

THE RIGHT TO DISCONNECT IN AUSTRALIA: CREATING SPACE FOR A NEW TERM IMPLIED BY LAW

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A French labour law commenced in 2017 attempting to preserve a ‘right to disconnect’, requiring companies with 50 employees or more to negotiate policies about work-related communications with employees outside work. This legislation points to a universal problem, equally affecting Australian employees. The expectation to stay connected out-of-hours is making employees miserable, leading to burnout, poor performance, and high turnover. While a right to disconnect has not yet been widely recognised in Australia, this article explores the several forms it could take. Some employers have begun implementing equivalent changes to their workplace policies and enterprise agreements. The right could be formulated as an express contractual term. Modern awards and the National Employment Standards could be varied to include it. However, these options depend on direct intervention at the workplace level, or by Parliament. Instead, the common law could be instrumental in recognising it as a term implied by law.

I INTRODUCTION

Employees physically leave the office, but they do not leave their work. They remain attached by a kind of electronic leash – like a dog. The texts, the messages, the emails – they colonise the life of the individual to the point where he or she eventually breaks down.¹

The beginning of 2017 saw a new French labour law come into operation, which sought to implement a ‘right to disconnect’ by way of statute.² According to that legislation, where French companies have 50 employees or more, they must negotiate specific policies regarding contact with employees outside of working hours.³ The aim of this requirement to negotiate is to reduce the time employees

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1 Interview with Benoit Hamon (Hugh Schofield, BBC News), quoted in Hugh Schofield, ‘The Plan to Ban Work Emails out of Hours’, *BBC News* (online, 11 May 2016) <<https://www.bbc.com/news/magazine-36249647>>.

2 *Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels* [Law No 2016-1088 of 8 August 2016 on Labour, Modernisation of Labour Relations, and Securement of Career Paths] (France) JO, 9 August 2016, 145, noting that in France, the right to disconnect is now codified into article L2242-17 of the *Code du travail* (France) [Labour Code].

3 *Code du travail* (n 2) art L2242-8.

spend in their work-related inboxes in the evenings, and on weekends. The then French Minister of Labour, Employment and Economic Inclusion, Myriam El Khomri, justified the new law as a necessary step towards reducing employee burnout and ‘info-obesity’ that had afflicted many workplaces.⁴

With this French development in mind, this article explores the potential for a right to disconnect to become part of Australian employment contracts as a term implied by law through operation of the common law. This kind of exploration does not appear to have been undertaken previously, in either the Australian context, or elsewhere. Assessments of the implementation of a right to disconnect have typically occurred in respect of overseas jurisdictions, and in the context of whether the right should be brought about via the passing of suitable legislation, or through a self-regulatory model, involving individual employers adopting suitable workplace policies.⁵ These two mechanisms for implementation have already been considered in detail with regard to overseas jurisdictions,⁶ yet there is scarce academic consideration in the Australian context, and nothing to suggest that a right to disconnect has the potential to be developed as a new term implied by law through operation of the common law. Therefore, this article generates a new and innovative contribution to employment law in both a local and global sense.

This article’s central thesis relates to the potential for the right to be implied as a term by law into the class of employment contracts. As such, this article’s focus is on the right as it applies to employees (ie, those engaged under a contract of service who are typically afforded statutory-based protections because of their employment relationship). Its scope does not extend to a consideration of how the right may impact independent contractors (ie, those engaged under a contract for services who have their own business and perform work for clients or customers of that business, and who do not typically benefit from the same statutory-based protections otherwise afforded to employees alone).⁷

Throughout, this article refers to the common approach of framing the right to disconnect as a ‘right’, rather than a ‘duty’. It does so on the assumption that a right to disconnect is a positive individual right, whose addressee is the employee.⁸ As Judy Fudge has opined, social rights, which could include a right to disconnect, are seen as imposing different types of obligations, including ‘negative and positive obligations on private actors’.⁹ In congruence with her opinion, as it is understood

4 Nicholas Kamm, ‘French Workers Win “Right to Disconnect” from After-Work Emails’, *France 24* (online, 31 December 2016) <<https://www.france24.com/en/20161231-french-workers-win-right-disconnect-after-work-emails>>.

5 See, eg, Paul M Secunda, ‘The Employee Right to Disconnect’ (2019) 9(1) *Notre Dame Journal of International and Comparative Law* 1, 27–30, in which he refers to these two separate approaches as the ‘French Legislative Model’ and the ‘German Self-Regulatory Model’.

6 See, eg, those jurisdictions listed below in Part II.

7 For a detailed assessment of the distinction between an ‘employee’ and an ‘independent contractor’, including the difference in protections afforded to these separate categories of worker, see further, Andrew Stewart, *Stewart’s Guide to Employment Law* (Federation Press, 7th ed, 2021) ch 3.

8 Olga Chesalina, ‘The Legal Nature and the Place of the Right to Disconnect in European and in Russian Labour Law’ (2021) 9(3) *Russian Law Journal* 36, 39.

9 Judy Fudge, ‘The New Discourse of Labor Rights: From Social to Fundamental Rights?’ (2007) 29(1) *Comparative Labour Law and Policy Journal* 29, 44.

in this article, the right to disconnect places a negative obligation on the employer – that being, to refrain from connecting with or contacting an employee outside working hours – as well as a positive obligation on the employer to take necessary measures to provide employees with the means to exercise their right to disconnect.

To place the purported right to disconnect within appropriate limits for the purposes of this article, it is understood broadly as ‘the right for employees to switch off their digital tools, including means of communication for work purposes outside their working time without facing consequences for not replying to emails, phone calls or text messages’.¹⁰ This understanding clearly focuses on the practical measures associated with implementing the right to disconnect, aligning it with what Simon Deakin and Frank Wilkinson have coined a ‘procedural regulation’.¹¹ It has the potential to be more than a right to negotiate a particular practice between employers and employees by way of a workplace policy, as in France. There is the potential for it to operate as a standalone right, in and of itself, and potentially as a new term implied by law. This article explores how that could occur in the Australian context.

Part II explores the existing international and Australian positions with respect to a right to disconnect, outlining the varying approaches to it across the globe, highlighting Australia’s present lack of direct statutory regulation concerning the right. The remainder of this article focuses exclusively on the Australian position, with Part III emphasising the consequences for employees who are always connected to their work, even outside working hours, bringing to light the true necessity of a right to disconnect from an employee perspective. Part IV builds on that discussion, considering the implications for employers, should a right to disconnect remain unrecognised in Australia, accentuating its necessity for employers. Part V examines five potential existing avenues for legal protection for an Australian employee being afforded a right to disconnect, leaving aside the possibility that a right to disconnect could be generated as a new term implied by law. That discussion will take place in Part VI, which focuses on the potential for implication of a new term by law, giving rise to an Australian right to disconnect at common law. Conclusions and recommendations are then made with respect to the steps that could and should be taken to have such a term implied as a new term by law throughout Australia by operation of the common law, should it remain unrecognised legislatively. It is emphasised that, despite challenges in having a new term recognised as one suitable to be implied by law into all Australian employment contracts, there exists great potential for a new right to disconnect to come into existence through the development of the common law. Having the right implied as a term by law is not the only way that it could come into existence, but that pathway remains compelling, particularly in the current climate where other areas of law are yet to be utilised to bring it to life.

10 This suggested definition is derived from the *European Parliament Resolution of 21 January 2021 with Recommendations to the Commission on the Right to Disconnect (2019/2181(INL))* [2021] OJ C 456/161 (*‘Right to Disconnect Resolution’*).

11 Simon Deakin and Frank Wilkinson, ‘Rights vs Efficiency? The Economic Case for Transnational Labour Standards’ (1994) 23(4) *Industrial Law Journal* 289, 290 <<https://doi.org/10.1093/ijl/23.4.289>>.

II EXISTING INTERNATIONAL POSITIONS

This initial discussion considers the current international and Australian positions with respect to the right to disconnect, highlighting the various modes of regulation and Australia's lack of direct regulation of the right. Returning to the French legislative-based right to disconnect mentioned at the commencement of this article, despite appearing timely and progressive, that law has since been criticised because its penalties for non-compliance are seen as weak.¹² Indeed, it contains a requirement that employers need only 'negotiate' specific policies regarding email contact with their employees. The law's scope is also seen as limited, since it does not apply to small companies or the French civil service.¹³

Nevertheless, France's approach has still proved beneficial, in that it has invigorated an international conversation, now gathering momentum in many other jurisdictions, including Finland,¹⁴ Germany,¹⁵ Lithuania,¹⁶ Luxembourg,¹⁷ Malta,¹⁸

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- 12 See, eg, Donalee Moulton, 'The Problem with a "Right to Disconnect" Law', *The Lawyer's Daily* (online, 11 April 2017) <<https://www.torys.com/-/media/files/pdfs/articles/2017/the-problem-wiht-a-right-to-disconnect-law.pdf>>.
- 13 Tammy Katsabian, 'It's the End of Working Time as We Know It: New Challenges to the Concept of Working Time in the Digital Reality' (2020) 65(3) *McGill Law Journal* 379, 395 <<https://doi.org/10.7202/1075597ar>>.
- 14 Tina Weber and Oscar Vargas Llave, 'Right to Disconnect: Exploring Company Practices' (Research Report, Eurofound, 2021) 15, 17 ('Eurofound').
- 15 There is no overarching German regulation on the right to disconnect: *ibid*. However, in 2013, the German Labour Ministry prohibited managers from replying to work-related emails after regular working hours, save for in an emergency: 'German Ministry Bans Out-of-Hours Calls to Staff', *Associated Press* (online, 30 August 2013) <<https://apnews.com/article/fl14cabdf280c4977b589747db7809cdf>>. Prominent German car companies (including Volkswagen, BMW and Daimler) have also generated their own suitable workplace policies containing the right: Tony Paterson, 'Out of the Office and Not Taking Emails: Victory for VW Workers', *Independent* (online, 24 December 2011) <<https://www.independent.co.uk/news/world/europe/out-of-the-office-and-not-taking-emails-victory-for-vw-workers-6281231.html>>; 'Volkswagen Turns Off Blackberry Email after Work Hours', *BBC News* (online, 8 March 2012) <<https://www.bbc.com/news/technology-16314901>>; *ibid* 17, 24, 50.
- 16 Eurofound (n 14) 15.
- 17 Dorothée David, 'Luxembourg: Will There Be a New Right to Disconnect in Luxembourg?', *Mondaq* (online, 19 May 2021) <<https://www.mondaq.com/employee-rights-labour-relations/1070266/will-there-be-a-new-right-to-disconnect-in-luxembourg#:~:text=In%20a%20recent%20opinion%2C%20the,on%20the%20right%20to%20disconnect>>.
- 18 Karl Briffa et al, 'Malta: Will the Right to Disconnect Become the New Reality?', *Mondaq* (online, 26 February 2021) <<https://www.mondaq.com/employee-benefits-compensation/1040146/will-the-right-to-disconnect-become-the-new-reality>>.

Russia,¹⁹ Slovenia,²⁰ South Korea,²¹ Sweden,²² and the United States.²³ Trade unions in Croatia,²⁴ the Czech Republic,²⁵ and Hungary²⁶ are actively addressing the issue. Both the Netherlands²⁷ and the Philippines²⁸ have current legislative proposals to implement a right to disconnect, which have been issued, but not yet adopted. Just as in France, in Argentina,²⁹ Greece,³⁰ Ontario (Canada),³¹ Portugal,³² Slovakia,³³ and

19 Chesalina (n 8) 49–56.

20 Eurofound (n 14) 15. See also, Amela Žrt, ‘The Future Is Now: The New World of Work in Slovenia’, *CMS Law-Now* (Blog Post, 9 April 2021) <https://www.cms-lawnow.com/ealerts/2021/04/the-future-of-is-now-the-new-world-of-work-in-slovenia?cc_lang=en>.

