



DECISION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Variation on the Commission’s own initiative — *Clerks—Private Sector*

Award 2020

(AM2024/34)

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT O’NEILL
COMMISSIONER MCKINNON

SYDNEY, 27 AUGUST 2026

Proposed variation on the Commission’s own initiative – working from home – Clerks—Private Sector Award 2020.

Introduction

[1] This matter, which concerns the *Clerks—Private Sector Award 2020*¹ (**Clerks Award**), was initiated by the Commission pursuant to s 157(3)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**) on 29 August 2024. A Statement which we issued on that date (**August 2024 Statement**) explained the circumstances in which this occurred and the subject matter of the proceedings.² To reiterate, the background is that on 12 September 2023, the Minister for Employment and Workplace Relations requested that the Commission initiate a targeted review of modern awards having regard to what were identified as a number of key issues. These included whether modern awards met the job security objects of the FW Act, the impact of modern award settings on balancing work and care, and what could be done to make modern awards easier to use. On 15 September 2023, the Commission initiated an award review to consider a number of the matters identified by the Minister including these three issues. The *Modern Awards Review 2023–24 Final Report*³ (**Review Report**) was published on 18 July 2024. One of the conclusions stated in the Report concerned working from home:

[162] ...the issue of whether current award provisions are ‘fit for purpose’ to accommodate working from home arrangements is a significant one. It is readily apparent that the provision[s] of awards which apply to industry sectors where working from home is most prevalent, such as the Clerks Award, do not necessarily match the practical arrangements by which employees work at home in actuality. This may be operating as an impediment to wider access to working at home arrangements. As earlier discussed, working from home has been raised as an important issue relevant to balancing work and care and job security in other streams of this Review, so

¹ [MA000002](#).

² [\[2024\] FWCFCB 357](#).

³ Fair Work Commission, [Modern Awards Review 2023–24](#) (Final Report, 18 July 2024).

we consider that award facilitation of access to working at home arrangements is a matter which requires priority consideration. The course we propose to take in this respect is outline[d] in the conclusions section to this report.

[2] In relation to this and a number of other issues which it was considered warranted ‘priority attention’, the Review Report concluded that the Commission should initiate separate award proceedings to consider and determine variations of the relevant modern awards. In respect of the issue of working from home arrangements, the Review Report stated (at [167(4)]):

Working from home — Clerks Award

These proceedings will be concerned with the development of a ‘working from home’ term in the Clerks Award, which we identify as the most commonly used award under which working from home is most likely to occur. The term is intended to be one which facilitates employers and employees making workable arrangements for working at home and removes any existing award impediments to such arrangements. The term that is developed may serve as a model for incorporation in other modern awards, with or without adaptation. The proceedings will be initiated in August 2024.

[3] This proceeding was initiated pursuant to this conclusion in the Report.

[4] The August 2024 Statement set out a proposed list of issues to be determined in the proceeding, and invited submissions in response. After receiving submissions from a number of parties, we confirmed the list of issues in a further Statement of 24 October 2024⁴ (**October 2024 Statement**). The confirmed issues are:

- (1) Are variations to the Clerks Award to include a ‘working from home’ term necessary to achieve the modern awards objective in s 134 of the FW Act?
- (2) How should ‘working from home’ be defined?
- (3) Would an appropriate ‘working from home’ term include a right for employees to request working from home arrangements? If so, in what circumstances should a right to request be available and in what circumstances would a request be able to be refused by the employer? Alternatively, should such a clause be facilitative in nature only?
- (4) In the [Review Report] at [167(4)], the Full Bench indicated its intention for a ‘working from home’ term to remove existing award impediments to working from home arrangements. What, if any, modifications of the provisions of the Clerks Award dealing with:
 - (a) the spread of ordinary hours (clause 13.3);
 - (b) continuous ordinary work hours (clause 13.6(a));
 - (c) the requirement for ordinary work hours to be worked at the discretion of the employer (clause 13.6(b));
 - (d) the maximum number of ordinary hours per day (clause 13.7);

⁴ [\[2024\] FWCFCB 407](#).

- (e) breaks (clause 15); and
- (f) allowances (clause 19)

should be considered in developing an appropriate ‘working from home’ term to give effect to this intention?

- (5) How will the employer’s obligations in respect of overtime under clause 21 operate alongside a ‘working from home’ term? In particular, how will the working of overtime hours be authorised and recorded?
- (6) Should the ‘working from home’ term apply to all classifications or groups of employees covered by the Clerks Award, or only some?
- (7) How would a ‘working from home’ term interact with the right to disconnect in s 333M of the FW Act and clause 13A of the Clerks Award?
- (8) Are there any other matters that should be considered in a ‘working from home’ term?

[5] In the same Statement, we set out some options for the parties’ consideration concerning research to be undertaken by the Commission to aid consideration of the issues. After conferring with the parties, consensus was reached that two research projects should be undertaken by the Commission. The first was a data profile of characteristics of employees covered by the Clerks Award, including in relation to working from home, derived from data published by the Australian Bureau of Statistics’ (**ABS**) in its Survey of Employee Earnings and Hours (**EEH**) as at May 2023 and its Characteristics of Employment (**COE**) as at August 2024, and from the Household, Income and Labour Dynamics in Australia (**HILDA**) Survey, Wave 23 (2023) conducted by the Melbourne Institute of Applied Economic and Social Research (**Data Profile**). The Data Profile was prepared by the Commission’s Economic Analysis Team and Pay Equity and Awards Team and published on 30 May 2025. The second was a survey of employees and employers concerning various aspects of the working from home issue. Swinburne University of Technology was commissioned to conduct this survey, and there was a process of consultation with interested parties concerning the survey questions. The survey was conducted in April 2025, and the resulting report, the *Clerks – Working from Home Surveys: An investigation into access to work from home arrangements under the Clerks—Private Sector Award 2020* was published by the Commission on 26 May 2025. Acting on a request by the Australian Industry Group (**Ai Group**), the data tables for each question in the survey were published on 11 August 2025. We shall refer to the report and the data tables collectively as the **Swinburne Report**. The Commission also published a research reference list.

[6] Following the publication of this research, directions were made for the filing of evidence, submissions and any draft determinations for variation of the Clerks Award. Evidence, submissions and/or draft determinations were filed by the following parties:

- Australian Council of Trade Unions (**ACTU**)
- Australian Services Union (**ASU**)
- Community and Public Sector Union (**CPSU**)

- Ai Group
- Australian Chamber of Commerce and Industry (ACCI)
- Australian Business Industrial and Business NSW (ABI)
- Wesley Mission
- Digital Service Providers Australia New Zealand (DSPANZ)
- Australian Bookkeepers Association

[7] We conducted a hearing on 10 and 11 February 2026, at the completion of which we reserved our decision subject to the receipt of short notes from the parties addressing certain question raised during the hearing. Those notes were received the following week.

[8] For the reasons which follow, we have decided to vary the Clerks Award to include a provision dealing with the issue of working from home. The proposed terms of that provision are set out later in this decision. We publish together with this decision a draft determination to vary the Clerks Award to insert this proposed provision. Interested parties may file submissions concerning any drafting or other technical issues arising from the draft determination by **5:00 pm (AEST) on Thursday, 17 September 2026.**

Statutory framework

[9] The Commission's modern award powers are set out in Part 2-3 of the FW Act. Section 139(1) provides that a modern award may include terms about a number of identified matters. These include, in paragraph (b), '...the facilitation of flexible working arrangements, particularly for employees with family responsibilities' and, in paragraph (c), 'arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours'. However, s 138 provides that a modern award may include terms that it is permitted or required to include 'only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective'.

[10] Section 157 of the FW Act confers on the Commission the power to make, vary or revoke modern awards. These powers may be exercised on the Commission's own initiative: s 157(3)(a). Under s 157(1)(a), the Commission may vary a modern award if it is satisfied that doing so is 'necessary to achieve the modern awards objective'. The power to vary modern awards is however limited by s 135A of the FW Act, which we discuss further below.

[11] The modern awards objective is set out in s 134(1) of the FW Act as follows:

- (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
 - (a) relative living standards and the needs of the low paid; and
 - (aa) the need to improve access to secure work across the economy; and
 - (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and
 - (b) the need to encourage collective bargaining; and

- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

[12] The principles relevant to a consideration of whether the variation of a modern award is necessary to achieve the modern awards objective are well-established and were summarised in *Application by Treves* [2023] FWCFB 98 at [67] as follows:

- Fairness in the context of the modern awards objective is to be assessed from the perspective of the employees and employers covered by the modern award in question.
- The obligation to take into account the considerations at s 134(1) means that each consideration, insofar as it is relevant to the proposed variation, must be treated as a matter of significance in the decision-making process. No particular primacy is attached to any of the s 134(1) considerations.
- It is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award. Generally speaking, the s 134(1) considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.
- In giving effect to the modern awards objective, the Commission is performing an evaluative function taking into account the matters in ss 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.
- What is ‘necessary’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134(1) considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.
- While the s 134(1) considerations inform the evaluation of what might constitute a ‘fair and relevant minimum safety net of terms and conditions’, they do not necessarily exhaust the matters the Commission might properly consider to be relevant.

The Clerks Award

[13] As stated in the Review Report, the Clerks Award is an appropriate vehicle to consider the interaction between modern award regulation and the issue of working from home. This is because it primarily covers ‘white-collar’ clerical and administrative work. Clause 4.1 of the Clerks Award provides that it covers, subject to certain exceptions in clauses 4.3 and 4.4 which are not presently relevant, private sector employers throughout Australia in relation to employees wholly or principally engaged in ‘clerical work’ and the employees described. ‘Clerical work’ is defined in clause 2 as follows:

clerical work includes recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard, attending a reception desk and administrative duties of a clerical nature.

[14] These duties are set out in greater detail in the classification structure and definitions set out in Schedule A to the Clerks Award.

[15] These duties have traditionally and historically been performed in an office environment. However, because these duties are now performed primarily using digital applications on electronic devices, they are particularly susceptible to being performed remotely, including at the employee’s home. This was recognised during the COVID-19 pandemic, in the early stage of which the Commission varied the Clerks Award to include, as part of a package of variations providing for work flexibilities during the lockdown phase of the pandemic, special and temporary provisions dealing with working from home. These variations were made on the joint application of the ACCI and the Ai Group and were supported by the ACTU and the ASU having regard to the critical circumstances then applying.⁵ The Full Bench which made these variations noted at [16] of its decision that, as at February 2020, the occupation of ‘Clerical and Administrative Worker’, which included many of the functions covered by the Clerks Award, included around 1.56 million employees representing 14.3 per cent of all employees. The variations reduced the daily minimum engagement period for part-time and casual employees from three to two hours when working from home⁶ and permitted, at the request of the employee and with the agreement of the employer, an extended spread of ordinary hours for day workers to 6:00 am to 11:00 pm, Monday to Friday, and 7:00 am to 12:30 pm on Saturday, when working from home.⁷ These provisions, together with the other pandemic-specific provisions, were removed from the Clerks Award from 1 July 2021.⁸

[16] There are a number of provisions in the Clerks Award concerning working hours which are relevant to our consideration of the working from home issue. First, clause 13.3 provides that the ordinary hours of work for employees other than shiftworkers may be worked between 7:00 am and 7:00 pm on Monday to Friday and 7:00 am and 12:30 pm on Saturday. However, clause 13.3 operates subject to the facilitative provision in clause 13.4 whereby the spread of ordinary hours ‘may be moved up to one hour forward or one hour back by agreement’ between the employer and either the majority of employees at the workplace, the majority of employees

⁵ [2020] FWCFB 1690; PR717900.

