

---

# “Connect” with the New Right to Disconnect



Jacinda Gray and Nancy Katakis, Lawyers of Corrs Chambers Westgarth

18 April 2024

[corrs.com.au](https://corrs.com.au)

**CORRS  
CHAMBERS  
WESTGARTH**

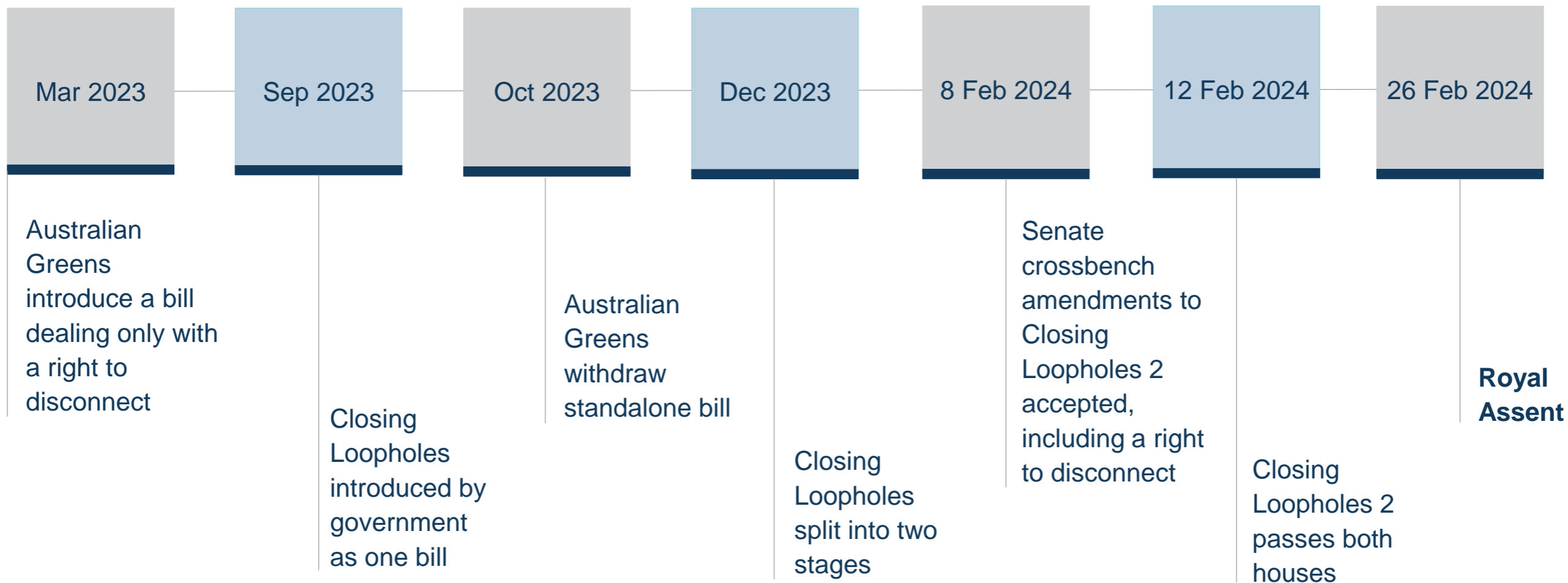
# Overview - “Connect” with the New Right to Disconnect

- 01 Timeline of passing Right to Disconnect
- 02 What is the Right to Disconnect?
- 03 What is reasonable or unreasonable refusal (by an employee)?
- 04 Right to Disconnect dispute timeline (Stop orders)
- 05 Interaction with other parts of the Fair Work Act
- 06 Impacts for employers and employees
- 07 Case study



# Timeline of passing Right to Disconnect

Commencement: 26 August 2024 (26 August 2025 for small businesses)