21 In 2016, South Korea contemplated legislation that was set to restrict employers from contacting employees at home, though it was never formally passed: ‘South Korea Mulls Law for Workers’ Right to Disconnect at Home’, *CTV News* (online, 25 June 2016) <<https://www.ctvnews.ca/business/south-korea-mulls-law-for-workers-right-to-disconnect-at-home-1.2961427>>. Separately, the Metropolitan Government in Seoul has issued an ordinance, merely suggesting that supervisors not contact their subordinates via mobile messenger apps after set working hours: Kim Seung-yeon, ‘Ban Off-Hour Messaging? Koreans Embrace Right to Disconnect as Part of Work Culture Reform’, *Yonhap News Agency* (online, 18 October 2017) <<https://en.yna.co.kr/view/AEN20171017006100315?section=search>>.

22 Eurofound (n 14) 15.

23 In 2018, New York City council members introduced a bill on the issue, proposing to make it illegal for employers to require employees to be available via email outside set work hours: ‘Private Employees Disconnecting from Electronic Communications during Non-work Hours’, *New York City Council* (Web Page, 31 December 2021) <<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3458217&GUID=8930D471-5788-4AF4-B960-54620B2535F7>>.

24 HINA, ‘Working from Home Erases Line between Working Hours and Private Time: Round Table’, *Total Croatia News* (online, 5 October 2020) <<https://www.total-croatia-news.com/digital-nomads-in-croatia/47152-working-from-home>>.

25 Vladimíra Drbalová, ‘To Be or Not to Be Disconnected! Is It a Question?’, *CEBRE: Czech Business Today* (Blog Post, 2020) <<https://cebre.cz/en/czech-business-today/volume-xix-7-2020/to-be-or-not-to-be-disconnected-is-it-a-question>>.

26 Eurofound (n 14) 15.

27 Tim Stickings, ‘Right to Disconnect: Dutch MPs Want New Law on Emails outside Work Hours’, *The National* (online, 21 May 2021) <<https://www.thenationalnews.com/world/europe/right-to-disconnect-dutch-mps-want-new-law-on-emails-outside-work-hours-1.1227033>>.

28 Charles Chau, ‘Bill for “Right to Disconnect” Filed in the Philippines’, *HRM Asia* (online, 4 February 2022) <<https://hrmasia.com/bill-for-right-to-disconnect-filed-in-the-philippines/>>.

29 *Régimen Legal Del Contrato De Teletabajo, Ley 27555* [Legal Regime of the Teleworking Contract, Law No 27555] (Argentina) art 5. See also L&E Global, ‘Argentina: Teleworking Law Regulations’ (Blog Post, 24 February 2021) <<https://knowledge.leglobal.org/argentina-teleworking-law-regulations/>>.

30 *NOMOS YIT' APIΘ. 3846 Eγγυήσεις για την εργασιακή ασφάλεια και άλλες διατάξεις* [Law No 3846 Guarantees for Occupational Safety and Other Provisions] (Greece) ΦΕΚ 66/Α' 11.5.2010 [Gazette ΦΕΚ 66/Α' 11.5.2010] art 5. See also Panagiotis Lampropoulos, ‘Greece Approves Controversial New Labor Bill’, *Jurist* (online, 19 June 2021) <<https://www.jurist.org/news/2021/06/greece-approves-controversial-new-labor-bill/>>.

31 *Employment Standards Act*, SO 2000, c 41, ss 21.1.1–21.1.2. See also Catherine Skrzypinski, ‘Ontario Government Grants Workers Right to Disconnect’, *SHRM* (Blog Post, 21 December 2021) <<https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/ontario-grants-right-to-disconnect.aspx#:~:text=The%20right%2Dto%2Ddisconnect%20provision,takes%20effect%20June%202%2C%202022.&text=The%20employee%2Dfriendly%20amendment%20will,the%20end%20of%20their%20workday>>.

32 *Lei n.º 83/2021, de 6 de dezembro* [Law No 83/2021, 6th December] (Portugal) art 199.º-A, which introduced a right to disconnect. See also Ana Catarina Mendes, ‘We Stopped Portugal’s Bosses Contacting Staff outside Work Hours. Here’s Why’, *The Guardian* (online, 18 November 2021) <<https://www.theguardian.com/commentisfree/2021/nov/18/portugal-bosses-work-hours-right-to-disconnect>>.

33 *Zákon Zákonník práce* [Labour Code] (Slovakia) § 52(10). See also Pavol Rak, ‘Slovakia: Amendment to the Labour Code’, *Noerr* (Blog Post, 12 February 2021) <<https://www.noerr.com/en/newsroom/news/>>

Spain,³⁴ an overarching right to disconnect is now part of statute for all employees, taking various forms across each jurisdiction, but with most mirroring the French model requiring employers to specifically negotiate suitable policies with their employees. The same approach has been taken in Belgium³⁵ and Denmark³⁶ in respect of their government civil servants. In Italy, there exists legislative protection for some employees (primarily those with agreements to perform work from home).³⁷ In Ireland, a dedicated code of practice concerning the right to disconnect now exists,³⁸ while in the United Kingdom ('UK'), there is no statutory right to disconnect. The *Working Time Regulations 1998* (UK), under which employees may opt out of the 48-hour workweek,³⁹ have been considered an ineffective means of endorsing the right.⁴⁰ Nevertheless, the UK-based union, 'Prospect', is currently urging the UK government to implement legislation conferring a right to disconnect for all employees.⁴¹

All the while, French prosecutions for a breach of the right have begun to emerge. Before the 2017 legislation was introduced, French law recognised a contractual right to disconnect for employees who worked from home. For example, in 2018, the French branch of Rentokil Initial was ordered to pay an ex-employee the equivalent of AUD92,000 for blatantly ignoring the contractual right. Rentokil Initial had required its former employee to leave his phone on

slovakia-amendment-to-the-labour-code---what-will-change#:~:text=Each%20employee%20working%20from%20home,tasks%20during%20that%20rest%20period>.

- 34 *Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales* (Spain) [Organic Law 3/2018, of December 5, on the Protection of Personal Data and Guarantee of Digital Rights] art 88.
- 35 Johnny Wood, 'Right to Disconnect: Why Working Late Is Becoming a Thing of the Past in Belgium', *World Economic Forum* (Web Page, 8 February 2022) <<http://web.archive.org/web/20220210050105/https://www.weforum.org/agenda/2022/02/belgium-right-to-disconnect-from-work/>>.
- 36 Jessica Parker, 'The Belgians Getting the Right to Disconnect from Work', *BBC News* (online, 31 January 2022) <<https://www.bbc.com/news/world-europe-60156257>>. Separately, Belgium has recently granted its workers the right to request a four-day work week without any alteration to their salary: Daniel Boffey, 'Belgium to Give Workers Right to Request Four-Day Week', *The Guardian* (online, 16 February 2022) <<https://www.theguardian.com/law/2022/feb/15/belgium-to-give-workers-right-to-request-four-day-week>>.
- 37 *Legge 22 maggio 2017, n. 81, Misure per la tutela del lavoro autonomo non imprenditoriale e misure volte a favorire l'articolazione flessibile nei tempi e nei luoghi del lavoro subordinato* [Law No 81 of 22 May 2017, Measures for the Protection of Non-entrepreneurial Autonomous Work and Measures to Encourage Flexible Adaptation as to Times and Places of Subordinate Work] (Italy) art 19(1). See also Dante Figueroa, 'Italy: Provisions on Self-Employed Workers and Flexible Work Schedules', *Library of Congress* (Web Page, 7 July 2017) <<https://www.loc.gov/item/global-legal-monitor/2017-07-07/italy-provisions-on-self-employed-workers-and-flexible-work-schedules/>>.
- 38 On 1 April 2021, the Irish Government brought into operation a code developed by the Workplace Relations Commission to underpin the government's commitment to facilitate and support remote and flexible working: Workplace Relations Commission (Ireland), 'Code of Practice for Employers and Employees on the Right to Disconnect' (Code, 2021). See also Melanie Crowley, 'The Right to Disconnect: What Does It Mean for Employers?', *Mason, Hayes & Curran* (Blog Post, 7 April 2021).
- 39 *Working Time Regulations 1998* (UK) reg 4(1).
- 40 Liam Geraghty and Evie Breese, 'What Is a Right to Disconnect and Does the UK Need One after COVID?', *Big Issue* (online, 1 November 2021) <<https://www.bigissue.com/news/employment/what-is-a-right-to-disconnect-and-does-the-uk-need-one-after-covid/>>.
- 41 In doing so, Prospect has published guidance on negotiating workplace policies concerning the right to disconnect: Prospect, 'Right to Disconnect: A Guide for Union Activists' (Guide, May 2021).

out-of-hours to talk to its customers and staff, despite him having concluded work for the day.⁴²

Most recently, in early 2021, the European Parliament voted to adopt a resolution calling on the European Commission to propose law that would grant workers the right to refrain from work-related emails and calls outside working hours, including when on holidays or leave, as well as protection from any adverse treatment against those who disconnect.⁴³ At present, however, there remains no overarching European framework which expressly defines and regulates the right to disconnect universally throughout the European Union.⁴⁴

Regardless of whether you agree that such business activities should be subject to regulation by government,⁴⁵ the fact that the existence of a right to disconnect has received increased global attention points to a problem extending to employees worldwide, including those in Australia. This problem has only been exacerbated by the COVID-19 pandemic. Not disconnecting from work-related communications outside hours (including phone calls, text messages and emails) is making employees miserable, affecting their health, wellbeing, and productivity.⁴⁶

In the Australian context, which is the focus of the remainder of this article, it is unsurprising that the Australian Council for Trade Unions has recently advocated for the explicit recognition of a right to disconnect in Australia. It has encouraged employers to provide for such a right in their enterprise agreements, recommending a Working from Home Charter, which promotes work/life balance by including a right to disconnect in a workplace policy document, among other measures.⁴⁷ However, a search of enterprise agreements registered with Australia's Fair Work Commission for those containing such a right at the time of writing indicates that uptake of that aspect of the charter at the local workplace level has been slow – a point that will be revisited later in Part V.

42 Cour de cassation [French Court of Cassation], 17-13.029, 12 July 2018. See also, Henry Samuel, 'British Firm Ordered to Pay €60,000 by French Court for Breaching Employee's "Right to Disconnect" from Work', *The Telegraph* (online, 1 August 2018) <<https://www.telegraph.co.uk/news/2018/08/01/british-firm-ordered-pay-60000-french-court-breaching-employees/>>.

43 *Right to Disconnect Resolution* (n 10). See also 'Industrial Relations and Labour Law Newsletter: EU Parliament Resolution on the Right to Disconnect', *International Organisation of Employers* (Blog Post, February 2021) <<https://industrialrelationsnews.ioe-emp.org/industrial-relations-and-labour-law-february-2021/news/article/eu-parliament-resolution-on-the-right-to-disconnect>>.

44 Instead, the *Working Time Directive* (2003/88/EC) refers to a number of indirectly related matters (eg, minimum daily and weekly rest periods): *Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 Concerning Certain Aspects of the Organisation of Working Time* [2003] OJ L 299/9 ('*Working Time Directive*').

