ Golding, ‘The Right to Disconnect in Australia’ (n 14) 739–40.

²⁵ See Fatema Akbar et al, ‘Email Makes You Sweat: Examining Email Interruptions and Stress Using Thermal Imaging’ (Paper No 668, Association for Computing Machinery, 2 May 2019) 7–8, 11; Issac Vaghefi, Liette Lapointe and Camille Boudreau-Pinsonneault, ‘A Typology of User Liability to IT Addiction’ (2017) 27(2) *Information Systems Journal* 125, 149.

²⁶ Golding, ‘Unwinding Australia’s New Right to Disconnect’ (n 9) 213–15; Jochman (n 2) 209. See also Senate Select Committee on Work and Care, Parliament of Australia, *Interim Report* (Report, 18 October 2022) 108 [6.39]; Dan Nahum, *Work and Life in a Pandemic: An Update on Hours of Work and Unpaid Overtime under COVID-19* (Report, Centre for Future Work, Australia Institute, 18 November 2020).

²⁷ Jochman (n 2) 215.

is necessary to consider whether time spent connected could constitute working time or an on-call period.

The *FW Act* specifies that '[a]n employer must pay an employee amounts payable to the employee in relation to the performance of work ... in full'.²⁸ However, the *FW Act* does not specify what is considered 'work'.

Alternatively, some modern awards require an employee to be paid on on-call allowance.²⁹ Hence, if constant connection meets the criteria of being on-call and the employee is covered by an award with an on-call allowance, there may be remuneration payable for remaining connected.

I note 'there is no universally applicable definition of the term "work"'.³⁰ An employee's employment contract will outline what is within the scope of their work.³¹ However, generally work needs to be directed from the employer and cannot be considered too minuscule to be compensated due to the *de minimis* principle.

1 Direction from Employer

For something to be considered 'work' there needs to at least be an implied direction from the employer for that activity to be performed. This is exemplified through the decision in *Shop, Distributive & Allied Employees' Association v Aldi Foods Pty Ltd* ('*SDA v Aldi*').³² Judge Humphreys considered the 15 minutes of preliminary tasks completed by Aldi workers was remunerable work on the bases that: (1) there 'was an expectation' employees would complete the tasks;³³ (2) disciplinary action would be considered by management if the tasks were not undertaken;³⁴ (3) there was no personal benefit to the employee by completing the tasks; and (4) the tasks were to the benefit of the employer.³⁵

In *Australian Salaried Medical Officers' Federation v Peninsular Health* ('*Peninsular Health*'),³⁶ Bromberg J also considered that work can be authorised by an implied direction:

In practical terms, the performance of work by an employee is sanctioned by his or her employer when the employer requests or requires the work to be done or, where the

²⁸ *FW Act* (n 7) s 323(1).

²⁹ See, eg, Fair Work Commission, *Rail Industry Award 2020* (MA000015, 1 January 2010) cl 18.2(b); Fair Work Commission, *Medical Practitioners Award 2020* (MA000031, 1 January 2010) cl 20.3.

³⁰ *Seo v Bindaree Food Group Pty Ltd* (2021) 306 IR 408, 414 [12] (Catanzariti V-P, Saunders D-P, Commissioner Lee) ('*Seo*'). See also *Shop, Distributive & Allied Employees' Association v Aldi Foods Pty Ltd* (2022) 318 IR 206, 212 [34] (Judge Humphreys) ('*SDA v Aldi*').

³¹ *Seo* (n 30) 414 [12] (Catanzariti V-P, Saunders D-P, Commissioner Lee); *SDA v Aldi* (n 30) 212 [38] (Judge Humphreys).

³² *SDA v Aldi* (n 30).

³³ *Ibid* 211 [31].

³⁴ *Ibid* 211 [33].

³⁵ *Ibid* 213 [39].

³⁶ (2023) 325 IR 26.

performance of the work is at the initiative of the employee, where the employer approves the performance of the work by the employee.³⁷

Bromberg J noted the following in the context of determining when an implied direction had been given:

In most employment arrangements, it is simply not practicable for employees to be closely supervised and directed and, accordingly, what an employer will do is communicate the outcome it expects to employees rather than provide a series of specific directions as to how, when and in what order the tasks necessary to obtain that outcome are to be performed. In those circumstances, the requirements made of the employee will be mainly implicit rather than express and will often arise out of the expectations set by the employer. Further, expectations set by the employer will often not be set expressly but will themselves be implicit from the circumstances, *including the nature of the employee's duties and the way in which, or the pattern in which, work is ordinarily performed to the apparent satisfaction of the employer.*³⁸

His Honour noted constructive or actual knowledge that an employee is performing work can constitute an acceptance of the work, and therefore be authorisation of such work.³⁹

Applying these cases to the issue of constant connection, it is difficult to determine whether a message from an employer by itself could constitute an implied direction to respond. As *SDA v Aldi* establishes, it may depend on whether the employee is subject to disciplinary consequences for not responding. Alternatively, the *Peninsular Health* decision — in particular the emphasised portion of the judgment quoted above — seems to indicate that a culture of constant connection could qualify as an implied direction.

To refute the argument an implied direction was given to respond, an employer may put a statement to the following effect in an email signature: 'I have sent this email at a time convenient to me; you are not expected to read or respond to this message outside of your working hours'.

I tentatively conclude that repeated expectations of after-work communication and other work can constitute an implied direction to perform such work. Therefore, in the right circumstances an employer may be considered to have impliedly directed an employee to remain constantly connected, satisfying the first general hurdle to be considered work.

³⁷ Ibid 43 [69].

³⁸ Ibid 54–5 [121] (emphasis added).

³⁹ Ibid 66 [173]–[175].

2 Application of the De Minimis Principle

Assuming there has been at least an implied direction to monitor communications outside of working hours, the question becomes: would short periods of time reading and responding to messages be subject to the *de minimis* principle?⁴⁰

The most on point case in this area is *Polan v Goulburn Valley Health* ('*Polan*').⁴¹ Ms Polan was required to rearrange rosters to replace absent junior doctors while off duty.⁴² Justice Mortimer distinguished between an employee being recalled to work and directed to work overtime. Her Honour described an employee being recalled to work to involve 'a specific instruction or direction', while an instruction to perform overtime could be implied from 'an ongoing arrangement between employer and employee'.⁴³ Justice Mortimer considered Ms Polan to be performing overtime and it was:

clearly authorised by her employer because the making of these arrangements was a core aspect of the duties of her employment, and it was contemplated by both the respondent and the applicant that the need for these arrangements could arise at any time of the day or night.⁴⁴

Justice Mortimer concluded the out-of-hours rostering was overtime and specifically contemplated the periods of work could be as little as 10 minutes long.⁴⁵

While not an authoritative ruling, the New South Wales Industrial Commission has suggested the *Polan* decision should only apply to the provisions of the specific agreement in that decision. Commissioner Sloan opined that the *Polan* decision 'does not stand as authority for the proposition that overtime will always be available for all work performed by an employee outside ordinary working hours, whether or not that takes place at the employer's premises'.⁴⁶

In 2018, a Fair Work Commission Full Bench ('FWCFB') reviewed the *Nurses Award 2010* — the award underpinning the enterprise agreements in *Polan* — and determined 'that taking a telephone call, answering a text, replying to an email or responding via other form of electronic communication is work'.⁴⁷ The FWCFB

⁴⁰ See Tanya Marcum, Elizabeth A Cameron and Luke Versweyveld, 'Never off the Clock: The Legal Implications of Employees' After Hours Work' (2018) 69(2) *Labor Law Journal* 73, 76–7. The *de minimis* principle is a principle of interpretation where '[u]nless the contrary intention appears, ... the law does not concern itself with trifling matters': *Farnell Electronic Components Pty Ltd v Collector of Customs* (1996) 72 FCR 125, 128 (Hill J), quoting Butterworths, *Halsbury's Laws of England*, vol 44(1) (at 1 September 1995) Statutes, '5 Statutory Interpretation' [1441].

⁴¹ [2016] FCA 440 ('*Polan*').

⁴² *Ibid* [17] (Mortimer J).

⁴³ *Ibid* [76].

⁴⁴ *Ibid* [84].

⁴⁵ *Ibid* [86].

⁴⁶ *Health Services Union New South Wales v Health Secretary* [2019] NSWIRComm 1055, [55].

⁴⁷ *Re 4 Yearly Review of Modern Awards* [2018] FWCFB 7347, [67] (Catanzariti V-P, Booth D-P, Commissioner Cribb).

decided workers under this award should be entitled to one hour of overtime pay for each instance of this work, regardless of whether they are formally on-call.⁴⁸

Until recently, this was persuasive authority that a breach of the right to disconnect by requiring an employee to complete administrative work outside of working hours could constitute work — subject to the relevant industrial instruments — and entitled the employee to overtime pay.

However, the recent decision of *Australian Nursing and Midwifery Federation v Johnson Stenner Aged Care Pty Ltd* ('*New Auckland Place*')⁴⁹ suggests that constant connection and incidental activities may not be considered work. *New Auckland Place* involved a direction for nurses to undertake a rapid-antigen test ('RAT') prior to attending work.⁵⁰ A FWCFB found that undertaking a RAT test was within the duties of nurses.⁵¹ However the FWCFB also found:

The Agreement nowhere provides that there is an entitlement to payment for any time spent performing any duty whatsoever which may fall within the classification descriptions.⁵²

The FWCFB also helpfully explained the common understanding of overtime:

As a general proposition, the established industrial conception of overtime is that (subject to any meal break requirement) it is worked continuously upon the completion of ordinary hours in a day, or worked as a discrete overtime shift, or is worked upon the employer recalling the employee to work after they have already completed their ordinary hours and left the workplace.⁵³

As the nurses could do what they wished in the 15 minutes in between taking the test and viewing the result, this was inconsistent with any notions of work.⁵⁴ In a similar way, remaining connected and answering the occasional message is discontinuous and not part of any continuous shift.

