



# Protecting Penalty and Overtime Rates Bill 2025

Submission to Legislation Committee

August 2025



## Executive Summary

The Australian Industry Group (**Ai Group**) welcomes the opportunity to provide input to the Senate Education and Employment Legislation Committee's inquiry into the Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 (the **Bill**).

While presented as introducing "special provisions," the Bill in substance imposes a blanket prohibition on the Fair Work Commission (**FWC**) reducing penalty or overtime rates or inserting substitution terms into modern awards, even where such variations are demonstrably fair, necessary, or in the public interest. This approach will undermine the integrity of Australia's legislative schemes and reflects an apparent lack of respect for, and trust in, the judgement of the FWC.

Such a fundamental shift is not only out of step with the confidence that the Government has otherwise shown in the FWC, including through the radical expansion of its jurisdiction to regulate key aspects of the labour market and economy during the last term, it curtails the tribunal's ability to ensure that the safety net is fair, contemporary, flexible, and fit for purpose. The Bill effectively sets a crucial element of the system in stone, regardless of how compelling the case may be for variation in the interests of employees, employers, or the broader community.

There is no evidence of any current attempt to reduce rates. Nor is there any basis for suggesting that section 134(1)(da) which was implemented by a previous Labor Government to specifically protect penalty rates is operating inadequately. That previous amendment promoting the need for additional remuneration for overtime and weekend work reflects a far more balanced, nuanced and frankly sensible approach than that proposed by the Bill.

The provision in the Bill prohibiting substitution terms is primarily aimed at preventing the FWC from progressing three active proceedings—none of which seek to reduce penalty or overtime entitlements, or similar applications in the future. Notably, two of these matters relate to Ai Group's applications for the insertion of reasonable and historically grounded exemption clauses into the Clerks and Banking Awards, to facilitate flexible arrangements for highly paid, professional, salaried employees.

Far from seeking to diminish entitlements, these applications reflect a practical response to the complexity, compliance burden and legal risk created by rigid award terms that do not align with modern, annualised salary-based roles. They aim to maintain protections while providing necessary flexibility, particularly where professional employees are not practically able to record every hour worked.

Ai Group proposes modest and sensible amendments be made to the Bill in order to ensure that it aligns with its stated intent and does not disturb existing flexibilities or constrain the FWC from acting in appropriate and exceptional cases. In doing so, we acknowledge that the Government has appropriately demonstrated a willingness to clarify the initial form of the Bill, and that the Explanatory Memorandum indicates it is not *intended* to require variations or review of existing modern award provisions. Nonetheless, we urge the Government to be receptive to putting such matters beyond doubt by adopting our proposed changes.

Specifically, Ai Group recommends:

- **Preserving limited FWC discretion** to vary awards in exceptional circumstances or where clearly in the public interest;



- **Allowing the FWC to resolve anomalies and technical irregularities** in modern award drafting;
- **Excluding highly paid professional and managerial employees** from the scope of the Bill;
- **Removing any limitation on the Fair Work Commission varying awards of its own motion**, including in particular through the current proceedings which arose as a product of award review undertaken by the FWC at the request of the then Workplace Relations Minister Tony Burke, that are directed at removing award derived barriers to the implementation of working from home arrangements;
- **Making technical drafting improvements** to ensure the Bill does not inadvertently require the disturbance of existing award terms or expose the FWC to unintended legal consequences.

In our view, these amendments will ensure the Bill upholds the Government's policy objectives without undermining the role, flexibility or institutional independence of the FWC.

# Introduction

1. The Australian Industry Group (**Ai Group**) welcomes the opportunity to make submissions to the Senate Education and Employment Legislation Committee (**Legislation Committee**) regarding the Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 (the **Bill**).
2. The Bill proposes to insert 'special provisions relating to penalty rates and overtime rates' into the *Fair Work Act 2009* (Cth) (**FW Act**). On considering the terms of the Bill, it is apparent the phrase 'special provisions' is a euphemism for a prohibition on the Fair Work Commission (**FWC**) reducing penalty and overtime rates or including particular 'substitution terms' in modern awards. We address each element of the Bill separately below and then set out our proposed modifications.

