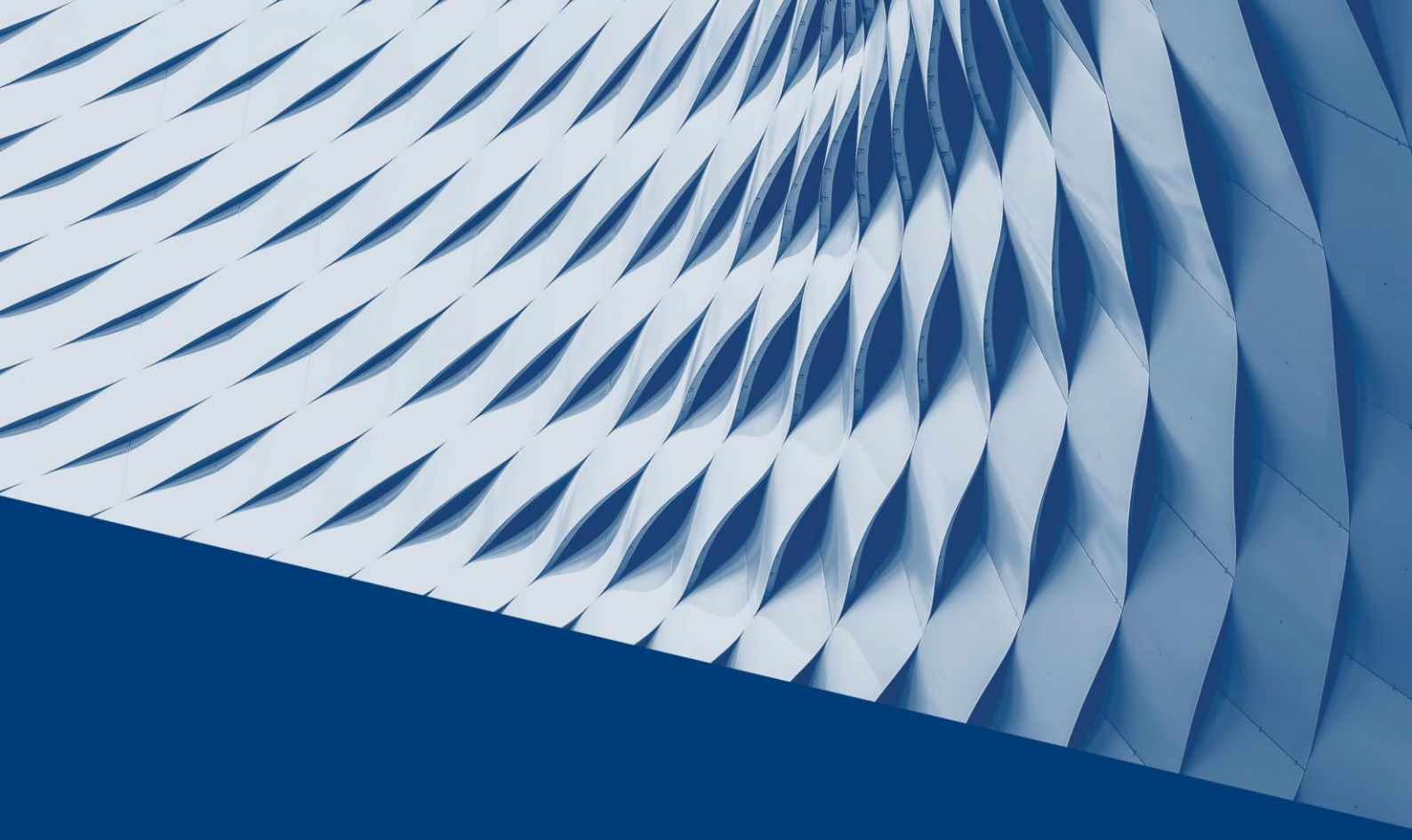

Fair Work Amendment Bill 2024

ACTU submission to the Senate Education and Employment Committee Inquiry

ACTU Submission, 8 March 2024
ACTU D. No 18/2024

ACTU
australian council of trade unions

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About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and State and regional trades and labour councils. There are currently 36 ACTU affiliates who together have over 1.7 million members who are engaged across all industries and occupations in the public and private sector.