This concurs with the FWCFB's view in *New Auckland Palace*:

Not every incident of employment duty attracts an entitlement to payment under the applicable industrial instrument. Employment will often involve minor and incidental duties being required to be performed outside of working hours without payment, such as making or answering occasional telephone calls about work attendance and rostering matters or dressing in uniforms required to be worn by the employer.⁵⁵

Reconciling the *Polan* and *New Auckland Place* decisions is not particularly useful given the different industrial instruments at play. It appears that activities

⁴⁸ Ibid [69]–[70].

⁴⁹ [2023] FWCFB 162 ('*New Auckland Place*').

⁵⁰ Ibid [2] (Hatcher P, Easton D-P, Roberts D-P).

⁵¹ Ibid [25].

⁵² Ibid [27].

⁵³ Ibid [31].

⁵⁴ Ibid. Cf *Australian Nursing and Midwifery Federation v Jeta Gardens (QLD) Pty Ltd* [2022] FWC 3039, where employees were directed to wait in a certain area while they undertook their rapid-antigen test.

⁵⁵ *New Auckland Place* (n 49) [34] (emphasis added).

that are considered more than incidental can be considered work if it is part of some continuous period. Hence simply reading and responding to a few sporadic messages is unlikely to be considered work as it is merely incidental. However, a direction — whether implied or explicit — to perform some substantive activity could be considered work. Ambiguity remains at where the line is drawn between what is considered substantial and what is considered incidental.

3 *Is a Constantly Connected Employee On-Call?*

On-call allowances and breaks between on-call periods are not specifically provided for within the *FW Act* and apply only if required by awards, enterprise agreements, or individual employment contracts. While it will depend on the instrument,⁵⁶ being on-call generally involves the employee being ‘free to conduct his, or her, private life subject to the employer being able to direct the employee to report for duty, and to the employee organizing his or her affairs to be able to respond to that direction if given’.⁵⁷

The *Polan* decision makes it reasonably clear — subject to the text of the relevant instrument — that being constantly connected could be considered being on-call. Justice Mortimer relevantly noted:

I do not consider it can be said that when the applicant was away from the workplace, and outside her ordinary working hours, but required to be ready and available to take calls so as to rearrange the rosters and shifts of doctors, she was performing her duties of employment. Rather, she was on-call. Once she received and made calls, and commenced trying to find replacement doctors or locums, and rearrange shifts, then she was performing the duties of her employment and was entitled to be remunerated for it.⁵⁸

Interestingly, Mortimer J concluded this time should be paid as overtime and not under the recall provision, despite the finding that the on-call allowance was owed.⁵⁹

4 *Is the Rationale Justified?*

Based on the discussion above, in my view the right to disconnect is unlikely to solve any issues with unremunerated work. Sporadically reading and responding to messages is unlikely to be considered ‘work’ that would entitle an employee to remuneration.

If an employee is undertaking a sufficiently continuous task of the necessary duration such that it is considered ‘work’, then this is not an issue related to the right to disconnect, it is simply that the employee is working and not being paid.

⁵⁶ See *Polan* (n 41) [64]–[65] (Mortimer J).

⁵⁷ *Warramunda Village Inc v Pryde* (2002) 116 FCR 58, 62 [17] (Lee J).

⁵⁸ *Polan* (n 41) [68].

⁵⁹ *Ibid* [82]–[84].

Further, an on-call allowance is not a uniform entitlement applicable to the workforce. While the *Polan* decision indicates constant connection would likely entitle an employee to an on-call allowance, this is reliant on that employee being covered by an industrial instrument that contemplates this. Given the entitlement to an on-call allowance is not a general right, a right to disconnect does not limit underpayment for employees that do not have an on-call entitlement in the first place. In my view, the more appropriate and direct resolution for employees required to monitor communications outside working hours without any remuneration is to bargain for an on-call allowance in an industrial instrument.

For those employees already covered by an industrial instrument with such an entitlement, they would be entitled to remuneration if they agree to remain connected irrespective of the right to disconnect.

Further, this rationale is complicated for salaried employees without any strict set hours of work, especially those outside of award coverage. Salaried employees are usually implicitly compensated for all working time. Typically, salaried employees — and even some part-time employees — will be paid above minimum rates and therefore would be remunerated for short periods of working time outside of formal working hours, assuming they are completing compensable work. While these short periods may entitle the worker to overtime, or the constant connection may be considered as on-call time, it is common for employment contracts to include a set-off clause, which purports to make a salary cover all entitlements owed to an employee under their enterprise agreement or award, and the national employment standards ('NES'). For the purposes of this argument, I will assume that the employee's employment contract is well-drafted, and the set-off clause applies to all entitlements.⁶⁰ If salaried employees are paid more than their minimum entitlements, unless the unpaid work is substantial, those salaried employees are likely already being compensated for this time and any additional entitlements by virtue of the set-off clause. Hence, the argument that a right to disconnect prevents underpayment can only be made for employees paid precisely — or only slightly above — their minimum entitlements.⁶¹

C Constant Connection Blurs the Divide Between an Employee's Working and Private Life

In modern times, it is common for employees to work flexibly, in terms of where and when they complete work. Further, it is common for employees to take work-

⁶⁰ Set-off clauses may not operate as intended and not cover all entitlements due to poor drafting: see, eg, *Kernaghan v Neffray Pty Ltd* [2020] FCCA 1141, [34]–[35] (Judge Riethmuller).

⁶¹ However, the employer may still be in breach of payslip reporting obligations in some cases for not separately outlining overtime or on-call allowances: see *Fair Work Regulations 2009* (Cth) regs 3.33–3.34 ('FW Regulations').

related devices home, receive work-related correspondence on their personal devices, or even use personal devices to complete more substantive work. Many employees simply do not travel to the workplace and start at 9:00am, clock off at 5:00pm, and go home to an uninterrupted private life. Their 'non-working time' is intruded on by work-related communications or a requirement to complete more substantive work, blurring the distinction between when work starts and ends.

This lack of distinction between a working and private life can lead to the issues discussed in Parts II(A) and (B) above.⁶² Additionally, this lack of distinction can have implications for family and friends, as employees may be unable to sufficiently engage with others if they are being distracted by a requirement to monitor work-related communications. In this way, constant connection has the potential to diminish the value in an employee's private life. In my view, there is significant value in a private life, and the right to disconnect has the potential to help employees maintain this value by creating a clearer boundary between their working and non-working lives.

However, the situation is more complicated for those with flexible working arrangements. There is a necessary trade-off between the benefits of flexible working and the lack of clarity between working and private lives. If an employee has agreed to work irregular hours, particularly if some of those hours are at their home, they have, to some extent, agreed to remove a clear distinction between their working and private lives. They no longer have clear working hours or a distinct place of work that creates clear boundaries to establish where and when work starts and ends. As will be discussed more below, particularly in Part IV(B), this issue can be addressed by a right to disconnect that involves specifically negotiated terms on non-contactable times as part of a flexible working arrangement.

For completeness, some people identify their personality through their work — to the extent where their private life is also their working life. Some studies have shown this interconnection between a private and working life has a positive effect on work performance.⁶³ For that group of people, the right to disconnect is likely to have less significance. However, for those that do not have such a connection to their work, the right to disconnect can be an important mechanism for creating clearer boundaries between their working and private lives.

⁶² See Golding, 'The Right to Disconnect in Australia' (n 14) 735–40.

⁶³ See generally Irina M Paullay, George M Alliger and Eugene F Stone-Romero, 'Construct Validation of Two Instruments Designed to Measure Job Involvement and Work Centrality' (1994) 79(2) *Journal of Applied Psychology* 224; Murat Bolelli and Beril Durmuş, 'Work Attitudes Influencing Job Involvement Among "Y" Generation' (2017) 3(1) *International Journal of Commerce and Finance* 1; Liang-Chih Huang et al, 'High Performance Work Systems, Employee Well-Being, and Job Involvement: An Empirical Study' (2016) 45(2) *Personnel Review* 296.

D Productivity Benefits from a Right to Disconnect

To summarise Golding's research, employers may gain productivity benefits for their business with less absenteeism from overworked employees and more effort from satisfied employees through the right to disconnect.⁶⁴ Relatedly, recent studies have shown that employee productivity would not decrease with a lighter workweek.⁶⁵

This rationale is supported by research undertaken since the right to disconnect was implemented, which showed 58% of employers reported the right to disconnect has had a positive effect on employee engagement and productivity. Additionally, only 4% of employers reported the right to disconnect had a negative impact on employee engagement and productivity.⁶⁶ This early research supports the rationale that the right to disconnect boosts employee productivity, or at the very least, does not harm it.

E Disproportionate Impact on the Informal Care Sector

Early discussions on the right to disconnect in Australia were in the context of informal carers being disadvantaged in the labour market.⁶⁷ While the right to disconnect implemented by the *Closing Loopholes Act No 2* is not exclusive to informal carers, I still argue the impact of the right is particularly important to those performing informal care.

Informal care refers to 'unpaid care and support to family members and friends', in particular young, elderly, and disabled people.⁶⁸ Unpaid childcare in Australia is estimated to be valued at \$34.5 billion, which is 'almost three times the size of financial and insurance services, the largest industry in the formal economy'.⁶⁹ Recent data confirms that women are still undertaking the majority of the informal care, especially in terms of looking after young children.⁷⁰ Resultingly, women's 'healthy work-hour threshold is considerably lower than

⁶⁴ Golding, 'Unwinding Australia's New Right to Disconnect' (n 9) 215–16. See also Von Bergen and Bressler (n 21) 54–5; Paul M Secunda, 'Hybrid Federalism and the Employee Right to Disconnect' (2019) 46(4) *Pepperdine Law Review* 873, 876; Pucheta and Costa (n 2) 970.