⁶ MA000002 clauses I.2.2 and I.2.3.

⁷ Ibid clause I.2.4.

⁸ [2021] FWCFB 3653; PR731091.

in a discrete section of the workplace or an individual employee. Clause 21.1(c) provides that an employer must pay an employee who is not a shiftworker the applicable overtime rates (which are set out in Table 5 immediately following clause 21.4) for ‘any hours worked at the direction of the employer ... outside the spread of ordinary hours’. The spread of ordinary hours for shiftwork is set out in clause 25.1, with clause 25.2 containing a similar facilitative provision to that in clause 13.4 and with clause 28.1 providing for the payment of overtime rates for work outside a shiftworker’s ordinary daily hours on an ordinary shift.

[17] Second, the Clerks Award contains provisions prescribing maximum and minimum numbers of ordinary hours that can be worked in a day. For all employees, the maximum number of ordinary hours that can be worked on any day is 10: see clause 13.7 for employees other than shiftworkers, and clause 26.2 for shiftworkers. In the case of employees who are not shiftworkers, this is exclusive of unpaid meal breaks. Clause 10.5 provides that part-time employees must be rostered for a minimum of three hours per shift, and clause 11.4 provides that casual employees must be paid for a minimum of three hours’ work for each engagement even if they are rostered to work for fewer than three consecutive hours. Clause 24.3(c) also requires that an employee required to work ordinary hours on a Sunday is to be paid a minimum of four hours’ pay.

[18] Third, clause 13.6 provides, in respect of employees other than shiftworkers:

13.6 Ordinary hours of work are to be worked:

- (a) continuously, except for rest breaks and meal breaks as specified in clause 15—Breaks (employees other than shiftworkers); and
- (b) at the discretion of the employer in accordance with this award.

[19] It should be noted that there is no provision concerning a requirement for the employer to publish or give notice of a roster of ordinary hours for employees other than shiftworkers. Clause 14, *Rostering arrangements (employees other than shiftworkers)*, is concerned only with rostered days off when this is the method by which the 38-hour week is applied.

[20] There is no equivalent to clause 13.6 for shiftworkers. In respect of when ordinary hours are to be worked, clause 26.4 provides that changes to shift starting and finishing times may be made by the employer upon the provision of at least seven days’ notice or at any time by agreement between the employer and the employee.

[21] Fourth, clause 13.8 provides, in respect of employees other than shiftworkers:

13.8 The employer and an employee may agree that the employee may take time off during ordinary hours and make up that time by working at another time during ordinary hours.

[22] An equivalent provision applicable to shiftworkers is contained in clause 26.5.

[23] Fifth, clause 15 prescribes entitlements to breaks for employees other than shiftworkers. The breaks prescribed are as follows:

15.2 An employee who is required to work the number of hours on any one day specified in an item of column 1 of Table 2—Entitlements to rest break(s) is entitled to a break or breaks as specified in column 2.

Table 2—Entitlements to rest break(s)

Column 1 Hours worked	Column 2 Breaks
More than 3 but not more than 8 ordinary hours	One 10 minute paid rest break (to be taken at a time determined by the employer)
More than 8 ordinary hours	Two 10 minute paid rest breaks (to be taken at a time determined by the employer)
More than 4 hours overtime on a Saturday morning	One 10 minute paid rest break

15.3 An employee who works more than 5 hours at a time is entitled to one 30 to 60 minute unpaid meal break, to be taken within the first 5 hours of work and within 5 hours after resuming work after a meal break.

15.4 An employer must pay an employee who is required to work through their meal break 200% of the minimum hourly rate from when the meal break would have commenced until a meal break is allowed.

NOTE: Where suitable to business requirements, the employer may arrange for an employee who is entitled to 2 paid rest breaks to take one rest break before, and one rest break after, their unpaid meal break.

[24] For shiftworkers, clause 27 confers an entitlement to paid rest and shift breaks.

[25] Sixth, clause 19 provides for a range of work and expense-related allowances, three of which have arisen for consideration in this matter. Clause 19.2 provides for a first aid allowance of \$16.79 per week for an employee who has current first aid qualifications and training that the employer considers appropriate and who is appointed by the employer to perform first aid duty. Clause 19.4(d) provides that if an employee is required to wear a uniform and to launder it themselves, they must be paid \$3.64 per week if they are a full-time employee or \$0.73 per shift if they are a part-time or casual employee. Clause 19.5 provides that if an employee is required to work overtime of more than 1.5 hours after the end of ordinary time without being given at least 24 hours' notice, the employer must pay the employee a meal allowance of \$20.75 or provide the employee with a meal. If the overtime exceeds four hours, the employer must pay a further meal allowance of \$16.62.

[26] Seventh, clauses 23 and 29 provide for time off in lieu of payment for overtime worked for employees other than shiftworkers and shiftworkers respectively. These provisions, which operate on the basis of agreement between the employee and employer, are in the model terms established during the 4 yearly review of modern awards.⁹

[27] Finally, clause 5 provides for a mechanism by which an employer and an individual employee may enter into an individual flexibility arrangement (**IFA**). Clause 5.1 identifies the potential subject matter of an IFA in the following terms:

5.1 Despite anything else in this award, an employer and an individual employee may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and the employer:

⁹ 4 yearly review of modern awards—Award flexibility [\[2016\] FWCFB 7737](#); [PR587174](#).

- (a) arrangements for when work is performed; or
- (b) overtime rates; or
- (c) penalty rates; or
- (d) allowances; or
- (e) annual leave loading.

[28] Clause 5 also prescribes that an IFA must be made genuinely without coercion or duress (clause 5.2), may be made only after the employee has commenced employment (clause 5.3), and must result in the employee being better off overall (clause 5.5). It also makes prescription for the process of making an IFA (clause 5.4), its required content (clause 5.6) and form (clause 5.7), record-keeping requirements (clause 5.9) and for an IFA's variation (clause 5.10) and termination (clause 5.11). In the last respect, clause 5.11 provides that an IFA may be terminated by written agreement at any time or, for IFAs entered into after 4 December 2013, by the employer or employee giving 13 weeks' written notice.

[29] The Clerks Award was first made by a Full Bench of the Australian Industrial Relations Commission on 19 December 2008 as part of the award modernisation process undertaken pursuant to Part 10A of the *Workplace Relations Act 1996* (Cth).¹⁰ The terms of the award were derived from a number of pre-existing awards, namely the federal *Clerical and Administrative Employees (Victoria) Award 1999*, federal clerical awards applying in the ACT and the Northern Territory, and a number of State clerical awards.¹¹ For example, clause 13.6, which provides for ordinary hours of work to be worked continuously (except for rest and meal breaks prescribed by the award) at the discretion of the employer, reproduces in substance clause 21.3 of the *Clerical and Administrative Employees (Victoria) Award 1999*. Thus, the provisions which have arisen for consideration in this matter were developed at a time when the performance of work at the employer's workplace remained the norm and the technology which now enables working from home had not yet been implemented to any significant degree.

Parties' positions and evidence

ACTU

[30] The ACTU filed a draft determination setting out its proposal for a working from a home term to be included in the Clerks Award. The ACTU's proposed term would establish a right for an employee to request to work from home, to which the employer would be required to respond in writing within 14 days. Under the ACTU's proposal, there would be a presumption towards approving requests, and the employer would only be able to refuse the request if it had discussed the request with the employee, genuinely tried to reach an agreement about it, had regard to the matters raised in the request and the consequences of refusal and, most importantly, had reasonable business grounds for refusing the request. 'Reasonable business grounds' would include the cost to the employer, a lack of capacity or practicality to change the working arrangements of other employees to accommodate the arrangement, and a likely loss of productivity or efficiency or negative impact on customer service if the request were granted. The ACTU's proposal would also require the employer to provide the equipment necessary for, or reimbursement for the costs associated with, an employee performing their job effectively

¹⁰ [2008] AIRCFB 1000, [PR986427](#).

¹¹ See [2008] AIRCFB 550 [52]–[55]; [2008] AIRCFB 1000 [226]–[227].

while at home, and would guarantee that an employee working from home would be covered by the same employment conditions as employees working on the employer's premises and would not suffer a reduction in pay. The details of the agreed working from home arrangement would have to be in writing. The arrangement could be varied, paused or terminated by agreement at any time or by either party giving 26 weeks' notice although, in the case of the employer giving notice, a number of prerequisites would apply including prior discussion and the existence of reasonable business grounds.

[31] The ACTU submitted in support of this proposal that a right to request, as opposed to a merely facilitative clause, is key to ensuring the accessibility of the entitlement and providing clarity to both employers and employees about the applicable process. This is necessary because there is a lack of visibility about rights under the Clerks Award and the right to request flexible working arrangements under s 65 of the FW Act. The Swinburne Report shows that a proportion of employees would like to work from home but are not doing so currently, and the inference to be drawn from this is that these employees either do not feel that there is an avenue available to them to make these arrangements or are not comfortable making a request of their employers. The ACTU also submitted that a right to request a working from home arrangement that applies to all employees will operate to normalise working from home arrangements and thereby reduce the stigma associated with this. A lack of flexibility in the workplace impacts on those employees balancing work and care, particularly those who are casual, part-time or on shift work, and flexibility cannot be requested under s 65 unless the employee has completed 12 months' continuous service.

[32] The ACTU explained that the parts of its proposal concerning the requirement on the employer to respond to an employee's request, and the requirement for reasonable business grounds for refusal of the request, largely replicates the requirements of s 65A of the FW Act. However, the list of potential reasonable business grounds is intended to be exhaustive rather than inclusive, as in s 65A(5), in order to ensure the integrity of the scheme having regard to the lack of the right to have a disputed request arbitrated. The proposed presumption towards approving requests is necessary, the ACTU submitted, because (as acknowledged in the Review Report) working from home arrangements play a crucial role in supporting those undertaking caring responsibilities and it is necessary to readjust the power imbalance between the employer and employee in respect of such requests. It is also necessary for there to be guarantees of equal working conditions and pay for employees working at home since there is a growing body of international research suggesting that workers are taking a pay cut to work at home. There is no justification for imposing different terms and conditions on those who access working from home arrangements under the Clerks Award, since clauses 13.3, 13.4, 13.6 and 13.8 already provide for considerable flexibility concerning working hours, and clause 5 facilitates individual agreements concerning variations to the award as to when work is performed.

[33] The ACTU relied on an expert report jointly prepared by Dr Lisa Heap and Dr Fiona Macdonald (**Heap/Macdonald Report**). This report included a literature and research review regarding working from home and conclusions drawn from the survey results in the Swinburne Report. Dr Heap was cross-examined by ABI and the Ai Group.

