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Beyond 9 to 5: Balancing the Right to Disconnect, Additional Work Hours and out of Hours Contact

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Beyond 9 to 5: Balancing the Right to Disconnect, Additional Work Hours and Out of Hours Contact

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This paper is only intended as a general overview of issues relevant to the topic and is not legal advice. If there are any matters you would like us to advise you on in relation to this paper, please let us know.

1 Introduction

1.1 Australians work long hours. In 2023, Australian employees worked an average of 280 hours of unpaid overtime. This includes the time employees spent staying late, working through their breaks, working weekends and taking calls and emails outside of their ordinary hours.[1]

1.2 With remote working arrangements and four-day work weeks becoming increasingly common, many employees are looking for working arrangements that maximise their time out of the office and minimise unpaid hours.

1.3 Workplace laws are beginning to address the idea of the work/life balance, seeking ways to limit the amount of unpaid work performed by Australians.

1.4 With this in mind, a 'right to disconnect' has been inserted into the *Fair Work Act 2009* (Cth) (***FWA***) which will take effect this year. This right will allow employees to reasonably refuse to monitor, read or respond to out of hours contact (**right to disconnect**).

1.5 Currently, under the *FWA*, employers cannot request or require employees to work additional hours that are not reasonable. This issue has been considered by courts in cases like *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd*[2] (***AMIEU v Dick Stone***). However, it is not always clear when a request to work additional hours will be reasonable.

1.6 The issue of disconnecting from work and working unreasonable hours also interact with workplace health and safety issues, including psychosocial hazards.

1.7 This session will explore the key issues relevant to additional work hours and out of hours contact, including:

(a) the right to disconnect;

(b) asking employees to work additional hours;

(c) how courts deal with unreasonable hours claims;

(d) workplace health and safety risks;

(e) minimising the risks of overworking; and

(f) the effects of remote and flexible working.

2 The right to disconnect

History of the right to disconnect

2.1 The right to disconnect will come into effect on 26 August 2024 for non-small business employers and 26 August 2025 for small business employers.

2.2 The right to disconnect was implemented by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (**Closing Loopholes Act**).

[1] Centre for Future Work, *Short Changed: Unsatisfactory working hours and unpaid overtime* (Report November 2023) 14.
[2] [2022] FCA 512.

2.3 Prior to this, a right to disconnect was initially proposed in the *Fair Work Amendment (Right to Disconnect) Bill 2023* (Cth). At the time of that proposal, some enterprise agreements already contained right to disconnect provisions.[3] The Bill proposed adding a similar right to disconnect into the National Employment Standards.

2.4 This right would have been extremely restrictive for employers, providing that:

(1) An employer could not contact an employee outside of the employee's hours of work (including during periods of leave), unless:

(a) the reason for the contact was an emergency or a genuine welfare matter; or

(b) the employee was in receipt of an availability allowance for the period during which the contact is made.

(2) An employee was not required to monitor, read or respond to emails, telephone calls or any other kind of communication from an employer outside of the employee's hours of work (including during periods of leave) unless the employee was in receipt of an availability allowance for the period during which the communication is made.

2.5 However, this Bill failed to pass Parliament.

2.6 In a second attempt to introduce the provision into law, the right to disconnect was then proposed as part of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* (Cth) (**Closing Loopholes Bill No. 2**).

2.7 Interestingly, the original Closing Loopholes Bill did not include the right to disconnect. However, the Senate Education and Employment Legislation Committee (**Committee**) recommended it resulting in a subsequent amendment, being made to the Closing Loopholes Bill.

2.8 That occurred because at the time of the Senate review, the Committee raised concerns about the intensification of workloads contributing to staff recruitment and retention issues, particularly in the teaching and policing sectors.[4]

2.9 Senator Barbara Pocock also raised concerns about the effects of unpaid work in highly feminised industries, such as education.[5]

2.10 It was as a result of these recommendations that the right to disconnect was added to the Closing Loopholes Bill No. 2.