45 Noting the various criticisms associated with legislating against the culture of connectivity as summarised in CW Von Bergen and Martin S Bressler, 'Work, Non-work Boundaries and the Right to Disconnect' (2019) 21(2) *Journal of Applied Business and Economics* 51, 61–2 <<https://doi.org/10.33423/jabe.v21i1.1454>>.

46 Harry Cooper, 'French Workers Gain the "Right to Disconnect"', *Politico* (online, 31 December 2016) <<https://www.politico.eu/article/french-workers-gain-right-to-disconnect-workers-rights-labor-law/>>.

47 Australian Council for Trade Unions, 'Working from Home Charter' (Charter, 23 February 2022). See also Daniel Ziffer, "'Right to Disconnect" Fight to Expand as Unions Push Claims in Enterprise Agreements', *ABC News* (online, 7 April 2021) <<https://www.abc.net.au/news/2021-04-07/right-to-disconnect-fight-to-expand-trade-union-eba-push/100050264>>.

To date, the Australian Parliament has also paid little attention to the potential to pass dedicated legislation directly recognising such a right; indeed, discussion of the right has only just emerged legislatively with the Australian Greens' introduction of a private member's Bill: Fair Work Amendment (Right to Disconnect) Bill 2023 (Cth) ('Right to Disconnect Bill'). Schedule 1 of the Bill purports to protect employees from consequences of not answering emails, calls, or other messages after hours, unless they are paid, or there has been a genuine emergency or welfare matter. At the time of writing, however, the Right to Disconnect Bill has only been read a first time, and its success is likely contingent on support from the recently elected Labor Government in May 2022, whose industrial relations agenda appears far more worker-centric.⁴⁸ It remains important to note that neither major Australian political party appears to have adopted a policy position with respect to the right to disconnect. Therefore, as matters currently stand, Australia is set well apart from the abovementioned jurisdictions with an existing statutory-based right to disconnect. That is not to say that other legal mechanisms could not be used to try to enforce the right, as will be expanded upon in Part V, with the potential for it to be developed judicially as a term implied by law into all Australian employment contracts explored in Part VI.

III NECESSITY FOR AUSTRALIAN EMPLOYEES

The purpose of this discussion is to highlight the widespread impacts on Australian employees where they are not afforded a right to disconnect. Part IV, which follows, operates similarly, highlighting the drawbacks for employers, should the right remain unrecognised in Australia. The discussion across both parts emphasises the overwhelming necessity for the recognition of such a right. In doing so, it gives context to the remainder of the article, which explores the legal mechanisms through which a right to disconnect has the potential to come to fruition in Australia.

It is no secret that digitisation of Australian work practices has meant that employees are becoming less and less capable of escaping their work. Until the late 1990s, the typical professional employee in the Western world would attend their office from Monday to Friday, performing their work in blocks of eight to nine hours.⁴⁹ This pattern of working was once so familiar it even provided creative inspiration for Dolly Parton's classic 1980 hit song, '9 to 5'.⁵⁰ That history goes to show that workplaces and work hours were once plainly identifiable. Nowadays, one's workplace and work hours are becoming increasingly less so. Work often

48 For a useful summary of the Albanese Labor Government's industrial relations agenda following its election in May 2022, see, eg, Andrew Stewart, 'Wages and Women Top Albanese's IR Agenda: The Big Question Is How Labor Keeps Its Promises', *The Conversation* (online, 24 May 2022) <<https://theconversation.com/wages-and-women-top-albaneses-ir-agenda-the-big-question-is-how-labor-keeps-its-promises-183527>>. See also, the Labor Government's recent legislative changes implemented following the passing of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth).

49 Von Bergen and Bressler (n 45) 51.

50 Dolly Parton, '9 to 5', *9 to 5 and Odd Jobs* (RCA Records Nashville, 1980).

occurs independently of the traditional workplace; it can be performed at home, in transit, and even on holidays.⁵¹ Workplaces have effectively expanded to wherever employees can take their smartphone, laptop, or smartwatch, creating the possibility of work being performed beyond any preconceived setting or timeframe. The COVID-19 pandemic has further fuelled this trend, with many more Australian employers now adopting flexible working arrangements to enable employees to work remotely far more often.⁵²

The growth of Australian employees being always ‘on’ and responsive to work-related communications outside working hours has resulted in a blurring of the lines between their work and private lives. Indeed, the distinction between an employee’s work and private life remains an important characteristic in other facets of Australian employment law. For example, the distinction between an employee’s work and private life is key to consider in the context of Australia’s unfair dismissal jurisdiction, which requires that there be a ‘sufficient connection’ between an employee’s purported misconduct and their work in order for an employee to be lawfully dismissed as a consequence of that misconduct.⁵³ As to ownership of intellectual property, only inventions created by employees ‘during the course of employment’ will be the property of the employer, noting that there are certain exceptions to this rule.⁵⁴ In workers’ compensation matters, in order for an injury or illness to be compensable, it must have arisen ‘out of or in the course of employment’, not beyond.⁵⁵

Yet a blurring of employees’ work and private lives has become increasingly prevalent since the number of employees working from home has dramatically increased during the COVID-19 pandemic.⁵⁶ A 2020 survey conducted at the height of the COVID-19 pandemic by the Centre for Future Work at the Australia Institute showed that during that same year, Australians were alarmingly working an average of 5.25 hours of unpaid overtime each week.⁵⁷ It is equally concerning that

51 Von Bergen and Bressler (n 45) 51.

52 See, eg, Australian Institute of Family Studies, *Employment & Work-Family Balance in 2020* (Report No 2, June 2021) 4–5.

53 See, eg, *Rose v Telstra Corporation Limited* [1998] AIRC 1592 [11] (Ross V-P) citing *Hussein v Westpac Banking Corporation* (1995) 59 IR 103,107 (Staindl JR). See also *Dover-Ray v Real Insurance Pty Ltd* (2010) 204 IR 399, where an employee’s social media post that was derogatory of her employer was limited to her ‘friends’, which included work colleagues, therefore giving rise to a sufficient connection to her employment.

54 See, eg, *Redrock Holdings Pty Ltd v Hinkley* (2001) 50 IPR 565, where an employee was simultaneously working for an employer while also performing their own private work.

55 See, eg, *Dring v Telstra Corporation Limited* (2021) 283 FCR 505, where the employee was on a work trip at her employer’s direction, but had engaged in a personal activity, which disrupted the nexus with her employment. She was therefore unable to claim compensation for an injury she suffered during that work trip.

56 See, eg, Australian Bureau of Statistics, *Household Impacts of COVID-19 Survey* (Catalogue No 4940.0, 17 March 2021) <<https://www.abs.gov.au/statistics/people/people-and-communities/household-impacts-covid-19-survey/feb-2021>>.

57 Dan Nahum, *Work and Life in a Pandemic: An Update on Hours of Work and Unpaid Overtime under COVID-19* (Report, Centre for Future Work at the Australia Institute, November 2020) 16.

70% of Australians working from home during 2020 reported that they had been performing some of that work outside their normal working hours.⁵⁸

It must be acknowledged here that the flexibility created by atypical patterns of work (such as working from home, and performing that work during non-traditional working hours), particularly during the COVID-19 pandemic, is not all bad. In fact, during the pandemic, working from home has become a necessary and, at times, a non-negotiable way of working.⁵⁹ Notwithstanding the pandemic, there is undoubtedly a case for greater flexibility in working patterns,⁶⁰ especially for employees (particularly women) and their households.⁶¹ Indeed, over the last 20 years, the proportion of women with children and those who have taken on caring roles for ageing relatives has dramatically increased.⁶²

On the one hand, it could be argued that a right to disconnect may have the flow-on effect of preventing an employee from working digitally at their preferred times in lieu of following fixed-time arrangements, thereby reducing their autonomy and flexibility.⁶³ On the other hand, a right to disconnect need not stifle desired flexibility in their working patterns. Implemented appropriately, it has the potential to maintain employee flexibility, with an employee free to enter and exit work throughout the day, provided their working time is recognised and limited to a predetermined number of hours, to ensure that they have a genuine rest period.⁶⁴ An overarching recommendation for how a right to disconnect could be fashioned to accommodate this kind of flexibility is revisited in this article's conclusion.

At this point, it must be emphasised that for many employees, without a recognised right to disconnect, there exists a 'darker side',⁶⁵ creating a 'double-edged sword' when it comes to the purported benefits of flexible working patterns.⁶⁶ Despite its apparent benefits, working flexibly has been shown to contribute to long work hours, seeping into employee private time, otherwise dedicated to leisure, rest, and family. The fallout can be disrupted sleep, overwhelming stress, burnout, challenging relationships, and distracted carers.⁶⁷ The consequences of not recognising a right to disconnect are made more even more concrete by turning to relevant research literature.

58 Ibid 29.

59 See also, Productivity Commission, 'Working from Home' (Research Paper, September 2021) 15–16.

60 As to the benefits of flexible working patterns, see further, Melissa Gregg, *Work's Intimacy* (Polity Press, 2011) 39–40; Katsabian (n 13) 387–8. See also above nn 41–5 and accompanying text.

61 See, eg, Natalie Skinner and Barbara Pocock, 'The Persistent Challenge: Living, Working and Caring in Australia in 2014' (Research Report, Centre for Work + Life, University of South Australia, September 2014); Manuela Tomei, *Teleworking: A Curse or a Blessing for Gender Equality and Work-Life Balance?* (2021) 56(5) *Intereconomics* 260, 262–3 <<https://doi.org/10.1007/s10272-021-0995-4>>.

62 Von Bergen and Bressler (n 45) 52.

63 See, eg, Katsabian (n 13) 397.

64 Ibid.

65 Jessica Fairbairn, 'The Right to Disconnect: The Darker Side of Mis-managed Flexible Working Arrangements' (Conference Paper, Employment Law Conference 2019, April 2019).

66 Tanya Marcum, Elizabeth A Cameron and Luke Versweyveld, 'Never off the Clock: The Legal Implications of Employees' after Hours Work' (2018) 69(2) *Labor Law Journal* 73, 75.

67 See generally, P Afonso, M Fonseca and JF Pires, 'Impact of Working Hours on Sleep and Mental Health' (2017) 67(5) *Occupational Medicine* 377 <<https://doi.org/10.1093/occmed/kqx054>>.

According to William Becker, co-author of a 2021 study, ‘Killing Me Softly: Electronic Communications Monitoring and Employee and Significant-Other Well-Being’,⁶⁸ employees need not even spend actual time on work in their off-hours to experience such harmful effects. The mere expectation of availability increases strain for employees, as well as their families, even in situations if they do not even not engage in actual work during their non-work time.⁶⁹ That is not to mention that even when trying to disconnect on their own accord, employees commonly experience stress, anxiety and worry related to unfinished tasks and the ‘fear of missing out’ – ‘a pervasive apprehension that others might be having rewarding experiences from which one is absent ... and is characterized by a desire to stay continually connected with what others are doing’.⁷⁰

Separately, in a 2016 paper, Gloria Mark et al published the results of a study in which they connected 40 knowledge workers to wireless heart rate monitors for 12 working days.⁷¹ The subjects’ heart rate variability was recorded, since it is a well-known way of measuring mental stress. At the same time, Marks’ team measured the employees’ computer use, allowing the researchers to draw a correlation between checking emails and the subjects’ stress levels. It is no surprise that Marks’ team found that: ‘The longer one spends on email [in a given] hour, the higher is one’s stress for that hour’.⁷²

Following up on this study, in 2019, Mark, with another team of researchers, published the results of a study, in which they put thermal cameras just below each subject’s computer monitor. This placement meant that the researchers could measure the heat emitted from the subject’s face, which is an indicator of psychological distress.⁷³ Interestingly, ‘batching’ inbox checks into set timeframes was found to not be a panacea (perhaps due to concern about potentially urgent messages being deliberately ignored). The researchers also found that the more stressed someone is, the quicker they answer an email, but this does not necessarily correlate with a better email. A text analysis program used by the research team showed that emails written by subjects who were stressed were far more likely to

68 William J Becker et al, ‘Killing Me Softly: Organizational E-mail Monitoring Expectations’ Impact on Employee and Significant Other Well-Being’ (2021) 47(4) *Journal of Management* 1024 <<https://doi.org/10.1177/0149206319890655>>.