ASU

[34] The ASU supported the ACTU's proposed working from home term. It submitted generally that working from home benefits individual workers, workers collectively, employers, and the economy broadly, including because it provides a mechanism for women to access work, participate in more work, and helps to shift caring responsibilities from primarily women to both parents. The ASU referred to a May 2025 report of the Productivity Commission which concluded that hybrid work had either a neutral or positive impact on labour productivity, with the benefits to productivity being increased worker satisfaction, avoiding commuting time, a reduction in breaks and sick days, less distractions and increased worker participation. In respect of worker participation, the ASU pointed to the benefits for women with caring responsibilities and employees with disabilities and chronic illnesses. In respect of the presumption of approval contained in the ACTU proposal, the ASU submitted that this is a necessary condition of a right to request a working from home arrangement because:

- the Swinburne Report demonstrates that female employees are more than seven times more likely to have a working from home request refused, demonstrating a need to guard against bias or discrimination against women in the workplace;
- working from home became prevalent during the COVID-19 pandemic and is now the current reality of modern, office-based working life;
- the presumption of approval recognises that the benefits of working from home are real and any perceived challenges are capable of being managed by employers and employees;
- it would limit the ability of employers or their managers to refuse requests as a form of 'punishment' or disciplinary action against employees; and
- according to the Swinburne Report, almost a quarter of employers denied some or all requests to work from home, representing almost a quarter of the workforce unable to access working from home arrangements and its associated benefits.

[35] The ASU submitted that the fact that the Swinburne Report shows that 17.8 per cent of employees would like to work from home but do not is sufficient reason alone to vary the Clerks Award to include a right to request to work from home. Further, the ASU submitted that working from home should arise from an award right and not just exist at the privilege of the employer, that there should be no default position as to whether work is performed at the employer's premises or at home, that an award right to request term will give rise to a workplace right that is protected under s 341 of the FW Act, and that such a term will mean that working from home will necessarily become a topic for enterprise bargaining by operation of the better off overall test in s 193 of the FW Act. The ASU submitted that a working from home term in the Clerks Award should not be conditioned by any attribute or circumstance of the workers, as is the case under s 65 of the FW Act.

[36] The ASU's submissions regarding the need for the grounds for a refusal of a working from home request, and the need for protections ensuring equal employment conditions and no reduction in pay, largely reflect those of the ACTU. The ASU submitted that, apart from a stand-alone working from home term, there are no other provisions of the Clerks Award which require modification to facilitate working from home arrangements. In respect of the requirement to work continuously in clause 13.6, the ASU submitted that its purpose was to avoid split shifts, and that otherwise there is no evidence to support the position that employees working from home are constantly stopping and starting their work day or engaging in work fluidly throughout their day. Similarly, the breaks for which clause 15 provides are structured

around the operations of the relevant business. In any event, the ASU submits, clause 13.8 allows for agreed arrangements for an employee to take time off during ordinary hours and make it up at a later time, which provides for sufficient flexibility, and it is always an employer's prerogative to permit an employee to attend to personal matters on work time.

[37] The ASU relied on witness statements made by the following employees covered by the Clerks Award:

- Casey Munro, a case manager in NRMA's Premium Care team whose duties include organising emergency accommodation, alternative transport and other support for customers who have experienced complex vehicle breakdowns.
- Clarinda Tannous, a customer service consultant for Downer. She receives and refers telephone calls from different clients of Downer in a contact centre.
- Glenn Padgett, a case officer for SS&C Administration Services Australia, which services customers of corporate clients in the superannuation industry.
- Amy Biggs, a senior legal assistant at Slater and Gordon Lawyers whose duties comprised administrative tasks like taking telephone calls, typing, filing, drafting correspondence and court documents, and communicating with clients and associates of the law firm.
- Quinn Contorno, formerly a product masterfile lead for Middy's Electrical. That role involved managing the database for all products on Middy's Electrical's website.
- Susan Maharaj, a service coordinator for NRMA Roadside Services whose duties include managing the dispatch of roadside assistance vehicles and staff to customers.

[38] Ms Biggs, Mx Contorno and Ms Maharaj were the subject of cross-examination. All of these witnesses gave evidence about their experiences with working from home arrangements, to which we will refer later in this decision.

CPSU

[39] The CPSU made submissions on the basis that any working from home term made for the Clerks Award might serve as a model for incorporation in other awards in which the CPSU has an interest, and indicated that flexible work arrangements, including working from home, are a significant area of interest for the CPSU's membership, particularly in its public sector areas of coverage. The CPSU referred to data demonstrating the growth in working from home during and after the COVID-19 pandemic, and also to the most recent results of its biennial *What Women Want Survey* which shows that working from home continues to be the most regularly accessed flexible work arrangement by women and that women who accessed work from home were more satisfied with their work-life balance. It also referred to a number of other research reports concerning working from home which showed that the benefits of this include gaining time from not commuting, more time to help with caring responsibilities, greater working time autonomy leading to more flexibility and productivity, increased worker motivation, reduced turnover, and a reduction in the employer's need for office space and associated costs. However, it also referred to some negative impacts associated with working from home including longer hours, unpaid hours, and a blurring of the lines of work and home,

as well as to a growing body of research suggesting that workers are taking a pay cut, and accepting lower wages growth, to work at home.

[40] The CPSU also submitted that working from home can improve work and family balance and women's participation in the workforce. The gender equality implications are that women who may otherwise be excluded from senior, high-status and well-paid roles because of a lack of flexibility, and who opt for roles that may be below their skill level with poorer pay, may be better placed to forge meaningful careers when offered flexible work including working from home. Moreover, the normalisation of working from home supports men to take on more caring responsibilities, thereby supporting gender equality at home and in the workplace.

[41] The CPSU submitted that these matters support the need for regulation of working from home as a collective flexibility, and that it is fundamental for a fair and relevant award safety net to include a right to request working from home in order to promote flexible modern work practices and the productive performance of work. To this end, the CPSU proposed a draft award term based on a negotiated term common to 104 enterprise agreements in the Australian Public Service. This term is not in substance significantly different to the ACTU's proposal: it provides for an employee right to request a working from home arrangement, a requirement for the employer to respond within 21 days, the same basis and grounds for refusal contained in s 65A of the FW Act, and the same requirements applicable to the variation and termination of any arrangement. It additionally makes provision for 'ad hoc' working from home arrangements which are one-off or short-term in nature to meet circumstances that are not ongoing.

ABI

[42] ABI filed a draft determination setting out a proposal for a 'Working from Home Arrangements' term to be added to the Clerks Award. ABI's proposed clause would apply where an employee and employer have agreed to a working from home arrangement, with 'working from home' defined to mean 'the performance of work by an employee at their home or another location of their choosing, other than their usual place of work, with their employer's agreement'. In respect of such arrangements, the proposed term would provide that, for employees working at home:

- an extended spread of ordinary hours for day workers of 6:00 am to 10:00 pm Monday to Friday and 7:00 am to 12:30 pm on Saturday is to apply, whilst the facilitative provision in clause 13.4 is inapplicable;
- the minimum engagement periods in clauses 10.5 and 11.4 for part-time and casual employees respectively do not apply;
- an employee and employer may agree that the requirement for the continuous working of ordinary hours requirement in clause 13.6(a) is not to apply;
- notwithstanding clause 10.2(c), an employer and a part-time employee are not required to agree as to the employee's starting and finishing times when the employee is working from home if they have instead agreed that the employee may choose their starting and finishing times on those days or they have instead agreed to start and finish within a specific range of times, and clause 10.3 does not apply to changes in start and finish times;
- an employee may take the meal and rest break entitlements in clause 15 at any time that suits their personal circumstances, with the agreement of the employer,

- and may also with the employer's agreement alter the duration of particular breaks provided that the total duration of the entitlement is not reduced;
- the first aid allowance in clause 19.2(b) will be paid pro-rata only with respect to the days the employee is physically present at the workplace;
- the uniform laundry allowance in clause 19.4(d) is not payable on any day the employee is working from home unless the employer requires a uniform to be worn whilst at home; and
- the meal allowance in clause 19.5 does not apply where the employee is working from home on the day the relevant overtime is performed.

[43] ABI submits generally that variations are necessary to remove impediments in the Clerks Award to flexible working from home arrangements which mutually suit employees and employers, and to avoid employers being exposed to liability for award non-compliance where employees currently work flexibly from home.

[44] ABI relied upon a witness statement made by Ben Pike, Head of Marketing and Media at Business NSW, which annexed results and analysis of an employer survey that was distributed to members of Business NSW, My Business, the Local Chamber Alliance and the ACCI. ABI also tendered the following documents:

- a Productivity Commission research paper entitled 'Productivity before and after COVID-19' (**PC Report**);
- a *Nature* journal article by Nicholas Bloom, Ruobing Han and James Liang entitled 'Hybrid working from home improves retention without damaging performance';
- a London School of Economics Centre for Economic Performance discussion paper by Alessandra Fenizia and Tom Kirchmaier entitled 'Not incentivized yet efficient: Working from home in the public sector';
- a news.com.au article by Ben Graham entitled 'Three quarters of Amazon corporate staff looking for another job after huge WFH call';
- the Irish Workplace Relations Commission Code of Practice for Employers and Employees: Right to Request Flexible Working and Right to Request Remote Working;
- an extract from the Irish *Work Life Balance and Miscellaneous Provisions Act 2023*; and
- an extract from the Labour Code of Portugal.

ACCI

[45] The ACCI supports ABI's proposed working from home term. Its general underlying position is, first, that the Clerks Award has in-built barriers to compliant working from home arrangements and, second, that the introduction of any right to work from home, or right to request to work from home, is not permitted by the FW Act and should be rejected. The ACCI submitted that the list of matters permitted under s 139(1) of the FW Act includes, in s 139(1)(b), 'the facilitation of flexible working arrangements, particularly with family responsibilities', but this must be read as confined to arrangements which have been approved as a result of a request made under s 65. Section 139(1)(c) permits award terms about arrangements for *when* work is performed but does not refer to the location of work, with the

result that the Commission is limited in the terms of any working from home term it might make — in particular, a term conferring a right in respect of working from home is not permitted under s 139(1). The only approach permitted is for a modern award to include provisions pursuant to s 142(1)(b) that would be essential for the purpose of making a particular term operate in a practical way where there is a working from home arrangement in place.

[46] As a general proposition, the ACCI submitted that it is lawful for an employer, and a normal incident of managerial prerogative, to determine the usual place of work for its employees, and it cannot be maintained that a requirement for an employee to attend work at the employer's usual place of business is an unreasonable requirement. The most appropriate approach to promoting flexible modern work practices and the efficient and productive performance of work is to take a facilitative approach that ensures the Clerks Award does not unnecessarily act as a barrier to working from home arrangements. In this respect, the ACCI points to the likelihood of inadvertent non-compliance with the Clerks Award when an employer and employee are engaging in a working from home arrangement that has been mutually agreed to, and submits that its position is a sensible approach to avoid such inadvertent breaches and to facilitate working from home arrangements that may otherwise have been declined by an employer for fear of potential breaches of the award. The specific barriers to working from arrangements in the Clerks Award identified by the ACCI are:

- Clause 10.2(c): the requirement for agreement in writing as to a part-time employee's start and finish times may lead to an award contravention due to the ad hoc nature of working from home arrangements.
- Clause 10.3: the requirement for agreement in writing for a change to a part-time employee's start and finish times is an unnecessary administrative burden in the context of working from home arrangements.
- Clause 10.5: the requirement to roster a part-time employee for a minimum of three consecutive hours on any shift may be inconsistent with a working from home arrangement whereby some employees may seek to work less than three hours.
- Clauses 13.3 and 13.4: the spread of ordinary hours for employees other than shiftworkers is not justified where an employee works at home and enjoys any degree of autonomy over when they work, and employers should not have to pay additional remuneration or risk contravention of the award in this situation.
- Clause 13.6(a): the requirement to work ordinary hours continuously is contrary to working from home arrangements where work is likely not always undertaken in a continuous manner, and the employer should not have to face the risk of liability for award non-compliance.
- Clause 15.2: the requirement to take meal and rest breaks at specified intervals is inconsistent with working from home arrangement where the taking of breaks in a different manner is characteristic and, again, the employer should not have to face the risk of liability for award non-compliance.
- Clause 19.2(a): the entitlement to a weekly first aid allowance should not apply when an employee is working from home and unable to provide first aid to colleagues and should therefore apply on a pro-rata daily basis.
- Clause 19.4(d): the entitlement to a weekly allowance for laundering uniforms should not apply when an employee is working from home and not required to wear a uniform and should therefore apply on a pro-rata daily basis.

