

Creating Exceptional Outcomes

# The Right to Disconnect

The new 'right' and practical considerations for implementation

/ July 2024

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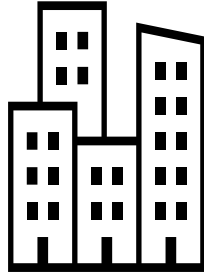
## A new workplace right in the *Fair Work Act*

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- Employees will have a right to not respond to contact from their employer outside of their working hours, unless not responding is unreasonable.

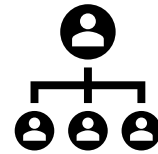


# When does it come into effect?



15 or more employees

**26 August 2024**



Fewer than 15 employees

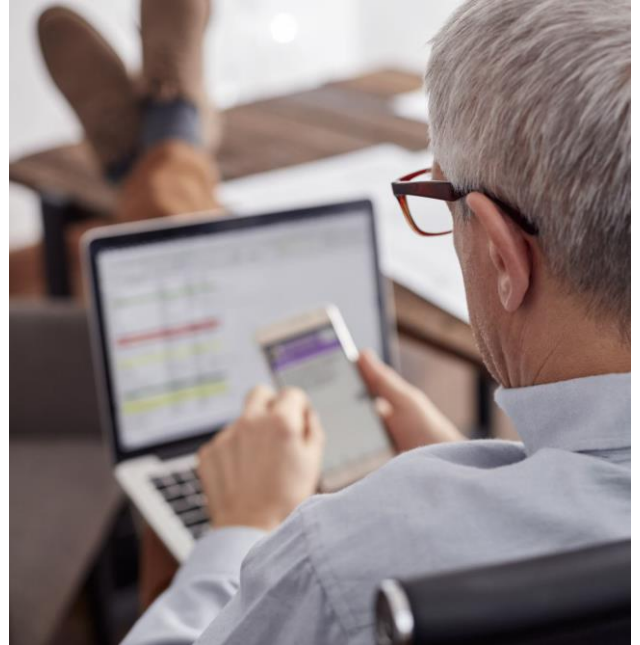
“small business”

**26 August 2025**

# What is the right to disconnect?

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- Employees may refuse to:
  - monitor;
  - read; or
  - respond to,
- contact (or attempted contact), outside of the employee's working hours from:
  - an employer; or
  - a third party if the contact or attempted contact relates to their work,
- unless the refusal is unreasonable.





# What is contact “outside of working hours”?

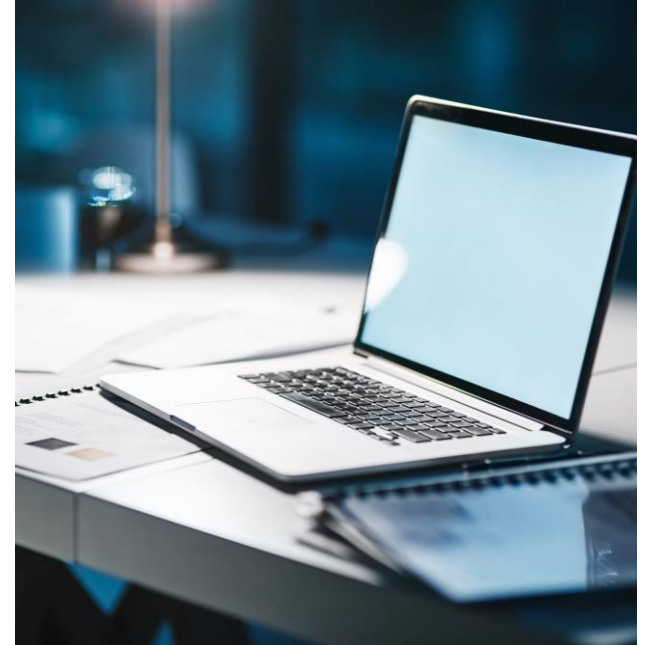
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## **General rule**

- When an employee has left the workplace for the day or logged off from their employer’s systems

# When is a refusal unreasonable?

- Whether the employee's refusal to engage with out-of-hours contact is reasonable or unreasonable, this will require an examination of the following factors:
  - the reason for the contact or attempted contact;
  - **how** the contact or attempted contact is made;
  - the **level of disruption** the contact or attempted contact causes the employee;
  - the extent to which the employee is **compensated** (including non-monetary benefits);
    - to **remain available** to perform work during the period in which the contact or attempted contact is made; or
    - for **working additional hours** outside of the employee's ordinary hours of work;
  - the **nature of the employee's role** and the employee's **level of responsibility**;
  - the employee's **personal circumstances** (including family or caring responsibilities); and
- If the contact is **required** under a law of the Commonwealth, State or Territory, any refusal to monitor, read or respond will be **unreasonable**.



