

Australian Nursing and Midwifery Federation

*Variation of modern awards to include a  
right to disconnect term*

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Australian  
Nursing &  
Midwifery  
Federation

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## A. About the ANMF

1. The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 322,000 nurses, midwives and personal care workers (PCWs) across the country. Approximately 89% of the ANMF's membership are women.
2. Our members work in the public and private health, aged care, and disability sectors across a wide variety of urban, rural, and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, to fulfil their professional goals, and achieve a healthy work/life balance.
3. Our strong and growing membership and integrated role as both a trade union and professional organisation provide us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.

## B. Background

4. The need for time away from the workplace for the purposes of rest and recreation is not a novel concept. Modern awards have long contained features that recognise the importance of workers being given the time away from work in order that they may balance their employment responsibilities with their personal lives and their health needs.
5. Technological developments, particularly in the area of digital communication, have drastically altered the way in which work is performed. The ability for an employer to provide an employee with a device, such as a mobile phone or laptop, that allows the employee to perform work from any location has blurred the distinction between the workplace and a worker's personal life outside of work. In a similar

manner, the digitisation of workplaces has made employees contactable at all hours, again encroaching on an employee's personal time.

6. For workers, these developments relate not only to rest in between period of work, but also their need to mentally disconnect from work. Where an employer, through a technological device, fails to observe these boundaries either through issuing directives or establishing expectations around a worker's availability, it presents a psychosocial hazard to the worker's wellbeing.<sup>1</sup> A lack of structure around the hours of work may also increase the likelihood of employees performing work beyond the hours for which they are fairly remunerated.
7. For many industries and occupations, the COVID-19 pandemic served as a catalyst that hastened the uptake of digital technologies and remote working from an employee's home became normalised. It is in this context that legislators and policy makers have sought to regulate to reaffirm the division between work and personal life.
8. On 26 February 2024, the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (the Amended Act) received royal assent. Amongst the changes to the *Fair Work Act 2009* (Cth) was the creation of a 'right to disconnect'. a set of rights concerning the role and functions of union delegates. In addition to the substantive legislative right, section 149F of the Amended Act requires the Fair Work Commission (the FWC) to include in all modern awards a term enshrining the right to disconnect. This submission is made in respect of this new legislative requirement, an opportunity welcomed by the ANMF.

## C. The ACTU Model Clause

9. The ANMF has viewed the submission of the Australian Council of Trade Unions (ACTU), with which the ANMF is affiliated. The ANMF is supportive of the model right to disconnect clause put forward by the ACTU as a suitable provision to be included in the *Nurses Award 2020* (Nurses Award).

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<sup>1</sup> Marcel Dolobáč and Katarína Skolodová, 'The Right to Disconnect in the Context of Employees' Mental Health' (2022) 14 *Adam Mickiewicz University Law Review* 164.

## D. The Nurses Award

10. As outlined above, the right to disconnect was the legislative response to the intrusion of work beyond typical work hours and settings, enabled largely by digital ways of working. While the ANMF supports this legislative reform, we note that the healthcare and similar sectors differ from other parts of the workforce for two principal reasons.
11. Firstly, the work of nurses and midwives is care-based. With a few notable exceptions, such as a Nurse Educator, such work cannot typically be performed remotely, as it necessarily requires direct contact with patients. In this sense, the experience of nurses and midwives is largely disconnected from the more recent working from home phenomenon turbocharged by the COVID-19 pandemic, which in turn has driven the push for a right to disconnect.
12. Secondly, the healthcare sector operates on a 24-hour basis. The Nurses Award is unique when compared to many other modern awards in that it explicitly facilitates employer contact outside of rostered working hours in a structured way.
13. Specifically, we refer to the following provisions:
  - a. Clause 17.2(a) of the Nurses Award allows an employer to require an employee to remain on-call at their private residence or another mutually agreed place, for which the employee receives a daily allowance.<sup>2</sup> Any days on-call do not count towards the days in which the employee is entitled to be free from duty.<sup>3</sup>
  - b. Clause 19.6 of the Nurses Award enables an employer recall an employee to work when that employee is on-call, for which the employee is paid at overtime rates.
  - c. Clause 19.7 of the Nurses Award enables an employer to recall an employee to work **even when that employee is not on-call**. This provision expands on the previous provision in slight ways:
    - i. Travel time to and from work counts as time worked;

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<sup>2</sup> Clause 19.8 of the Nurses Award.