- Clause 19.5(a): the entitlement to a meal allowance where an employee is required to work more than 1.5 hours overtime and has not been given at least 24 hours' notice of this should not apply when an employee is working from home and can therefore access a meal at home.
- Clause 24.3(c): the requirement to pay a minimum of four hours' pay for work when an employee is required to work ordinary hours on a Sunday should not apply when the employee performs the work at home, is not required to commute, and may only need to work a few minutes. More generally, the ACCI submits that the penalty rates provisions in clauses 24.2, 24.3 and 24.4 applicable to weekends and public holidays should be clarified so that variations to ordinary hours made by employees are not subject to penalty rates in order to allow for flexibility in working from home arrangements.
- Provisions of an equivalent nature to those above applicable to shiftworkers (clauses 25.1, 26.3, 26.4 and 27).

Ai Group

[47] The Ai Group similarly submitted that the Clerks Award contains an array of provisions which do not correspond to the realities of working from home arrangements but are designed around assumptions about patterns of work that no longer hold true. It gives as an example the hours of work provisions which largely assume that employers exercise complete control over working hours and that employees are passive participants in this process, when in fact employees working from home exercise significant autonomy and control over what work is performed, how it is worked and at what times. The Ai Group submits that the Clerks Award assumes employees work continuously save for the employer's discretion, but in fact employees working from home take breaks and perform work when it is suitable to them without employers having visibility over this. On this basis, the Ai Group contends that the Clerks Award should be varied to include a facilitative mechanism which is modelled on IFAs but tailored to working from home arrangements.

[48] The Ai Group submits that the focus should be on removing impediments to working from home that are created by the Clerks Award and ensuring that the award reflects a fair and relevant safety net given the widespread adoption of working from home arrangements. The impediments in the Clerks Award to working from home arrangements identified by the Ai Group are largely the same as those identified by the ACCI and addressed in ABI's proposed award term. The Ai Group contends that employees covered by the Clerks Award are working from home despite these impediments and that there is either deliberate or, more likely, inadvertent non-compliance with the award on a large scale. Accordingly, the prevalence of working from home has rendered the identified award provisions unfair for employers and employees and, while those provisions may have historically been justified for sound reasons, the changing pattern of work and technology has meant those justifications no longer apply.

[49] The term proposed by the Ai Group states its purpose as being 'to create a mechanism... that enables employers and employees to modify the application or operation of the provisions of the award, by agreement, to facilitate and reflect working from home practices'. The proposed term defines 'working from home' as referring to 'circumstances where an employee is working from the employee's usual domestic residence, or such other location as agreed between the employer and employee which is not the premises of the employer'. The term

would provide that where an employee requests a working from home arrangement, the parties may agree to vary the application or operation of clauses 10.2–10.6 (part-time employees), clauses 13 and 26 (ordinary hours of work), clauses 15 and 27 (breaks), clause 19 (allowances) and clauses 21, 22, 24, 28, 30 and 31 (overtime, rest periods after overtime and penalty rates). An agreement about a working from home arrangement may be reached between the employer and an individual employee, the majority of employees at the workplace or the majority of employees in a discrete section of the workplace. The proposed term would also make provision for the process of making an agreement about a working from home arrangement, its form and content, how it is to be kept as a record, its application to new employees in the case of collective arrangements, and its termination.

Other submissions

[50] Wesley Mission submitted that an employer should not incur additional costs under the Award for allowing employees flexible working from home, such as if an employee chooses to work broken shifts outside the spread of ordinary time hours to suit their personal circumstances, when the working of such hours is not required by the employer, and where, but for the employee's choice to work from home, the employee would have worked the employer's standard office hours. It also submitted that, should a working from home right be included in the Clerks Award, it should be subject to the conditions that it applies only after the completion of a probationary period (or sooner by mutual agreement), that the arrangement must be mutually beneficial to the employee and the employer, and that it cannot adversely impact the employer's clientele, the employer or other employees.

[51] The DSPANZ, which represents providers of business software and applications, submits that its members will play a critical role in operationalising a work from home term in the Clerks Award since their software systems will be essential for accurately capturing, managing and reporting on working from home arrangements, and help ensure compliance with award entitlements. It submits that there should be close consultation with DSPANZ during the development and refinement of a working from home term and that, once it is finalised, there will need to be adequate time for software providers to make the necessary changes in their systems to support their business customers and then educate them about the changes.

The jurisdictional issue – s 135A

[52] The ACTU and the ASU contend that the variations to clauses 13.3 and 13.4 to widen the spread of ordinary hours which are proposed by ABI, the ACCI and the Ai Group, and the associated proposal to vary overtime and penalty rates provisions of the Clerks Award, are not permitted because of the operation of s 135A of the FW Act. Section 135A, which was added to the FW Act by the *Fair Work Amendment (Protecting Penalty and Overtime Rates) Act 2025* (Cth) (**Amending Act**) provides:

135A Special provisions relating to penalty rates and overtime rates

- (1) In exercising its powers under this Part to make, vary or revoke modern awards, the FWC must ensure that:
 - (a) the rate of a penalty rate or an overtime rate that employees are entitled to receive is not reduced; and

- (b) modern awards do not include terms that substitute employees' entitlements to receive penalty rates or overtime rates where those terms would have the effect of reducing the additional remuneration referred to in paragraph 134(1)(da) that any employee would otherwise receive.
- (2) Subsection (1) does not limit the operation of section 144 (flexibility terms) or section 160 (which deals with variation to remove ambiguities or correct errors).
- (3) Nothing in subsection (1) requires the FWC to exercise its powers under this Part to make, vary or revoke modern awards.

[53] The Amending Act came into effect on 30 August 2025. Section 135A applies in relation to applications made before the commencement date for the variation of a modern award.¹² Section 134(1)(da), which is referred to in s 135A(1)(b), refers to 'additional remuneration for ... employees working overtime; ... employees working unsocial, irregular or unpredictable hours; ... employees working on weekends or public holidays; or ... employees working shifts'. Section 144, referred to in s 135A(2), specifies the requirement for modern awards to contain a flexibility term which enable an employee and their employer to agree on an IFA varying the effect of the award in relation to the employee and the employer in order to meet their genuine needs. One relevant feature of the section is that s 144(4)(c) requires the employer to ensure that any IFA must result in the employee being 'better off overall' than the employee would have been if no IFA were agreed to. Clause 5 of the Clerks Award, to which we have earlier referred, is the provision in the award which satisfies the requirement in s 144.

[54] The ACTU contends that the facilitative provisions proposed by ABI, the ACCI and the Ai Group which would allow a wider spread of ordinary hours would substitute for existing entitlements to overtime rates applicable to any ordinary hours worked outside the spread of ordinary hours prescribed by clauses 13.3 and 13.4 of the Clerks Award, and this would have the effect of reducing the additional remuneration which the employee would otherwise receive. Consequently, s 135A(1)(b) would prohibit the Commission from varying the Clerks Award in the manner proposed. The ASU contends that the same proposed provisions would offend s 135A(1)(a) in that they amount to a reduction in the overtime penalty rate to zero for ordinary hours worked outside the spread of ordinary hours prescribed by clauses 13.3 and 13.4.

[55] In response, the Ai Group submitted, first, that its proposed provision did not operate to vary any of the penalty rates prescribed by the Clerks Award and thus did not offend s 135A(1)(a). It submitted that s 135A(1)(b) was concerned with award variations that would replace prescribed penalty rates with a 'rolled up' single rate of pay, and that provisions antecedent to the specified penalty rates (like the ordinary hours of work clause specified in clause 13) were outside the scope of s 135A. Its proposal did not substitute for penalty rates or replace them with a 'rolled up' rate of pay, and therefore s 135A(1)(b) was not applicable. ABI, supported by the ACCI, submitted that its proposed provision would apply only where the employee *requests* to work their ordinary hours outside the spread of ordinary hours prescribed by the Clerks Award. Because, under clause 21.1(c), overtime rates apply to work performed outside the spread of ordinary hours *at the direction of the employer*, the proposed provision did not reduce or substitute for any existing entitlement to overtime rates. ABI also submitted, similarly to the Ai Group, that its proposed provision did not involve any substitution of overtime rates by replacing them with an alternative entitlement such as a 'rolled up' rate, and

¹² *Fair Work Act 2009* (Cth) Sch 1 cl 127.

that s 135A ought not in any event be construed in an over-literal manner which departed from its discernible purpose.

Findings about the extent and characteristics of working from home under the Clerks Award

[56] We make the following findings concerning the extent and characteristics of working from home arrangements for employees and employers covered by the Clerks Award.

(1) Working from home arrangements are widespread

[57] The results of the survey of employers and employees set out in the Swinburne Report demonstrate that working from home arrangements for employees covered by the Clerks Award are widespread. In respect of employers, 25.8 per cent reported that all of their clerical employees had access to working from home arrangements, 32.0 per cent said that half or more (but not all) of their employees had such access, and 31.8 per cent said that some, but less than half, of their employees had access to working from home. Only 10.4 per cent of employers said that they did not allow working from home for any of their clerical employees. This has occurred in a context whereby 50.8 per cent of employers said they operated a hybrid organisation with a physical office and working from home arrangements, 45.3 per cent had an office-based organisation where office attendance was a typical expectation, and 3.9 per cent had a virtual organisation with no physical office. Even for office-based organisations, employers indicated that 42.2 per cent of employees had access to working from home.

[58] For employees, 66.5 per cent reported being able to work from home at some stage, with 52.3 per cent currently doing so. This is consistent with 2024 data from the HILDA survey included in the Data Profile which shows that 62.7 per cent of clerical and administrative employees have an entitlement to work from home, with COE data showing that 40.9 per cent ‘usually’ worked from home. The evidence given by the ASU’s witnesses supported this picture: all of them were permitted to work from home for at least some of their working days across the week, and they described the same position as being generally applicable to their colleagues in the workplace.