# Draft Award Clause

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- Currently in consultation, to be inserted from 26 August 2024.
- Gives an indication of what will be considered reasonable requirements by the FWC
- Can contact an employee:
  - on stand-by, on-call or recall to work (with relevant allowance/payment);
  - to notify the employee they are required to attend or perform work;
  - if it is in accordance with the usual arrangements for such notification; or
  - where there is an emergency roster change.

A woman with dark hair, wearing a black sleeveless top and a black bag, is looking down at her smartphone. She is standing on a train platform, with a blurred background of a train and other people. The image is framed by a white circular border on the right side.

# Types of communication and “*circumstances*”

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- **Emails**
  - can still be sent to an employee outside their working hours – the right to disconnect means the employee isn’t required to monitor their email and/or respond unless failure to do so would be unreasonable
- **Text messages or phone calls**
  - may be less reasonable unless urgent, as an employee would normally monitor/respond/answer



# The new 'right' and adverse action

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Employers prohibited from taking **adverse action** against an employee for exercising the 'right to disconnect'



Penalties of up to \$93,900 for small businesses and \$469,500 for other corporations



Be cautious if disciplining employees for exercising their 'right to disconnect'



Disputes dealt with by the Fair Work Commission



# Dispute resolution process

Employee refused to monitor/read/  
respond to comms/attempted comms

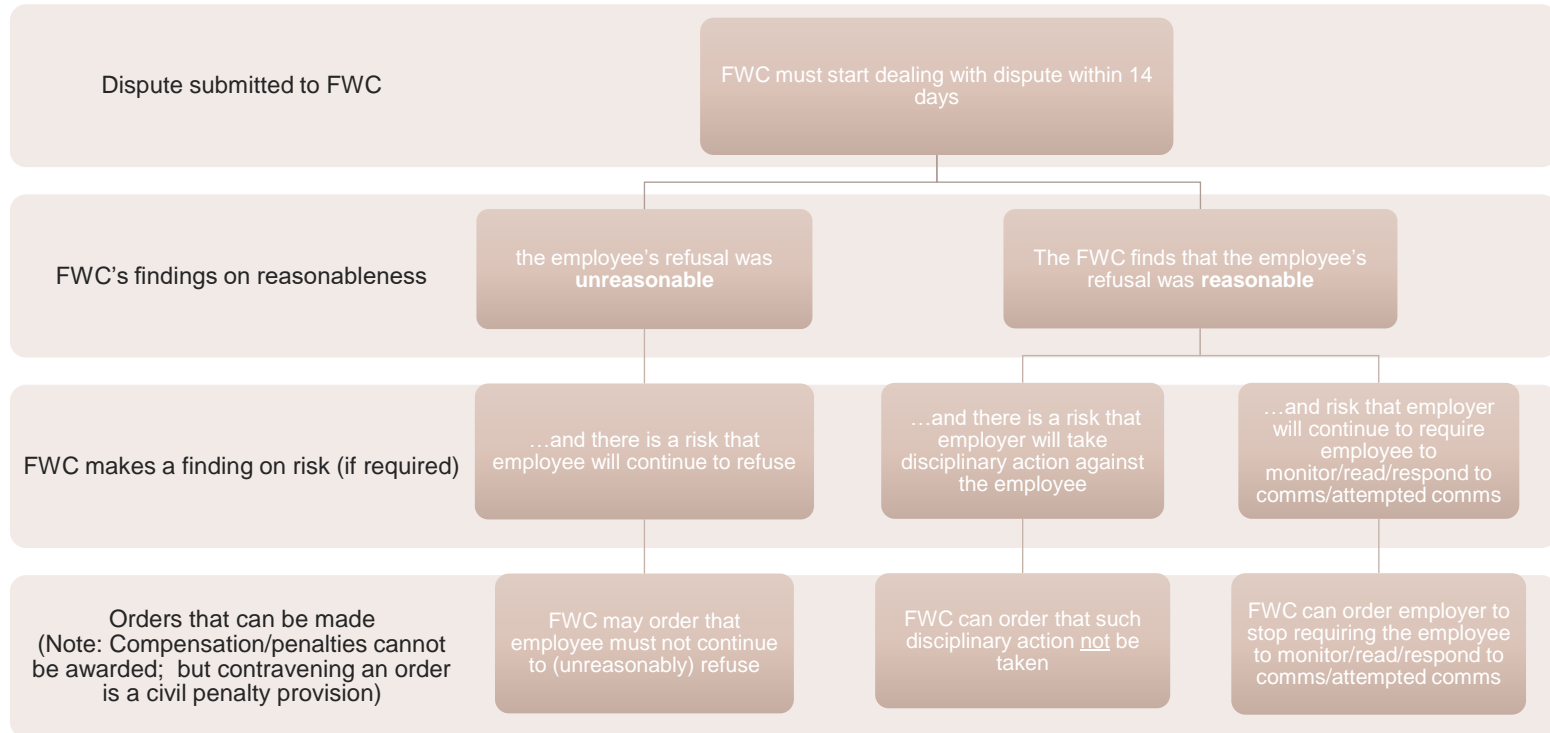
Employer reasonably believes that the  
refusal was **unreasonable**