## **The proposed prohibition on reductions to penalty rates (s.135A(1)(a))**

3. As far as Ai Group is aware, there are no applications currently before the FWC to reduce overtime or penalty rates in any modern award. To the extent this Bill seeks to address proceedings akin to the *penalty rates* case, in which a 5-member Full Bench presided by Justice Iain Ross AO (currently non-executive Member – Monetary Policy Board), heard evidence and submissions over 39 days of hearing in 2015 and 2016 from 143 lay and expert witnesses and ultimately determined to moderately decrease the Sunday penalty rate in some modern awards to increase employment opportunities; no such case is before the FWC.
4. The FW Act currently requires the FWC to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. Per s.134(da), in determining what is necessary to achieve the modern awards objective, the FWC must take into account:

(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;
5. Where the FW Act already imposes this requirement on the FWC, (i.e, to ensure modern awards are fair and take into account the need to provide additional remuneration for working overtime and on weekends), what necessity could there be to impose an absolute ban on reduction in rates and 'substitution terms'.

## **The proposed prohibition on 'substitution' terms (s.135A(1)(b))**

6. In large part, the Bill is intended to scuttle three proceedings that are currently before the FWC, none of which seek to reduce penalty or overtime rates.

7. That the Government would intervene in current proceedings through legislative change rather than by making submissions to the FWC is a concerning and troubling change in the approach to regulating employment conditions in Australia. Since 1904, there has always been an independent court or tribunal that has been charged with the heavy burden of determining fair and relevant working conditions. Although governments routinely make submissions to the tribunal about how it should exercise its powers, they have generally preserved and respected the independence of the institution. Considering this remarkable change in course, this Legislation Committee should seek to understand the issue at the heart of the three proceedings which are said to justify any fettering of the FWC's discretion.
8. The first proceeding relates to the retail industry, and has been reserved for decision since it was heard in March this year (Vice President Gibian is presiding). The other two proceedings are currently before Justice Hatcher, President of the FWC. Ai Group filed submissions in support of its position in February 2025. In the normal course, the matters would be listed for hearing and the FWC would consider the arguments on the merits and determine whether the changes are necessary to achieve the modern awards objective. In this case, the timetable has been vacated in light of the Bill.
9. In the two matters that are currently before the President, Ai Group has asked the FWC to insert 'exemption rate' clauses into two modern awards, which are:
  - a. Clerks—Private Sector Award 2020 (**Clerks Award**); and
  - b. Banking, Finance and Insurance Award 2020 (**Banking Award**).
10. The exemption clauses are intended to have practical application to senior staff who are paid significantly above the minimum rates within the award, including professional staff and managers. For the Banking Award, it would only apply to Level 3 employees and above. As to the Clerks Award, it needs to apply to all classification levels for two key reasons:
  - a. First, these positions are often clerical employees who work alongside senior managers and professionals. The clerical employees work the same flexible patterns of hours as those to whom they report or provide administrative support;
  - b. Second, the classification structure in the Clerks Award lacks clarity in the sense that it is difficult to ascertain which level is clearly 'senior'.
11. The Banking Award and the Clerks Award cover a wide array of organisations and occupations across the Australian economy. These include occupations and industries which are particularly prone to social and technological change, including the advent of computer technologies, such as artificial intelligence as well as the proliferation of working from home arrangements. The Clerks Award covers all employers in the private sector and their employees who fall in the clerical and administrative classifications in the award. The Banking Award covers all employers in the banking, finance and insurance industry and extends to managerial and professional bankers and finance professionals.



569,800 people are estimated to be employed in financial and insurance services. It is estimated there are 1.8 million clerical and administrative employees in Australia.