The right to disconnect

2.11 Under the new section 333M of the *FWA*, employees will have a right to disconnect. Particularly, the amendment will provide that:

(1) An employee may refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable.

[3] See for example *Victoria Police (Police Officers, Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2019*.
[4] The Senate Education and Employment Legislation Committee, *Fair Work Legislation Amendment (Closing Loopholes Bill No.2) Bill 2023 [Provisions]* (Report, February 2024) 56-58.
[5] Ibid 147-148.

(2) An employee may refuse to monitor, read or respond to contact, or attempted contact, from a third party if the contact or attempted contact relates to their work and is outside of the employee's working hours unless the refusal is unreasonable.

2.12 The following factors will be relevant under section 333M for determining whether an employee's 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 to remain available to perform work, or for working additional hours;

(d) the nature of the employee's role and the employee's level of responsibility; and

(e) the employee's personal circumstances (including family or caring responsibilities).

2.13 It is not clear how urgent tasks or critical projects will be affected by the right to disconnect. However, the reason for the contact or attempted contact will be a consideration for determining whether a refusal is reasonable. Work being urgent or critical will likely be a relevant factor under this consideration.

2.14 Similarly, the nature of the employee's role and the employee's level of responsibility will also be a consideration. If an employee is more senior and has a high level for responsibility for urgent and critical work, this will also likely be a relevant factor.

2.15 Under the new section 333M(6), if an employee is covered by an enterprise agreement with a more favourable right to disconnect term than in the *FWA*, the term in the enterprise agreement will continue to apply to the employee.

Right to disconnect disputes

2.16 Should an employer refuse to acknowledge an employee's right to disconnect, or seek to challenge whether the employee's refusal is reasonable, the parties to the dispute must attempt to resolve the dispute at the workplace level by discussions in the first instance.

2.17 If discussions do not resolve the dispute, a party to the dispute may apply to the Fair Work Commission (**FWC**).

2.18 Under new section 333P, the FWC will be able to make one of the following orders:

(a) if the FWC is satisfied the employee has made an unreasonable refusal, an order to prevent the employee from continuing to unreasonably refuse to monitor, read or respond to contact or attempted contact;

(b) if the FWC is satisfied the employee has not made an unreasonable refusal and there is a risk that the employer will take disciplinary or other action against the employee, an order to prevent the employer from taking that action; or

(c) if the FWC is satisfied the employee has not made an unreasonable refusal and there is a risk that the employer will continue to require the employee to monitor, read or respond to contact or attempted contact, an order preventing the employer from continuing to do so.

2.19 A person to whom a FWC order applies must not contravene a term of the order. The maximum penalty will be $18,780 for an individual and $93,900 for a corporation.

2.20 Penalties will not apply for contacting an employee outside of their ordinary working hours. Penalties can only be made where an order of the FWC is contravened.

2.21 Originally, the Amending Act provided that a contravention of a FWC order would lead to criminal penalties. However, the *Fair Work Amendment Bill 2024* (Cth) was subsequently introduced into Parliament to clarify that a contravention of a FWC order could only lead to pecuniary penalties.

2.22 There is still limited information on the right to disconnect provisions. However, under the Closing Loopholes Act, the FWC must make written guidelines in relation to these provisions. There is no legislative deadline for the making of these guidelines, however it is anticipated that the guidelines will be released prior to the right to disconnect provisions taking effect.[6]

2.23 Whilst the Closing Loopholes Act does not provide for any exemptions for specific industries or roles, there will be some limited exemptions in place for certain employers having to comply with an order made by the FWC regarding the right to disconnect:

(a) where it would be prejudicial to Australia's defence, national security or an operation of the Australian Federal Police;

(b) where the Director-General of Security has made a declaration; and

(c) where the Director-General of the Australian Security Intelligence Service has made a declaration.