Fair Work Amendment Bill 2024

The *Fair Work Amendment Bill 2024* ("Bill") would amend the Fair Work Act ("Act") to ensure that an order made by the Fair Work Commission (FWC) in relation to the employee right to disconnect does not expose an employer to criminal penalties under s.675(1) of the Act.

The Bill aims to address a drafting error with the original *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2024*. It would achieve that aim and the ACTU supports its passage.

The ACTU notes that this error could have easily been corrected by the Senate during the passage of the Closing Loopholes No. 2 Bill. The need for this separate Bill is an unfortunate waste of time and resources for all concerned.

Proposed amendments to the Bill

The invitation by the Senate Education and Employment Committee to provide a submission to this inquiry said that its scope also would include the "proposed amendments tabled in the Senate". The ACTU opposes all four amendments that have been proposed at the time of writing. This submission responds to three amendments put by Senator Cash on behalf of the Opposition.

Cash amendment – 2415

Cash Amendment 2415 would have the effect of repealing the right to disconnect as passed by both Houses of Parliament on 12 February 2024. The ACTU strongly opposes this amendment for the following reasons.

The impact of "availability creep" on workers

The right to disconnect is a welcome and measured response to the growing problem of "availability creep" – the expectation on workers to respond to and complete work out of hours.

The problem is widespread. The Australian Services Union (ASU) recently surveyed its members about their work/life balance and unpaid overtime.[1] This includes their members in call centres, administration, local government, NGOs, social and community services and the legal profession. The survey shows that availability creep is a serious problem, finding that:

- 70% of workers often take work related calls or check email outside of work hours.
- 1 in 3 workers are expected to perform work outside of scheduled working hours.
- 57% of workers find it difficult to say no to performing work outside of normal working hours.

Availability creep, more generally, has negatively impacted upon workers' mental and physical health, productivity and turnover, especially for working carers already juggling competing demands on their time, according to the recent Senate Select Committee on Work and Care.[2]

The ASU survey also found that, unsurprisingly, workers feel pressured to respond to out of hours contact by their employer with nearly 1 in 4 workers feeling that they will be disciplined if they do not answer calls and/or monitor emails outside of work and half of them feeling that their career will be negatively affected.

As a result of constantly being "on call" members reported poor mental health, disrupted sleep, missed or disrupted social interactions, and interference with personal life. This accords with a wealth of similar research which shows that excessive working hours and unreasonable work intensification lead to worse mental and physical health for workers. [3] It also comes at a time when work-related mental health issues continue to rise, with a 36.9% increase in incidents since 2018, according to a new report by Safe Work Australia released last month.[4]

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[1] Australia Services Union, *Right to Disconnect Report – July 2023,* Available at: *https://www.clockoffswitchoff.com.au/findoutmore*

[2] Senate Select Committee on Work and Care (March 2023), *Final Report* paragraph 6.44

[3] See for example, Pega et al, WHO/ILO, Global, regional, and national burdens of ischemic heart disease and stroke attributable to exposure to long working hours for 194 countries, 2000-2016: A systematic analysis from the WHO/ILO Joint Estimates of the Work-related Burden of Disease and Injury, Environment International, Volume 154, 2021. It found that people working long hours (more than 55 hours per week), have higher risks of heart disease and stroke.

[4] Safe Work Australia (27 February 2024), *Psychological health in the workplace report* https://data.safeworkaustralia.gov.au/report/psychological-health-and-safety-workplace

The average Australia worker now does an estimate 280 hours of unpaid overtime each year. This amounts to more than $130 billion a year across the labour market, or $11,055 per worker on average, according to a recent survey of 1,640 workers in paid work, by the Centre for Future Work.[5] This is a tremendous loss of pay and time for workers facing a cost of living crisis.

What the right would mean for workers?

Beyond the numbers, the right to disconnect would make a positive and real difference to the lives of workers. The below case studies are real stories, but the names of the workers have been changed to protect their identity.

Case study 1: Suzie

Suzie is a call centre worker, and was called by her manager before work asking her to come in early to complete training. This is training that's essential for her work and was due to be completed during work hours. This meant that Suzie had to try to navigate a work call from her employer whilst dropping her children at school when otherwise she simply could have completed the training at work. The right to disconnect will mean that in the future, Suzie can confidently reject that before-work call when she is with her children.