⁶⁵ Golding, 'Unwinding Australia's New Right to Disconnect' (n 9) 215–16. See also Marcum, Cameron and Versweyveld (n 40) 75; Kyle Lewis et al, *The Results Are in: The UK's Four-Day Week Pilot* (Report, February 2023); Guðmundur D Haraldsson and Jack Kellam, *Going Public: Iceland's Journey to a Shorter Working Week* (Report, June 2021).

⁶⁶ Australia HR Institute, *Quarterly Australian Work Outlook: June Quarter 2025* (Report, June 2025) 18–23.

⁶⁷ Senate Select Committee on Work and Care, Parliament of Australia, *Interim Report* (n 26) 108–9 [6.37]–[6.45].

⁶⁸ *Ibid* 4 [1.25]–[1.26].

⁶⁹ *Ibid* 14 [2.8].

⁷⁰ Australian Institute of Family Studies, *Towards COVID Normal: Employment & Work-Family Balance in 2020* (Research Report No 2, June 2021) 1, 9.

men doing the same' work.⁷¹ Consequently, women are disadvantaged in obtaining higher paying jobs as '[t]here is a direct correlation between long working hours and high-paying jobs'.⁷² A Spanish study on the connection between telework and care noted:

the pressure on women to act as superwomen who can do it all has intensified in recent years, forcing them to display a high capacity to cope with all life scenarios, in a context where the division of labour in the private sphere remains an unresolved challenge.⁷³

When male and female informal carers are then required to remain connected to work, they are placed in a more difficult position compared to employees not performing informal care. A recent study by Lily Chernyak-Hai et al on Australian employees with care responsibilities found that the higher the competing demands of work and care responsibilities, the higher the level of work-life interference.⁷⁴ This is reinforced by another recent Australian study, which found that a strong majority of employees working from home reported difficulty managing actively caring for children and working.⁷⁵

Informal carers are already in a difficult situation in terms of managing time. Requiring constant connection furthers the burden on an informal carer's time management to a point where they simply do not have the hours in a day to be able to balance care and work responsibilities. Trying to remain dedicated to both these areas may negatively impact the health of carers.⁷⁶ Ultimately, a right to disconnect could contribute to creating more equitable labour market opportunities for carers, especially in terms of attaining more high-paying jobs.

F A Right to Disconnect could Reduce Flexibility in the Workplace

The main argument opposing the new right to disconnect from the Business Council of Australia and the Australian Industry Group ('AIG') appears to be the impact the right to disconnect will have on flexibility in the workplace.⁷⁷ This is also one of the

⁷¹ Senate Select Committee on Work and Care, Parliament of Australia, *Final Report* (n 19) 18 [2.50]. See also Iduzki Soubelet-Fagoaga et al, '(Tele)Work and Care during Lockdown: Labour and Socio-Familial Restructuring in Times of COVID-19' (2021) 18(22) *International Journal of Environmental Research and Public Health* 12087:1–19, 14.

⁷² Senate Select Committee on Work and Care, Parliament of Australia, *Final Report* (n 19) 16 [2.43]–[2.44].

⁷³ Soubelet-Fagoaga et al (n 71) 14.

⁷⁴ Lily Chernyak-Hai et al, 'Unpaid Professional Work at Home and Work-Life Interference among Employees with Care Responsibilities' (2021) 155(3) *The Journal of Psychology* 356, 366–7.

⁷⁵ Australian Institute of Family Studies (n 70) 7.

⁷⁶ Senate Select Committee on Work and Care, Parliament of Australia, *Final Report* (n 19) 99–100 [5.71]–[5.75].

⁷⁷ Business Council of Australia, 'Industrial Relations Changes a Blow to Australia's Prosperity' (Media Release, 8 February 2024)

main contentions of the Coalition.⁷⁸ Acknowledging national system employees presently have a right to disconnect, I still note this point for the purposes of later discussions on the adequacy of the new right to disconnect in Australia.

These concerns are understandable in that some flexibility will be removed. The current right to disconnect model is based on not requiring employees to monitor communications outside of working hours. For employees allowed to work flexibly within a span of hours, as opposed to having set working periods, flexibility may be curtailed as having a right to disconnect first requires having set working hours.

However, if implemented properly I argue a right to disconnect will still have a net positive effect. As noted by Barbara Pocock, the new legislation is likely to facilitate discussions between employees and employers around methods and time of contact.⁷⁹ If anything, this can facilitate the improved operation of informal and formal flexible working arrangements in that contactable times are included within the negotiation.

Flexible working arrangements are seen to have many benefits, including for example, increasing productivity⁸⁰ and giving workers with caring responsibilities access to similar opportunities to those without caring responsibilities.⁸¹ However, this is countered by the blurring of the line between working and non-working time, leading to more hours being worked.⁸² Hence the right to disconnect has the potential to take away one of the key disadvantages of flexible working arrangements if applied correctly.

In a more general sense, it is important for the right to disconnect to be flexible to accommodate for the diverse needs of different industries, employers, and employees.⁸³

<https://www.bca.com.au/industrial_relations_changes_a_blow_to_australia_s_prosperity>; Rob Harkavy, 'New Australian "Right to Disconnect" Law Sparks Backlash from Business Groups', *ICLG (Web Page)*, 12 February 2024) <<https://iclg.com/news/20133-new-australian-right-to-disconnect-law-sparks-backlash-from-business-groups>>.

⁷⁸ Senate Select Committee into Work and Care, Parliament of Australia, *Final Report* (n 19) 201 [1.2]–[1.5]; Senate Select Committee into Work and Care, Parliament of Australia, *Interim Report* (n 26) 120 [1.11]–[1.14].

⁷⁹ David Marin-Guzman, 'Crossbench and Greens Seal Deal on Workplace Changes', *Australian Financial Review* (online, 7 February 2024) <<https://www.afr.com/work-and-careers/workplace/workers-to-get-right-to-ignore-after-hours-calls-from-bosses-20240207-p5f313>>.

⁸⁰ Pucheta and Costa (n 2) 970.

⁸¹ Productivity Commission (n 4) 84.

⁸² See Jon Messenger et al, *Working Anytime, Anywhere: The Effects on the World of Work* (Research Report, Eurofound and the International Labour Office, 24 April 2017) 23; Jochman (n 2) 209; Secunda, 'Hybrid Federalism and the Employee Right to Disconnect' (n 64) 876.

⁸³ Pakes (n 19) 4; Daniel Ziffer, "'Right to Disconnect" Fight to Expand as Unions Push Claims in Enterprise Agreements', *ABC News* (online, 7 April 2021) <<https://www.abc.net.au/news/2021-04-07/right-to-disconnect-fight-to-expand-trade-union-eba-push/100050264>>.

III WERE THE PRE-EXISTING LAWS IN AUSTRALIA SUFFICIENT?

Before discussing the adequacy of the Australian right to disconnect model, this Part will discuss the adequacy of the pre-existing Australian laws at addressing the rationale for the right to disconnect discussed in Part II. This includes: (1) maximum working hours provisions in the NES; (2) work health and safety laws; and (3) common law duties.

A Maximum Weekly Hours

The AIG has contended the maximum weekly hours provision in s 62 of the *FW Act* could be sufficient in enforcing a right to disconnect. They have stated '[i]f there are concerns that these laws aren't being followed we need to look at educating people about them and enforcing them, rather than simply introducing a further layer of impractical regulation'.⁸⁴

Employees have a right to refuse to work unreasonable overtime,⁸⁵ however they can otherwise be directed to work overtime.⁸⁶ Hence if the employer is not asking for too much, and they are not disincentivised by the premium to be paid for working overtime, then an employee must work that overtime. Failure to follow a lawful and reasonable direction is grounds for dismissal.⁸⁷

As discussed in Part II(B), replying to sporadic messages is unlikely to be considered 'work' and therefore the maximum weekly hours provision in s 62 of the *FW Act* is not applicable and consequently inadequate. However, given some activities associated with constant connection may be considered work, I will still consider whether any overtime would be considered reasonable.

The *FW Act* sets out a list of factors to consider whether overtime is reasonable. The factors are: (1) employee health and safety; (2) employee's personal circumstances; (3) workplace needs; (4) entitlement to overtime payments; (5) notice given by the employer; (6) notice given by the employee to refuse additional hours; (7) work patterns in the industry; (8) nature of the employee's role; (9) accordance with averaging terms in awards; and (10) other relevant matters.⁸⁸

⁸⁴ Australian Industry Group, 'Pushing "Right to Disconnect" through Parliament a Recipe for Disaster' (Media Release, 2 February 2024) <<https://www.aigroup.com.au/news/media-centre/2024/pushing-right-to-disconnect-through-parliament-a-recipe-for-disaster/>>.

⁸⁵ *FW Act* (n 7) s 62(2). See also *Brown v Premier Pet* [2012] FMCA 1089 [20]–[22] (Jarrett FM), affd *Premier Pet Pty Ltd v Brown* [No 2] [2013] FCA 167 ('*Premier Pet*').

⁸⁶ See, eg, *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2015) 230 FCR 298, 332–3 [175]–[180] (Logan, Bromberg and Katzmann JJ); *Gorval v Employure Pty Ltd* [2016] FCCA 231, [37] (Judge Altobelli) ('*Gorval*').

⁸⁷ *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143, 153–4 (Isaacs ACJ), 155–6 (Gavan Duffy and Starke JJ); *Grant v BHP Coal Pty Ltd* [2014] FWC 1712, [148] (Commissioner Spencer), affd (2014) 244 IR 176. See also *R v Darling Island Stevedoring & Lighterage Co Ltd*; *Ex parte Halliday*; *Ex parte Sullivan* (1938) 60 CLR 601, 621–2 (Dixon J); *FW Regulations* (n 61) reg 1.07(3)(C).

⁸⁸ *FW Act* (n 7) s 62(3).

