



# STATEMENT

*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, 29 AUGUST 2024

*Commencement of new matter on the Commission’s own initiative – matter foreshadowed in Final Report of the Modern Awards Review 2023–24 – working from home – Clerks—Private Sector Award 2020.*

[1] As foreshadowed in the Modern Awards Review 2023–24 Final Report<sup>1</sup> (Final Report), the Commission is commencing a new matter on its own initiative, pursuant to s 157(3)(a) of the *Fair Work Act 2009* (Cth) (FW Act), to develop a working from home term in the *Clerks—Private Sector Award 2020*<sup>2</sup> (Clerks Award).

[2] The background to the Modern Awards Review 2023–24 (Review) is explained in detail in the Final Report at [1]–[8] and [160]–[167]. In summary, the Review resulted in the Full Bench identifying award provisions which require the Commission’s priority attention. The Final Report indicated that the Commission would initiate proceedings on its own initiative to consider and determine variations of modern awards in six areas, one of which was the development of a working from home term in the Clerks Award.

[3] As indicated in the Final Report (at [167(4)]), this proceeding is concerned with the development of a working from home term in the Clerks Award which ‘facilitates employers and employees making workable arrangements for working at home and removes any existing award impediments to such arrangements’. This term may serve as a model for incorporation in other modern awards, with or without adaptation. For this reason, proceedings will not be limited to parties with an interest in the Clerks Award and any interested party is invited to participate.

### **Working from home in the Review**

[4] Working from home was canvassed in both the ‘work and care’ and ‘making awards easier to use’ streams of the Review.

[5] The Work and Care Discussion Paper<sup>3</sup> explored working from home arrangements and invited parties to comment on whether any variations to modern awards regarding working

from home arrangements were needed to ensure they continue to meet the modern awards objective. Parties were provided with an opportunity to file submissions by 12 March 2024. Proposals concerning working from home arrangements with respect to one or more modern awards were identified in nine submissions received from various parties.

[6] The ‘Making awards easier to use’ stream of the Review discussed proposals for variations to the seven most commonly-used awards, including the Clerks Award. These included proposals concerned with or said to be relevant to working from home.

[7] In the Final Report, the Full Bench (at [102]) observed that:

There was a general consensus amongst parties that modern awards should be varied to deal with working from home arrangements and an acknowledgement of the importance of working from home arrangements to support workers with caring responsibilities. It was also acknowledged that working from home is not relevant to all industries or modern awards.

[8] The Final Report (at [107]) went on to find:

... notwithstanding the general consensus that modern awards should address the issue of working from home, there was no common position reached as to the form which working from home provisions should take in modern awards.

[9] The Full Bench stated the following conclusions (at [162] and [167(4)]):

... 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 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 we consider that award facilitation of access to working at home arrangements is a matter which requires priority consideration...

...

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.

[10] The Full Bench’s identification of the Clerks Award as the most commonly-used modern award under which working from home arrangements are most likely to occur is supported by research published by the Commission which indicates that 41.4 per cent of clerical and administrative workers regularly work from home in contrast to 31.5 per cent of all employees across all occupations.<sup>4</sup>

### **History of working from home arrangements in the Clerks Award**

[11] Working from home provisions are not currently a feature of modern awards. However, as identified in the Work and Care Discussion Paper, Schedule I was temporarily inserted into

the Clerks Award to facilitate working from home arrangements during the COVID-19 pandemic.<sup>5</sup> In a decision of 6 October 2020, considering whether an extension to the operation of the initial Schedule was warranted, a Full Bench of the Commission observed:

[The absence of an express provision to facilitate working from home] suggest that there is a need to consider whether it is necessary to vary the Clerks Award to provide more enduring means of facilitating agreed working from home arrangements. The extension of Schedule I provides the parties with an opportunity to consider whether a more enduring solution is necessary and if so, the form of that solution.<sup>6</sup>

[12] On 22 December 2020, the Full Bench granted an application to vary Schedule I and further extended its operation until 30 June 2021.<sup>7</sup> Revised Schedule I included:

- A definition of remote work.
- An extended span of hours for employees working remotely.
- A provision allowing employees to elect to work their hours in a non-continuous manner while undertaking remote work.
- A provision allowing part-time employees to select their own starting and finishing times when undertaking remote work, with agreement from their employer.
- Flexibility in relation to the taking of meal or rest breaks by employees undertaking remote work, subject to agreement with the employer.

[13] The Commission directed parties to confer in respect of whether variations to the Clerks Award were necessary to facilitate working from home arrangements.

[14] On 11 April 2021, the Australian Council of Trade Unions wrote to the Commission, on behalf of the Australian Municipal, Administrative, Clerical and Services Union, the Australian Industry Group and the Australian Chamber of Commerce and Industry, asking the Commission to discontinue the matter. A statement was issued on 29 April 2021,<sup>8</sup> expressing the provisional view that Schedule I should cease operation. The Commission later issued a decision confirming these provisional views, with the schedule ceasing operation on 30 June 2021.<sup>9</sup>

### **Issues to be determined**

[15] Because these proceedings have been initiated by the Commission, it is necessary to identify the issues which will arise for determination in the proceedings. Our *provisional* view is that the issues which will arise in the proceedings are as follows:

- (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 Final 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);
  - (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<sup>10</sup> of the Clerks Award?
- (8) Are there any other matters that should be considered in a ‘working from home’ term?

### Next steps

**[16]** A hearing before the presiding member is listed in **Sydney** at **9:30 am (AEST) on Friday, 13 September 2024** to hear any submissions concerning the *provisional* list of issues and the timetabling of this case. The final version of the list of issues will be issued following this. Parties interested in attending the hearing should email [awards@fwc.gov.au](mailto:awards@fwc.gov.au) by **5:00 pm (AEST) on Wednesday, 11 September 2024** to advise whether they will attend the hearing in person or wish to request to attend by video link using Microsoft Teams. A Notice of Listing is published with this Statement.

**[17]** A new major case webpage has been established for the ‘[Working from home – Clerks Award Case](#)’. All material related to the case will be published on the major case webpage. Interested parties are encouraged to subscribe to receive updates.



PRESIDENT

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<sup>1</sup> Fair Work Commission, [Modern Awards Review 2023–24](#) (Final Report, 18 July 2024).

<sup>2</sup> [MA000002](#).

<sup>3</sup> Fair Work Commission, [Work and Care](#) (Discussion Paper, 29 January 2024).

<sup>4</sup> Fair Work Commission, [Work and Care](#) (Data Profile, 28 March 2024) 6.

<sup>5</sup> [\[2020\] FWCFB 1690](#).

<sup>6</sup> [\[2020\] FWCFB 5199](#) [94].

<sup>7</sup> [\[2020\] FWCFB 6985](#).

<sup>8</sup> [\[2021\] FWCFB 2326](#) [9].

<sup>9</sup> [\[2021\] FWCFB 3653](#).

<sup>10</sup> See [PR777958](#); the Clerks Award is in the process of being updated on the Commission’s website to include this clause.