(2) Employees working from home are likely to be predominantly female

[59] Clerical and administrative workers are predominantly female (over 70 per cent).¹³ This infers that a large majority of employees covered by the Clerks Award who have working from home arrangements are likely to be female. This is confirmed by the 2021 survey of employers undertaken by the Commission during the COVID-19 pandemic concerning working from home,¹⁴ which found that 72.9 per cent of employees covered by the Clerks Award who had been working from home since 1 July 2020 were female. The employee sample for the Swinburne Report survey did not necessarily properly reflect the gender make-up of employees covered by the Clerks Award, since it was only 56.7 per cent female. The survey did not expressly identify employees who said that they worked from home by gender, but the

¹³ Natasha Cortis et al, UNSW Social Policy Research Centre, [Gender-based Occupational Segregation: A National Data Profile](#) (Final Report, 6 November 2023) section 4.1.2.

¹⁴ Fair Work Commission, [Survey Analysis for the Clerks—Private Sector Award 2020 – Work from Home Case](#) (February 2021) chart 5.

proportion of employees who said they currently had access to working from arrangements was slightly higher for women (47.1 per cent) than for men (45.7 per cent), with more men (33.9 per cent) than women (30.8 per cent) saying they did have access to working from home arrangements but would like to work from home more often. This implies that at least a substantial majority of employees working from home are women.

(3) *Most employee requests for working from home arrangements are approved in whole or part*

[60] The Swinburne Report data discloses that most requests by employees to work from home are approved. More than half of employers (51.0 per cent) said that they had never refused an employee request to work from home, and another 37.0 per cent had refused less than half of such requests. Only 1.0 per cent of employers said that they had refused all working from home requests. The survey responses from employees were consistent with this: 45.4 per cent of employees said that they had requested to work from home and, of these, 64.2 per cent had their request approved, 29.8 per cent had their request approved in part, and only 6.1 per cent had their request wholly declined.

[61] None of the ASU witnesses gave evidence of a complete refusal of a working from home request. Mr Padgett, who participated in enterprise bargaining, said that a claim for a reduction in the number of days employees were required to work in the office had been rejected by his employer, but this was in a context where the employer already only required employees to work six days per month in the office. Ms Biggs gave evidence about the position concerning working from home requests in her workplace which was broadly typical of the witness evidence and consistent with the survey data:

We have a work from home policy. The policy outlines the firm's procedures and guidelines for flexible working arrangements and encourages approval of these requests wherever possible. These arrangements can be obtained both formally and informally depending on the needs of the employee making the request, and the duration of the proposed arrangement...

(4) *A significant proportion of working from home arrangements are employer-initiated*

[62] Importantly, the Swinburne Report survey data shows that a substantial proportion of employees said that they are able to work from home without having had to make a request to do so: 11.1 per cent of all surveyed employees said they had been able to work from home without formal approval, and another 12.6 per cent had continued to work from home since the COVID-19 pandemic. Of employees who are working from home, 22.3 per cent said that they were doing so because of an 'employer direction' or as a condition of employment. The witness evidence supports the proposition that, in many cases, working from home arrangements are the result of employer initiatives or have remained in place since the pandemic. For example, Ms Maharaj said:

My work from home arrangement is not formally written down and there's no policy I'm aware of. There is nothing in the EBA about it.

We started working from home in March 2020 as a result of COVID and gradually everybody ended up working from home.

From March 2020 onwards any new people that were employed were employed on a work from home basis right from the start of their employment.

[63] Similarly, Mr Munro said:

I have been working from home for the past three years, ever since I started in the role.
The position was advertised as remote work, and my contract of employment states that.

[64] Mx Contorno said:

We did not need to make an application to work from home – it was just a given that everyone could do it two days a week.

(5) *About two-thirds of employees working from home work half or less of their hours at home, while about a third work more than half their hours at home*

[65] The Swinburne Report discloses that employees with working from home arrangements are working the following approximate percentages of their total working hours at home:

Percentage of working hours worked at home	Proportion of employees working from home (%)
10 or less	18.5
11-20	11.3
21-30	10.5
31-40	16.2
41-50	10.9
51-60	9.4
61-70	4.0
71-80	4.0
81-90	3.8
91 or more	11.5

(6) *There is some unmet demand on the part of employees to work from home*

[66] Not all employees who wish to be working from home, either at all or to the degree they would prefer. Apart from the 6.1 per cent of employees who had made a request to work from home but had that request denied, another 17.8 per cent of surveyed employees are not working from home but would like to (notwithstanding that they had apparently not requested it). In addition, 21.4 per cent of all employees surveyed do some work from home but would like to work from home more often.

(7) *Significant reasons for the approval of working from home requests include: productivity/efficiency; improved work engagement; pregnancy, childcare or other caring responsibilities; disability and health issues; and over 55 years of age.*

[67] The major reasons given by employees in the Swinburne Report survey data for the approval of working from home (noting that some employees identified multiple reasons) are:

- Productivity/efficiency: 38.8 per cent.
- Improved work engagement: 29.9 per cent.
- Pregnancy: 3.4 per cent.

- Caring responsibilities for a child of school age or younger: 16.4 per cent.
- Caring responsibilities for a person with a disability, medical condition, mental illness or who is elderly: 4.3 per cent.
- Caring or supporting an immediate family or household members because they are experiencing family or domestic violence: 4.3 per cent.
- Employee has a disability: 1.7 per cent.
- Employee has or had an illness: 5.1 per cent.
- Employee is 55 years of age or older: 3.4 per cent.
- Specific reason not required by employer: 17.3 per cent.
- Employer has supportive policies which encourage working from home and flexible work offerings: 33.5 per cent.

[68] ABS COE data in the Data Profile similarly shows a range of reasons for why employees who are regularly working from home chose to do so, with the most common reasons being:

- to work more flexibly or choose own hours;
- to catch up on work after hours;
- less time spent travelling or commuting or save money;
- operates business from home or home-based job;
- childcare or family considerations or caring responsibilities.

[69] ‘Childcare or family considerations or caring responsibilities’ is given as the main reason by 9.1 per cent of women compared to 6.1 per cent of men.

[70] The Swinburne Report survey asked employers the grounds upon which a request for a working from home arrangement would, in normal practice, be approved. The reported results were:

- Productivity/efficiency: 42.2 per cent.
- Improved work engagement (e.g. employees can pick work or work more hours): 31.8 per cent.
- Employee is or was pregnant: 23.2 per cent.
- Employee is a parent or has caring responsibilities for a child of school age or younger: 27.6 per cent.
- Employee is a carer to a person with a disability, medical condition, mental illness or who is elderly: 21.9 per cent.
- Employee has a disability: 19.0 per cent.
- Employee has a personal illness: 20.6 per cent.
- Employee is 55 years of age or older: 12.8 per cent.
- Employee has been experiencing family or domestic violence: 15.4 per cent.
- Employee is caring or supporting an immediate family or household member because they are experiencing family or domestic violence: 16.1 per cent.
- No specific reason is required to access working from home arrangements (e.g. because this is a standard employee benefit): 40.4 per cent.
- Employer has supportive policies which encourage working from home and flexible work offerings: 36.7 per cent.

- Employer does not allow working from home arrangements under any circumstances: 7.6 per cent.

[71] Ms Biggs is an example of an employee for whom working from home aids in dealing with a disability and illness. She gave the following evidence:

Because of my disabilities, working from home regularly makes it much easier for me to be able to work consistently and reliably. If I was unable to work from home regularly, I feel that I would struggle to maintain my current working hours, particularly during flare-ups. This would result in the need to take more frequent sick leave and eventually a permanent reduction in work hours. This would ultimately negatively affect my team due to unreliability and understaffing.

(8) *Employers give a range of reasons for the refusal of working from home requests which appear to be business-related and reasonable*

[72] The major reasons given by employees in the Swinburne Report survey data for the refusal of a request for a working from home arrangement (noting again that some employees identified multiple reasons) include:

- The requested arrangements would be too costly: 27.3 per cent.
- Productivity / efficiency: 31.8 per cent.
- Employer preference for employees to work from the office or workplace: 50 per cent.
- No capacity to change the working arrangements of other employees to accommodate the request: 36.4 per cent.
- Impractical to change the working arrangements of other employees, or take on new employees, to accommodate the request: 13.6 per cent.
- The requested arrangement would be likely to result in significant loss in efficiency or productivity or have a significant negative impact on customer service: 9.1 per cent.
- Concerns about employee's willingness or ability to perform their role when working from home: 13.6 per cent.
- Employee's work cannot be completed from home: 45.5 per cent.
- Employee's job involves regular client / customer interactions that are required to take place in-person: 50 per cent.
- Privacy/security concerns (including issues with ICT): 27.3 per cent.

[73] We observe that the above percentages are based on a small sample size because, as earlier stated, only a small proportion of employees surveyed had had a request to work from home refused. It is therefore difficult to assign statistical significance to the Swinburne Report data indicating that the refusal rate was 0.6 per cent for male employees and 4.4 per cent for female employees, particularly when taking into account that more women said they could access working from home arrangements without requiring formal approval (13.1 per cent) than men (8.6 per cent).

(9) *Employees derive a range of personal and financial benefits from working from home*

[74] The Swinburne Report shows that employees identified the following principal benefits of working from home (with employees giving multiple reasons):

- Financial savings: 48.2 per cent.
- Time saved: 60.1 per cent.
- Improved productivity/performance: 49.7 per cent.
- Household management: 46.1 per cent.
- Caring for pre-school child/children: 12.4 per cent.
- Caring for school-aged child/children: 19.0 per cent.
- Caring for a family member with a disability: 6.8 per cent.
- Caring for a family member who is ill: 9.0 per cent.
- Caring for (an) elderly relative(s): 7.9 per cent.
- Managing a personal illness: 13.2 per cent.
- Managing a disability: 3.2 per cent.
- Study/education: 10.9 per cent.
- Sports/exercise: 29.6 per cent.
- Work availability/engagement: 31.8 per cent.
- Volunteering/community service: 10.0 per cent.
- Engage in a second job or business: 5.1 per cent.

[75] Significant proportions of employees said that working from home has a moderate (32.2 per cent) or significant (53.5 per cent) positive impact on work-life balance.

[76] The Swinburne Report data is consistent with ABS data for the workforce generally, referred to in the Heap/Macdonald Report, which indicates that the main reasons employees usually work from home are to work more flexibly or choose their own hours (30.0 per cent), to spend less time on travelling or commuting or to save money (15.1 per cent), because of childcare or family considerations or caring responsibilities (7.7 per cent), to catch up on work after hours (21.0 per cent), or because they operate a business from home or are in a home-based job (10.9 per cent). It is also consistent with large international studies, referred to in the Heap/Macdonald Report, which have found that working from home allows employees to work with greater autonomy and flexibility, leading to increased productivity and wellbeing, and supports a better work-life balance for employees with caring responsibilities.

[77] The above data results may be compared to the 0.1 per cent of employees who, in the Swinburne Report, said that they do not work from home and like going to work.