69 Virginia Tech, ‘Mere Expectation of Checking Work Email after Hours Harms Health of Workers and Families’, *Science Daily* (online, 10 August 2018) <<https://www.sciencedaily.com/releases/2018/08/180810091553.htm>>.

70 Andrew K Przybylski et al, ‘Motivational, Emotional, and Behavioral Correlates of Fear of Missing Out’ (2013) 29(4) *Computers in Human Behavior* 1841, 1841 <<https://doi.org/10.1016/j.chb.2013.02.014>>.

71 Gloria Mark et al, ‘Email Duration, Batching and Self-Interruption: Patterns of Email Use on Productivity and Stress’ (Conference Paper, 2016 CHI Conference on Human Factors in Computing Systems, May 2016) 1720 <<https://doi.org/10.1145/2858036.2858262>>.

72 Ibid 1724.

73 Fatema Akbar et al, ‘Email Makes You Sweat: Examining Email Interruptions and Stress with Thermal Imaging’ (Conference Paper, 2019 CHI Conference on Human Factors in Computing Systems, May 2016) 3 <<https://doi.org/10.1145/3290605.3300898>>.

contain words expressing anger.⁷⁴ As such, they recommended ‘that organizations make a concerted effort to cut down on email traffic’.⁷⁵

Other researchers have also identified a connection between constant connectivity to work through digital devices and unhappiness. Another 2019 study, appearing in the *International Archives of Occupational and Environmental Health*, considered long-term trends in the self-reported health data of nearly 5000 Swedish workers.⁷⁶ This study showed that repeated exposure to ‘high [information and communication technology] demands’ (in other words, the need for constant connectivity) was linked to ‘suboptimal’ health outcomes.⁷⁷ This trend continued even when variables were adjusted (ie, age, sex, socioeconomic status, health behaviour, body mass index, job strain, and social support).⁷⁸

Another way of measuring the harm caused by being constantly connected to work through digital devices is to reduce their presence. This reduction is precisely what Harvard Business School Professor, Leslie Perlow, explored in an experiment conducted with consultants from the Boston Consulting Group.⁷⁹ After Perlow introduced a technique called ‘predictable time off’ (‘PTO’),⁸⁰ during which team members were provided set times each week when they could completely disconnect from email and phone communication (with the full support of their colleagues), the consultants became markedly happier. Before PTO was introduced, just 27% of the consultants reported that they were excited to start work in the morning. That figure is in stark contrast to 51% after the reduction in communication.⁸¹ Similarly, the percentage of consultants satisfied with their job rose from under 50% to over 70%.⁸² Contrary to expectations, this mild reduction in electronic accessibility did not make the consultants *feel* less productive; rather, it increased the percentage of those who felt as though they were ‘efficient’ and ‘effective’ by over 20%.⁸³ As reported in her 2012 book on this research, *Sleeping with Your Smartphone*, these results, when first discovered, left Perlow puzzled as to why a culture of constant connectivity was ever adopted at all.⁸⁴

74 Ibid 10.

75 Mark et al (n 71) 1725.

76 Magdalena Stadin et al, ‘Repeated Exposure to High ICT Demands at Work, and Development of Suboptimal Self-Rated Health: Findings from a 4-Year Follow-Up of the SLOSH Study’ (2019) 92(5) *International Archives of Occupational and Environmental Health* 717 <<https://doi.org/10.1007/s00420-019-01407-6>>.

77 Ibid 717.

78 Ibid 723.

79 See Leslie Perlow, *Sleeping with Your Smartphone: How to Break the 24/7 Habit and Change the Way You Work* (Harvard Business Review Press, 2012).

80 Ibid 4.

81 Ibid 5.

82 Ibid.

83 Ibid.

84 Ibid.

Research has also linked employees' dramatic increase in the use of technology (especially smartphones)⁸⁵ with characteristics of addiction.⁸⁶ Former product philosopher at Google, Tristan Harris, has gone so far as to dub smartphones the 'Slot Machine in Your Pocket'.⁸⁷ Just as with substance addiction, excessive and compulsive technology use has been linked with risky behaviours, including people ignoring important professional and life duties.⁸⁸ Relatedly, a high level of importance on remaining connected to their work has induced behaviours in employees that demonstrate a virtual obsession with constantly checking for new work-related communications on digital devices.⁸⁹

Put otherwise, some employees are so addicted to being 'on' that they find themselves unable to be 'off', which can lead to tension and conflicting expectations between work and private life. Regrettably, this always 'on' culture has become entrenched in the way many Australian employees now work and has been exacerbated even more so by changes to work patterns during the COVID-19 pandemic. Given the above, it is hard to deny that there is a clear need, from an employee perspective, for a right to disconnect. As demonstrated below, the same can arguably be said on the part of employers.

IV NECESSITY FOR AUSTRALIAN EMPLOYERS

Discussion now moves to considering the impact that an absence of a right to disconnect could have on Australian employers, reemphasising its necessity in Australian employment law. Put bluntly, the consequences for employers could be incredibly risky and expensive without a right to disconnect. Without a direct recognition of the right, developed either at the employer's initiative, or alternatively by Parliament or the judiciary, employers may expose themselves to increased risk of liability for a breach of the duty of care that they owe to their employees – an established non-delegable duty owed by employers to employees to provide a safe place of work, both at common law and under statute.

At common law, an employer's duty of care arises from the tort of negligence, as well under contract as a term implied by law, with both duties generally treated as coextensive and correlative.⁹⁰ As to the equivalent statutory duty, the Work

85 José De-Sola Gutiérrez, Fernando Rodríguez de Fonseca and Gabriel Rubio, 'Cell-Phone Addiction: A Review' (2016) 7(175) *Frontiers in Psychiatry* 1 <<https://doi.org/10.3389/fpsy.2016.00175>>.

86 See, eg, Abdullah J Sultan, 'Addiction to Mobile Text Messaging Applications is Nothing to "LOL" About' (2014) 51(1) *Social Science Journal* 57 <<https://doi.org/10.1016/j.soscij.2013.09.003>>; Isaac Vaghefi, Liette Lapointe and Camille Boudreau-Pinsonneault, 'A Typology of User Liability to IT Addiction' (2017) 27(2) *Information Systems Journal* 125 <<https://doi.org/10.1111/isj.12098>>.

87 Tristan Harris, 'The Slot Machine in Your Pocket', *Der Spiegel*, (online, 27 July 2016) <<https://www.spiegel.de/international/zeitgeist/smartphone-addiction-is-part-of-the-design-a-1104237.html>>.

88 Von Bergen and Bressler (n 45) 54.

89 Ibid.

90 In *Astley v Austrust Ltd* (1999) 197 CLR 1, the High Court held that contractual and tortious duties of care can coincide, and that the availability of one will not have the effect of displacing the other. Indeed, if an employer's negligence is found to be responsible for an employee's injury or illness, then the employee may – subject to workers' compensation provisions in the relevant jurisdiction – sue for damages in

Health and Safety Acts that apply at the federal and state/territory levels⁹¹ provide for a ‘general duty of care’ to protect employees’ health and safety at work.⁹² The Acts impose such an obligation on an employer based on what is considered ‘reasonably practicable’ in the circumstances.⁹³ Whether derived from common law or statute, an employer’s duty of care operates far more comfortably in the context of an employee performing work during normal working hours and in a formal workplace setting.⁹⁴ Yet, that same duty has the potential to extend to an employee performing work out-of-hours and beyond a traditional workplace setting;⁹⁵ in essence, an employer may owe a duty of care to an employee whenever or wherever they engage in the performance of work. The absence of control over the premises will not absolve an employer of its duty.⁹⁶ As highlighted in Part III, absent a right to disconnect, there are significant risks for employers who permit employees who perform work outside their premises and outside of normal working hours. By allowing (sometimes even encouraging) employees to be always ‘on’ and connected to their work, employers may expose themselves to significant legal risk because of broadening the scope of their duty of care wider than they may have ever intended or contemplated.

Naturally, the question of the scope and extent of an employer’s duty of care in such a situation will only be answered conclusively if a suitable test case arises. A test case would ideally question an employer’s liability for an employee’s injury (whether physical or psychological) sustained due to overwork outside the traditional workplace and normal working hours, absent any established right for employees to disconnect. At the time of writing, there appears to be no directly

either breach of contract, or in the tort of negligence. It goes without saying that an employee would seek the most favourable remedy that may flow from either cause of action: see further, Gabrielle Golding, ‘Coronavirus and Directing Employees to Work from Home: Examining an Employer’s Duty of Care’, *Labour Law Down Under* (Blog Post, 21 April 2020) <<https://labourlawdownunder.com.au/?p=825>>.

- 91 These Acts are based on a uniform ‘Model Act’, noting that there are some slight differences across certain jurisdictions: see, eg, the SafeWork Australia, ‘Model Work Health and Safety Bill’ (Model Legislation, 14 April 2022) 224–34 (‘Model Act’). For ease of reference, further references to this legislation will be made with respect to the Commonwealth’s *Work Health and Safety Act 2011* (Cth) only. See further *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas); *Occupational Health and Safety Act 2004* (Vic); *Work Health and Safety Act 2020* (WA).
- 92 *Work Health and Safety Act 2011* (Cth) s 19; *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW) s 19; *Work Health and Safety Act 2011* (Qld) s 19; *Work Health and Safety Act 2012* (SA) s 19; *Work Health and Safety Act 2012* (Tas) s 19; *Work Health and Safety Act 2020* (WA) s 19, *Occupational Health and Safety Act 2004* (Vic) ss 21.
- 93 ‘Model Act’ (n 91) ss 17, 19; *Work Health and Safety Act 2011*(Cth) ss 17, 19. This statutory duty is similar to those owed at common law, but not entirely identical.
- 94 See, eg, *Wilson v Tyneside Window Cleaning Co* [1958] 2 QB 110, 121 (Pearce LJ), 124 (Parker LJ), where it was held that for the purpose of the operation of an employer’s duty of care, a workplace includes premises occupied by the employer or a third party in which the employee is working.
- 95 To take one example, an employer was found to owe a duty of care to an employee who sustained significant physical injuries after consuming alcohol and returning to his employer’s premises outside of normal working hours in *Walker v Greenmountain Food Processing Pty Ltd* [2020] QSC 329.
- 96 See, eg, *DIB Group Pty Ltd v Cole* [2009] NSWCA 210, [41]–[55] (Beazley JA).

applicable Australian case law to that effect.⁹⁷ It should also be emphasised that the mere fact that an employer owes a duty of care will not negate the need for a right to disconnect to be recognised in and of itself. If anything, the existence, and potential extension of, an employer's duty of care bolsters the necessity for such a right, and the various options for its recognition will be explored later in Parts V and VI.