In applying these factors, ‘each case must be considered on its own facts’.⁸⁹ In deciding what is considered reasonable, it may also be necessary to consider awards, enterprise agreements and contracts. For example, a clause in an enterprise agreement stating 104 hours of overtime per year is reasonable can inform a decision that a requirement to work 455 hours of overtime per year is unreasonable.⁹⁰ There can be no claim of unreasonable overtime if the employee voluntarily works the overtime without the direction of their employer.⁹¹

As outlined in Part II(A), constant connection can have negative health implications. Consequently, overtime involving constant connection that is a ‘risk to employee health and safety’ is arguably unreasonable.⁹² Further, as outlined in Part II(E), constant connection has a particularly strong impact on those involved in informal care. Consequently, requiring overtime involving constant connection without considering this personal circumstance may similarly be considered unreasonable.⁹³

However, the number of additional hours can be considered as an additional matter in determining reasonableness.⁹⁴ Time spent returning calls and messages is likely to be nominal, weighing against an argument a direction to communicate beyond standard working hours would be unreasonable.⁹⁵

The laws around work and reasonable overtime lend themselves to flexible application, with each case being decided on its own merits due to ambiguous and unique industrial instruments. The issue with flexibility in this sense is that the maximum weekly hours provision may not cover some employees that wish to disconnect, leading to continuation of the issues discussed in Part II. Further, if an employer directs an employee to communicate outside of the employee’s working hours, but without exceeding the maximum hours allowed by the NES, the ability to refuse unreasonable overtime will not help the employee. Maximum working time legislation should complement an explicit right to disconnect for maximum effectiveness.⁹⁶

While breaks between on-call periods may offer a mechanism to recognise a right to disconnect, it is far from uniform. As breaks between on-call periods are not required by the *FW Act*, it is down to specific instruments to establish this right. Not all awards contain on-call provisions,⁹⁷ and those that do may not

⁸⁹ *Premier Pet* (n 85), [31] (Collier J).

⁹⁰ See *Construction, Forestry, Maritime, Mining and Energy Union v Hay Point Services Pty Ltd* (2019) 291 IR 415.

⁹¹ See *Picos v Healthengine Pty Ltd* [2015] FCCA 1983, [76]–[82], [231] (Judge Lucev).

⁹² See *FW Act* (n 7) s 62(3)(a).

⁹³ See *ibid* s 63(3)(b).

⁹⁴ *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd* (2022) 314 IR 441, 487 [250] (Katzmann J).

⁹⁵ See *Gorval* (n 86) [36] (Judge Altobelli).

⁹⁶ See *Chesalina* (n 3) 47–9.

⁹⁷ See, eg, Fair Work Commission, *Aged Care Award 2010* (MA000018, 1 January 2010); Fair Work Commission, *Miscellaneous Award 2020* (MA000104, 1 January 2010); Fair Work Commission, *Restaurant Industry Award 2020* (MA000119, 1 January 2010); Fair Work Commission, *Fast Food Industry Award 2020* (MA000003, 1 January 2010).

mandate breaks between on-call periods.⁹⁸ Further, the interpretation of an on-call provision depends on the wording in the specific instrument.⁹⁹ Consequently, the same issues arise regarding variable application.

Given the ambiguities around whether constant connection is work, and then whether it would be unreasonable overtime, the maximum weekly hours provision does not provide any uniform protection against the psychological risks of constant connection and overwork. In the same vein, there is little clarity around the distinction between an employee's working and private life, which does not help the disadvantages of flexible working arrangements. In terms of offering equity to informal carers, it is equally inadequate. There remains the issue of whether responding to messages is work in the first place, and informal carers may not be working more than the required 38 hours to enliven this protection.

B Work Health and Safety Acts

The Commonwealth and each state and territory in Australia have work health and safety Acts that provide punishments for persons conducting a business or undertaking ('PCBU') who breach their duty of care to workers.¹⁰⁰ While this legislation was initially intended to be uniform, various circumstances now mean this is not the case.¹⁰¹ For simplicity, the *Work Health Safety Act 2011* (Cth) ('WHS Act') will be referred to throughout this Part. Unlike the *FW Act*, the *WHS Act* does not apply to national system employers; it only applies to the Commonwealth, Commonwealth authorities and some limited designated private sector entities.¹⁰² Workers in each state are covered by the work health and safety Act for that state.

PCBU's have a general duty to 'ensure, so far as is reasonably practicable, the health and safety of' workers.¹⁰³ This requires the elimination of risks, or if that is not reasonably practicable, the minimisation of risks so far as is reasonably practicable.¹⁰⁴

The *Work Health Safety Regulations 2011* (Cth) ('WHS Regulations') were recently amended to specifically mention that PCBUs 'must manage psychosocial risks'.¹⁰⁵ All states except Victoria specifically address psychosocial risks in their

⁹⁸ See, eg, Fair Work Commission, *Gas Industry Award 2020* (MA000061, 1 January 2010) cl 17.3; Fair Work Commission, *Plumbing and Fire Sprinklers Award 2020* (MA000036, 1 January 2010) cls 17.2–17.3.

⁹⁹ See Polan (n 41) [64]–[65] (Mortimer J).

¹⁰⁰ *Work Health and Safety Act 2011* (Cth) ('WHS Act'); *Work Health Safety Act 2011* (ACT); *Work Health Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld); *Work Health Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas); *Occupational Health and Safety Act 2004* (Vic); *Work Health and Safety Act 2020* (WA).

¹⁰¹ Stewart (n 16) 356–7.

¹⁰² *WHS Act* (n 100) s 12.

¹⁰³ *Ibid* s 19(1).

¹⁰⁴ *Ibid* s 17.

¹⁰⁵ *Work Health Safety Regulations 2011* (Cth) reg 55C ('WHS Regulations').

work health and safety legislation,¹⁰⁶ and Victoria is due to implement psychosocial risk regulations by the end of 2025.¹⁰⁷ The Managing Psychological Hazards at Work Code of Practice specifically identifies '[u]nreasonable or excessive time pressures or role overload' and '[s]hifts/work hours that do not allow adequate time for sleep or recovery' as psychosocial hazards.¹⁰⁸

As noted in Part II(A), constant connection can lead to negative health implications, particularly mental health. Constant connection can be caused by excessive time pressures and work hours that do not allow adequate recovery time. Consequently, I argue constant connection constitutes a 'reasonably foreseeable [hazard] that could give rise to risks to health and safety'.¹⁰⁹ Therefore PCBUs are required to eliminate or minimise the psychosocial risks arising from constant connection 'so far as is reasonably practicable'.¹¹⁰

This seems to align with the view the Productivity Commission took prior to the amendments and new codes of practice that specifically recognise psychosocial risks:

Given the relative clarity about this issue in WHS law, a 'right to disconnect' would only be needed as a preventative measure if evidence suggested that employees faced unreasonable pressure from their employers to remain 'available' despite existing protections.¹¹¹

The effectiveness of the protection depends on what is considered 'reasonably practicable'.¹¹² Various factors are outlined in s 18 of the *WHS Act* to aid this interpretation. The degree of harm that could occur from overwork is as high as death,¹¹³ which weighs in favour of eliminating the risk.¹¹⁴ Further, in most circumstances it would seem available to the employer to message the employee

¹⁰⁶ See *Work Health and Safety (General) Regulations 2022* (WA) pt 3.2 div 11; *Work Health and Safety Regulations 2012* (SA) ch 3 pt 2 div 11; *Work Health and Safety Regulation 2017* (NSW) pt 3.2 div 11; *Work Health and Safety Regulations 2022* (Tas) pt 3.2 div 11; *Work Health and Safety Regulation 2011* (ACT) pt 3.2 div 3.2.11; *Work Health and Safety (National Uniform Legislation) Regulations 2011* (NT) pt 3.2 div 11; *Work Health and Safety Regulation 2011* (Qld) pt 3.2 div 11.

¹⁰⁷ Ben Carroll, 'New Rules to Protect Workers' Mental Health' (Media Release, Victoria State Government, 21 February 2025) <<https://www.premier.vic.gov.au/new-rules-protect-workers-mental-health>>.

¹⁰⁸ Safe Work Australia, *Model Code of Practice: Managing Psychosocial Hazards at Work* (Code of Practice, 1 August 2022) 16.

¹⁰⁹ *WHS Regulations* (n 105) reg 34.

¹¹⁰ See *ibid* reg 35; *WHS Act* (n 100) s 19.

¹¹¹ Productivity Commission (n 4) 46.

¹¹² *WHS Act* (n 100) s 18.

¹¹³ Paul M Secunda, 'The Employee Right to Disconnect' (2019) 9(1) *Notre Dame Journal of International & Comparative Law* 1, 14. See also Justin McCurry, 'Japanese Woman "Dies from Overwork" after Logging 159 Hours of Overtime in a Month', *The Guardian* (online, 5 October 2017) <<https://www.theguardian.com/world/2017/oct/05/japanese-woman-dies-overwork-159-hours-overtime>>; Reuters, 'Working Long Hours Kills Hundreds of Thousands a Year, WHO Says', *ABC News* (online, 17 May 2021) <<https://www.abc.net.au/news/2021-05-17/long-working-hours-kill-thousands-who-report-finds/100144968>>.

¹¹⁴ See *WHS Act* (n 100) s 18(b).

at a different time, which is a low-cost and easy-to-implement way to avoid this psychosocial hazard.¹¹⁵

A recent example of the intersection of work health and safety duties and the right to disconnect concerns Cobar Management Pty Ltd ('Cobar'). An anonymous notifier reported two finance employees were working excessive hours, noting those employees reported to a manager who was based in Switzerland and had a significant time difference. Cobar made several voluntary changes to decrease the risks of psychosocial injury from excessive working hours, notably including locking staff out of computers between 9:00pm and 5:00am unless an exemption was granted and providing training on the right to disconnect. Additionally, managers in different time zones were required to conduct risk assessment plans. Cobar spent \$1,251,511.10 on rectifying initiatives and entered an enforceable undertaking with further initiatives costing \$1,031,060.00 (inclusive of the regulator's recoverable costs).¹¹⁶ While the issues within Cobar were broader than employees being unable to disconnect from work, the rectification measures highlight allowing employees to disconnect from work is one way to mitigate psychosocial hazards.