(10) *There is a mixed picture as to whether working from home has a positive, negative or neutral effect on productivity, with a hybrid model being the optimum*

[78] There is no clear picture as to the effect of working from home on productivity, whether measured at the national, business or individual level. The PC Report refers to studies which indicate that fully-remote work during the pandemic was likely to have been detrimental to productivity because of the importance of in-person interactions for collaborative tasks and idea generation, and because fully-remote work required more time to be spent on meetings and coordination activities, which reduced the time for productive tasks. However, it also refers to studies indicating that a hybrid working model, where some days are worked at home and some

in the office, tends to be either beneficial for or at least not detrimental to productivity. This is because employees do not need to be in the office full-time to experience the benefits of in-person interactions, and allowing employees to work some days from home can improve worker satisfaction, avoid time spent on commuting, reduce breaks and sick days, improve employee retention and lead to higher quality and novelty of output. Further, the productivity effects of working from home may differ as between employees: in particular, less-experienced employees have a greater need for knowledge transfer and feedback from more senior employees obtained from in-person interactions, such that working from home may inhibit skill development. The PC Report also refers to the capacity of working from home to boost workforce participation amongst those who are more geographically distant, mothers, persons with disability and other employees who have difficulty coming into the office five days per week, which may have indirect benefits for productivity.

[79] The Heap/Macdonald Report, drawing on some of the same studies as the PC Report, comes to somewhat more positive conclusions concerning the effect of working from home on productivity. It concludes that employers may benefit from the increased job satisfaction and access to jobs that working from home brings in the form of increases in individual productivity and access to a larger talent pool, and further concludes that there is no good evidence for employer perceptions of productivity losses, with the quality and competence of managers being more important than the location of performance of work for employee engagement and productivity.

[80] The Swinburne Report does not suggest that employers have any uniform view about the effects of work from home on productivity, with the data earlier cited showing that the effect on productivity features as a major reason for employers both accepting and refusing requests by employees to work from home. Qualitative responses from employers in the Swinburne Report survey concerning working from home include: ‘higher productivity wfh’; ‘lower productivity, inability to manage staff, employees take advantage of it’; and ‘most of our employees complete their responsibilities and we have no issues in productivity’. On the employee side, slightly less than half of employees consider that working from home has improved their productivity and performance.

[81] It is not possible to draw any general conclusion from the evidence regarding whether working from home is beneficial, detrimental or neutral in relation to productivity. At the business and individual levels, productivity effects will depend on the nature of the work being performed, the experience level and other characteristics of individual employees, the proportion of working days being performed at home, how working from home is managed in the workplace and a range of other factors.

(11) *Employees working from home often have flexibility to set their own working hours*

[82] The Swinburne Report survey shows that, in response to the question ‘When WFH, do employees covered by the Clerks Award have freedom to set the specific hours that they work?’, 13.3 per cent of employers answered ‘always’, 21.4 per cent answered ‘often’ and 37.0 per cent ‘sometimes’. Employee responses to the same question produced broadly equivalent results: 16.6 per cent said ‘always’, 23.2 per cent said ‘often’ and 33.7 per cent said ‘sometimes’. The ASU’s witnesses were disproportionately comprised of employees working in customer service

roles more likely to involve fixed hours and thus did not generally give evidence of this degree of flexibility in working hours. However, Mx Contorno did give this evidence:

... I could set my own start and finish times because I wasn't working directly with customers. I tended to work a little bit earlier in the day because that was when branches were open and I could interact with branch staff. I usually started between 7:30 and 8:00am would work a 7-and-a-half-hour day.

[83] There was also evidence that employees exercise flexibility in when, and whether, they take their break times. Mx Contorno said: 'I didn't have set breaks... Typically, I took less breaks at home'. Mr Munro said that, because of the demands of his job, he usually took breaks 60 to 90 minutes later than scheduled and did so on a flexible basis, albeit that he was required to log his breaks in the employer's system. When he did take breaks, he often took his dog on a walk.

[84] This flexibility is associated with a large proportion of employees not being required to log their hours of work when working from home: 42.7 per cent said they were never required to do so, while another 7.2 per cent rarely had to do so. For 56.6 per cent of employees, requirements for logging hours were different when working from home compared to working in the office.

(12) *Employees working from home often choose to work their hours outside the spread of ordinary hours prescribed by the Clerks Award*

[85] The Swinburne Report discloses that employees working from home often change their working hours to work outside the spread of ordinary hours prescribed by the Clerks Award. Amongst employers, 6.3 per cent said their employees always did this and 20.2 per cent said they often did it. This was most commonly done by starting work before 7:00 am, followed by finishing work after 7:00 pm. Employees similarly reported performing work outside the spread of hours: 7.2 per cent said they always did this, 18.3 per cent said they often did it, and 32.7 per cent said they sometimes did it. A total of 59.9 per cent of employees said they at least sometimes finished work after 7:00 pm, followed by 54.2 per cent who at least sometimes started work before 7:00 am.

(13) *Most employers and employees do not consider variations to the Clerks Award necessary to make it easier for employees to access working from home arrangements*

[86] The Swinburne Report finds that 88.0 per cent of employers and 85.7 per cent of employees do not consider that changes are required to make it easier for employees covered by the Clerks Award to access working from home arrangements.

Consideration

[87] The findings we have made concerning the extent and nature of working from home arrangements in the area of employment covered by the Clerks Award do not, we consider, justify a major regulatory intervention by way of a new award provision compelling employers to allow employees to work from home in a wider range of circumstances. Working from home arrangements are widespread to the extent that they may now be considered an entrenched feature of employment in the clerical and administrative sector, and most employee requests

for a working from home arrangement are approved in whole or part. The evidence does not support the proposition that employers are, to any significant degree, refusing requests for working from home arrangements on arbitrary, capricious or discriminatory grounds. In the small proportion of cases where requests are refused, the grounds given for this are, at least ostensibly, reasonably related to the legitimate business interests of the employer. Most employees and employers do not consider that variations to the Clerks Award are necessary to make it easier to access working from home arrangements.

A right to request?

[88] In respect of the issues identified in the August 2024 Statement, it is convenient to begin with the issue concerning whether we should establish an award term providing for an employee ‘right to request’ (issue (3)). The proposal advanced by the ACTU and supported by the ASU, and the similar proposal advanced by the CPSU, would substantially replicate the structure of the NES entitlement in Division 4 of Part 2-2 of the FW Act concerning requests for flexible working arrangements. The NES entitlement, broadly speaking, involves an explicit right to make a request based on specified personal circumstances, a requirement for the employer to respond within 21 days, and further requirements that the request may only be refused after discussions and a genuine attempt to reach agreement, and upon reasonable business grounds. A dispute arising from a refusal may be taken to this Commission for conciliation and, if necessary, arbitration. The NES entitlement plainly enables to a significant degree requests for working from home arrangements by employees where those requests are related to pregnancy, parental and childcare responsibilities, other caring responsibilities, disability, being over 55 years of age, or family and domestic violence.

[89] The ACTU and the ASU submit in various ways that the NES entitlement has proved inadequate, including because in arbitral decisions of this Commission since the entitlement was enhanced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) employees have generally not been successful (ACTU) and ‘ha[ve] largely prevented workers from accessing flexible working arrangements’ (ASU). These submissions, insofar as they concern working from home requests, are substantially misplaced for two reasons. First, of the 24 matters which have been the subject of full merits arbitration by the Commission pursuant to s 65C of the FW Act since the 2022 amendments took effect, only 16 have concerned working from home requests.¹⁵ Of these, the applicant has been successful in five cases. More importantly, in 14 of those 16 matters, the applicant was *already* working from home to some degree when they made their application, with the issue in dispute being the proportion of working days which could be worked from home and whether the employer could reasonably require office attendance on *some* days. Second, and more fundamentally, analysing

¹⁵ *Gregory v Maxxia Pty Ltd* [2023] FWC 2768 (16 November 2023); *Gratton v Bendigo Bank* [2024] FWC 717 (15 April 2024); *Ridings v Fedex Express Australia Pty Ltd* [2024] FWC 1845 (12 July 2024); *Aoyama v FLSA Holdings Pty Ltd* [2025] FWC 524 (24 February 2025); *Applicant v Respondent* [2025] FWC 1125 (23 April 2025); *Sampsonidis v Make It Mine Finance Pty Ltd* [2025] FWC 1330 (13 May 2025); *Louise v Metcash Trading Ltd* [2025] FWC 2090 (18 July 2025); *Wilbow v Salter Brothers (Wentworth Ave) Hotel Pty Ltd* [PR790926](#) (decision in transcript, 25 August 2025); *Hutchinson v Cleanco Queensland Ltd* [2025] FWC 2887 (13 October 2025); *Chandler v Westpac Banking Corporation* [2025] FWC 3115 (20 October 2025); *Huxhagen v AWP Australia Pty Ltd* [2026] FWC 745 (16 March 2026); *Kliffen v Reapit Employment Services Pty Ltd* [2026] FWC 1766 (14 May 2026); *Gurung v Knauf Gypsum Pty Ltd* [2026] FWC 2371 (26 June 2026); *Taunisila v AGL Energy Limited* [2026] FWC 2428 (29 June 2026); *Polak v Macedon Ranges Shire Council* [2026] FWC 2568 (6 July 2026); *Robinson v Australian Financial Complaints Authority Limited* [2026] FWC 2720 (29 July 2026).

the efficacy of the NES entitlement by reference to Commission decisions under s 65C involves a very significant sample bias since, by definition, the Commission only deals with cases where an employee's request has been refused and any dispute about that refusal has not been resolved either directly between the employee and the employer or in conciliation by the Commission. A proper analysis of the efficacy of the NES entitlement would require data concerning the proportion of employee requests for flexible working from home arrangements made under s 65 which are accepted or otherwise resolved by the employer through consultation with the employee, or which are refused on the basis of business grounds which the employee accepts are reasonable and does not dispute. It would also need to take into account that the large majority of disputes concerning flexible working arrangement requests which are brought to the Commission pursuant to s 65B(3) are resolved by agreement through conciliation. In the absence of such an analysis, the most likely inference based on the Swinburne Report data is that, at least in the clerical and administrative sector, most requests for flexible working from home arrangements made by employees under s 65 are accepted in whole or part by the employer.

[90] The ACTU and the ASU submit more broadly that the NES entitlement to request flexible working arrangements should, via an award term, be effectively extended in respect of working from home arrangements to all employees so that they may effectively balance work and care, obtain the personal benefits of working from home and remove the 'flexibility stigma' associated with working from home. They point to the recommendation in the October 2022 *Interim Report of the Senate Select Committee on Work and Care* that the Australian Government amend s 65 of the FW Act to make the right to request flexible work available to all workers, with the employer having a positive duty to reasonably accommodate flexible working arrangements, as supporting the award term they seek.

[91] While modern awards are permitted to contain terms which supplement the NES in a non-detrimental way (s 55(4)(b)), we doubt that it constitutes a proper exercise of the Commission's modern award powers to establish award terms which attempt to rewrite NES entitlements to overcome perceived shortcomings in the legislative scheme. The Senate Select Committee's recommendation is a matter for the Government to consider. In any event, as already stated, the evidence does not establish that persons who are not entitled to make a flexible working arrangement request under s 65 are, as a consequence, being denied access to beneficial working from home arrangements in the clerical and administrative sector. To the extent that widespread access to working from home arrangements may be said to be consistent with the modern awards objective in s 134(1) — a matter to which we will return — the ACTU and the ASU have not established that the working from home term which they propose is 'necessary' for that purpose such as to satisfy the statutory criteria in ss 138 and 157(1).