Employee believes refusal was  
**reasonable**

Workplace resolution must be attempted.

If not resolved, Employee or Employer can  
apply to FWC for an order or mediation

# FWC Orders



# Alternatives to an Order

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- If an application is made to Fair Work Commission for an order, it can deal with the dispute by:
  - Mediation
  - Conciliation
  - Making a recommendation
  - Expressing an opinion
  - Arbitration



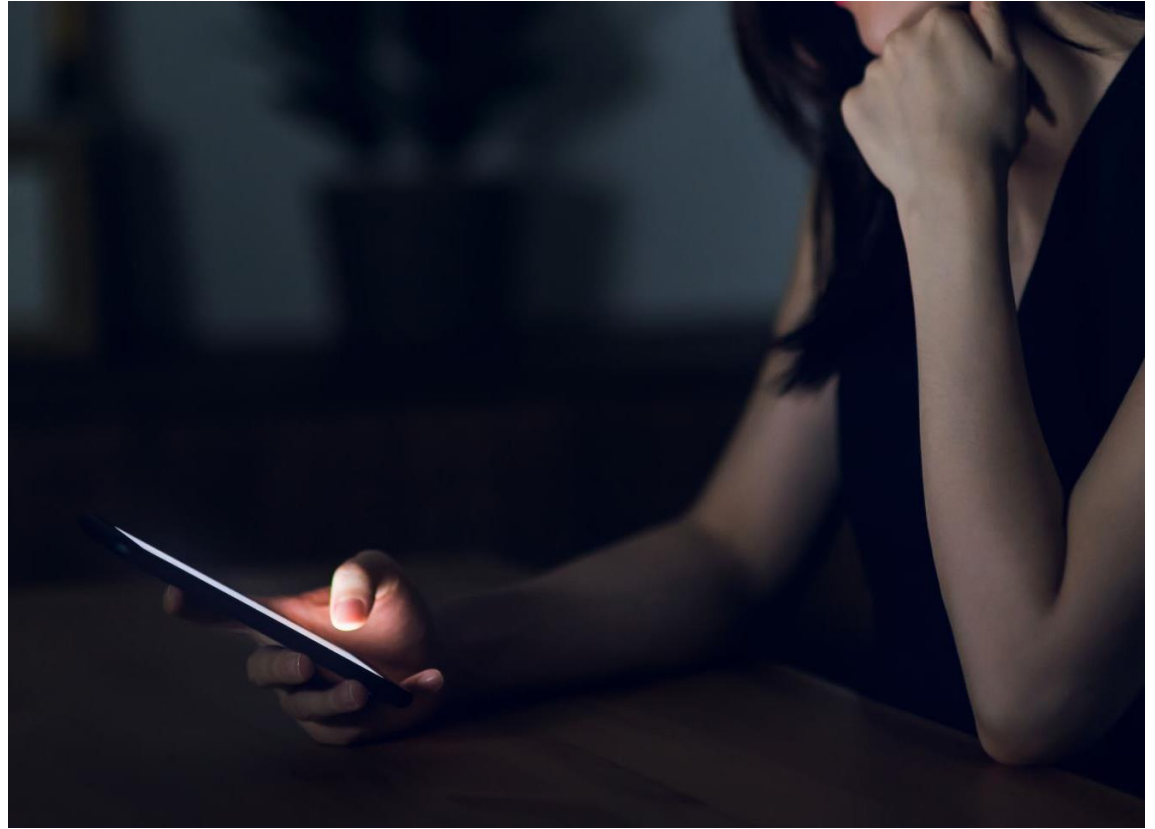
# Potential legal actions/risks

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- Primarily - dispute resolution process
- It is a 'workplace right', so employers must not take adverse action (detrimental action) against an employee for exercising that 'right' under the general protections provisions of the FW Act
- Work health and safety prosecution (*Managing the risk of psychosocial hazards at work Code of Practice 2022*) – PCBU and officers' duty of care
- Worker's compensation, and 'reasonable management action':
  - In *Brennan v BWP* [2024] NSWPIIC 165, the Tribunal Member criticised an employer for continued attempts to contact an employee when they were on short term sick leave, stating this was not reasonable action by the employer, and noting the proposed right to disconnect.
- Interaction with "reasonable additional hours" under the NES.
  - Full-time employee must not work more than 38 hours a week unless the additional hours are reasonable (pro-rata for part timers).

# Practical Considerations

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A woman with blonde hair tied up, wearing a patterned blouse and a dark cardigan, is holding a white tablet and gesturing with her right hand while talking to a man with a beard. They are in a modern office environment with large windows in the background.