## 333M (1) & (2): The Right to Disconnect

01

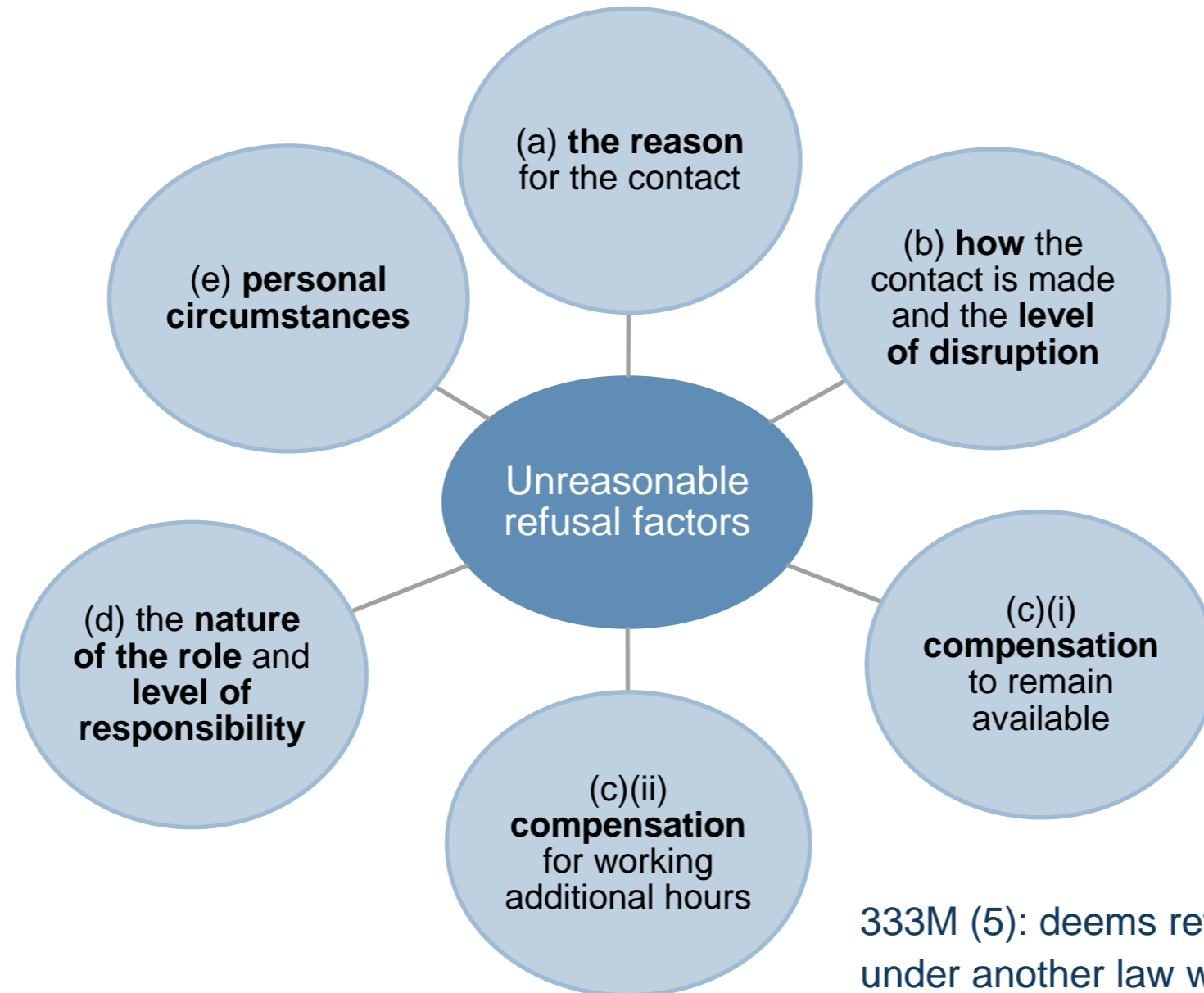
An **employee** may **refuse to monitor, read or respond to contact, or attempted contact**, from an **employer outside of the employee's working hours** unless the refusal is **unreasonable**.

02

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**.



## 333M (3): What is reasonable or unreasonable refusal?



333M (5): deems refusal of contact that is required under another law will be unreasonable.