[92] The ASU's submission that the fact that Swinburne Report data indicates that 17.8 per cent of employees would like to work at home but do not is by itself demonstrative of the need for an award term with a presumption in favour of granting working from home requests cannot be accepted. The unstated premise of this submission is that every employee who wants to work from home should have the right to do so. However, this does not take into account that, in some areas of employment in the clerical and administrative sector, working from home may not be practicable for a range of reasons, including that the work requires in-person contact with customers, clients or other employees (such as the role of receptionist), or the facilities and equipment needed to perform the work cannot be made available at an

employee's home, or that it cannot be accommodated having regard to working arrangements with other employees. The ACTU's and ASU's proposed term would be unlikely to change this situation to any real degree, since it still allows for working from home requests to be refused on reasonable business grounds, with the result being that the term would add significantly to employers' compliance obligations without achieving any significant change to practical outcomes.

[93] For these reasons, we do not propose to adopt a 'right to request' term of the type proposed by the ACTU and the ASU, nor the similar term proposed by the CPSU. However, we do consider that there would be benefit in an award term which incorporates a simple right of an employee to make a request to their employer for a working from home arrangement. The 17.8 per cent of employees to which we have just referred appears to consist of employees who have a desire to work from home but have never made a request to do so. This *may* indicate that some employees lack the confidence to make a request, or lack the confidence that it will be fairly considered. An award provision to the effect that an employee may request, and an employer may agree to, a working from home arrangement would have three benefits. First, it would establish a visible mechanism for making requests. Second, this would constitute a workplace right within the meaning of s 341(1)(a) which is protected by s 340 of the FW Act. Third, a dispute in relation to a request made pursuant to the term would be one arising about a matter under the Clerks Award, which would then be subject to the dispute resolution procedure in clause 40 of the award.

Award impediments to working from home arrangements

[94] We next turn to issue (4) identified in the August 2024 Statement, namely whether particular provisions of the Clerks Award operate as an impediment to working from home arrangements and should be modified on that basis. At the outset, we do not consider that there is any evidence before us demonstrating that any current provision of the Clerks Award operates as an impediment to working from home arrangements in the sense of deterring or making difficult the implementation of such arrangements in actuality. Rather, what the evidence demonstrates is that many arrangements which have already been implemented are likely to be inconsistent and non-compliant with particular provisions of the Clerks Award. If, at some future time, this results in enforcement action, that will likely disrupt many working from home arrangements and perhaps impede their continuation.

[95] The most obvious examples of this concern the requirement in clause 13.6(a) of the Clerks Award for ordinary hours to be worked continuously, the employer's discretion over the working of ordinary hours in clause 13.6(b), and the requirements concerning the time for taking and the length of rest and meal breaks in clauses 15.2 and 15.3. As we have found, a large majority of employees working from home set their own hours of work, and over a third do so often or always. This is accompanied by flexibility as to when, and for how long, breaks are taken, and a greater incidence of employers not requiring employees to log their hours of work. A number of the benefits which employees said they derived from working from home, including in relation to household management, caring responsibilities and sport and exercise, are likely to be in part related to the flexibility in working hours which working from home often brings. If, for example, an employee prefers to work from home so that they can drop off children at and pick them up from school, it may suit the employee to interrupt the continuity of their work, and take breaks for which the Clerks Award does not provide, in order to

undertake this task. Conversely, it may also suit an employee to work through breaks for which the Clerks Award provides in order to finish earlier and engage in recreational activities such as sport or exercise. These matters make it likely that there is widespread non-compliance with clauses 13.6(a), 15.2 and 15.3 of the Clerks Award when employees are working from home. It is also apparent that many working from home arrangements operate in a way which is at odds with the employer's discretion over when ordinary hours are worked in clause 13.6(b).

[96] In our view, it would be beneficial for the Clerks Award to contain a term which facilitates agreed arrangements for the operation of these provisions to be modified when employees are working, or want to work, from home. Clauses 13.6(a) and (b), 15.2 and 15.3 were established in an era in which workplace attendance, and more highly-supervised and regimented systems of work, were the norm. They are not, in their current form, adaptable to the more flexible and individualised working arrangements often associated with working from home. In our view, the existence of widespread, consensual and mutually-beneficial working arrangements that are inconsistent with applicable award provisions tends to bring the modern award system into disrepute, and a measure of adaptation of award provisions to accommodate contemporary circumstances is necessary. These arrangements could theoretically be accommodated as IFAs under clause 5 of the Clerks Award but, in practical terms, the 'better off overall' requirement in clause 5.5, which reflects the requirement in s 144(4)(c) of the FW Act, operates as a deterrent to employers entering into such arrangements because the FW Act provides no mechanism for independent assessment of compliance with this requirement other than in the event of enforcement action. That makes a new award term facilitating such arrangements the preferable option.

[97] The ASU objects to any provision allowing a departure from, in particular, clause 13.6(a) because this would open the door to split-shift arrangements which, it contends, was the original purpose of the provision. The ASU did not establish, and we are unable to confirm, that this was in fact the purpose for which clause 13.6(a) was made, although it appears to be an available inference. In any event, although we understand why the ASU holds a concern about the introduction of split shifts, we do not consider that there is a realistic prospect that a facilitative clause which allows individualised and consensual departures from clause 13.6(a) will lead to the widespread introduction of split shifts. Split shifts usually involve a shift system applying to large groups of employees, and we doubt that an individualised facilitative clause accessible by existing employees on their request only could be used as a mechanism to introduce such a system. Despite working from home arrangements being implemented on a widespread basis in a manner apparently inconsistent in many cases with clause 13.6(a), there is no evidence that this has resulted in split shifts. In any event, there may be some cases where it might suit an employee working from home to work their ordinary hours in two separate blocks during the day to accommodate some other personal or family commitment. In that situation, the principal disability associated with working split shifts, namely the time and cost involved in undertaking a double commute to and from the workplace, would not apply.

[98] The ASU submits that clause 13.8 provides a mechanism to deal with this issue. We disagree. Clause 13.8, which provides that employer and an employee may agree that the employee may take time off during ordinary hours and make up that time by working at another time during ordinary hours, operates on the presumption that the employee has set hours of work and that this may be departed from by agreement. The provision does not accommodate an ongoing working from home arrangement whereby the employee may have the autonomy to

determine when they perform their ordinary hours of work. In any event, if there is no objection to consensual departures from clause 13.6(a) by utilising clause 13.8, it is difficult to see the basis for an objection to a facilitative provision of the type we envisage which is directed specifically to working from home arrangements.

[99] ABI, the ACCI and the Ai Group point to the Swinburne Report data which shows that employees working from home often work before or after the spread of hours of 7:00 am to 7:00 pm (Monday–Friday) and submit that this justifies a significantly wider spread of hours for employees working from home. We do not favour the adoption of these proposals for three reasons. *First*, the evidence does not establish, in respect of employees working from home and performing work outside the 7:00 am to 7:00 pm spread of ordinary hours prescribed by clause 13.3(a), for how long they actually do so. The existing facilitative provision in clause 13.4 effectively allows, by individual or collective agreement, the start time to be moved forward to 6:00 am or the finish time to be moved back to 8:00 pm. This is likely to be sufficient to accommodate most cases in which work is performed outside the Monday–Friday spread of hours prescribed by clause 13.3(a). The same conclusion applies to the Saturday spread of hours prescribed by clause 13.3(b), where clause 13.4 allows an agreed start time of 6:00 am or an agreed finish time of 1:30 pm.

[100] *Second*, the concerns variously expressed by ABI, the ACCI and the Ai Group that autonomous working by employees at home outside the prescribed spread of hours might lead to employers unwittingly incurring overtime liabilities are in our view, and except in relation to shiftworkers, misplaced. Clause 21.1(c) provides that any hours worked by the employee outside the spread of ordinary hours only attract the obligation for the employer to pay overtime rates if such hours are worked ‘at the direction of the employer’. Where an employee working at home performs some of their ordinary hours of work outside the award spread of hours, and this is not the result of any express employer direction, or any necessity arising from the employer’s work requirements,¹⁶ but occurs only because of the employee’s personal preference and convenience, this would not in our opinion give rise to any entitlement to overtime under clause 21.1(c).

[101] Additionally, we note that if any overtime liability is incurred, clause 23 provides a mechanism for the employee and employer to agree that time off may be taken in lieu of overtime.

[102] *Third*, without expressing a final view about it, we consider that it is likely that s 135A(1)(a) of the FW Act would prohibit variations to the spread of ordinary hours prescribed by clause 13.3 in the various ways proposed by ABI, the ACCI and the Ai Group. The effect of an award variation to expand the spread of ordinary hours would be to abolish an entitlement to overtime rates that currently exists where an employee works ordinary hours outside the currently-prescribed spread at the direction of the employer. There is no substantive distinction between the abolition of an entitlement to an overtime rate and the reduction of that rate to zero. It does not appear to us that the applicability of s 135A(1) would be affected where the entitlement is reduced with the agreement of the employee. Accordingly, if we varied

¹⁶ A requirement to work overtime may arise by implication from the work requirements imposed by the employer: *Dorsch v HEAD Oceania Pty Ltd* [2024] FCAFC 133 [95]; *Doherty v Prospa Advance Pty Ltd (No 2)* [2024] FedCFamC2G 950 [13]–[15].

clause 13.3 as proposed, it appears to us that we would likely have failed to ‘ensure that ... an overtime rate that employees are entitled to receive is not reduced’, contrary to s 135A(1)(a).

[103] There were also various employer organisation proposals concerning the modification of the applicability of the first aid allowance in clause 19.2(b), the uniform laundry allowance in clause 19.4(d) and the overtime meal allowance in clause 19.5. However, there is nothing before us to permit the conclusion that the current formulation of these allowance entitlements operates as an impediment to, or are inconsistent with, the implementation of working from home arrangements. Nor has there been any demonstration that working from home for some days during the week materially alters the basis upon which the allowance is currently payable. In the case of the first aid allowance, which is payable whether the employee is full-time, part-time or casual, the allowance compensates for holding a first aid qualification and the potential application of first aid in the workplace (that is, not simply by reference to the frequency of the performance of any work duty). The uniform laundry allowance is payable for the cost of washing of a prescribed uniform, and although this cost may be lower for some employees because working from home arrangements mean less frequent washing, there is an insufficient basis on the materials to support a variation made by reference to the number of days an employee works other than at home. In the case of the overtime meal allowance, the employer organisation proposals assume that there is no disability associated with being required to work overtime at home without prior notice because they will have ready access to a meal at home. However, it may be the case that such a requirement to work overtime prevents an employee from buying or preparing a meal, in which case an analogous disability will apply.

[104] We therefore consider that there is no proper basis on the evidence before us to vary the allowance provisions to facilitate working from home arrangements.

[105] The proposals advanced by ABI, the ACCI and the Ai Group also included that we should alter provisions concerning changes to the start and finish time for part-time employees (clause 10.3), the minimum rostering period for part-time employees (clause 10.5), the minimum daily payment for casual employees (clause 11.4) and the minimum payment for work on Sundays (clause 24.3(c)). As we made clear in the October 2024 Statement at [8], provisions pertaining to part-time employment and the minimum payment period would not be considered in this proceeding:

The issue of the minimum engagement period for part-time employees generally will, we anticipate, be a major issue in the review of part-time employment which the Commission intends to initiate in 2025, and we do not wish to pre-empt the outcome in these proceedings. In respect of the minimum engagement period for casual employees, we do not consider that it should be determined in advance of the issue of the minimum engagement period for part-time employees....