<sup>3</sup> Clause 13.1(h) of the Nurses Award.

- ii. Where the employee is called in to work within 3 hours ahead of their rostered start time and the employee remains at work, only travel time to work counts as time worked;
  - iii. An employee recalled to work will be paid for a minimum of 3 hours, even where the work is completed within a shorter period; and
  - iv. The employer will provide the employee with transport to and from work, or reimburse the cost for such.
14. It is the ability for an employer to recall an employee who is not on call, pursuant to clause 19.7 of the Nurses Award that any provision around the right to disconnect should be focussed.
15. The ANMF acknowledges the genuine need for employers in healthcare settings to be able to adequately and safely staff their facilities, and this extends to circumstances whereby it may be necessary for an employer to contact an employee to achieve this end. It must however be acknowledged that the never-ending possibility for an employee to be recalled to work, even when they are not on-call, creates inbuilt hazard to employees who may otherwise never experience true mental disconnection from the workplace. In setting a right to disconnect term, the FWC must grapple with this conundrum.
16. From the perspective of the ANMF, it is the capacity for an employer to recall an employee to work who is not on call that requires curtailing. The Nurses Award provides very few disincentives to deter employers from recalling employees who are not on call, as set out at subparagraphs 13.c.i-iv of this submission. Under the current settings of the Nurses Award, an employer could very easily rely on threadbare staffing arrangements and make a cost saving by declining to sufficiently roster employees on-call in the hope that employees do not need to be recalled to work. Even where employees do need to be recalled to work, the cost difference between those who are versus those who are not on-call is so minimal that an employer has no substantial reason to be compelled to proactively plan a roster with employees on-call.
17. The consequence of these settings in the Nurses Award is that it creates a false equivalence between recalling employees to work irrespective of whether they are

on-call. This flies in the face of the underlying assumption of the right to disconnect, that when an employee is not on duty and not on-call they should be allowed to presume that they can go about their own business and only be contacted as a last resort.

## E. The Fix

18. The ANMF is of the view that work performed in a 24-hour environment, such as in a healthcare setting, should be structured in such a way as to limit the need to recall employees to work, particularly those who are not on-call to begin with. It is in this light that the ANMF particularly supports clause X.3.g of the ACTU's draft model clause.<sup>4</sup>
19. The ACTU model clause largely mirrors the wording of section 333M of the Amended Act, which sets out a test for reasonableness refusing to monitor digital devices or respond to employer communications. The ACTU model clause introduces a further criterion for consideration around whether an employer has taken all reasonably practicable steps, including making adequate staffing arrangements and planning for workplace fluctuations, to eliminate or minimise the need to contact workers when they are not working.
20. In the context of Nurses Award, reasonably practicable steps ought to include the following:
  - a. That an employer should be required to adequately staff the workplace during all shifts in the first instance based on foreseeable workplace norms.
  - b. That an employer should make appropriate use of on-call provisions to ensure that a suitable number of workers can be contacted and recalled to work, if necessary.
  - c. That where employees need to be recalled to work, the employer must contact those who are on-call in the first instance.
  - d. That where the previous steps have been exhausted, only then should an employer be permitted to contact an employee who is not on-call.

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<sup>4</sup> ACTU Submission, Annexure A.

21. This proposal is significant in that it shifts the onus to the employer to take proactive steps to plan a roster in such a way so as to largely avoid the need to contact employees who are not on call. Employees who are not on call should be able to go about their lives free from the perpetual threat that at any moment their employer may contact them or direct them to perform work. Employers would need to factor in the risk that employees who are not on call may not see or respond to attempts of contact by the employer.

## F. Additional Considerations

22. The ANMF emphasises that by placing clause X.3.g of the ACTU's draft model clause amongst the criteria for assessing the reasonableness of an employee failing to monitor digital devices or respond to employer communications, the above proposal should not operate as a total prohibition on contacting employees outside of rostered work or on-call hours. In other words, clause 19.7 of the Nurses Award would not be rendered ineffectual under this proposal.

23. Nor would this proposal prevent an employer from reaching out to employees to offer additional shifts. An employee who is not on-call would not be expected to monitor any digital devices that would inform them that additional shifts were on offer. Their right would be around whether they respond to such a request, and if so, whether they accept or decline the offer.