## Questions raised by reasonableness factors

- 01 What types of contact are considered more disruptive? Is a phone call always more disruptive than an email?
- 02 What will be the view on 'all in' salaries or pay rates that 'include compensation' for out of hours contact?
- 03 Is the 'nature of role' determined by the contract, historical convention, or the current facts on the ground?
- 04 What is the full scope of personal circumstances that need to be considered for contact to be reasonable?

# Right to Disconnect dispute timeline



## Phase 1: Workplace

Relevant circumstances need to exist to give rise to the right  
333P (1)

Parties must attempt to resolve the dispute at the workplace level  
333N (2)



## Phase 2: Fair Work Commission (apply for stop order and/or to deal with dispute)

Disputes can be escalated to the FWC  
333N (3)

Expedited decisions can be requested by employers for vexatious claims  
333P (5)

Certain applications can be dismissed (vexatious, or from excluded departments)  
333P (4)

Representation is permitted at the FWC  
333N (4)



## Phase 3: Civil Penalties

Civil penalties apply for breaching stop orders  
333Q



## Phase 4: Multi Claim Disputes

These can be resolved at single FWC arbitration with party consent  
333V

## 333P: What are 'Stop Orders'?

01

Stop order applications can be made by either the employer or the employee.

An **employer** can seek a stop order if:

- an **employee has unreasonably refused** to monitor, read or respond to contact or attempted contact and there is a risk the employee will **continue to do so**.

An **employee** can seek a stop order if:

- an **employee's refusal** to monitor, read or respond to contact or attempted contact is **not unreasonable** and there is a risk that the **employer** will:
  - (i) **take disciplinary or other action** against the employee because of the employer's belief that the refusal is unreasonable; or
  - (ii) **continue to require the employee to monitor**, read or respond to contact or attempted contact despite the employee's refusal to do so.



## 333P: What are 'Stop Orders'? (cont'd)

02

The FWC may make **any order it considers appropriate** (other than an order requiring the payment of a pecuniary amount):

Types of Stop Orders	FWC must be satisfied that the...
To prevent the <b>employee</b> from <b>continuing to unreasonably refuse</b> to monitor, read or respond to contact or attempted contact	Employee has <b>unreasonably refused</b> to monitor, read or respond to contact and there is a <b>risk they will continue to do so</b>
To prevent the <b>employer</b> from <b>taking disciplinary or other action</b> against the employee because of the employer's belief that the refusal is unreasonable	Employee's refusal of contact is <b>not unreasonable</b> and there is a <b>risk</b> the employer will take <b>disciplinary or other action</b> in response
To prevent the <b>employer</b> from <b>continuing to require the employee</b> to monitor, read or respond to contact or attempted contact.	Employee's refusal of contact is <b>not unreasonable</b> and there is a <b>risk</b> the employer will <b>continue to require</b> them to monitor, read or respond to contact.



If stop orders are breached, civil remedies may be imposed.

# Interaction with other parts of the Fair Work Act



## Unfair Dismissal

- Refusing out of hours contact can no longer be a valid reason to terminate, unless the refusal was unreasonable.
- Hence unfair dismissal claims may also raise the reasonableness of a disconnection.



## General Protections

- The right to disconnect is a workplace right for general protections purposes. (333M (4))
- Employers cannot take adverse action in response to reasonably refusing to monitor communications.



## Enterprise Agreements

- If an employee is covered by an enterprise agreement that contains a more favourable right to disconnect, this will prevail. (333M (6))
- Rights to disconnect or availability allowances may be disputed in workplace bargaining.



## Modern Awards

- Modern awards must include a right to disconnect term. (149F)
- FWC must vary modern awards to include a right to disconnect term. (111C)
- However, a modern award is not invalid on or after commencement if it does not include a right to disconnect term. (111B)

# Commentary on the Right to Disconnect

Peter Dutton on behalf of the opposition has committed to reverse the changes if elected next.

Ian Neil SC noted that “legislating a universal right is a top-down approach that had not worked elsewhere”.