12. These awards apply to many highly paid professional and senior employees who work in full-time, 'white-collar' jobs. If you look at any salary guides for the banking industry, it will list the annual salaries paid in the market, not the hourly wages one can expect to receive (compared to hospitality, construction or manufacturing where the latter is common). Ask a finance professional how much they are paid, and they will tell you about their annual salary and possibly their bonus; they will not tell you about their overtime rates, penalty rates or shift loadings. Those are simply irrelevant to the industry, particularly for professionals and managerial employees.
13. The proposal to insert exemption rates in these awards is not radical and it is not seeking to exploit some kind of 'loophole'. Such provisions have historically been a feature of awards covering clerical staff and salaried professionals. Indeed, it is somewhat anomalous that exemption rate clauses are contained in hospitality awards, but not in the awards covering the largest white-collar sectors.<sup>1</sup>
14. To understand the rationale for exemption rates, one should ask two questions:
  - a. Should highly paid, white-collar professionals be required to record every *moment* they perform work?
  - b. Should employers be exposed to millions of dollars in penalties and even imprisonment for not accurately monitoring every moment their highly paid, professional and white-collar workforce perform work, even when they are at home?
15. Ai Group believes the answer to both questions is 'no'. This is a key reason that Ai Group has asked the FWC to insert exemption clauses.
16. It is not an attempt to reduce pay and we have acknowledged that the FWC may insert additional safeguards in the provisions we have proposed to address any concerns that unions may properly raise in the course of proceedings considering the variations. Such an approach would be consistent with the typical conduct and resolution of proceedings dealing with proposed changes to awards. The intent is to enable employers to enter into arrangements with staff that see employees paid well above the minimum weekly wages but in a way that recognises that some employees are paid to perform a job, rather than based upon a Bundy-clock, particularly in circumstances where employees possess significant autonomy over their working hours.
17. Our proposals are also intended to deal with the challenges of recording such hours, particularly when employees are working from home and not subject to intrusive surveillance or monitoring (a practice to which union movement often objects). There is a real risk the Bill will undermine the FWC's ability to remove impediments to working from home that currently exist in modern awards. The Full Bench of the FWC has

1. Registered and Licensed Clubs Award 2020, clause 18.4 and Hospitality Industry (General) Award 2020, clause 20.

acknowledged the need to address overtime and penalty rates in the context of the proliferation of working from home: [Emphasis added]

[40] While working from home is currently possible and permissible in many workplaces, the absence of express provision to facilitate working from home can impose practical constraints on these arrangements. For example, absent an express provision, other award provisions such as the span of hours within which ordinary hours can be worked, continue to apply. **This can constrain the utility of working from home arrangements from both the employee and employer perspectives as it requires the employer to pay overtime or penalty payments in circumstances where the employee has sought the additional flexibility in order to meet their preferences.**

18. Given it is commonplace for professionals to be paid annual salaries and not required to record every second they work, the Legislation Committee might reasonably ask ‘how can the recording of working hours be causing a problem?’. Unfortunately, the answer is nuanced, generally misunderstood (even among employment lawyers) and requires some understanding of the interaction between modern awards, the *Fair Work Act 2009* (Cth) and the Fair Work Regulations 2009 (**FW Regulations**). It is also likely one of the largest ‘sleeping giant’ issues affecting hundreds of thousands of employers and millions of employees. The following points should be understood:

- i. First, there is no general obligation to record all hours of work under the FW Act. This is a deliberate feature of design of the legislation. Rather:
  - a. Section 535 of the FW Act requires *employers* to make and keep ‘employee records’ of the kind prescribed by the FW Regulations.
  - b. FW Regulation 3.34 states that if a penalty rate or loading (however described) must be paid for overtime hours actually worked by an employee, the employer must make and keep a record that specifies:
    - i. The number of overtime hours worked by the employee each day;  
or
    - ii. When the employee started and ceased working overtime hours.
- ii. Second, entitlements to overtime, penalty rates and shift loadings in modern awards are often complicated and frequently updated or clarified through court processes and FWC proceedings. The Federal Court has repeatedly (albeit delicately) pointed out that the terms of modern awards are ‘not infrequently characterised by imprecise drafting’. This is not to criticise the FWC, but merely to recognise that they are complicated and dynamic instruments.
- iii. Third, it is common practice for employers to enter contractual ‘set off’ arrangements with employees to facilitate an annual salary. In essence, this is a contractual arrangement where the employer agrees to pay an employee an annual salary which is intended to satisfy the employer’s obligations to pay the employee’s entitlements under a modern award or enterprise agreement. The