In practice more generally, it is evident there has been an increased focus on psychosocial risks in workplaces since the amendments to the *WHS Regulations*. While there is still some way to go, employers appear to be more conscious of the mental health of their employees. This is perhaps due to the significant penalties for a breach of a work health and safety duty, including a maximum \$16,630,000.00 monetary penalty for corporations and 15 years imprisonment for individuals.¹¹⁷ This creates a strong deterrence factor in breaching a work health and safety duty, including potentially by not allowing employees to disconnect from work. Albeit it is highly unlikely a breach of a work health and safety duty related to constant connection would attract such significant penalties.

In this regard the *WHS Act* is arguably an adequate way to protect against the psychological impact of constant connection. In the same way, allowing employees adequate rest time between work is a way to mitigate the risk of psychological injury, helping to clarify the distinction between an employee's working and private life and boosting productivity. The incidental effect of allowing employees adequate rest time is that employees are not contacted as frequently, preventing the possibility of unremunerated work.

However, one clear issue is that regulators have limited resources, and a limited ability to enforce compliance when the health and safety risk arises

¹¹⁵ See *ibid* ss 18(d)–(e).

¹¹⁶ NSW Government, 'Enforceable Undertaking Accepted from Cobar Management Pty Ltd', *NSW Resources* (News Article, 31 January 2025) <<https://www.resources.nsw.gov.au/news-articles/enforceable-undertaking-accepted-from-cobar-management-pty-ltd>>.

¹¹⁷ *WHS Act* (n 100) ss 31–3, sch 4 cl 1; Australian Government, 'Indexation of Penalty Amounts under the *WHS Act*', *Comcare* (News Article, 4 July 2024) <<https://www.comcare.gov.au/about/news-events/news/penalty-amounts-indexation>>. Penalties vary in different jurisdictions.

outside of the workplace. While the regulator has broad investigative powers,¹¹⁸ their usefulness in enforcing a right to disconnect is questionable. It is far more difficult to identify the potential risk of a psychological injury from constant connection that could develop over time and potentially away from the workplace, in comparison to some acute physical injury that could occur at a workplace from an unsafe plant. Additionally, it is difficult to see any regulator having the resources to deal with such a broad issue. Consequently, the new right to disconnect is a useful complement to the *WHS Act* to further highlight, and create discussion on, the need to limit psychosocial risks to protect the mental health of employees.

Further, the *WHS Act* applies equally to those providing informal care and workers more generally. Hence it does not specifically address the inequalities for informal carers. However, they still stand to benefit from increased consideration of psychological health.

Overall, it is arguable the *WHS Act* creates an obligation for employers to allow employees to disconnect to mitigate psychosocial hazards. While not an explicit right to disconnect, viewing constant connection from a work health and safety perspective with the requirement to limit psychosocial hazards in the *WHS Act* can address the same issues the right to disconnect aims to resolve. This weighs against the need for an explicit right to disconnect, provided the requirements in the work health and safety Acts are being followed by employers, employees are making appropriate notifications to the regulators when the requirements are not being followed, and regulators are properly investigating and penalising PCBUs who breach their obligations. However, in circumstances where it will be difficult for a regulator to monitor compliance and enforce the work health and safety requirements, there remains a need for an explicit right to disconnect.

C Common Law Duties: Negligence and Contractual Duty of Care

An employer also has a duty of care to an employee at common law, both through negligence and an implied contractual term.¹¹⁹ These two causes of action can coexist, in that the availability of one does not limit the availability of the other.¹²⁰ Further, these duties are 'identical in content'.¹²¹ The general understanding of the duties in an employment context is as follows:

The ... employer was of course under a duty, by his servants and agents, to take reasonable care for the safety of the [employee] by providing proper and adequate means of carrying out his work without unnecessary risk, by warning him of unusual

¹¹⁸ *WHS Act* (n 100) s 155.

¹¹⁹ Golding, 'The Right to Disconnect in Australia' (n 14) 740.

¹²⁰ *Astley v Austrust Ltd* (1999) 197 CLR 1, 22–3 [47]–[48] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

¹²¹ *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 517 [332] (Beazley JA).

or unexpected risks, and by instructing him in the performance of his work where instructions might reasonably be thought to be required to secure him from danger of injury.¹²²

However, the issue with these mechanisms and enforcing an indirect right to disconnect is *Koehler v Cerebos (Australia) Ltd* ('*Koehler*').¹²³ In that case, the employee frequently complained that she had insufficient resources and time to complete her job effectively, but did not disclose that she was stressed or otherwise at risk of psychiatric injury.¹²⁴ She was later diagnosed with a psychiatric disorder and it was not disputed stress from work was the cause.¹²⁵ However, the High Court decided the injury was not foreseeable, and set a precedent that has proved difficult to overcome:

An employer may not be liable for psychiatric injury to an employee brought about by the employee's performance of the duties originally stipulated in the contract of employment. In such a case, notions of 'overwork', 'excessive work', or the like, have meaning only if they appeal to some external standard. ... Yet the parties have made a contract for employment that, by hypothesis, departs from that standard. Insistence upon performance of a contract cannot be in breach of a duty of care.¹²⁶

The risks of psychiatric injury from constant connection that the right to disconnect aims to address fall squarely within the 'notions of "overwork", [and] "excessive work"' described in *Koehler*. Consequently, unless there is some clear outward indication that makes a stress-related injury foreseeable, it is unlikely constant connection would be compensable within these common law claims. Peter Handford has succinctly outlined the practicalities of this situation:

The employee who stoically battles on, or who makes some sort of reference to his or her workload but is reluctant to disclose personal medical details, will be in a worse position than one who pours out a litany of problems at the earliest opportunity.¹²⁷

The decision in *Kozarov v Victoria* ('*Kozarov*') exemplifies that it is still possible for employees to enforce the duty of care to protect themselves from psychiatric injuries.¹²⁸ However, it is conceded that *Kozarov* sets a high bar, as it involved a worker being repeatedly exposed to particularly distressing material in their role assisting in the prosecution of sexual offences, including viewing child pornography.¹²⁹ Indeed, Kiefel CJ and Keane J noted that complaints of excessive

¹²² *O'Connor v Commissioner for Government Transport* (1954) 100 CLR 225, 229 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ).

¹²³ (2005) 222 CLR 44 ('*Koehler*').

¹²⁴ *Ibid* 51 [10] (McHugh, Gummow, Hayne and Heydon JJ).

¹²⁵ *Ibid* 51–2 [14].

¹²⁶ *Ibid* 56 [29].

¹²⁷ Peter Handford, 'Liability for Work Stress: Koehler Ten Years On' (2015) 39(2) *University of Western Australia Law Review* 150, 162.

¹²⁸ (2022) 273 CLR 115 ('*Kozarov*').

¹²⁹ *Ibid* 129–30 [32] (Gageler and Gleeson JJ).

work are still not sufficient to put the employer on notice that an employee is at risk of psychiatric injury.¹³⁰

Consequently, the common law duty of care does not protect employees from psychological injury from constant connection in the same way as the new right to disconnect. Nor do the common law duties sufficiently protect against unpaid work, provide clarity between an employee's working and private lives, help boost productivity or reduce inequalities for informal carers.

It is beyond the scope of this article to discuss whether workers' compensation legislation in each state and territory would cover psychiatric injuries caused by constant connection to work. However, as a passing comment these schemes are primarily aimed at compensating for injuries after they have occurred, not as a preventative measure.¹³¹ Accordingly, their effectiveness at preventing workplace injuries, including potential psychiatric injuries arising from constant connection, is largely dependent on the deterrence from the consequences of an accepted claim on employers. This may be impacted by: (1) whether that type of injury is compensable under the relevant legislation; (2) the financial consequences (which in turn may depend on the employer's insurance arrangements); (3) reputational damage; and (4) the practical difficulties of managing injured employees.

IV WHAT IS THE OPTIMAL APPROACH IN AUSTRALIA

This Part will provide a prospective analysis as to whether the new right to disconnect model in the *Closing Loopholes Act No 2* will be effective at solving the problems discussed in Part II. I will then discuss an alternative of a soft approach encouraging negotiations between employers and employees. This Part will conclude by outlining the methods of monitoring compliance that can be implemented to complement either the current model, or a revised model.

While the present model is new and its effectiveness will take some time to properly evaluate, there is merit in considering alternatives at this early stage. Simply because there is a model in place it does not mean it is not worth considering alternatives to optimise the operation of the present right to disconnect.

In her first article on this topic, Golding primarily focused on a right to disconnect as a term implied by law into employment contracts.¹³² I do not generally disagree with this possibility, however, given we now have a legislative right to disconnect I have opted not to discuss this option in detail here.¹³³

¹³⁰ Ibid 126–7 [12]–[19].

¹³¹ See, eg, *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 5; *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 3; *Workers Rehabilitation and Compensation Act 1988* (Tas) s 2A.

¹³² See Golding, 'The Right to Disconnect in Australia' (n 14) 750–5.

¹³³ However, the discussion on the right to disconnect as an implied contractual term could be relevant for employees in non-referring states: see above n 17.