# Talk with your workforce

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- Have open conversations about working hours and expectations in the context of the employer's operational requirements and its stakeholders
- Find out the extent to which employees are currently being required to respond to afterhours contact and identify trends:
  - Discuss at health and safety committee;
  - Note psychosocial risks, and the code of practice;
  - What teams are generally making contact after hours?;
  - Who is usually required to respond?;
  - What is the contact generally about?;
  - Do you need to do a survey or use some other tool to ascertain areas of risk?; and
  - Review position descriptions/duties as necessary

# Contracts of employment, position descriptions and policies



Do you **reasonably require** the employee to be contactable after hours?



Do employment **contracts, position descriptions or policies** require employees to be reasonably available outside of working hours? What at the hours of work?



Does remuneration level **adequately compensate** for requirements to remain contactable outside the employee's working hours?





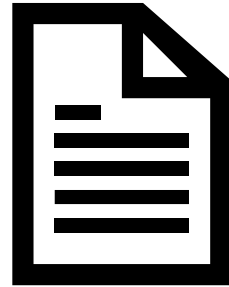
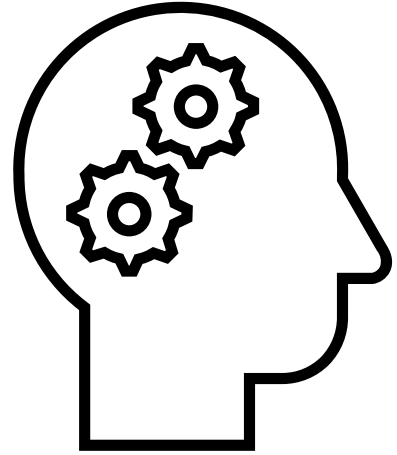
Consider terms of  
engagement with  
*third parties*

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# Develop a policy

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- In consultation with employees/management/union



# Inform & equip managers

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- Managers should be trained/encouraged to:
  - seek feedback from their team on implementation;
  - recognise unlawful adverse action against an employee;
  - identify when after hours contact is likely to be reasonable, having regard to the circumstances; and
  - identify a method with the team in which the manager can notify team members that an after hours response is required (e.g. a text message in addition to an email)