difficulty with this approach is that it is impossible to know what the employee is due under the modern award (and therefore to determine whether an employee has been paid enough to satisfy their entitlements) unless the employer monitors (and records) all time the employee works. There are also questions around the effectiveness of setting off payments between different months. While we are still awaiting the Federal Court's judgement in relation to the approach that Coles and Woolworths took to the 'off-setting' of entitlements above statutory minimums, the Fair Work Ombudsman's position remains that employees must be paid in full for each pay period in accordance with legislative requirements, surplus payments in one period cannot justify underpayments in another pay period and payment of an entitlement above the minimum cannot satisfy underpayment of another entitlement.

- iv. Fourth, most highly paid professional employees do not record their hours of work, even if the employer asks them to. It is entirely unrealistic, with the advent of mobile computer technology, to expect professional employees to clock on and clock off every moment they perform work. Similarly, research undertaken by the Swinburne University of Technology that was commissioned by the FWC to assist it consider the Clerks working from home case found that approximately two thirds of employees never, rarely or only sometimes record their start and finishing times.
- v. Fifth, section 557C of the FW Act imposes a reverse onus on employers in underpayment claims involving employee records. In essence, if an employee makes an underpayment claim for hours worked, and the employer does not have an employee record but was required to make one, the employer must disprove the allegation to defeat the claim. Absent time records, this is a difficult burden indeed. If the employer cannot prove the employee was not working when they claim, the employee will succeed in the underpayment claim, exposing the employer to civil remedy penalties and criminal wage theft penalties.

19. The absence of exemption clauses is causing significant cost for employers and government. Take the Social, Community, Home Care and Disability Services Industry Award 2010 (**SCHADS Award**) for example. It was common for the awards in place prior to award modernisation to include exemption clauses, such as:

- a. The South Australian Social and Community Services Award,<sup>2</sup> which exempted overtime and penalty rates for Level 5 employees who agreed to a 'suitable employment package'; and
- b. The Crisis Assistance, Supported Housing Industry - Western Australian Award 2006 which exempted employees classified as Level 6 or above from overtime where they were paid a loading of 7.5% above the minimum rates of pay.

2. <sup>2</sup> AN150140.



20. The current SCHADS Award does not contain exemption rates clauses. This is so even though it applies to senior staff, including CEOs. It is of course ludicrous that a CEO, or indeed any manager, with authority to largely determine or control their working hours is remunerated in accordance with a prescriptive regulatory regime designed for application to much less senior staff and for their organisation to be subject to onerous and unworkable record keeping arrangements in relation to such senior employees. Such an approach is inevitably a catalyst for non-compliance with such unrealistic provisions. Exemption rates, set at an appropriate rate determined by the Commission, are a well-established alternate mechanism that provide fair and certain entitlements.
21. Although the Bill is not intended to remove existing exemption rates in awards, the heavy-handed approach it adopts will likely render it practically impossible for the FWC to insert similar sensible and fair provisions in awards other awards, even if it determines that it is necessary part of the safety net. Sadly, the Bill will set in stone the quagmire of complexity and administrative cost that all too often accompanies instruments that do not contain exemption clauses. This Legislation Committee should urge the Government to take great care. The Bill will not simply 'protect penalty rates', it will undermine the FWC's ability to ensure the proper functioning of modern awards.

## Proposed recommendations

22. The Legislation Committee has been charged with inquiring into the Bill and reporting to the Senate by 21 August 2025. It is common for such reports to contain recommendations to the Senate. Ai Group contends the following recommendations should be made.