A Right to Disconnect Model Implemented by the Closing Loopholes Act No 2

The right to disconnect model implemented by the *Closing Loopholes Act No 2* allows '[a]n employee [to] 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'.¹³⁴ Employees' right to disconnect also extends to work-related communication from third parties.¹³⁵ While it is not an exhaustive list, the following must be considered when determining whether a refusal is unreasonable:

- (a) the reason for the contact or attempted contact;
- (b) how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
- (c) the extent to which the employee is compensated:
 - (i) to remain available to perform work during the period in which the contact or attempted contact is made; or
 - (ii) for working additional hours outside of the employee's ordinary hours of work;
- (d) the nature of the employee's role and the employee's level of responsibility;
- (e) the employee's personal circumstances (including family or caring responsibilities).¹³⁶

There is also a mandated dispute resolution process that requires an employee and employer to first have workplace level discussions before an application can be made to the Fair Work Commission ('FWC').¹³⁷ The FWC is then empowered to make orders against an employee requiring them to stop unreasonably refusing communication, or against an employer preventing them from taking any action against an employee exercising their right to disconnect.¹³⁸ A contravention of these orders can result in a maximum civil penalty of 60 penalty units,¹³⁹ or pecuniary penalty of five times this amount for body corporates, being 300 penalty units.¹⁴⁰ This equates to \$19,800.00 for individuals and \$99,000.00 for body corporates.¹⁴¹ Notably, the potential for criminal penalties for failure to recognise a right to disconnect was removed by the *Fair Work Amendment Act 2024* (Cth).¹⁴²

¹³⁴ FW Act (n 7) s 333M(1).

¹³⁵ Ibid s 333M(2).

¹³⁶ Ibid s 333M(3).

¹³⁷ Ibid s 333N.

¹³⁸ Ibid s 333P.

¹³⁹ Ibid ss 333Q, s 539.

¹⁴⁰ Ibid s 546(1)(b).

¹⁴¹ At the time of writing, a penalty unit equates to \$330.00: *Crimes Act 1914* (Cth) s 4AA(1).

¹⁴² FW Act (n 7) s 675(2)(fa).

The right to disconnect is also a workplace right,¹⁴³ which is an important protection for employees. An employer cannot take adverse action against an employee because the employee has exercised a workplace right.¹⁴⁴ Adverse action includes dismissing an employee or generally treating them less favourably compared to other employees.¹⁴⁵ Accordingly, the inclusion of the right to disconnect as a workplace right is particularly important, as an employee has a claim of action against an employer who dismisses them or otherwise treats them less favourably because of a reasonable refusal to monitor out-of-hours contact. This is also significant as there are no eligibility requirements for employees to make an adverse action claim, or a cap on compensation that can be awarded. In this way, it provides protection to employees who do not meet the qualifying requirements to make an unfair dismissal claim, and enables them to seek reinstatement, or compensation above what could be awarded in an unfair dismissal claim.¹⁴⁶

The right to disconnect is also a mandatory award term,¹⁴⁷ which will allow the FWC to decide on the appropriate carve-outs in awards for when employees must monitor communications in addition to the general unreasonable refusal to monitor carve-out in the legislation.

It is noteworthy that the current model is not a prohibition on out-of-hours contact from the employer,¹⁴⁸ but framed as an employee right to refuse to monitor such contact. Hence under the current model, there is nothing stopping employers and third parties continually contacting employees. In this way the adequacy of the model at preventing the psychological risks is somewhat diminished. If employees receive work communications on personal devices, they will still see the notification of a message and potentially some of its content depending on their notification settings. Seeing the notification may prompt them to read the message in any event, and hence the right to disconnect becomes partially redundant. While an employee may simply turn off their notifications, or not monitor a work device, this begs the question of how an employee will determine whether a refusal to monitor or respond to communications is

¹⁴³ Ibid s 333M(4).

¹⁴⁴ See *ibid* s 340(1)(a).

¹⁴⁵ *Ibid* s 342.

¹⁴⁶ To be eligible to make an unfair dismissal claim, an employee must be employed for six months and either: (1) be covered by an award; (2) be covered by an enterprise agreement; or (3) be under the high-income threshold: *ibid* s 382. Remedies for unfair dismissal are limited to reinstatement and compensation capped at the lesser of 26 weeks of remuneration or half the high-income threshold: *ibid* s 392. Comparatively, adverse action is a civil remedy provision, and the Federal Circuit and Family Court of Australia is granted board powers to 'make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision': *ibid* s 545(1).

¹⁴⁷ *Ibid* s 149F. For more detailed discussion of the legislative scheme see Golding, 'Unwinding Australia's New Right to Disconnect' (n 9) 207–13.

¹⁴⁸ For example, in Portugal, employers are prohibited from contacting employees during their rest periods except for situations of '*force majeure*': *Portuguese Labour Code* (n 12) art 199.⁹-A. See also Ana Teresa Ribeiro, 'Labour Law in Portugal during the Pandemic: Main Measures and Developments' (2022) 15(2) *Italian Labour Law e-Journal* 105, 115.

reasonable if they are not even seeing the message. They would be unable to determine the reason for the contact as well as the method and level of disruption of the contact, two of the factors in determining reasonableness.

Alternatively, this could be viewed as a strength of the model as it accommodates employees who do not want to disconnect from their workplace.¹⁴⁹ The model allows those employees to continue to monitor communication without consequence to the employer. A prohibition on contact would have taken the decision out of the hands of employees.

The European experiences regarding the right to disconnect have illustrated that a hard approach is effective at creating a cultural change towards better work-life balance. For example, Groupe JLO started with a hard approach, completely preventing out-of-hours contact. They later changed their approach to better facilitate employee flexibility. However, they noted that the hard approach successfully contributed to a culture shift towards more balanced working.¹⁵⁰ In a similar way, a hard approach like the current model in Australia could facilitate a culture shift towards more balanced working and non-working lives.

One strength of this model is the explicit consideration of compensation for being contactable when determining reasonableness. This partially alleviates the issue that responding to isolated messages is unlikely to fall within compensable work time as discussed in Part II(B) as employers may start to explicitly pay employees more to be contactable outside working hours through on-call or similar clauses. Modern awards with on-call provisions provide some clarity that the right to disconnect does not apply: (1) when an employee is being paid an availability allowance and the contact is for notification of attendances at work; (2) when an employee is being recalled to work; and (3) for an emergency roster change.¹⁵¹

Of course, remuneration is only one consideration, and it is possible that employees will not be able to exercise a right to disconnect despite not receiving additional remuneration if other factors suggest exercising the right is unreasonable. Further, it seems an inevitability that employment contracts will begin to have a standard term to the effect of: 'your salary includes compensation for being contactable outside of working hours'. This will likely diminish the relevance of the consideration as employers can then argue they are compensating their salaried employees for being contactable outside working hours when there is unlikely to be any specific allowance for this in a salaried employee's remuneration. However, I suggest this is still a positive change as employees may be able to negotiate a right to disconnect in return for a slightly lower salary or vice versa.

¹⁴⁹ See, eg, Schofield (n 5).

¹⁵⁰ Weber and Llave (n 15) 41, 50, 52.

¹⁵¹ See, eg, Fair Work Commission, *Nurses Award 2020* (MA000034, 1 January 2010) cls 13A.4–13A.5; Fair Work Commission, *Banking, Finance and Insurance Award 2020* (MA000019, 1 January 2010) cls 13A.4–13A.5; Fair Work Commission, *Fire Fighting Industry Award 2020* (MA000111, 1 January 2010) cls 12A.4–12A.5.

Having a consideration for caring responsibilities is a positive step in resolving some of the challenges faced by informal carers discussed in Part II(E). However, it is unclear how the FWC will balance the considerations if there is a senior employee with a high level of responsibility who is also providing informal care. If the level of responsibility consideration is given greater weight compared to the caring responsibilities consideration, then the model may be ineffective in this purpose. Alternatively, if they are given equal weight the other considerations may be the deciding factor.

The main issue with this model is the ambiguity. Until cases begin coming before the FWC, it is unclear what will be considered an unreasonable exercise of the right to disconnect. Indeed, President Hatcher has indicated the FWC will not produce guidelines until they have dealt with some disputes and 'have some understanding of the practical issues for which guidance may be required.'¹⁵² This ambiguity could have significant consequences for an employee or employer if the first case to come before the FWC concerns an adverse action claim involving termination following a worker exercising the right to disconnect. For an employee, they may be terminated for what they believed was a permissible exercise of the right to disconnect. On the other hand, an employer may be required to pay damages or reinstate the employee. However, this situation will not arise if the parties use the dispute resolution procedure in s 333P of the *FW Act* and the FWC determines whether the refusal to monitor communications is unreasonable prior to any dismissal.

I acknowledge the ambiguity associated with the right to disconnect is generally aligned with the industrial relations system created by the *FW Act*. The right to disconnect provision in s 333M of the *FW Act* is comparable to the maximum weekly hours provision in s 62 of the *FW Act* and the employee's entitlement to be absent on a public holiday in s 114 of *FW Act*, in that all three provisions list out several factors that the FWC is required to take into account to determine reasonableness for each test. However, that does not mean the ambiguity will not be an issue. For example, s 114 of the *FW Act* continues to be subject of numerous disputes.¹⁵³

By the start of March 2025, seven right to disconnect disputes had been lodged in the FWC, with four related to adverse action and other dismissal laws.¹⁵⁴ However, as at 21 August 2025, the FWC has not 'been asked to deal with any test

¹⁵² *Re Variation of Modern Awards to Include a Right to Disconnect Term* [2024] FWC 1818, [11] (Hatcher P).

¹⁵³ See, eg, *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1; *Premier Pet* (n 85); *Sagona v R & C Piccoli Investments Pty Ltd* [2014] FCCA 875; *Fair Work Ombudsman v DTF World Square Pty Ltd (in liq)* [No 3] [2023] FCA 201; *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd* (n 94); *United Workers' Union v Bervar Pty Ltd* [2022] FedCFamC2G 418; *Australian Salaried Medical Officers Federation v Goulburn Valley Health* [2024] FWC 807.