On the assumption that a duty of care is owed, the question of whether an employer has breached it (whether it be pursued as an action in tort, contract, or under statute) will depend on the facts of each case. For an action in tort or contract, the court will consider whether a reasonable person in the employer's position would have foreseen a risk of injury to the employee. Injury can include both physical and psychological harm, which, in limited circumstances, may include work-related stress.⁹⁸ Again, the research described earlier in Part III is indicative of the fact that a reasonable person in an employer's position could foresee the potential for such injuries being suffered by an employee who is not afforded a right to disconnect. Separately, under the Work Health and Safety Acts, the court must consider whether, as a general duty, a 'person conducting a business or undertaking'⁹⁹ (which generally includes an employer) has ensured, so far as reasonably practicable, the health and safety of any workers (including employees) that they have engaged or caused to be engaged, or whose working activities they have influenced or directed, while at work in the business or undertaking.¹⁰⁰

It is well established that satisfying that a duty of care has been met to the requisite standard can be bolstered where an employer can demonstrate that they have taken appropriate steps to minimise any harm that could be suffered by the employee. There are clearly risks faced by an employee who is constantly connected to their work (as described in Part III). An employer could most simply meet the requisite standard of care where a right to disconnect becomes recognised in some form and is enforced by them. Such an approach appears to satisfy what would be expected of a reasonable person in the position of a responsible employer. As will be expanded upon later in Parts V and VI, such a right in and of itself could either be developed at the employer's initiative, by Parliament, or the judiciary.

97 Cf *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* (C-303/98) [2000] ECR I-07963, where time spent 'on call' was held to be regarded as 'working time' in respect of Spanish doctors, who are subject to the control of a maximum working day under the European Union's *Council Directive 93/104/EC of 23 November 1993 concerning Certain Aspects of the Organization of Working Time* [1993] OJ L 307/18. This was later replaced by the *Working Time Directive* (n 44).

98 The High Court's decision in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 made it more challenging for Australian employees to claim for psychiatric injury caused by stress at work, at least in respect of situations where the stress was caused by the amount of work that the employee was required to perform. For a comprehensive assessment of Australian case law concerning an employer's duty of care as it relates to work-related stress experienced by an employee: see, eg, Peter Handford, 'Liability for Work Stress: *Koehler* Ten Years On' (2015) 39(2) *University of Western Australia Law Review* 150. See also the more recent decision in *Kozarov v State of Victoria* (2022) 273 CLR 115, which concerns the assessment of common law liability for psychiatric injury sustained in the workplace.

99 See, eg, *Work Health and Safety Act 2011* (Cth) s 5.

100 *Ibid* s 19(1).

Even in the absence of a recognised right to disconnect, SafeWork Australia – a federal government statutory agency charged with developing national policy to improve work health and safety and workers’ compensation arrangements – has already contemplated the requisite standard of an employer’s care. It has suggested the following for employers in its guidelines on controlling risks associated with employees performing work from home:

Communicate with your workers about setting good work patterns and routines and regularly remind them of the importance of this. Follow up with any workers who you are concerned might need some extra assistance in doing this (eg who might be more prone to working long hours).¹⁰¹

In those same working from home guidelines, SafeWork Australia states that it would be considered ‘reasonably practicable’ for an employer to manage its workers’ mental health by ‘making sure workers are effectively disengaging from their work and logging off at the end of the day’.¹⁰² SafeWork Australia’s Model Code of Practice: Managing Psychosocial Hazards at Work (‘Code of Practice’) further contemplates the management of psychosocial risks associated with working flexibly.¹⁰³ It identifies that there may be risks related to ‘job demands’ (including unreasonable or excessive time pressures or role overload and shifts/work hours that do not allow adequate time for sleep and recovery), as well as ‘low job control’ (such as workers having little control over aspects of their work, including how or when their job is done).¹⁰⁴ Collectively, these guidelines and the Code of Practice fall short of establishing a recognised right to disconnect but go so far as to demonstrate a need for it in order for an employer to meet its requisite standard of care. What follows is that recognising a right to disconnect is, in turn, of the utmost necessity for employers, so that they can minimise potential legal risk in respect of satisfying the duty of care that they owe to employees under both common law and statute.

Separate from concerns arising out of the heightened potential for a breach of their duty of care, without a right to disconnect, employers may experience a number of organisational disruptions. They may notice a lack of employee productivity by their overworked employees because, unsurprisingly, additional work does not necessarily correlate to better work.¹⁰⁵ In fact, research has consistently shown that longer working hours correlate with productivity decreases.¹⁰⁶ An ‘always-on’ work culture may also deny employees a sense of autonomy, even creativity and initiative, if they are in a permanent state of reactivity and alertness.¹⁰⁷ The

101 ‘Working from Home: Managing Risks’, *SafeWork Australia* (Web Page) <<https://www.safeworkaustralia.gov.au/safety-topic/managing-health-and-safety/working-home/managing-risks>>.

102 Ibid.

103 SafeWork Australia, ‘Code of Practice: Managing Psychosocial Hazards at Work’ (Model Code of Practice, July 2022) <https://www.safeworkaustralia.gov.au/sites/default/files/2022-08/model_code_of_practice_-_managing_psychosocial_hazards_at_work_25082022_0.pdf>.

104 Ibid 33–7.

105 Secunda (n 5) 4.

106 Lonnie Golden, ‘The Effects of Working Time on Productivity and Firm Performance: A Research Synthesis Paper’ (Research Paper No 33, Conditions of Work and Employment Series, International Labour Office, 2012) 7–8.

107 Von Bergen and Bressler (n 45) 55.

associated risk of employees becoming burnt out and potentially ill may force them to take time away from work, further decreasing their availability and productivity.¹⁰⁸ It is no wonder that some Australian employees are now becoming curious about ‘quiet quitting’ their jobs; in essence, not leaving their employment outright, but quitting the idea of going above and beyond in their role.¹⁰⁹ An employee’s situation may even be so detrimental that they decide to resign from their employment altogether, and seek work elsewhere, leaving their employer to spend time and money finding a suitable replacement. Clearly, therefore, a right to disconnect is just as necessary for employer-based interests as it is for employees. Now that the necessity for a right to disconnect has been well formulated in respect of both parties to the employment relationship, the remainder of this article will now explore what Australia’s employment law protections can do to bring about a right to disconnect and escape these deeply problematic trends.

V POTENTIAL LEGAL PROTECTIONS

Leaving aside the potential for common law intervention, which is discussed later at Part VI, there exist some possible avenues for legal protection for an employee being able to disconnect outside work, but none of which are foolproof, or even guaranteed. These are the ability for a right to disconnect to be included in a workplace policy document, as an express contractual term in an individual employment contract, or as part of an enterprise agreement at the workplace level. There is also the potential for the right to be added as 1 of the 11 minimum standards provided for under the *Fair Work Act 2009* (Cth) (*FW Act*) National Employment Standards (‘NES’)¹¹⁰ or incorporated as part of a modern award¹¹¹ applicable to employees in a particular industry or occupation. These options are each examined over two sections in turn below. Discussion then turns to the potential for the development of a new term implied by law by virtue of the common law in Part VI, which I suggest has promising potential.

108 Liuba Y Belkin, William J Becker and Samantha A Conroy, ‘The Invisible Leash: The Impact of Organizational Expectations for Email Monitoring After-Hours on Employee Resources, Well-Being, and Turnover Intentions’ (2020) 45(5) *Group and Organization Management* 709, 727.

109 ‘Quiet quitting’ has emerged as a social media phenomenon in Australia following the release of a viral video on the social media platform, TikTok: see, eg, Alicia Nally and Katherine Feeney, “‘Quiet Quitting’ Helps Australian Workers Avoid Burnout as New Trend Has TikTok Talking’, *ABC News* (online, 4 August 2022) <<https://www.abc.net.au/news/2022-08-04/australian-workers-quietly-quitting-jobs-seek-new-careers-tiktok/101292468>>; Mark Humphrey-Jenner, ‘Quiet Quitting: The Burnout Phenomena Hitting Business’, *UNSW Sydney Newsroom* (Blog Post, 17 August 2022) <<https://newsroom.unsw.edu.au/news/business-law/quiet-quitting-burnout-phenomenon-hitting-business>>.

110 *Fair Work Act 2009* (Cth) pt 2.2 (*FW Act*).

111 *Ibid* pt 2.3.

A Workplace Policies, Express Contractual Terms, and Enterprise Agreements

There are three options available to employers and employees to agree upon with respect to implementing a right to disconnect at the individual workplace level: workplace policies, express contractual terms, and enterprise agreements, each of which are addressed in turn below.

First, workplace policies need not be considered blunt or purely aspirational. Provided they form part of an employee's employment contract,¹¹² they can give rise to contractually based entitlements for employees, which could include a policy dictating employees' right to disconnect. Workplace policies will most obviously be deemed contractual where they are referred to expressly in a written employment contract or letter of offer, which makes clear that they are contractual in nature.¹¹³ However, courts will not always be willing to recognise that a workplace policy is contractually binding,¹¹⁴ and sometimes, employers make the mistake of only incorporating terms of a workplace policy as at the date of the employment contract, but not its later updates.¹¹⁵ Nevertheless, if a contractually based policy is breached, it could give rise to damages for breach of contract. The main challenge is that the creation, implementation, and enforcement of such policy-based entitlements are largely at the discretion of individual employers. The result is that the content, nature, and efficacy of such a policy will be at the employer's whim, with its actual benefit to employees reliant on the employer's prerogative.¹¹⁶

Whether a policy containing a right to disconnect comes into existence will be contingent on an employer's capacity to generate and implement that policy, as well as require employees to adhere to it. There is little available publicly to allow a comprehensive assessment of just how many Australian employers may have already implemented a right to disconnect in some form by way of a workplace policy, since employers tend not to make such documents publicly available. However, as mentioned earlier, in Germany, the gateway for larger companies to generate such policies has been opened by prominent German car companies,

112 As to the interrelationship between workplace policies and employment contracts: see, eg, Mark Giancaspro, 'Do Workplace Policies Form Part of Employment Contracts? A Working Guide and Advice for Employers' (2016) 44(2) *Australian Business Law Review* 106; Anna Chapman, John Howe and Susan Ainsworth, 'Organisational Policies and Australian Employment Law: A Preliminary Study of Interaction' (Working Paper No 53, Centre for Employment and Labour Relations Law, University of Melbourne, February 2015) 5–8.

113 See, eg, *Cicciarelli v Qantas Airways Ltd* (2012) 201 FCR 378. Signing the contract, or accepting work based on such an offer, means that an employee will be taken to have agreed to those policies. See also, *Transport Workers' Union of Australia v K & S Freighters Pty Ltd* (2010) 205 IR 137, where, even without written employment contracts, employees were required to sign a receipt to indicate they accepted the terms of a workplace policy handbook, noting that the court also suggested that the employees' signatures themselves were irrelevant with respect to the workplace policy handbook being deemed a part of their employment contracts: at 155 [90] (Coward J).

114 See, eg, the various circumstances presented in Giancaspro (n 112) in which a policy document is deemed not to be contractual: at 116–17.

115 See, eg, *Bostik (Australia) Pty Ltd v Gorgevski [No 1]* (1992) 36 FCR 20.

116 See also, *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 where it was held that 'a balance has to be struck between an employer's interest in managing [its] business as [it] sees fit and the employee's interest is not being unfairly and improperly exploited': at 46 (Lord Steyn).

