

The Australian HR Institute
Submission to the Fair Work Commission
Discussion Paper: Work Care (Modern Awards 2023-2024)

March 2024

The Australian HR Institute

The Australian HR Institute (AHRI) is the professional body for Human Resources in Australia, with over 17,000 members from Australia and internationally.

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1. Summary

1.1 AHRI believes that productive and inclusive workplaces are those where managers and staff reach agreement over how best to do their work, including where and when they work. This is more efficient and allows both employees and employers greater flexibility.

1.2 As a result, AHRI's key recommendations in this submission include:

- retaining the 38-hour working week as any reduction could both deny workers the choice to work additional hours if they choose to do so and curb output. A reduction also creates ambiguity when entitlement for additional hours and overtime would typically apply. It is noted that currently 31% of workers are employed on a part-time basis, which reflects mutual agreements to work less than 38 hours on a case-by-case basis.

- considering the negative impact of the current modern awards system on labour market participation of various under-utilised groups, such as working parents and carers. This is largely due to the upward pressure 'overtime rates' and other related restrictions place on the organisation's wage bill.

- opposing any expansion of existing working from home rights.

- extending the current right to request flexible working, which is currently restricted to certain groups under the National Employment Standards (NES), to all workers from 2027. AHRI believes that this would be a more effective way of facilitating discussions between managers and staff about both remote working possibilities and other flexible working arrangements.

- opposing the proposal to replace the 'reasonable business grounds' under which employers can refuse a flexible working arrangement with a refusal on the grounds of 'unjustifiable hardship'.

2. Review of working hours and enhancing working from home rights

2.1 AHRI believes that that it would be inefficient and ineffective for modern awards to mandate a reduction in the standard working week of 38 hours, not least because the current system does little to promote flexible hours.

2.2 Many businesses in Australia are covered by a modern award which restricts employees from working outside defined 'ordinary hours'. This is because working outside ordinary hours often incurs higher wage rates, which are financially burdensome for business. This arrangement has a disproportionate impact on various groups, such as working parents, who may prefer the choice to work outside the organisation's typical working arrangements to manage childcare and other responsibilities.

2.3 In addition, flexibility is further undermined by the restrictions placed on employers when there is demand from either the employer or employee to work outside defined 'ordinary hours'.

As one employer from the environmental services industry put it:

"For example, if you have to provide a full-time worker 38 ordinary hours per week within a certain span of hours, they can work outside the span at overtime rates but your obligation is still to provide them a roster of 38 hours within their ordinary hours."

2.4. AHRI members report that many of their employers use both Enterprise Agreements and Individual Flexibility Arrangements because they provide more flexibility than standard clauses in awards. This enables employers and current employees of an organisation to mutually agree to vary certain award terms (such as by making new arrangements for when working hours can be performed). However, these are also often costly for employers because a 'Better Off Overall Test' (determined by the Fair Work Commission) must be applied and only to workers. This generally means employers are worse off financially under these agreements.

2.5 AHRI therefore proposes that the current review considers how ordinary hours of work, individual flexibility arrangements, rostering, overtime, penalties, shiftwork and allowance clauses are constraining the flexibility of employees' working hours and whether they are denying employees and employers to find an arrangement that suits both parties.

2.5. AHRI also believes that any expansion of existing working from home rights risks both raising expectations among the existing workforce and exacerbating existing tensions between those who can work from home those and those who cannot. These tensions are documented by employers in a recent report on flexible working and hybrid working, which shows that that around 36% of employees cannot work from home¹.

AHRI therefore does not agree that working from home rights should be incorporated into modern awards.

3. Extending the right to request flexible working by 2027

3.1 Instead, AHRI believes that extending the right to request flexible working would be a more effective way of helping facilitate discussions between managers and staff about remote and hybrid working possibilities and other flexible working arrangements.

3.2 AHRI research indicates that many organisations are adopting other flexible working arrangements, such as job-sharing and flexible start and finish times, to help support those who cannot work remotely to promote a better work-life balance². According to the research, two thirds of organisations offer other flexible working arrangements to staff who cannot work from home. Extending the right to request flexible working may also help more organisations manage the tensions that exist in some organisations between those who can work from home and those who cannot.

3.3 Recent AHRI research shows that almost all (97%) organisations offer some form of flexible working arrangement, excluding hybrid working (95% in 2022)¹. However, this is a measure of availability, not take-up.

¹ Australian HR Institute, *Hybrid and Flexible Working Practices in Australian Workplaces* (October 2023), 8 and 33.

² Australian HR Institute, *Hybrid and Flexible Working Practices in Australian Workplaces* (October 2023), 17.

3.4 Official data shows that only a third of Australian employees say that they have an agreement to work flexible hours³. Indeed, the proportion of employees that have an agreement to work flexible hours has only seen a modest increase over the past decade or so². As the literature review that forms part of this review recently pointed out, awareness of the entitlement to request flexible working arrangement among worker-carers is low⁴. Extending the right to request is likely to increase awareness and perhaps boost take-up rates.

3.5 Other advantages of extending the right to request flexible working to all employees include:

- improving labour market participation for all workers.
- reducing the regulatory complexity that comes with restricting the right to certain groups.
- avoiding a two-tier workforce with, on the one hand, those employees who are currently not covered and, on the other, employers possibly encouraged to hire from groups not covered by the right.
- reduced perceived employment costs and barriers for people with caring responsibilities⁵, greater retention of staff and improved productivity and performance⁶.

3.6 AHRI acknowledges that extending the right to request flexible working may also have additional costs for employers; especially in terms of the bureaucracy and costs associated with processing the additional requests.

3.7 However, a recent UK impact assessment of extending the right to request flexible working suggested that the cost of extending the right to all workers in the UK was relatively low (around 5 million pounds a year). The same assessment also underlined the benefits of extending the policy, such as reduced absence⁷.

³ [Working arrangements, August 2023 | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/working-arrangements-august-2023)

⁴ Smith M. and Charlesworth S., *Literature review for the Modern Awards Review 2023-24 Relating to the Workplace Settings Within Modern Awards That Impact People When Balancing Work and Care* (March 2024), 28.

⁵ Productivity Commission, *Working from home* (September 2021) 82–83.

⁶ Senate Select Committee on Work and Care, *Final Report* (March 2023) 127.

⁷ [Proposals to reform flexible working regulations \(The Flexible Working Regulations 2014\): Impact Assessment \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644442/proposals-to-reform-flexible-working-regulations-the-flexible-working-regulations-2014-impact-assessment.pdf)

3.8 AHRI is also aware from our members that many employers have struggled to keep pace with the volume of workplace reforms that have taken place over the past two years. **AHRI therefore proposes extending the right to request flexible working to all employees in 2027.**

4.0 AHRI is opposed to any changes to the Fair Work Act relating to Section 65; as proposed in the Work and Care interim report⁸. In particular, AHRI does not support the proposal to replace the 'reasonable business grounds' under which employers can refuse a flexible working arrangement with a refusal on the grounds of 'unjustifiable hardship'.

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⁸ Senate Select Committee on Work and Care, *Interim Report (Report October 22)* [6.35].