¹⁵⁴ David Marin-Guzman, 'The Right to Disconnect is Becoming the Right to Sue', *Australian Financial Review* (online, 2 March 2025) <<https://www.afr.com/work-and-careers/workplace/the-right-to-disconnect-is-becoming-the-right-to-sue-20250228-p51fuz>>.

cases regarding the substantive right to disconnect provisions in the FW Act'.¹⁵⁵ Acknowledging seven cases in approximately six months is not an excessive amount, it remains to be seen whether the right to disconnect will be an ongoing basis for unfair dismissal and adverse action claims.

Another negative of the current model is the framing of the current right to disconnect may reduce flexibility, in that for an employee to have a right to refuse to monitor out-of-hours communications, they must first have defined hours. Salaried employees without specific set working hours may now be forced into a specific period of work if they wish to disconnect. This may have a similar effect on employees with flexible working arrangements. In this way the framing of the right to disconnect around working hours appears to be a step backwards for flexible working arrangements, however a step forward in distinguishing between an employee's working and private life.

Overall, the ambiguities in the present model make it difficult to determine how adequate the model will be. The level of psychological protection from the impacts of constant connection and associated boosts to productivity will largely depend on the interpretation of what is an unreasonable refusal to monitor communications. The specific consideration for caring responsibilities does help to address the inequalities for carers in the labour market. The specific consideration for remuneration for being connected may help initiate discussions on more on-call or similar constant connection allowances.

However, these positives must be weighed against a potential to limit flexibility and considered in the context of work health and safety legislation which largely addresses the issues with psychosocial risks. Acknowledging the lack of any judicial interpretation of the current right to disconnect, in my view the current model is not the best approach when considered against the issues it is attempting to solve.

B Soft Approach: Encouraging Negotiations

One legislative approach Australia could have implemented is a framework that encourages negotiations between employees and employers to implement a right to disconnect. Indeed, the right to disconnect was implemented, to some extent, with the intention of encouraging communications between employees and employers about boundaries and working time.¹⁵⁶

At least having a legislative requirement to negotiate is preferable to having no legislation aimed at recognising a right to disconnect. Self-regulation generally risks 'abuse [of] unequal power relationships' in an employment

¹⁵⁵ *Re Variation of Modern Awards to Include a Right to Disconnect Term* [2025] FWCFB 185, [4] (Hatcher P, Asbury V-P, O'Neill D-P, Commissioner McKinnon).

¹⁵⁶ See above n 79. See also Commonwealth, *Parliamentary Debates*, Senate, 8 February 2024, 232 (Murray Watt).

relationship.¹⁵⁷ Even if companies are prepared to negotiate voluntarily, there is no fall-back option if negotiations fall through.¹⁵⁸

Alternatively, an employer is generally entitled to create a policy and then simply not follow it. There is no legally enforceable obligation for employers to follow their own policies unless they are incorporated into an enterprise agreement or an employment contract.¹⁵⁹ Employers may inadvertently incorporate policies into employment contracts, which can lead to significant awards of damages in an action for breach of contract if an employer is found to not have complied with their own policy.¹⁶⁰ However, following the decision in *WorkPac Pty Ltd v Rossato*, where the High Court emphasised the primacy of express terms in employment contracts,¹⁶¹ an express term in an employment contract to the effect that an employer's policies do not form part of the contract is a strong basis for excluding policies from having contractual status. Consequently, a well-drafted employment contract will expressly exclude policies from having contractual status, enabling employers to enforce policies as a lawful and reasonable direction, without creating rights for an employee or binding the employer to a specific process.¹⁶²

As a further alternative, without legislative guidance a company may make a policy which seems positive from an outside perspective to improve public image, but not actually offer any substantive protection.¹⁶³ Hence any policy-based approach is unlikely to offer any substantive protection to employees, as they will not actually have an enforceable right to disconnect.

In Australia, there were reportedly at least 56 enterprise bargaining agreements with a right to disconnect prior to the legislative amendments,¹⁶⁴ which suggests there was only a small portion of employers voluntarily creating legally enforceable rights for their employees.

The preferable soft approach is to give employees a right to negotiate an agreement with their employers on the right to disconnect that is then legally enforceable. This involves a similar type of legislation to that of France, however the precise model could have been improved and adapted to the Australian environment.

¹⁵⁷ Judy Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?' (2007) 29(1) *Comparative Labor Law & Policy Journal* 29, 56.

¹⁵⁸ See Weber and Llave (n 15) 2, 55.

¹⁵⁹ See Mark Giancaspro, 'Do Workplace Policies Form Part of Employment Contracts: A Working Guide and Advice for Employers' (2016) 44(2) *Australian Business Law Review* 106.

¹⁶⁰ See, eg, *Elisha v Vision Australia Ltd* (2024) 99 ALJR 171; *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403; *Goldman Sachs JBWere Services Pty Ltd v Nikolich* (2007) 163 FCR 62.

¹⁶¹ (2021) 271 CLR 456, 479–80 [65] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

¹⁶² See, eg, *Robinson v Pilbara Iron Company (Services) Pty Ltd [No 2]* (2023) 326 IR 132.

¹⁶³ Secunda, 'The Employee Right to Disconnect' (n 113) 31.

¹⁶⁴ Commonwealth, *Parliamentary Debates*, Senate, 22 January 2024, 18 (Barbara Pocock).

In France, companies with over 50 employees are required to negotiate how they can respect employees' right to disconnect with employee representatives.¹⁶⁵ Failing this, employers are required to publish a charter that outlines 'the duties and rights of the employees beyond formal working time and allows the right to disconnect'.¹⁶⁶

The French approach has illustrated that collective agreements are not the most effective way to implement the right to disconnect, with issues including a lack of enforceability,¹⁶⁷ and 'cut-and-paste' style agreements.¹⁶⁸ This is not dissimilar to many of the clauses in Australian awards at the time of writing, which simply cut-and-paste s 333M of the *FW Act*.¹⁶⁹

It is possible the inclusion of the right to disconnect as a mandatory award term may increase the prevalence of more specific clauses in enterprise agreements. For the FWC to approve an enterprise agreement, it must be satisfied the agreement passes the better off overall test.¹⁷⁰ This requires that 'each award covered employee, and each reasonably foreseeable employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee'.¹⁷¹ Accordingly, during enterprise bargaining, there may be some negotiation on right to disconnect clauses to ensure the enterprise agreement passes the better off overall test, which may lead to more specific right to disconnect clauses. However, a search of enterprise agreements on the FWC website shows that while, at the time of writing, there are several hundred enterprise agreements that now include a right to disconnect clause, many of them are still mostly copy and paste clauses from s 333M of the *FW Act* or from the relevant award, with little additional clarity.¹⁷²

Further, only 34% of Australian employees are covered by enterprise agreements according to the most recent data.¹⁷³ Therefore, most employees will not benefit from the potential for more specific right to disconnect clauses in enterprise agreements.

I suggest that the right to disconnect could have been recognised by a 'right to request' style model that operates in a similar way to flexible working

¹⁶⁵ Golding, 'The Right to Disconnect in Australia' (n 14) 728–9; Tammy Katsabian, 'It's the End of Working Time as We Know It: New Challenges to the Concept of Working Time in the Digital Reality' (2020) 65(3) *McGill Law Journal* 379, 385; UNI Global Union, *Legislating a Right to Disconnect* (Report, 1 October 2020) 3–4.

¹⁶⁶ Katsabian (n 165) 394.

¹⁶⁷ Secunda, 'The Employee Right to Disconnect' (n 113) 28.

¹⁶⁸ Katsabian (n 165) 395.

¹⁶⁹ See, eg, Fair Work Commission, *Meat Industry Award 2020* (MA000059, 1 January 2010) cl 14A; Fair Work Commission, *Fast Food Industry Award 2020* (MA000003, 1 January 2010) cl 13A; Fair Work Commission, *Seafood Processing Award 2020* (MA000068, 1 January 2010) cl 13A.

¹⁷⁰ *FW Act* (n 7) s 186(2)(d).

¹⁷¹ *Ibid* s 193(1)(a).

¹⁷² See, eg, Fair Work Commission, *DTM Enterprise Agreement 2024* (AE528116, 27 February 2025) cl 36; Fair Work Commission, *Svitzer Australia Port of Eden Lines and Launch Services Enterprise Agreement 2024* (AE527695, 31 January 2025) cl 27; Fair Work Commission, *Diona Pty Ltd Enterprise Agreement 2024–2028* (AE527145, 17 December 2024) cl 37.

¹⁷³ Department of Employment and Workplace Relations (Cth), *Trends in Federal Enterprise Bargaining: December Quarter 2024* (Report, 27 March 2025) 5.

arrangements.¹⁷⁴ A right to request disconnection could have been included as part of the flexible working arrangements system or could have been implemented separately but using a similar model. Using this model or the framework of this model preserves flexibility, addressing the concerns noted above.¹⁷⁵

Iain Campbell and Sara Charlesworth have outlined some key criteria for an effective right to request model.¹⁷⁶ The first criterion is that a right to request should be ‘available to *all* employees, not only those with caring responsibilities’.¹⁷⁷ While Part II(E) noted that the impact of constant connection disproportionately affects informal carers, the negative health effects discussed in Part II(A) apply to all workers. Currently, there is only a right to request flexible work arrangements for limited classes of employees, namely, those that are pregnant, carers, disabled, over 55, or experiencing family and domestic violence (collectively, ‘designated classes’).¹⁷⁸ Hence if a right to request disconnection were implemented in line with the right to request flexible work arrangements, it would help the carers disproportionately affected by constant connection, but not all employees. From an employer perspective, they could reject such requests for any of the reasons in s 65A(5) of the *FW Act*, maintaining a balance between the interests of employees and employers.

Given the focus on addressing psychosocial hazards in the work health and safety legislation and the heightened impact of constant connection for informal carers, I am slightly more persuaded that only those within the designated classes should be able to request disconnection. If this were the case, it would still be within an employer’s prerogative as to whether they would be willing to negotiate with employees outside the designated classes on a right to disconnect.