Volkswagen, BMW and Daimler.¹¹⁷ Each of those large employers has adopted a policy preventing out-of-hours and holiday work-related emails or calls. Goldman Sachs has also recently provided a re-statement of its ‘Saturday rule’ policy. Under that policy, its junior bankers are specifically mentioned not to be expected to be in the office from 9:00pm Friday to 9:00am Sunday¹¹⁸ – an approach that seems far from controversial. During April 2021, it was also reported in *The Sydney Morning Herald* that one of Australia’s major supermarket chains, Coles, was planning to prevent out-of-hours work by way of relevant updates to its workplace policies.¹¹⁹ Griffith University issued a directive in late 2020 that internal emails should not be sent after midday on Fridays, in an effort to aide staff motivation and avoid burnout during the COVID-19 pandemic.¹²⁰ For the Australian legal profession, the notion of a right to disconnect in a suitable policy applicable to individual law firms has been suggested as a lofty ideal,¹²¹ but being left up to individual firms, the actual uptake of such policies appears to have been limited with no large major firms declaring to have taken the lead in implementation.

Separate from the potential for a workplace policy to be incorporated as a contractual term,¹²² it is possible that a right to disconnect could become part of an employee’s individual employment contract as an express contractual term. As a reminder, an express term is one that the parties have agreed upon, either verbally or in writing.¹²³ Therefore, if specifically agreed between the parties, either verbally, or in writing, a right to disconnect can comprise a term of an employee’s contract, which, if breached, could sound in damages for breach of contract. Clearly, a term agreed between the parties in writing will be clearer than one agreed verbally, but there is no strict requirement that an employee’s contract be committed to a written contractual document at all. Unfortunately, there is no way of surveying each individual employment contract in Australia to ascertain the extent to which such a term may have become part of individual employees’ employment contracts, and if it has, how prevalent such an occurrence has become. For completeness, it is mentioned here as a possibility for how a right to disconnect may come about for individual employees, absent an overarching workplace policy with the same (potentially contractual) effect.

117 See above n 15.

118 Jenny Surane, ‘Goldmans Promises Junior Bankers Saturdays Off’, *Australian Financial Review* (online, 25 March 2021) <<https://www.afr.com/work-and-careers/workplace/goldmans-promises-junior-bankers-saturdays-off-20210325-p57e26>>.

119 Nick Bonyhady, ‘Work Is Everywhere Now, So Do Staff Have a “Right to Disconnect”?’ , *The Sydney Morning Herald* (online, 26 April 2021) <<https://www.smh.com.au/politics/federal/work-is-everywhere-now-so-do-staff-have-a-right-to-disconnect-20210422-p57lkw.html>>.

120 Tess Bennett, ‘How Friday Afternoon Email Etiquette Cuts Weekend Workloads’, *Australian Financial Review* (online, 19 January 2023) <<https://www.afr.com/work-and-careers/workplace/this-organisation-banned-emails-on-friday-afternoon-20230113-p5ccd3>>.

121 Jerome Doraisamy, ‘The Right to Disconnect for Lawyers’, *Lawyers Weekly* (online, 24 November 2021) <[122 See above n 15.](https://www.lawyersweekly.com.au/biglaw/33112-the-right-to-disconnect-for-lawyers#:~:text=In%20Australia%2C%20unions%20have%20been,a%20right%20to%20disconnect'>https://www.lawyersweekly.com.au/biglaw/33112-the-right-to-disconnect-for-lawyers#:~:text=In%20Australia%2C%20unions%20have%20been,a%20right%20to%20disconnect'>.</p></div><div data-bbox=)

123 For a useful summary of the law governing the express terms in employment contracts, see Stewart, *Stewart’s Guide to Employment Law* (n 7) 111–13.

Separate from an express contractual term or applicable workplace policy, a right to disconnect could become part an enterprise agreement, provided one applies in the relevant workplace. Such a dedicated clause could be included in an enterprise agreement, provided an employer reaches agreement with its employees on its inclusion, and the Fair Work Commission is satisfied that employees covered by the agreement will be better off overall than they otherwise would have been under any applicable modern award.¹²⁴ Assuming such a right forms part of an enterprise agreement, any contravention of it could result in a civil penalty for a breach of section 50 of the *FW Act*.

One challenge of relying on the right to be included as part of an enterprise agreement is that the number of Australian employees covered by an enterprise agreement is gradually declining.¹²⁵ Indeed, as mentioned in Part II, even where employees are covered by an enterprise agreement, at the time of writing, a search of those enterprise agreements registered with the Fair Work Commission indicated that very few Australian employers have included a right to disconnect in their enterprise agreements. Another difficulty is that the process of negotiating the terms of an enterprise agreement between ‘bargaining representatives’¹²⁶ (which may or may not be a union) and the employer may ultimately mean that a right to disconnect is not included in the agreement that is eventually reached. This possibility of the right ultimately not being included in an enterprise agreement that is submitted to employees for approval,¹²⁷ and later (assuming it is approved by employees), to the Fair Work Commission for approval,¹²⁸ remains despite its necessity for both employees and employers as articulated above in Parts III and IV.

Nevertheless, one enterprise agreement, which was successfully negotiated to include the right, was Victoria Police’s *Victoria Police (Police Officers, Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2019*.¹²⁹ During 2021, the Police Association of Victoria struck a deal with Victoria Police on behalf of its employees to allow police officers below a certain rank to receive an ‘availability allowance’ while off-duty for each hour they are required to be contactable. The general position, however, is that those police officers cannot be expected to respond to phone calls or emails outside their normal working hours (subject to limited exceptions, like emergencies, or to check on their welfare).¹³⁰ The Police Association of Victoria campaigned for this development, since it would

124 As to the application of the ‘better off overall’ test under *FW Act* (n 110) s 193, see further, *Re Armacell Australia Pty Ltd* (2010) 202 IR 38, 49 [41] (Guidice J, Acton SDP and Commissioner Lewin); *Hart v Coles Supermarkets Australia Pty Ltd* [2016] FWCFB 2887, 2 [6] (Waston V-P, Kovacic DP and Commissioner Roe); *Re Australia Western Railroad Pty* [2011] FWAA 8555, [5] (Commissioner Williams). An illustrative example is provided in Explanatory Memorandum, Fair Work Bill 2008 (Cth) 130 [824].

125 See, eg, Andrew Stewart, Jim Stanford and Tess Hardy, *The Wages Crisis: Revisited* (Report, Australia Institute, 2022) 39.

126 See further, *FW Act* (n 110) ss 173–4.

127 Whether by ballot or some other method: *ibid* s 181(1).

128 See further, *ibid* ss 54(1), 186, 188.

129 *Victoria Police (Police Officers, Protective Services Officers, Police Reservists and Police Recruits) Enterprise Agreement 2019* [2020] FWCA 1578.

130 *Ibid* 39 [59].

assist in combatting so-called ‘availability creep’ and hyper-vigilance, which had previously meant that police officers were unable to decompress from work and, consequently, their mental health was being adversely impacted.¹³¹

Other Australian employers may now choose follow Victoria Police’s benchmark. However, that position is by no means guaranteed for the reasons already articulated above. It could also be seen as entirely inadequate to leave individual employers (with the agreement of their employees, who may or may not be represented by a union) responsible for deciding whether it is appropriate to generate a right to disconnect in an enterprise agreement. To repeat a point made earlier, even if the uptake in enterprise agreements were strong, the overall impact on Australian employees would be limited, since enterprise agreements now cover just 15% of Australian employees,¹³² many of whom are instead covered by one of the 121 industry or occupational modern awards, underpinned by the minimum standards set out under Australia’s NES. The NES, contained under Part 2-2 of the *FW Act*, set out 11 minimum entitlements, which apply to all national system employees (ie, all employees, other than some state and territory public sector employees).¹³³ It has been estimated that the *FW Act* covers around 85% of all Australian employees.¹³⁴ As such, it is worth exploring the amendment of those statutory-based instruments, which is the subject of the discussion directly below.

B Modern Awards and the NES

Modern awards are statutory-based instruments that set out the minimum terms and conditions of employment on top of the NES.¹³⁵ It is possible that they could be individually varied to include a right to disconnect. However, given their sheer number and the process that must be undertaken to vary them, it would appear simpler and more comprehensive for the NES (which apply to all national system employees, irrespective of whether they are covered by an enterprise agreement or modern award) to be amended, so as to provide a right to disconnect. Breaching the NES amounts to a breach of section 44 of the *FW Act* (another civil penalty provision), alongside the 11 existing standards of maximum working hours, flexibility, and other minimum rights.

At this point, to achieve substantive change, the most effective option appears to be for the Australian Federal Parliament to create a uniform legislative standard

131 ‘Your EBA Explained: Your Right to Disconnect’, *Police Association Victoria* (Web Page, August 2020) <<https://tpav.org.au/news/journals/2020-journals/august-2020-journal/eba19-right-to-disconnect>>.

132 David Marin-Guzman, ‘Enterprise Bargaining Back into Decline’, *Australian Financial Review* (online, 21 December 2020) <<https://www.afr.com/work-and-careers/workplace/enterprise-bargaining-back-into-decline-20201221-p56p70>>.

133 The *FW Act* (n 110) applies to all national system employers and employees, except for those covered by their respective state-based workplace relations system (eg, those working in state-based public sector organisations). A national system employer is an employer covered by the *FW Act* (eg, because they are a constitutional corporation, Commonwealth agency, territory employer or referred employer). A national system employee is an employee working for a national system employer.

134 Stewart, *Stewart’s Guide to Employment Law* (n 7) 36.

135 Those terms and conditions under modern awards must be equal to, or more generous than those that would otherwise apply under the NES: *FW Act* (n 110) s 55.

allowing for a right to disconnect under the *FW Act*'s NES. However, without a dedicated policy position concerning the right from either major political party, as well as the shortage of political debate on the topic, it is difficult to assess the likelihood of such legislative change being adopted, even with the recent introduction of the Australian Greens private member's Bill, which purports to insert a right to disconnect as a standalone right within the *FW Act*.¹³⁶ Specifically, as mentioned in Part II, it is unclear as to the extent to which either major party will support this Bill. Nevertheless, should such legislative change occur, it is acknowledged that Australian employees would benefit from a clearly understood and universal legislative framework. It could be relied upon by the vast majority of Australian employees and would require concrete legislative guidance and suitable measures as to its implementation, so as to ensure adequate social acceptance and meaningful uptake of the newly formulated entitlement.¹³⁷

Absent robust political debate concerning the right at this point in time, what remains clear is that the wealth of literature appears to be in support of the need for the entitlement on both sides of the employment relationship as articulated above in Parts III and IV. Employer groups may well oppose the right's recognition since it could be seen to encroach on an employer's ability to manage its workforce. However, many low-paid, un-unionised, private sector, as well as other relatively powerless workers in smaller workplaces would otherwise have little chance of negotiating or enforcing a right to disconnect in accordance with a workplace policy or enterprise agreement, making a case for statutory intervention by way of an update to the NES even stronger.¹³⁸

Justice Finn reminds us that common law jurisdictions now find themselves in 'age of statutes', emphasising that 'it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society'.¹³⁹ Surely now, in contemporary Australian society, with modern ways of working, it is justifiable for statute to secure employee health and wellbeing by virtue of a right to disconnect, ideally articulated in the NES,¹⁴⁰ which underpins all modern awards and enterprise agreements. Such a development would see a right to disconnect become a universal entitlement, applying Australia-wide to all national system employees, without differentials based on where an employee works. Parliament is in a prime position to conduct the requisite overarching assessment of the suitability of the right, meaning it would be well placed to implement change based on a 'whole-of-society approach, along with the rigour of subjecting the proposal to parliamentary debate'.¹⁴¹

The difficulty with the foregoing suggestion is that the legislative process is typically slow and often convoluted. There are many other Bills that Parliament

136 Fair Work Amendment (Right to Disconnect) Bill 2023 (Cth).

137 This accords with the suggestion made in Katsabian (n 13) 398.

138 See further, the similar argument made with respect to paid menstrual leave in Gabrielle Golding and Tom Hvala, 'Paid Period Leave for Australian Women: A Prerogative Not a Pain' (2021) 43(3) *Sydney Law Review* 349, 359–62.