Right to disconnect terms

2.24 In addition to the general protection being included in the FWA, amendments will be made to every modern award to provide for a right to disconnect term by 25 August 2024.[7] These modern award terms will provide for the exercise of an employee's right to disconnect.

2.25 These modern award terms will likely explain how the right to disconnect will apply to different industries and occupations.

2.26 The FWC has also identified that the right to disconnect may be affected by already existing award terms, such as on call provisions and overtime provisions.[8] Right to disconnect terms may be drafted to address this overlap with award-specific provisions.

2.27 The FWC has released a proposed draft timetable for consultation for the process of amending the modern awards. Parties will have until 20 May 2024 to lodge submissions with the FWC on right to disconnect terms.[9]

2.28 Final determinations varying modern awards will be published by 23 August 2024 and come into effect on 26 August 2024.[10]

Preparing for the right to disconnect

2.29 It is not yet clear whether the right to disconnect will have the desired effect of reducing the prevalence of unpaid working hours.

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[6] *FWA* s 333W.
[7] [2024] FWC 649.
[8] Ibid.
[9] [2024] FWC 768.
[10] Ibid.

2.30 Several issues have been identified with the right to disconnect laws that may undermine their effectiveness including:[11]

(a) the proposed civil penalties may not be high enough to encourage employers to take steps to minimise additional hours in their workplaces;

(b) monitoring and ensuring compliance with the right to disconnect laws may be difficult in certain industries, particularly industries where remote work and digital communication is widespread; and

(c) the onus is on the employee to exercise their right to disconnect, with no positive requirement for employers to stop making contact unless a FWC order is in place.

2.31 To prepare for the new right to disconnect laws, employers should review their current employment contacts. Particularly, employers should look at salary arrangements and see if salaries currently compensate employees for monitoring and responding to out of hours contact. Employment contracts may need to be amended to clarify that employees are paid to monitor and respond to out of hours contact.

2.32 Employers may also decide they would like to start paying their employees an availability allowance to compensate workers for out of hours contact.

2.33 Employers can also review the right to disconnect guidelines when they are released by the FWC.

2.34 If employers currently have workers that are covered by a modern award, they should also review the right to disconnect term when it is inserted into the relevant award.

3 Asking employees to work additional hours

3.1 Maximum weekly hours are part of the NES. Employees may refuse to work any additional hours if they are unreasonable.

3.2 Under section 62(1) of the *FWA*, an employer must not request or require an employee to work more than the following number of hours in a week, unless the additional hours are reasonable:

(a) for a full-time employee – 38 hours; or

(b) for an employee who is not a full-time employee – the lesser of:

(i) 38 hours; and

(ii) the employee's ordinary hours of work in a week.

3.3 Due to section 62(1), it is prima facie unreasonable to require or request a full-time employee work in excess of 38 hours. The exception to this is if it is reasonable for the requirement or request to be made. The burden is on the employer to show that the excess hours are reasonable.[12]

3.4 Whether it is reasonable to ask an employee to work additional hours will depend on the circumstances of the employer and the employee.

3.5 Under section 62(3) of the *FWA*, the following factors must be taken into account in determining whether additional hours are reasonable or unreasonable:

[11] Department of Parliamentary Services, Bills Digest No. 52 (February 2024) 8-9.
[12] *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (In Liq) (No 4)* [2021] FCA 1242, [474].

(a) any risk to employee health and safety from working the additional hours;

(b) the employee's personal circumstances, including family responsibilities;

(c) the needs of the workplace or enterprise in which the employee is employed;

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

(e) any notice given by the employer of any request or requirement to work the additional hours;

(f) any notice given by the employee of his or her intention to refuse to work the additional hours;

(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

(h) the nature of the employee's role, and the employee's level of responsibility;

(i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64; and

(j) any other relevant matter.