However, I equally accept being able to disconnect has benefits for all employees. In my view, if a right to request disconnection — and even to request flexible working arrangements more generally — was available to the entire workforce, it could still have an overall positive effect with employees feeling more refreshed, and employers potentially seeing productivity benefits and less absenteeism.¹⁷⁹

The second criterion is that there should be a procedure for ‘direct facilitation of a request’, which includes anti-discrimination provisions for making a request.¹⁸⁰ The anti-discrimination portion of this criterion is accommodated by the general protections in the *FW Act*.¹⁸¹ If a right to request disconnection were included as part of a flexible working arrangement, then it would already be covered by the

¹⁷⁴ See Senate Select Committee on Work and Care, Parliament of Australia, *Interim Report* (n 26) 109 [6.44], where this idea received a passing mention.

¹⁷⁵ See above Part II(F).

¹⁷⁶ Sara Charlesworth and Iain Campbell, ‘Right to Request Regulation: Two New Australian Models’ (2008) 21(2) *Australian Journal of Labour Law* 116.

¹⁷⁷ *Ibid* 129 (emphasis in original).

¹⁷⁸ *FW Act* (n 7) s 65(1A).

¹⁷⁹ See above Part II(D).

¹⁸⁰ Charlesworth and Campbell (n 176) 129.

¹⁸¹ *FW Act* (n 7) ss 341–2.

general protections. If it were introduced as a new mechanism, it may need to be included as an explicit workplace right.¹⁸² In terms of the facilitation, there should be clear guidelines implemented on what is required in a disconnection agreement.¹⁸³ The most important requirement is clearly the uncontactable times. However, other important points include any permissible exceptions, both in terms of the purpose and methods of the communication that may be acceptable. The Fair Work Ombudsman could facilitate these guidelines in a similar manner to the current information provided on flexible working arrangement requests, which includes template letters and fact sheets.¹⁸⁴

The final criterion is that a right to request disconnection would need to place a clear obligation on the employer to actually consider the request, including a right to review the decision.¹⁸⁵ Using the flexible working arrangements framework would accommodate this given the recently added detailed provisions on the requirements for an employer to refuse a request for flexible working arrangements, and the ability to refer the dispute to the FWC.¹⁸⁶

Using the flexible working arrangement model would embrace the notions of flexibility that must be enshrined within any right to disconnect. It would allow workers who do not wish to disconnect to remain connected, and those that wish to disconnect to request that. The employer could refuse the request if it fell within the established reasons in s 65A(5) of the *FW Act*, but could not unreasonably refuse a request. In this way, all parties would have their interests balanced.

This would in theory improve the French model and prevent cut-and-paste style agreements applying to broad classes of employees. A personalised touch reduces the ambiguities that are present in the current model. If a right to request disconnection agreement was well-made, it would outline specific periods an employee could disconnect without having to worry about considering if their refusal to monitor communications is unreasonable. Further, using a disconnection window in a similar way to BMW and Evonik in Germany could alleviate the issue of defining working time in the current model.¹⁸⁷ For example, while an employee may work between 7:00am and 3:00pm Monday to Friday, the agreed disconnection period may be from 7:00pm to 5:00am Monday to Friday and all day Saturday and Sunday.

Once an agreement is reached, it would place an enforceable duty on the employer to not contact the employee. In this way, it would adhere to the

¹⁸² Although it may be part of 'other process or proceedings under a workplace law or instrument' that are already a protected workplace right: *ibid* s 34.1(2)(k).

¹⁸³ See Productivity Commission (n 4) 45; Golding, 'The Right to Disconnect in Australia' (n 14) 749.

¹⁸⁴ See 'Flexible Working Arrangements', *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/employment-conditions/flexibility-in-the-workplace/flexible-working-arrangements>>.

¹⁸⁵ Charlesworth and Campbell (n 176) 130.

¹⁸⁶ *FW Act* (n 7) ss 65A–65B. These provisions only came into effect on 6 June 2023: *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) s 2, sch 1 pt 11. See also *Naden v Catholic Schools Broken Bay Ltd* [2025] FWCFB 82.

¹⁸⁷ Weber and Llave (n 15) 33, 37.

argument that an employer duty is more effective than an employee right for effectively recognising a right to disconnect.¹⁸⁸

The downside is that this would place the obligation on the employee to make the initial request, instead of making it a duty of the employer. Even with anti-discrimination provisions in place, employees might be reluctant to make a request for fear of reprisal. This is one weakness compared to the current model, which does not require the employee to do anything at first instance.

Overall, a right to request disconnection could be effectively implemented using the flexible working arrangement framework, either by making it part of the existing framework, or creating a new section based on that framework. In this way, it could reduce the inadequacies in the ambiguities in the present model and better serve the rationale the right to disconnect was implemented for.

C Monitoring Compliance

Any method of recognising a right to disconnect should be complemented with adequate monitoring and compliance auditing.¹⁸⁹ This could be like the requirements for heavy vehicle drivers to keep a diary of working and rest times for fatigue management.¹⁹⁰ Given employees remain connected through ICT, and employers already use software to track ICT use, this does not appear too onerous for employees using devices supplied and maintained by employers. However, the difficulty arises for employees with work communications on their personal devices, or employers who do not have the resources to track ICT use. This also raises the significant issue that data surveillance is unlawful in some jurisdictions without the consent of the owner of the device.¹⁹¹

Further, mandatory recording of time outside formal working time — accounting for the minutes it takes to respond to a message — may make an employer feel justified in capturing all working time by an employee while at work, and docking pay for incidental things like toilet breaks.¹⁹²

While it is beyond the scope of this article to discuss specific recordkeeping obligations under the *Privacy Act 1988* (Cth), employee information about ‘the employee’s hours of employment’ is exempt from the requirements of that Act.¹⁹³

However, from a policy perspective there should also be some consideration to respect the privacy of the worker.¹⁹⁴ One method is to require the worker’s consent

¹⁸⁸ Chesalina (n 3) 57; Ribeiro (n 148) 115.

¹⁸⁹ See Secunda, ‘The Employee Right to Disconnect’ (n 113) 28; Weber and Llave (n 15) 56.

¹⁹⁰ *Heavy Vehicle National Law 2013* (ACT) s 293; *Heavy Vehicle National Law 2013* (NSW) s 293; *Heavy Vehicle National Law Act 2012* (Qld) s 263; *Heavy Vehicle National Law (South Australia) Act 2013* (SA) s 293.

¹⁹¹ See, eg, *Surveillance Devices Act 2016* (SA) s 8; *Surveillance Devices Act 2007* (NSW) s 10.

¹⁹² Katsabian (n 165) 392.

¹⁹³ *Privacy Act 1988* (Cth) ss 6 (definition of ‘employee record’), 7B(3).

¹⁹⁴ Katsabian (n 165) 391. See also Secunda, ‘The Employee Right to Disconnect’ (n 113) 8–10.

before tracking their ICT activity to monitor compliance.¹⁹⁵ An alternative method is to use software which tracks the time emails or messages are sent to ensure they are within the allowable timeframes.¹⁹⁶ Irrespective of the method of data collection, the collection process and uses of the data should be transparent to employees.¹⁹⁷

In the absence of software to track these communications, an employer could use the cheaper but more time-consuming method of manually recording out-of-hours communications. However, it seems impossible for an employer to track work-related communications from third parties to their employees outside of working hours on non-employer-owned devices without data tracking software. In such situations, the responsibility would likely fall on the employee to record out-of-hours communications themselves.

I acknowledge the wording of the current right to disconnect model does not place an obligation on an employee to report incidents of out-of-hours contact. However, a record of out-of-hours contact may be relevant if there is a dispute about whether a refusal to monitor communications was unreasonable. In addition, this data could be considered by employers to reduce the chances of psychosocial injury in accordance with the *WHS Act*.

V CONCLUSION

It is becoming a necessity in the modern working world dominated by ICT for employees to be able to disconnect from their work, both in terms of completing substantive work, and sporadically reading and replying to messages. Without this disconnection, employees are exposed to a range of health issues associated with stress and overwork.

Prior to the *Closing Loopholes Act No 2*, a variety of mechanisms may have been indirectly able to recognise a right to disconnect in Australia. In particular, the new focus on psychosocial risks in the various work health and safety Acts arguably makes constant connection an identifiable psychosocial hazard and places an obligation on employers to allow employees to disconnect from work. Accordingly, there is less necessity in an explicit right to disconnect given the negative psychological effects are the primary issue the right to disconnect aims to resolve.

However, I remain of the view an explicit right to disconnect has some utility, but I tentatively suggest a right to request disconnection would be more appropriate than the current model in the *Closing Loopholes Act No 2*. I argue the broad-brush approach taken presents too much ambiguity, especially when considering what is unreasonable, and has the potential to limit flexible working arrangements.

¹⁹⁵ Katsabian (n 165) 391.

¹⁹⁶ See Weber and Llave (n 15) 45–7.

¹⁹⁷ See Australian Unions, *Working from Home* (Charter, 17 November 2020) 3 <<https://www.actu.org.au/wp-content/uploads/2023/06/media1449328d59-working-from-home-charter-2.pdf>>.

Contrastingly, a right to request disconnection allows for individual circumstances to be considered leading to tailored and more effective agreements directly between employers and employees that preserve flexibility. In my view, a right to disconnect negotiated on a case-by-case basis between employers and employees is more effective than a broad prohibition on out-of-hours contact.

At the very least, the discussions generated by the right to disconnect have and will continue to foster improved communications about work-life balance. Following Labor being re-elected to government in the 2025 federal election, the right to disconnect is likely to continue to feature within the Australian industrial relations framework. With some slight tweaks, a right to disconnect has the potential to lead to happier and more productive workplaces and have a positive impact on both employers and employees.