139 *Buck v Comcare* (1996) 66 FCR 359, 365 (Finn J).

140 *FW Act* (n 110) pt 2.2.

141 Golding and Hvala (n 138) 359.

must navigate. Any proposed statutory development of the right will be subject to parliamentary debate, which may stifle progress in bringing the right into existence at all, or in a palatable format. It is almost impossible to predict ‘what demands are likely to be met with legislative responses’.¹⁴² In essence, legislative reform can be cumbersome and, at times, entirely unpredictable. As things stand, it is unclear whether the Australian Greens will receive adequate support to have the Right to Disconnect Bill passed, and the impact that the legislative process will have on the Bill as presently proposed. Therefore, it is appropriate to go on and consider how the judiciary could step in and seize an opportunity by filling a gap that has been left wide open, absent suitable legislative intervention to date through the creation of a new term implied by law, generating a right to disconnect. That is certainly not to say that a judicial route will prove any less slow, convoluted, and unpredictable; rather it presents a previously unexplored route through which to recognise the right to disconnect, which carries great potential toward a path of having the right finally recognised in Australian law.

VI CREATING SPACE WITH A NEW TERM IMPLIED BY LAW

The purpose of the discussion in this Part is to explain how the right to disconnect could instead be made part of all Australian employment contracts as a term implied by law. From the outset, I acknowledge that the above possible legal protections discussed in Part V are not without merit. The difficulty that remains, however, is that notwithstanding their potential, a gap in employment contracts in the form of a right to disconnect remains needing to be filled. In acknowledging that remaining gap, the common law presents a compelling mechanism with which to fill it through the implication of a suitable term by law. As already suggested, such a process may ultimately prove no less slow, convoluted, and unpredictable than the statutory-based route, but the point is that the common law retains an ability to respond (sometimes ‘radical[ly]’¹⁴³) to this growing social problem, even in the current absence of legislative action.¹⁴⁴ Hence, it is worthy of separate and dedicated consideration here.

At this point, it is important to appreciate that the common law regulates contracts, including employment contracts, in various ways,¹⁴⁵ with one of the most significant ways being through the implication of terms to fill gaps that

142 Barry J Reiter, ‘The Control of Contract Power’ (1981) 1(3) *Oxford Journal of Legal Studies* 347, 365 <<https://doi.org/10.1093/ojls/1.3.347>>.

143 See, eg, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 378 (Lord Goff).

144 See, eg, Robert Walker, ‘Developing the Common Law: How Far is Too Far?’ (2013) 37(1) *Melbourne University Law Review* 232, 250: ‘Sometimes ... governments are reluctant to bring forward measures responding to a perceived social problem. There may be various reasons for this, including congestion of the legislative programme, lack of consensus as to the correct solution, or simply a feeling that controversial legislation might be a vote-loser rather than a vote-winner’.

145 See, eg, the rules concerning formation, terms, performance, and termination of contracts.

may exist.¹⁴⁶ Just as with any other type of contract, employment contracts can be subject to the implication of terms. It is well established that one of the ways a term can be implied into all Australian employment contracts is through the common law, so long as the term is necessary within that class of contract.¹⁴⁷ Terms implied by law are arguably such an influential weapon in judicial technique in respect of employment contracts that Hugh Collins has recognised them as responsible for ‘shaping’ the normative core of the employment relationship.¹⁴⁸ Throughout, I have referred to the potential for the implication of a ‘new’ term by law, when in fact, if a court recognises that a term is necessary to be implied by law as a necessary incident in a certain class of contract, it fills a gap and is treated as though it has always existed. In that sense, the term is novel in respect of the label it is finally given, but not so in respect of the gap filling function it plays.

Elsewhere, I have considered the likelihood of Australian judges continuing to make new law governing employment contracts by implying new terms by law in the face of ever-expanding statutory schemes.¹⁴⁹ For the purpose of the present exercise, I suggest that potential clearly exists in respect of the judicial development of an employee’s right to disconnect, operating as a term implied by law. Perhaps the greatest challenge is having the right set of circumstances brought before a court that is convinced and willing to make new law through the implication of a term by law that recognises the right in the class of employment contracts. That set of circumstances is clearly contingent on a suitable employee having the means to mount such a case, alongside a factual matrix that favours the right’s recognition, as well as convincing legal argument evincing the necessity for recognising the right. Of course, none of these factors can be guaranteed; though, the need to recognise the right continues to expand as has been detailed above

146 On terms implied by law as ‘gap fillers’, see, eg, Hugh Collins, *Employment Law* (Oxford University Press, 2nd ed, 2010) 9–11.

147 As to the class of contract, see, eg, *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, 307 (Lord Bridge). In relation to the requirement of necessity, there are competing narrow and wide approaches to the necessity test for implying a term by law: Gabrielle Golding, ‘Terms Implied by Law into Employment Contracts: Are They Necessary?’ (2015) 28(2) *Australian Journal of Labour Law* 113 (‘Terms Implied by Law’). Cf terms implied in fact, which are implied into the particular contract in question, based on the presumed intention of the parties: *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (Lords Simon and Keith and Viscount Dilhorne); *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 352–3 (Mason J); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 422 (Brennan CJ, Dawson and Toohey JJ), 441 (McHugh and Gummow JJ). Cf also terms implied by custom and usage, where implication is based on a custom or usage in a particular industry: *Con-Stan Industries of Australia Pty Ltd v Norwich Wintehur Insurance (Australia) Ltd* (1986) 160 CLR 226, 236 (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ) (‘Byrne’), which was endorsed in *Byrne* (n 147) 423–4 (Brennan CJ, Dawson and Toohey JJ), 440 (McHugh and Gummow JJ) and *Breen v Williams* (1996) 186 CLR 71, 124 (Gummow J).

148 Hugh Collins, ‘Implied Terms in the Contract of Employment’ in Mark Freedland (ed), *The Contract of Employment* (Oxford University Press, 2016) 471, 472 <<https://doi.org/10.1093/acprof:oso/9780198783169.003.0022>>.

149 Gabrielle Golding, ‘The Role of Judges in the Regulation of Australian Employment Contracts’ (2016) 32(1) *International Journal of Comparative Labour Law and Industrial Relations* 69 (‘The Role of Judges’) <<https://doi.org/10.54648/IJCL2016005>>, which considers the judicial law-making function in respect of regulating employment contracts through terms implied by law.

in Parts III and IV. For that reason, this discussion will continue based on the assumption that, at some stage, a compelling case has the potential to be brought.

As to the topic of necessity for implying a term by law, I have recommended in earlier work that the necessity test for implying a term by law is uncertain and must be clarified.¹⁵⁰ This uncertainty pervades employment contracts specifically, as well as contracts generally, with the same necessity test applied when a new term is implied into any contract by law. There currently exists two interpretations of the necessity test. The first is the narrow interpretation from *Byrne v Australian Airlines Ltd* ('*Byrne*'),¹⁵¹ requiring that the term to be implied by law must be necessary to ensure that the class of contract is not 'rendered nugatory, worthless, or ... seriously undermined'.¹⁵² The second interpretation is wider and derived from *University of Western Australia v Gray* ('*Gray*').¹⁵³ It allows for courts to consider matters of justice and policy in determining what is necessary to be implied by law.¹⁵⁴ The High Court in *Commonwealth Bank of Australia v Barker* ('*Barker*') neglected to clarify which interpretation of the test ought to be adopted when a new term is sought to be implied by law, or how this would affect terms implied by law that are already in existence.¹⁵⁵ The High Court appeared to apply the narrow formulation of the necessity test from *Byrne* as a means of refusing the implication of a mutual trust and confidence term – a term that exists in most other common law jurisdictions.¹⁵⁶ Drawing on the previous decision in *Byrne*,¹⁵⁷ in their joint judgment, Chief Justice French and Justices Bell and Keane said the implied term of mutual trust and confidence imposes mutual obligations 'wider than those which are "necessary", even allowing for the broad considerations which may inform implications in law. It goes to the maintenance of a relationship'.¹⁵⁸

However, the Court's actual application of the necessity test (ie, its reasoning for refusing the implication of the mutual trust and confidence term) was wider, in that it was largely policy-based. In their joint judgment, the three judges justified the non-necessity of the term based on it being 'a step beyond the legitimate law-making function of the courts' which 'should not be taken'.¹⁵⁹ Using further policy-

150 As to the detail surrounding that uncertainty, see, eg, Golding, 'Terms Implied by Law' (n 147).

151 *Byrne* (n 147).

152 *Ibid* 450 (McHugh and Gummow JJ).

153 (2009) 179 FCR 346 ('*Gray*').

154 *Ibid* 377–9 [141]–[147] (Lindgren, Finn and Bennett JJ).

155 (2014) 253 CLR 169 ('*Barker*').

156 The mutual trust and confidence term (or substantially similar terms) exist in many other common law jurisdictions, including Bermuda, Canada (to some extent), Fiji, Hong Kong, New Zealand, South Africa, Tonga, the United Kingdom, and Vanuatu. See Andrew Stewart et al, *Creighton and Stewart's Labour Law* (6th ed, Federation Press, 2016) 525, citing *Reda v Flag Ltd* [2002] UKPC 38; *Murray v Minister of Defence* [2008] ZASCA 44; *Bachicha v Poon Shiu Man Henry* [2000] 2 HKLRD 833; *Koloa v Helu* [1999] TOSC 80; *Melcoffee Sawmill Ltd v George* [2003] VUCA 24; *National Union of Hospitality Catering and Tourism Industries Employees v Mataka* [2011] FJCA 46. See also, *Bhasin v Hrynew* [2014] 3 SCR 494; *Unkovich v Air New Zealand Ltd* [1993] 1 ERNZ 526, 589 (Colgan J).

157 *Byrne* (n 147) 436 (McHugh and Gummow JJ).

158 *Barker* (n 155) 194 [37] (French CJ, Bell and Keane JJ).

159 *Ibid* 178 [1].

based reasoning, they went on to say the creation of a new standard of that kind was a form of ‘judicial law-making’¹⁶⁰ and ‘not a step to be taken lightly’.¹⁶¹

In the context of the present exercise, I say that whichever necessity test is applied, a right to disconnect remains entirely necessary. It is necessary to make employment contracts ‘work’ in the narrow sense. Without it, employment contracts will be ‘rendered nugatory, worthless, or ... seriously undermined’¹⁶² because tired, stressed, burnt out and ill employees cannot be expected to (or may find themselves unable to) perform what they are contracted to do. It is also necessary based on broader notions of justice and policy. From a policy perspective, there are no straightforward or universal protections to grant employees the right to disconnect outside work. From a position of justice, given the potentially significant detriment suffered by employees, it seems entirely logical and appropriate for a right to disconnect to operate with a protective purpose, especially considering that there is nothing else to directly fulfil that role. Existing duties implied by law into employment contracts do little to assist either; for instance, as described in Part IV, an employer’s existing duty of care¹⁶³ presents a well-established duty owed to employees, but does not, in and of itself, encapsulate such a right. Rather, it highlights the necessity for a clear and definitive recognition of the right. Similarly, statute and statutory-based instruments have done no more than to provide for maximum working hours but neglected to account for situations in which those working hours become displaced or blurred into what would otherwise be considered an employee’s private life by reason for digital technologies. Absent a right to disconnect, this trend of displacing or blurring of an employee’s maximum working hours appears set to continue. Just as with the existence of an employer’s duty of care, the setting of maximum working hours has not encapsulated a right to disconnect of itself. It rather emphasises the need for an express recognition of the right in some form.