3.6 The relevance of each of these factors will depend on the circumstances of the employer and the employee. It may be the case that one factor will be very significant and outweigh the other factors. In other cases, it may be necessary to balance each of these factors.[13]

3.7 Employers should be looking at these factors when considering whether they should ask employees to work additional hours.

3.8 Section 62 is a civil remedy provision. Courts may order penalties where employers make unreasonable requests or requirements for an employee to work additional hours.

4 How courts deal with unreasonable hours claims

4.1 There have only been a small number of cases dealing with section 62 of the *FWA* and what constitutes reasonable additional hours.

4.2 There are multiple reasons for this. It has been considered that these provisions are poorly understood by employees and that employees lack the confidence to invoke these provisions and potentially end up in a dispute with their employer.[14]

4.3 There are also limited incentives for employees to pursue unreasonable hours claims. A contravention of section 62 of the *FWA* may lead to penalties for the employer, but will not necessarily result in remedies for the employee.

4.4 Unless the unreasonable hours claim can be linked to a contravention of the general protections provisions of the *FWA*, employees will be limited in the remedies they can obtain; underpayments may not follow unless there has been a breach of an Award or enterprise agreement provision and an order of penalties against an employer may not be

[13] Explanatory Memorandum, Fair Fair Work Bill 2009 (Cth) 42, [250].
[14] Department of Parliamentary Services, Bills Digest No. 52 (February 2024) 8.

sufficient incentive enough to commence court proceedings to challenge the action, even in circumstances where any penalty order may be paid to the applicant.

4.5 For many employees, particularly award-covered employees, there is more financial incentive to pursue an underpayment claim instead of an unreasonable hours claim.

4.6 Alternatively, an employee may make a claim for workers' compensation for a psychological injury caused by unreasonable additional hours.

4.7 The unreasonable hours provisions of the *FWA* are also difficult to enforce. These provisions can easily be overcome contractually by providing additional payments to compensate an employee for working additional hours.

4.8 With the right to disconnect coming into effect, it is possible that there will be even fewer unreasonable hours claims in the future. The right to disconnect may become a more accessible pathway for employees to deal with unreasonable additional hours.

4.9 While employees will be unable to pursue compensation through the right to disconnect provisions, there may be incentive to pursue a right to disconnect claim to obtain a binding FWC order. This could provide even less incentive to pursue unreasonable hours claims.

4.10 However, there is some case law that shows how unreasonable additional hours claims are approached by courts.

AMIEU v Dick Stone

4.11 In *AMIEU v Dick Stone*, the Federal Court considered section 62 of the *FWA* and when additional hours will be unreasonable.

Facts

4.12 In this case, Mr Boateng, was a Ghanaian immigrant employed (within three weeks of arriving in Australia) by Australian meat wholesaler Dick Stone Pty Ltd (**Dick Stone**) to work as a knife hand labourer.[15]

4.13 Mr Boateng was provided with an employment contract that:[16]

(a) represented Mr Boateng's ordinary weekly hours as 50 hours per week over 6 days, starting at 2am each day;

(b) neglected to mention any overtime rates he was entitled to; and

(c) failed to reference the relevant award.

4.14 As Mr Boateng had only recently immigrated to Australia, he was unaware of the relevant workplace relations laws that protected his employment rights and entitlements.[17]

4.15 Mr Boateng agreed to the employment contract and began working routine 50-hour weeks at a standard rate of pay. No overtime was paid to Mr Boateng for the hours he worked in excess of the statutory 38 hour maximum.[18]

4.16 Mr Boateng and the Australasian Meat Industry Employees Union commenced proceedings in the Federal Court arguing that Dick Stone contravened the NES and the *Meat Industry*

[15] *AMIEU v Dick Stone* (n 2) [49].
[16] Ibid [51]-[52].
[17] Ibid [232].
[18] Ibid [180].

Award 2010 by compelling Mr Boateng to work unreasonable additional hours without overtime.