# Inform & equip managers

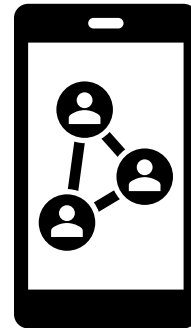
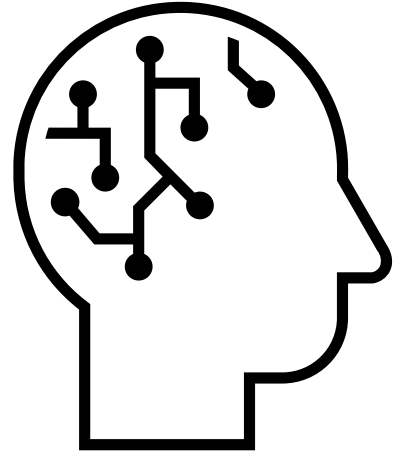
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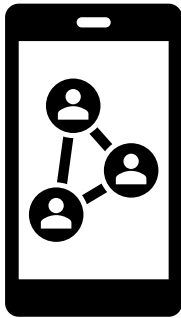
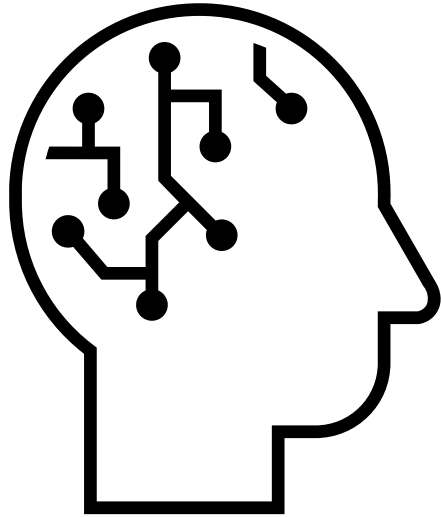
- Managers should be trained/encouraged to:
  - Show leadership: set expectations
  - encourage employees to raise with their manager any requirements that the employee has for another employee to monitor, read and respond to afterhours contact (that is different from the usual expectation);
  - follow the expected process in relation to approving overtime for certain employees to perform after hours work in response to contact (e.g. grant approval to such requests, where appropriate); and
  - discuss with employees if managers are concerned about out of hours work.

# Can technology assist?

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- Can emails be easily identifiable as urgent or non urgent? (eg with a flag, or accompanied by a text message)
- Emails not requiring a response out-of-hours could be marked / identifiable by the sender
- Use delay for sending emails
- Emails could include a note in the footer reminding the recipient of the email of their right to disconnect
- Emails could include working days/hours

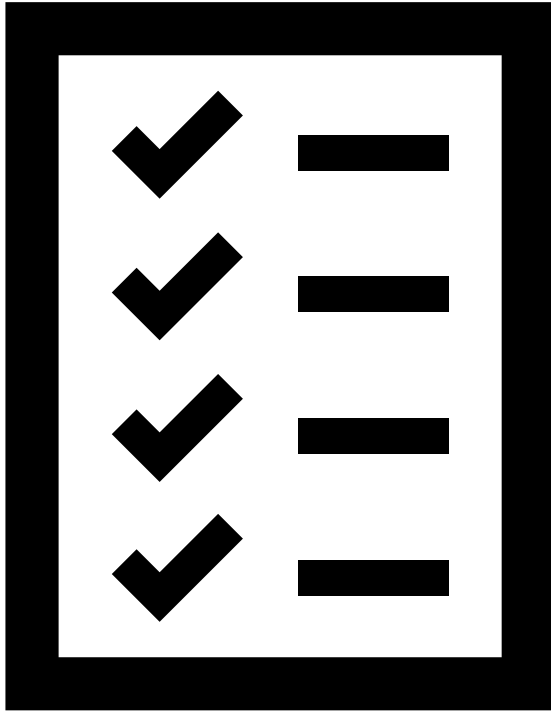




# Can technology assist?

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- Protocols for subject lines that helps recipients quickly determine whether an immediate response is required
- Use computer software that shows a co-worker recipient's status in real time – e.g. available, on personal leave, not working today
- Out of office emails
- Do employees need emails on their phones?



# Guidelines to be developed

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- The Fair Work Commission will publish guidelines in relation to the right to disconnect under the Fair Work Act.
- These will be developed over the coming year/s after cases filter through.

# Thank you



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