### Recommendation 1 – Retain some degree of FWC discretion

23. As outlined above, the FWC and its predecessors have always had discretion in the exercise of its powers. There is no convincing justification for changing this approach, which has served Australia well for over 100 years. The Bill will set a concerning precedent and will encourage the politicisation of the institution. Where legislation is used as a mechanism to achieve particular outcomes in specific proceedings, it is difficult to maintain that the body is truly independent. Governments should advance arguments before the independent umpire, not usurp its role by changing the rules in order to ensure their preferred outcome in a case.
24. The discretion held by the FWC has enabled it to move swiftly and respond to exigencies, such as COVID-19 pandemic in which the FWC promptly amended overtime, shift work and penalty rate provisions (by consent with the unions) to take into account the fact many people were working from home. The discretion has also allowed the institution to make decisions that are politically contentious, including in relation to superannuation, annual leave and minimum wages. The point here is that we do not know what exigencies will occur in future and the FWC should not be hampered in its ability to respond to them as the need arises.

25. If passed, the Bill would mean that regardless of how unfair or irrelevant conditions in modern awards are, the FWC would be powerless to alter them if it could reduce the rate or allow a 'substitution term'. That is poor policy. It is clearly undesirable for the Bill to freeze current conditions, regardless of their unworkability, unfairness and irrelevance. Ai Group's preference would be for the Bill to be abandoned. Failing this, at least some discretion should be left to the FWC to exercise its powers in situations where it is clearly unfair not to be able to do so, and it is in the public interest.
26. For these reasons, we ask the Legislation Committee to make the following recommendation to the Senate:

*To preserve some discretion in the FWC and avoid fundamentally altering the approach to regulating employment conditions by an independent tribunal, insert new subsections (3) and (4) as follows:*

*(3) Subsection (1) does not limit the FWC's ability to make a determination to vary a modern award where the determination is made:*

- (a) as an outcome of proceedings commenced by the Commission on its own motion if the Commission is satisfied it is necessary to achieve the modern awards objective, or*
- (b) If the Fair Work Commission is satisfied that the variation is fair to employees and that the variation is in the public interest.*

*Note: Examples of when a variation may be in the public interest include if it promotes compliance with the award, promotes productivity or addresses exceptional circumstances such as a pandemic.*

## Recommendation 2 – Permit the FWC address anomalies and technical irregularities

27. The intention of the Government is that new s.135A would not apply to powers exercised by the FWC under s.160 of the FW Act. This approach is sensible and welcome. It should be recognised that s. 160 of the FW Act confers a limited power on the FWC to vary awards to remove an ambiguity or uncertainty or to correct an error.
28. There are circumstances where a modern award may contain terms relating to penalty rates or overtime rates which, although they are anomalous or technical irregularities that need to be resolved, are not necessarily 'ambiguous, uncertain or made in error' and therefore capable of being varied through s.160 determinations.
29. For context, pursuant to Item 6, Sch. 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, Fair Work Australia (**FWA**, as it was then known) was required to undertake a review of all modern awards 2 years after they came into effect. During this review, FWC was required to consider whether the modern awards:
- a. achieve the modern awards objective; and

- b. were operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.
30. FWA was specifically empowered with the ability to make a determination varying any of the modern awards in any way that FWA considered appropriate to remedy any issues identified in the review.
31. In support of this proposal we also point out that, as part of the 4 yearly review of modern awards, the FWC made countless changes to awards to deal with drafting and technical issues. During that process, an issue arose as to whether penalty rates should be expressed as either 'time and a half' or 'double time' or '150% of the minimum hourly rate' or '200% of the minimum hourly rate' (or '200% of the ordinary hourly rate' in awards where there is an all purpose payment). A number of unions claimed the latter would reduce an employee's entitlements under the award. They argued that where an employee is receiving an over award payment, it is the higher rate that should be multiplied to calculate the amount payable. The FWC rejected the unions' position, stating:

[96] Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory. Further, if an employer chooses to pay an employee more than the minimum amount payable for ordinary hours worked, the employer is not required to use that higher rate when calculating penalties or loadings. We are not persuaded by the submissions advanced by union parties and do not propose to replace the terms 150% and 200% with time and a half or double time, etc.<sup>3</sup>
32. In the subsequent years over which the Review was conducted the Commission made numerous changes to awards to ensure that penalty rates and shift allowances are calculated by reference to minimum rates rather than over-award payments. If the proposed s.135A was in place many of these changes would likely have been unable to be made as they would technically have resulted in reductions in the relevant rates. While extensive work was undertaken (by the Commission and parties) to address this and similar issues across the system there would undoubtedly be many problematic provisions that were not yet identified. It is also foreseeable that the 'redrafting' of awards that occurred during the 4 yearly review, often at rapid pace, may have resulted in anomalous and problematic outcomes that have not yet been identified. Such issues would not always be able to be addressed through the proposed carve out in the Bill of the operation of s.160.
33. It is important the FWC retains this ability to resolve these kinds of drafting anomalies and technical issues. The Bill would constrain it.
34. For this reason, the Legislation Committee should recommend that:

3. 4 yearly review of modern awards [2015] FWCFB 4658.

*To ensure the FWC retains an appropriate ability to vary awards to address anomalies and technical irregularities, new subsection be included in s.134A(3)(c) as follows:*

*(3) Subsection (1) does not limit the FWC's ability to make a determination to vary a modern award where the determination is made:*

...

*(c) to resolve an anomaly or technical irregularity.*

35. Alternatively, the same result could be achieved through the following recommendation:

*To ensure the FWC retains an appropriate ability to vary awards to address anomalies and technical irregularities, section 160 of the Act be varied as follows:*

*The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error or to resolve an anomaly or technical irregularity.*

## Recommendation 2 – Limit the principle to employees who are not managers or professionals

36. In *Variation of Professional Employees Award 2020 on Commission's own motion* [2023] FWCFB 13 (20 January 2023), a Full Bench of the FWC observed: (emphasis added)

[44] It may be accepted, at a high level of generality, that **it is not industrially appropriate for an award applying to highly-paid professional salaried employees to provide for a prescriptive regime of overtime and weekend penalty rates and shift allowances**. To a certain extent, the combination of the concept of a profession consisting of persons with specialised knowledge and skills in a recognised body of learning derived from research, education and training at a high level and held accountable to ethical and performance standards, and the payment of an annual salary intended to remunerate all aspects of the employment relationship, requires professional employees to work flexibly as required to meet the demands of their employment.

37. Ai Group agrees entirely with these comments. An outcome of that decision was the following clause was inserted into the Professional Employees Award 2020:

### **18.6 Exemptions**

The following award provisions will not apply to employees who have a contractual entitlement to an annual salary which exceeds the appropriate minimum annual wage prescribed in clause 14.1 by **25%** or more:

- (a) clause 18.2—Payment for overtime;
- (b) clause 18.3—Time off instead of payment for overtime;
- (c) clause 18.4—Penalty rates;
- (d) clause 18.5—Record keeping.

38. The same reasoning applies to other modern awards, including the Clerks Award and the Banking Award. Both confer a prescriptive regime of overtime and weekend penalty rates and shift allowances on highly-paid professional salaried employees with specialised knowledge and skills. It is industrially inappropriate for that level of prescription to continue. The intent of the Bill appears to be to make that impossible for the FWC to do.
39. In light of this, we seek the following recommendation:

(2) Subsection (1):

(a) does not limit the operation of section 144(flexibility terms) or section 160 (which deals with variation to remove ambiguities or correct errors); or

(b) apply in relation to powers of the FWC that are exercised solely in relation to highly-paid professional or managerial salaried employees to address prescriptive regimes of overtime and weekend penalty rates and shift allowances.

### Recommendation 3 – Technical changes to drafting

40. Ai Group's last recommendation seeks to align the Government's stated intent of the Bill with the drafting. Ai Group seeks s.135A(1) be amended as follows:

(1) ~~Before *in* exercising its powers under this Part to make, vary or revoke modern awards, the FWC must~~ be satisfied ensure ~~that~~ by exercising its power, it will not:

(a) ~~modern awards do not~~ reduce the rate of a penalty rate or an overtime rate that employees are entitled to receive under the award; or and

(b) ~~modern awards do not include cause to be included in a modern award terms that substitute employees' entitlement 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~~ under the award.