Case study 2: Sarah

Sarah, an airline worker, is operating under a jobshare agreement. She shares a full-time job at the airport with another colleague. This arrangement means that, unlike a rotating shift worker, Sarah has a regular set of hours which she splits with her job share partner. The right to disconnect will ensure Sarah can enjoy her time away from the office, knowing that when she is rostered off, she isn't required to be in contact with the employer, and can enjoy the full benefits of her jobshare arrangement.

The practical and positive nature right

Opposition to the right to disconnect appears to be based on two arguments: that it will hinder productivity[6], and is a "blunt instrument" that could also undermine existing flexible work arrangements.[7] Neither argument has any foundation.

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[5] Fiona Macdonald (November 2023), *Short changed: Unsatisfactory working hours and unpaid overtime*, Centre for Future Work, https://futurework.org.au/wp-content/uploads/sites/2/2023/11/Short-Changed-GHOTD-2023.pdf page 5

[6] Sky News, "Peter Dutton pledges to overturn right to disconnect, argues legislation will deteriorate 'productivity problem' in workers and spike inflation", 11 February 2024.

[7] David Marin-Guzman, "Business fights back against 'right to disconnect' from work", AFR 21 December 2023.

Preventing employers from requiring their staff to do unpaid work out of hours will not limit productivity, but it should limit wage theft. Labour productivity is a measure of the value or output produced from each hour of work. It has nothing to do with paying people less - or nothing at all.

The right to disconnect could actually improve productivity: it could encourage disorganised bosses to be better organised – rather than relying on staff to respond to poorly timed contact, and it would help workers get the rest they need to be more productive when actually working.

Rather than being a "blunt instrument", the concept of reasonableness and flexibility is at the heart of the right to disconnect. An employee can only refuse to monitor, read or respond to employer or third-party work-related contact is that refusal is reasonable as outlined in s.333M(3) of the Act. This includes considering, in summary: the reason for the contact, how it is made, the level of disruption, how the employee is compensated, and the nature of their work and their personal circumstances.

This provides a practical framework for employers, employees and their unions to work out together what is reasonable in their particular circumstances. This could result in negotiated terms in collective agreements or in workplace policies and procedures.

The changes will also require that the right to disconnect will become a term of modern awards (as per s.149F). Inclusion of the right in awards will see it tailored for particular sectors, occupations or industries, taking on board the views of the relevant parties to each Award and effectively providing yet more practical guidance on how it should apply.

Finally, if parties have a dispute about the application of the new right, then they should seek to resolve it at the workplace level by discussions in the first instance (s.333N).

Opponents of the right to disconnect should have more faith in employers, employees and their unions to reach a sensible position on what the right might look like for particular workplaces or sectors - underpinned by a sensible legislative framework designed precisely to support such negotiated outcomes.

In summary, it is not surprising that 84% of Australians have previously supported the Right to Disconnect[8] along obviously, with the majority of Parliamentarians in both Houses of the Australian Parliament about four weeks ago.

Cash amendments 2416 and 2417

These amendments will only be moved if Amendment 2415 above is not agreed to.

Amendment 2416 would have the effect of stripping out the civil penalties that apply if a person contravenes an order in relation to the right to disconnect. This would leave an employee with no effective way of getting an employer to comply with an order, greatly weakening the right to disconnect. On this ground the amendment should be opposed.

Amendment 2417 would deny the right to disconnect for an employee working for an employer that employs fewer than 20 employees. The ACTU does not support this amendment because rights should be universal and not selectively applied. To the extent that small businesses face greater challenges than other businesses in implementing this right, we note that they have 18 months from the day of royal assent before the right becomes operative. We would also anticipate helpful guidance and support provided to them on the right, particularly by the Fair Work Ombudsman and FWC.

Finally, this amendment is proposing a different definition of small business than is in the Act (at s.23(1)). The proposed definition instead has a:

- higher total head count of "fewer than 20 employees" instead of 15;
- counts part time employees as a fraction of a full-time equivalent, instead of an ordinary head count; and
- does not consider associated entities for the purposes of calculating the number of employees (unlike s.23(3)).

This definition adds complexity, could be abused, and is inconsistent with the existing definition in the Act.

Recommendations

Recommendation 1 – The Bill should be passed.

[8] Centre for Future Work (22 November 2022), Call me Maybe (Not): working overtime and the right to disconnect in Australia", https://futurework.org.au/report/call-me-maybe-not/

Recommendation 2 – The four amendments put at the time this Submission was made should be rejected.

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