ACCI fears the right could hinder workplace flexibility and undermine ‘reasonable working hours’.

Tony Burke is saying “it is interesting that this is even controversial. At its core, all we are saying is that you are meant to be paid when you are working in Australia”

Angus Taylor MP is concerned about an “unprecedented collapse in labour productivity”.

The Greens do not expect to see “a deluge of legal cases”.

ACTU describes the right as addressing “unpaid work” and is “essential to maintaining a balance”.

Barbara Pocock reported that the purpose is about “improving the conversation about the boundary around our working time”.

# Impacts for employers and employees

## Practical issues

- Increased disputation about day-to-day workplace matters
- How to manage communications where working patterns do not align with ordinary office hours or where workers are in different time zones
- How to identify working hours for those employees offered flexible work arrangements
- No time limit to exercise right

## Legal and business risks

- Operational impacts e.g. sick leave relief at short notice
- Disputes, lost management time and money
- Non-compliance risk and penalties (including for breach of modern award)
- Adverse action claims
- Complexity arising from interaction with proposed modern award right to work from home
- Impact on discharging professional duties e.g. lawyer's duty to court or client

**Note:** Impacts less likely to be significant for: managerial and professional employees given seniority and remuneration; and employees with 'on call' or 'stand by' allowances

# Recommendations

- ✓ Review remuneration arrangements for roles which require regular out of hours contact
- ✓ Monitor release of Commission guidelines and develop internal guidelines and training
- ✓ Consider developing workplace policy/procedures on out of hours contact
- ✓ Review and manage existing policies, procedures and disciplinary processes
- ✓ Implement processes for collating and documenting unreasonable/reasonable refusals
- ✓ Identify solutions to monitor employees' work activity outside of agreed working hours
- ✓ Update template contracts and position descriptions
- ✓ Reassess expectations with clients and employees
- ✓ Identify solutions to track contact

## On the horizon:

Expected by 26 August 2024:

- Commission will publish guidelines on how the right to disconnect will operate
- Commission has started the process to vary modern awards to include provisions for a right to disconnect

On the radar...

- Commission to consider whether to include a working from home right in modern awards

# Case study



## Background

- Alice, is a junior lawyer, often required to work beyond regular office hours to meet deadlines and address urgent client matters.
- Alice finds herself constantly checking emails, responding to client calls, and working late into the night.

## Scenario

- Alice communicates to colleagues and supervisor that she is setting boundaries and will not monitor, read or respond to any work-related emails or calls after 6.00 pm on weeknights.
- One evening, her supervisor attempts to email and call Alice after 6.00 pm about an urgent client matter that needed to be attended to as soon as possible.
- Alice does not respond until the following morning when she commences work.
- Alice's supervisor expresses concern about her decision to disconnect from work after-hours, highlighting the urgency of some client matters and the expectation for lawyers to be readily available to address pressing issues, regardless of the time.

# Case study: Reasonableness factors

Was the refusal unreasonable?



## Reason for contact

If (attempted) contact was for urgent task that needed to be actioned before next business day = **refusal unreasonable**

If (attempted) contact was for non-urgent task that could wait until next business day = **refusal reasonable**



## How contact is made and level of disruption

If received multiple emails and calls after hours = **refusal reasonable**

If contact is infrequent and genuinely urgent = **refusal unreasonable**



## Compensation for availability and additional hours

If not adequately compensated for availability and the expectation to respond to work-related communication after hours = **refusal reasonable**

If appropriately compensated for out of hours contact and the demands of the job = **refusal unreasonable**



## Nature of role and level of responsibility

If role requires availability for urgent matters after hours and contact was for an urgent matter = **refusal unreasonable**

If workload allows for flexibility in responding to non-urgent matters = **refusal reasonable**



## Personal circumstances

If have caregiving responsibilities or other personal commitments that require attention after hours = **refusal reasonable**

If personal circumstances allow for flexibility and has the capacity to respond to work-related communication = **refusal unreasonable**





Sydney

Melbourne

Brisbane

Perth

Port Moresby

This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.