I have also suggested previously that there are competing views as to whether courts should or should not be responsible for determining the content of employment obligations.¹⁶⁴ The High Court in *Barker* created the potential for courts to avoid implying any new terms into employment contracts at all in the future, appearing to diminish the future role of courts in regulating Australian employment contracts in the future.¹⁶⁵ Even though, as articulated above in Part V, a strong case for legislative intervention exists, this potential should not be seen

160 Ibid 189 [29].

161 Ibid 185 [20].

162 *Byrne* (n 147).

163 As to the existence of this duty in tort, contract, and statute, see the earlier discussion in Part IV of this article. For a further examination of this duty, including its historical origins, see Gabrielle Golding, ‘The Origins of Terms Implied by Law into English and Australian Employment Contracts’ (2020) 20(1) *Oxford University Commonwealth Law Journal* 163, 166–7 <<https://doi.org/10.1080/14729342.2020.1763597>>.

164 See generally, Golding, ‘The Role of Judges’ (n 149).

165 See the more detailed discussion on overcoming this apparent diminution in Gabrielle Golding, ‘Rethinking the Rationale for Implying Terms by Law into Australian Employment Contracts’ (2020) 39(1) *University of Tasmania Law Review* 1, 13–17.

as diminishing the courts' ability to imply new terms by law into employment contracts, should they identify a gap that requires filling, especially in a situation where an employee has brought an arguable case to that effect. As employment contract law expert, Douglas Brodie, has outlined in his monograph dedicated to the future of the employment contract, 'there is no reason to believe that the common law will be hobbled by the increased scale of legislative intervention. Such an outcome would be inconsistent with the courts' ongoing mission of modernising the common law.'¹⁶⁶ The present exercise has made it clear, particularly across Parts III and IV, that the gap that requires filling in employment contracts is one concerning a right to disconnect. The time is ripe for the courts to perform that gap-filling role, modernising the common law in the manner Brodie envisages. There will still always be gaps for which the common law plays an important role in filling.

A final challenge in having a right to disconnect recognised as a term implied by law into all Australian employment contracts must be mentioned: that is, the likelihood of the High Court, as it is currently composed, deciding in favour of implying such a term. Arguably, the court's recent decisions in *Workpac Pty Ltd v Rossato* ('*Workpac*'),¹⁶⁷ *Construction, Forestry, Maritime, Mining & Energy Union v Personnel Contracting Pty Ltd* ('*Personnel Contracting*')¹⁶⁸ and *ZG Operations Australia Pty Ltd v Jamsek* ('*Jamsek*')¹⁶⁹ collectively demonstrate its apparent disinclination to consider employment contract issues by reference to the imbalance of power between the parties, or the reality of how employment relationships actually operate. In turn, such a disinclination may have the effect of stymying the likelihood of a right to disconnect being recognised as a new term implied by law into all Australian employment contracts. Relevantly, in each decision, the High Court emphasised that the primary consideration in determining how to characterise an employment relationship is what is contained in the express terms of a written employment contract, rather than the reality of the relationship between the parties.¹⁷⁰

This newfound approach clearly presents a setback in terms of the common law's potential to intervene and fill gaps in employment contracts through the mechanism of a term implied by law where necessary. However, I argue that it ought not to be determinative of how the common law could or should respond, if the existence of a right to disconnect as a term implied by law is called into question at some point in the future. To suggest otherwise would indicate that the court ceases to have any meaningful law-making function with respect to employment contracts, when there are clearly gaps in those contracts remaining to be filled, particularly

166 Douglas Brodie, *The Future of the Employment Contract* (Edward Elgar, 2021) 210 <<https://doi.org/10.4337/9781783479689>>.

167 (2021) 271 CLR 456 ('*Workpac*').

168 (2022) 312 IR 1 ('*Personnel Contracting*').

169 (2022) 312 IR 74 ('*Jamsek*').

170 *Workpac* (n 167) 479–80 [65] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ); *Personnel Contracting* (n 168) 104–5 [43], 108–9 [58]–[62] (Kiefel CJ, Keane and Edelman JJ); *Jamsek* (n 169) 155 [50] (Kiefel CJ, Keane and Edelman JJ), 160 [82]–[83], 161–162 [90] (Gageler and Gleeson JJ), 162 [95], 163 [100] (Gordon and Steward JJ).

in the absence of any suitable legislative intervention. Indeed, notwithstanding Australia's existing statutory employment law protections, as things presently stand, there is nothing immediately available under statute that yet accounts for an employee's right to disconnect, which ought to be considered a vital part of the employment relationship. While maximum working hours are accounted for in employment contracts, modern awards, and enterprise agreements (whichever applies to an employee's employment), as things stand, those instruments have done little to protect employees from being constantly connected to work beyond those maximum hours. The 'dark side' outlined in Part III remains.

As suggested earlier, the Australian Parliament has shown no signs of alleviating the need for a right to disconnect. Extensive statutory and statutory-based regulation already governs Australian employment relations, further bolstering the argument for leaving regulation of terms of employment to Parliament as recommended above in Part V. Nevertheless, based on the foregoing, I maintain that the establishment of a right to disconnect is one such gap that remains wide open, paving the way for potential common law intervention through the recognition of a term by law.

VII CONCLUSION AND RECOMMENDATIONS

To conclude, I reiterate that there are wide-ranging reasons as to why a right to disconnect ought to be recognised in Australian law. Absent such a right, as Part II made apparent, the potential impacts on employee health and wellbeing are immense. After all, as Greg McKeown reminds us, 'if you don't prioritise your life, someone else will'¹⁷¹ – and, at present in the Australian context, that 'someone else' could well be one's employer. The inevitable flow-on effects for employers, articulated in Part IV, are just as concerning. The overarching questions that remain are twofold. First, what should the right involve if it is recognised? Secondly, what form of recognition of the right (ie, statutory or common law) will best serve Australian employees? In closing, the following discussion explores potential answers to both these questions.

Part II of this article considered various overseas jurisdictions which have come to recognise the right, and it is those, which are useful to draw upon when considering what the right should involve, if recognised in Australia. That discussion highlighted that those jurisdictions where the right is recognised typically do so on a statutory basis, drawing upon the formulation of the right in France where the legislative requirement is simply that employers need only 'negotiate' specific workplace policies regarding email contact with their employees outside working hours. To reiterate a point made in this article's Introduction, the right to disconnect has the potential to be more than a statutory-based right requiring employers to merely negotiate a particular practice with their employees through a workplace policy. There is the potential for it to operate as a standalone right, in and of itself,

171 Greg McKeown, 'If You Don't Prioritise Your Life, Someone Else Will', *Harvard Business Review* (online, 28 June 2012) <<https://hbr.org/2012/06/how-to-say-no-to-a-controlling>>.

either by reason of statute, or the common law as a term implied by law. The right to disconnect has the potential to operate more broadly as an overarching ‘right for employees to switch off their digital tools, including means of communication for work purposes outside their working time without facing consequences for not replying to emails, phone calls or text messages’.¹⁷² As suggested in Part V, while updates to workplace policies, individual employment contracts, and enterprise agreements to include a right to disconnect in some form are a step in the right direction, they are by no means guaranteed, or even the most appropriate options to best protect employees. Amendments to modern awards and the NES could be pursued and prove viable, but there is no guarantee that such amendments will be met with the requisite appetite from those in Parliament with the power to amend such instruments. Timely and suitable legislative action is by no means a certainty but would present the opportunity for a universally understood right to become available and enforceable by operation of statute, should it be passed by Parliament.

In the absence of legislative intervention, Part VI emphasised that the common law has a potentially vital role to play in establishing such a right as a term implied by law, since it is an entirely necessary incident of all employment contracts. Returning to a point made earlier, to achieve that aim, the final piece of the puzzle is the right set of circumstances: for example, an employee subject to an ongoing expectation by their employer of being responsive to emails outside of contracted working hours. In turn, that employee would need to be willing bring their case before a judge and have adequate financial means (or appropriate union support), pleading its existence in all employment contracts as a term implied by law.

A member of the judiciary would then need to find that the right is a necessary incident of all Australian employment contracts, making the decision to imply it as a term by law, based on either the narrow or the wide interpretation of the necessity test, or a combination of both, as explained in Part VI. As emphasised repeatedly throughout this article, it is difficult to see how such a right could be viewed as unnecessary on either interpretation of the necessity test. It is insufficient to leave it to individual employees to decide to exercise the right for themselves.¹⁷³ Such a suggestion ignores the inherent power imbalances between the parties to an employment relationship and avoids a universal approach to an ever-expanding problem. Any suggestion that employees can manage the right themselves wrongly ‘assumes that they have control. In fact, control over work varies by job type, seniority and employer policies among other factors’.¹⁷⁴

Should the right become recognised, whether statutorily or by operation of the common law, it will be incumbent on workplaces to develop procedures in recognition of the right, as well as adequate training of supervisors, managers,

172 As suggested in this article’s Introduction, this suggested understanding is derived from the *Right to Disconnect Resolution* (n 10).

173 Cf Von Bergen and Bressler (n 45) 62.

174 Ope Akanbi, ‘The Right to Disconnect: Why Legislation Doesn’t Address the Real Problems with Work’, *The Conversation* (online, 16 November 2021) <

and senior personnel to ensure adequate compliance. For example, discussions about what a working day actually is for employees will need to occur between employers and employees, especially for those who work remotely. Concrete legislative or judicial guidance and suggested measures as to how the right to disconnect should be implemented will therefore be key in ensuring compliance and the actual facilitation of change in employer and employee behaviour.

I disagree with any suggestion that that it would be too difficult for a court to generate such a right that is suitable for all employers and all employees, or that there would necessarily be a judicial disinclination to recognise the right at all following the High Court's decisions in *Workpac*, *Personnel Contracting* and *Jamsek*. I remain confident that, absent any legislative recognition of the right, the common law and the judicial law-making function will retain the flexibility and adaptability required to make any 'right to disconnect' sufficiently malleable to meet employers' operational needs and accommodate the reasonable needs of employees. The courts' 'ongoing mission of modernising the common law'¹⁷⁵ is congruent with meeting these needs. There is little force in arguments, which suggest that certain industries that operate outside traditional working hours would render the right unworkable, or that a right to disconnect ignores the global nature of international businesses where employees are required to work across different time zones.¹⁷⁶ It is not a case of creating a 'one-size-fits-all' term implied by law. Rather, a suitable term will be accommodating of differences, while still maintaining the overarching purpose of the right for employees to switch off their digital tools, including means of communication for work purposes outside their working time, without facing adverse consequences for not responding. Overall, while there is some way to go in combatting the habits that have crept into our modern way of working, the time has come for those habits to change. The necessity for a right to disconnect outweighs any suggestion to the contrary.

175 Brodie (n 166) 210.

176 See also the purported practical concerns raised in Ana Cid, Laurence Harvey Wood and Gabriella Long, 'The Right to "Disconnect" for Employees', *Seyfarth* (Blog Post, 17 August 2021) <<https://www.seyfarth.com/news-insights/the-right-to-disconnect-for-employees.html>>.