**Note:** Subclause (1) does not require the variation of any existing award provision.

41. The variation to proposed section 135A(1) to replace the word "ensure" with the words "be satisfied" is an important change to provide that the FWC simply needs to be satisfied that the variation won't result in a reduction in the relevant rates or remuneration rather than requiring it to effectively guarantee (i.e. ensure) that it won't. This properly empowers the FWC to apply a level of discretion in the application of the new principle.
42. The current drafting imposes an obligation to 'ensure' a certain outcome ('FWC must ensure...'), which places a very heavy burden on the FWC and is in the same terms as the modern awards objective itself. The risk of unintended consequences associated with imposing a statutory obligation of this nature on a tribunal is high. Under the current drafting, if the FWC unintentionally makes a variation to the award which results in a

reduction in remuneration for any employee, the validity of the variation may be subject to complex and costly challenges in the courts. This would result in significant uncertainty. It would also likely result in the FWC taking an unduly cautious approach to considering variations to awards. The proposed amended wording would also reflect an appropriate level of trust by the legislature in the FWC.

43. Requiring the FWC to reach a state of satisfaction that the exercise of its power will not result in the outcomes in subsections (1)(a) and (1)(b) would still adequately address the mischief that is sought to be managed by this Bill without creating such a risk.
44. The insertion of the words *"by exercising its power, it will not..."*, combined with the deletion of the words *"modern awards do not"* would remove the risk that the new provision could cause the FWC to disturb existing terms of awards. This is consistent with the proposed intent of the provision as evidenced in the additional subsection (3):

**(3) Nothing in subsection (1) requires the FWC to exercise its powers under this Part to make, vary or revoke modern awards.**

45. However, it avoids the apparent contradiction between two provisions as currently proposed. On the one hand, subsection 135A(1) requires the FWC to ensure a particular state of affairs whenever it exercises its powers under Part 2-3 of the FW Act (i.e. that modern awards do not include any substitution terms or reduced penalty/overtime rates). On the other hand, proposed subsection (3) says that this does not require the FWC to exercise any powers. Subsection (3) does no work when the FWC is exercising powers under Part 2-3 of the FW Act. As currently drafted, the FWC is, at least arguably, obliged to disturb the current provisions in modern awards to the extent they offend proposed s.135A. The Government has indicated that it does not wish for the FWC to disturb existing provisions. We welcome this, but respectfully consider the Bill could and should better reflect the stated intent.
46. Finally, our proposed insertion of the words "under the award" in paragraphs 135(1)(a) and 135(1)(b) would ensure that there is no need to take into account the impact on employees to whom an enterprise agreement that incorporates an award (as amended) by reference applies. Again, we understand this to be consistent with the Government's policy intent.
47. In advancing these drafting proposals we acknowledge that they address matters that are undoubtedly a product of the approach selected by the Office of Parliamentary Counsel rather than Government policy. We also observe that, for this reason, adopting drafting proposals should not be contentious. The last thing that should occur is for unclear legislative amendments that will inevitably be a catalyst for avoidable litigation over their interpretation to be introduced.

**Australian Industry Group**

**8 August 2025**





# About Australian Industry Group

Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our purpose is to create a better Australia by empowering industry success. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international), we have the resources and expertise to meet the changing needs of our membership. We provide the practical information, advice and assistance you need to run your business. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

## Australian Industry Group contact for this report

**Brent Ferguson | Head of National Workplace Relations Policy**

The Australian Industry Group

T 02 9466 5530

© The Australian Industry Group, 2025

The copyright in this work is owned by the publisher, The Australian Industry Group, Level 5, 441 St Kilda Road, Melbourne VIC 3009. All rights reserved. No part of this work may be reproduced or copied in any form or by any means (graphic, electronic or mechanical) without the written permission of the publisher.