The Federal Court Decision

4.17 The Federal Court upheld the Union's claim and found that the requirement to work additional hours, in excess of 38 hours per week and without the payment of overtime, was unreasonable and unduly compromised his health and safety.

4.18 While it was not in contention that Mr Boateng's 50-hour work weeks aligned with the business needs of the employer, this did not render those hours reasonable.[19]

4.19 The Court held that, when regard was had to the reasonableness criteria contained in section 62(3) of the *FWA*, the additional hours posed an adverse health and safety risk to Mr Boateng. This was because an inherent requirement of Mr Boateng's role involved the use of sharp knives that, when combined with exhaustion and fatigue stemming from excessive work hours, exacerbated the threat to his physical health.[20]

4.20 Further, the 2am starts were 'unsocial' hours and the 6-day working week deprived Mr Boateng of his weekends.[21]

4.21 Dick Stone was fined $30,000 for contravening section 62 of the *FWA* and $20,000 for failing to pay overtime rates in accordance with the *Meat Industry Award 2010*. This penalty was paid to the Australasian Meat Industry Employees Union.[22]

Reynolds v Harrier Group Pty Ltd[23]

4.22 In this case, Ms Reynolds was employed as the CEO of Harrier Group Pty Ltd (**Harrier Group**). Ms Reynolds claimed that Harrier Group contravened multiple provisions of the *FWA* during her employment, including section 62.[24]

4.23 Ms Reynolds claimed that she consistently worked above her maximum ordinary hours of work and beyond reasonable additional hours. Ms Reynolds claimed that:[25]

(a) she had to work excessive hours and return early from holidays and sick leave;

(b) from 2018 onwards, she would consistently work not less than 70 hours per week; and

(c) during 2018, she travelled extensively for work and spent 103 nights away from her home and family.

4.24 The Court concluded that Harrier Group did not contravene section 62 of the *FWA* and had not required Ms Reynolds to work unreasonable additional hours.

4.25 Ms Reynolds was employed at a senior level in the company. Her employment contract contemplated the fact that she would need to work hours in addition to the 38-hour week standard. Her remuneration was high to reflect the expectation she would be required to work additional hours from time to time.[26]

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[19] Ibid [236].
[20] Ibid [230].
[21] Ibid [250].
[22] *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd (No 2)* [2022] FCA 1263, [68]-[77], [89].
[23] [2023] FedCFamC2G 930.
[24] Ibid [1]-[2].
[25] Ibid [102].
[26] Ibid [452].

4.26 Further, Ms Reynolds had a significant degree of control over the additional hours that she worked. Harrier Group and its Board had not required or requested that Ms Reynolds work any unreasonable additional hours.[27]

Dorsch v HEAD Oceania Pty Ltd[28]

4.27 In this case, Mr Dorsch was employed as 'Sales & Marketing Manager' by HEAD Oceania Pty Ltd (**HEAD Oceania**). Following his dismissal, Mr Dorsch claimed that HEAD Oceania had breached section 62 of the *FWA* by requesting or requiring him to work additional hours which were not reasonable.[29] This case examined in more detail the "requirement" to work additional hours.

4.28 The Court considered that an employee may establish that they were required to work additional hours not only if they were 'directed' to do so, but if an employee gave evidence of the work they were directed to complete and the impossibility of completing it within their ordinary hours, they may also satisfy the provision. They found that there is no requirement for the employer to explicitly communicate a request or requirement that an employee should work additional hours.[30] for an employee to be able to establish that the 'requirement' by an employer for them to work additional hours, was not reasonable.

4.29 The court distinguished this scenario from a scenario where an employee merely chose to work additional hours without the approval or knowledge of their employer. In that circumstance they found that an employee cannot allege that there was a requirement to work additional hours.[31]

4.30 Mr Dorsch's claim failed. While Mr Dorsch had claimed that he regularly worked approximately 70 to 80 hours per week, he had not provided evidence of the precise dates or periods where he was required to work these hours. Further, Mr Dorsch decided for himself what additional hours he would work in any week.[32]

5 Workplace health and safety risks

5.1 Whilst the right to disconnect amendments seek to address the issue of any working hours through the FWA, employers need to be aware that requiring employees to work excessive additional hours already exposes them to risks under work health and safety laws.