[106] As to Sunday work, clause 24.3(c) of the Clerks Award only applies ‘if ... an employee is directed to work ordinary hours on a Sunday’. There was no evidence before us of any circumstance in which a non-shiftwork employee working from home has been directed to work on a Sunday. The Swinburne Report indicates that some employees may choose to work ordinary hours on the weekend absent any requirement to do so, in which case clause 24.3(c) would not apply. Otherwise, we consider that the rationale for clause 24.3(c), namely that employees should not be disturbed from their leisure on Sundays without some minimum payment for being required to work, remains applicable to employees working from home.

Should we vary the Clerks Award to add a working from home term?

[107] Having regard to the conclusions we have stated above, we consider that it is necessary to achieve the modern awards objective to vary the Clerks Award to include a working from home term (issue (1) in the August 2024 Statement). In order for the Clerks Award to constitute a fair and, in particular, *relevant* safety net of term and conditions, we consider that it is necessary that its provisions be adapted to the contemporary reality of working from home arrangements. That, in our view, requires a term which provides for a mechanism for an employee to request, and their employer to agree to, a mutually-suitable working from home arrangement, and which allows the employee and employer as part of such an arrangement to agree upon departures from current award requirements pertaining to the continuous working of ordinary hours, the employer's control over when ordinary working hours are to be performed, and the taking of rest and meal breaks. The term should also accommodate facilitative arrangements for which the Clerks Award already provides in respect of widening the spread of ordinary hours, making up time taken off during working hours, changes to shift start and finish times and taking off time in lieu of overtime (**TOIL**) being incorporated in a single working from home arrangement to maximise the degree of flexibility available and to minimise the regulatory burden.

[108] The working from home term (**WFH term**) which we have formulated to give effect to our conclusions and which we propose to insert in the Clerks Award immediately after the IFA term is as follows:

5A. Requests for working from home arrangements

- 5A.1 An individual employee may request, and an employer may agree to, an arrangement permitting the employee to work from home.
- 5A.2 **Working from home** means the performance of duties by an employee at their residence or at another location chosen by the employee that is approved by the employer.
- 5A.3 A request by an individual employee for a working from home arrangement must be made in writing and must specify the day(s) upon which the employee proposes that they work from home.
- 5A.4 Despite anything else in this award, an individual employee and an employer may agree to modify the application of the following terms of this award to facilitate the grant of a request for a working for home arrangement:
 - (a) the working of ordinary hours continuously under clause 13.6(a);
 - (b) the working of ordinary hours at the discretion of the employer in accordance with this award under clause 13.6(b);
 - (c) the time for taking rest breaks under clause 15.2;
 - (d) the time for taking meal breaks under clause 15.3.
- 5A.5 An individual employee and an employer may enter into a facilitative agreement in accordance with the following terms of this award as part of a working from home arrangement:
 - (a) alteration of the spread of ordinary hours under clauses 13.4(c) or 25.2(c);
 - (b) making up time taken off during working hours under clauses 13.8 or 26.5;

- (c) changes to times at which the employee will start and finish a shift under clause 26.4(b);
 - (d) time off instead of payment for overtime under clauses 23 or 29.
- 5A.6 An agreement about a working from home arrangement made as a result of a request under clause 5A.3 must be in writing and must identify:
- (a) the day(s) on which it is agreed the employee may work from home;
 - (b) the location where work is to be performed when working from home;
 - (c) the modification to the application of any award terms in accordance with clause 5A.4;
 - (d) any facilitative agreement in accordance with clause 5A.5;
 - (e) the start date of the arrangement; and
 - (f) the means by which the arrangement may be terminated by either party.
- 5A.7 An agreement about a working from home arrangement must be one that is made by the individual employee and the employer without coercion or duress.
- 5A.8 The employer must keep the agreement as a time and wages record and give a copy to the employee.
- 5A.9 Clause 5A does not limit the operation of clause 5—Individual flexibility arrangements.

NOTE 1: An eligible employee may also request a flexible working arrangement under section 65 of the Act.

NOTE 2: Disputes about requests for working from home arrangements under this clause may be dealt with under clause 40—Dispute resolution.

[109] The WFH term, at subclause 5A.2, defines what working from home means for the purpose of the operation of the term (issue (2) in the August 2024 Statement). We have included in the definition locations chosen by the employee other than their residence to accommodate situations such as an employee caring for a relative at the relative's residence and performing work there. The approval of the employer is required to ensure that the alternative location is known to the employer and approved as suitable for the performance of the relevant work.

[110] The WFH term contains a number of safeguards for employees, some of which are derived from the standard IFA provision (clause 5 of the Clerks Award):

- it operates only upon request by an existing employee;
- any agreement reached as a result of the request must be in writing and record the relevant details of the agreed arrangement;
- any agreement must be made without coercion or duress; and
- the employer is required to keep the agreement as a time and wages record in the event that any enforcement issue arises.

Other issues

[111] In respect of the remaining issues raised in the August 2024 Statement (issues (5), (6), (7) and (8)), no party raised any specific proposal for variation of the Clerks Award. In respect of issue (5), the obligation to pay overtime rates under clause 21 only operates when overtime hours are worked at the express or implicit direction of the employer, and the operation

of this provision will not be affected by the WFH term. It will remain the obligation of the employer to record overtime hours worked pursuant to reg 3.34 of the *Fair Work Regulations 2009* (Cth) having made a direction that overtime be worked. As to issue (6), no party submitted that an award working from home term should not apply to all employees covered by the Clerks Award, and we see no justification to exclude any classifications or groups of employees from the term. We therefore do not consider it necessary to address them further. As to issue (7), there was no material before us identifying any difficulty in the interaction between employees working at home and exercising their right to disconnect under s 333M of the FW Act and clause 13A of the Clerks Award, and we do not consider that the WFH term would alter the capacity of employees to exercise the right to disconnect. Finally, we do not consider that there is any other relevant issue that we need to address.

Modern awards objective

[112] As earlier stated, we consider that the variation of the Clerks Award to include the WFH term is necessary to achieve the modern awards objective in s 134(1). In reaching this conclusion, we have taken into account the mandatory considerations in s 134(1) in the following way (using the paragraph designations in the subsection):

Paragraph (a): The reference to the ‘low paid’ in s 134(1)(a) has, in Annual Wage Review decisions and other decision involving the exercise of modern award power, been benchmarked as an amount which represents two-thirds of the median adult weekly earnings of all full-time employees.¹⁷ There are two measures of this benchmark: \$1164.67 per week according to the ABS COE data for August 2025 and \$1234.67 per week according to the ABS EEH survey for May 2025.¹⁸ A full-time employee covered by the Clerks Award who is paid the Level 1 or Level 2 award rate would be below the first measure, and such an employee paid at the Level 1, Level 2, Level 3 or the Call centre principal customer contact specialist award rates would be below the second measure. We consider that, to the extent that the WFH term will facilitate and sustain viable and award-compliant working from home arrangements, it will assist the needs of the low paid in that it will save them commuting time and costs and better enable them to balance their work and care responsibilities. To that extent, this consideration favours the Clerks Award being varied to include the WFH term. It is not possible to assess whether the WFH term will affect relative living standards.

Paragraph (aa): There is no evidence before us that the variations will have any effect, detrimental or otherwise, as to the need to improve access to secure work. This is therefore a neutral consideration.

Paragraph (ab): The WFH term is likely to enable workplace conditions that facilitate women’s full economic participation to the extent that it supports working from home arrangements which assist women with caring responsibilities to participate in employment. This is significant in a context where the Clerks Award predominantly covers female employees, who constitute at least a significant majority of those currently working from home. This is an element of achieving gender equality which

¹⁷ Most recently, *Annual Wage Review 2026* [2026] FWCFB 3500 [84].

¹⁸ Ibid.

weighs in favour of the WFH term. It is also possible that enabling greater female participation in employment will have a positive effect on achieving equal remuneration for work of equal or comparative value.

Paragraph (b): We are unable to identify, on the material before us, whether the WFH term will encourage collective bargaining. We will therefore treat this as a neutral consideration.

Paragraph (c): The material before us satisfies us that, to the extent that the WFH term facilitates viable and award-compliant working from home arrangements, it will support increased workplace participation and social inclusion by persons with caring responsibilities, persons with disability, persons who are managing illness, and persons in regional and remote areas. This weighs in favour of the WFH term.

Paragraph (d): As we have earlier explained, the WFH term is intended to promote flexible modern work practices by allowing consensual adjustments to award provisions, to support contemporary working from home arrangements. Because the WFH term is facilitative and not prescriptive, it will allow employees and employers to enter into working from home arrangements which are consistent with the efficient and productive performance of work.

Paragraph (da): The WFH term does not disturb existing award entitlements to penalty rates or loadings for working overtime, unsocial, irregular or unpredictable hours, weekends, public holidays or shifts. Because of the approach we have taken in relation to proposals likely constrained by s 135A, this is a neutral consideration in this matter.

Paragraph (f): We do not consider that the WFH term will increase employment costs. There is some regulatory burden associated with entering into more formal and written working from home arrangements pursuant to the WFH term, but this is balanced by the reduced potential regulatory burden in respect of current arrangements which are not compliant with the Clerks Award. Because the WFH term is facilitative, we do not consider that it will be detrimental to productivity or business efficiency, and may have positive effects. Weighing these matters, we will treat this as a neutral consideration.

Paragraph (g): The WFH term will support a stable and sustainable modern award system by ensuring the Clerks Award operates consistently with the contemporary reality of working from home. The WFH term is, we consider, simple and easy to understand. This weighs in favour of the Clerks Award being varied to include the WFH term.

Paragraph (h): The evidence does not demonstrate that the WFH term would have an effect, adverse or otherwise, upon the national economy. We therefore treat this as a neutral factor.

[113] That the relevant prescribed matters all either weigh in favour of, or are neutral as to, varying the Clerks Award to include the WFH term, supports the conclusion that the WFH term is necessary to ensure the Clerks Award (together with the NES) provides a fair and relevant safety net of terms and conditions of employment.

Next steps

[114] A draft determination to vary the Clerks Award to insert the WFH term is published together with this decision. Any submissions concerning drafting or other technical issues arising from the draft determination must be lodged by **5:00 pm (AEST) on Thursday, 17 September 2026** to awards@fwc.gov.au.



PRESIDENT

Appearances:

K Tobin for the Australian Council of Trade Unions.

K Thomas for the Australian Municipal, Administrative, Clerical and Services Union.

M Waincott for CPSU, the Community and Public Sector Union.

P Willink, counsel, instructed by *R Bhatt* for The Australian Industry Group.

L Izzo and *T Lawrence* for Australian Business Industrial and NSW Business Chamber Ltd.

A Cameron for the Australian Chamber of Commerce and Industry.

Hearing details:

2026.

Sydney:

10, 11 February.

Final written submissions:

Australian Municipal, Administrative, Clerical and Services Union: 16 February 2026.

Australian Council of Trade Unions: 16 February 2026.

Australian Business Industrial and NSW Business Chamber Ltd: 17 February 2026.

Australian Chamber of Commerce and Industry: 18 February 2026.

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