5.2 Under the Model Work Health and Safety laws, which has been adopted in all states and Territories but Victoria (and similar provision exists under Victoria's safety laws) a person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of workers.[33] This includes the psychological health of workers.[34]

5.3 The 'Managing psychosocial hazards at work – Code of Practice' (**Code of Practice**) identifies high job demands, including long work hours, as a common psychosocial hazard that employers need to control.

[27] Ibid [453].
[28] [2024] FCA 162.
[29] Ibid [3].
[30] Ibid [336].
[31] Ibid.
[32] Ibid [344].
[33] *Work Health and Safety Act 2010* s 19.
[34] Ibid s 4.

5.4 The Code of Practice is currently in place in all States and Territories except for Victoria and the Northern Territory.

5.5 Long and irregular hours of work is also a risk factor for other health and safety risks, including workplace bullying, sexual harassment and sexual assault. Where there is a workplace culture of excessive hours, there is an increased risk of these unsafe behaviours.[35]

5.6 Excessive working hours also increases the risk of fatigue. The risks of injury from fatigue increases where workers have long daily hours in demanding jobs. SafeWork Australia recommends avoiding working hours of more than 50 hours per week to help manage the risk of fatigue.[36]

5.7 In certain industries, such as the transport industry, there are also fatigue management laws. These laws set requirements about maximum shift lengths and required breaks between shifts. These laws are also likely to affect what would be considered 'reasonable' in those industries.

6 Minimising the risks of overworking

6.1 Employers should take steps to control the risks that excessive hours and overworking poses to worker health and safety.

6.2 Overworking should be managed like other psychosocial hazards. The Code of Practice provides a framework for controlling the risks of psychosocial hazards.

6.3 This framework involves consulting staff to identify hazards in the workplace, including hazards relating to high job demands and long work hours.

6.4 Employers may need to assess employee workloads. If workers are given more work than can reasonably be completed within ordinary working hours, there is a risk they will work additional hours.

6.5 It may be necessary to change work design if overworking is an issue. Employers can look at the type of work that employees are spending time on and whether this work needs to be performed. In some cases, workers may be spending time on tasks that can easily be automated or streamlined.

6.6 Additional training may be necessary in some cases. For example, time management training may be needed where employees are struggling with how they should allocate time.

7 The effects of remote and flexible working

7.1 Employees also have a right to request a flexible working arrangement under the *FWA*. Under section 65 of the *FWA*, where an employee has completed at least 12 months of continuous service with an employer and a particular circumstance applies to an employee, they may request a change in their working arrangements.

7.2 One of the following circumstances must apply to the employee:

[35] Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (Report, November 2021) 82.
[36] SafeWork Australia, *Guide for Managing the Risk of Fatigue at Work* (November 2013) 14.

(a) the employee is pregnant;

(b) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

(c) the employee is a carer;

(d) the employee has a disability;

(e) the employee is 55 or older;

(f) the employee is experiencing family and domestic violence; or

(g) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing family and domestic violence.

7.3 An employer can only refuse a request on reasonable business grounds.

7.4 It is possible that there will be an increase in unreasonable additional hours claims if employers do not take steps to manage working from home and flexible working arrangements.

7.5 It is common for employees in mid-seniority positions to work extra hours without notifying their employers. With flexible working arrangements, there is a decreased formal delineation between work and home. This means it is easier for employees to continue working outside of their ordinary hours.

7.6 Employers need to be actively managing employees and their working arrangements. Employers should monitor the hours that employees spend logged on while they are working from home. In some cases, it may be necessary to set boundaries for employees to minimise the hours they spend working.

8 Contacts

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