

8 August 2025

Gerry McNally  
Committee Secretary  
Education and Employment Legislation Committee

Via online upload

Dear Committee Secretary

## Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025

### Our disposition on the Bill

Thank you for your invitation to make a submission on the *Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 (Bill)*. The Business Council of Australia (BCA) does not support the Bill and believes it should not be passed in its current form or at all.

The Government has prevailed on Australian employers to trust the Fair Work Commission (FWC) as the independent industrial relations umpire. It has given the FWC greater powers than ever before via multiple amendments to the *Fair Work Act 2009* (Cth) (FW Act). This includes many new powers under both the Secure Jobs, Better Pay and two tranches of Closing Loopholes amendments. Government Ministers have repeatedly referred to the FWC's professionalism,<sup>1</sup> the impartiality of its members,<sup>2</sup> and approved its decisions.<sup>3</sup>

It is also important to recall that the government gave an undertaking to the cross bench regarding the review and simplification of modern awards, including the General Retail Industry Award (GRIA). The GRIA is renowned for its complexity in interpretation and application which not only creates challenges for small, medium and large business but more significantly, constrains employees' ability to seek work arrangements that better suit their personal circumstances. It was within these undertakings that the proceedings before the FWC were issued to simplify the provisions of the GRIA.

It is confusing, surprising and disappointing, therefore, that when presented with applications by employers to make amendments to awards, the Government has sought to remove the FWC's ability to determine those applications on their merits (having regard to the modern awards objective<sup>4</sup> and the objects of the FW Act<sup>5</sup>), and lock in the current methodology of determining penalty rates and overtime loadings on a proscriptive and resource-intensive and inflexible hourly basis, despite evidence tabled before the FWC as to the case for change. We note that overtime rates were not mentioned in the policy announcements made to preserve penalty rates ahead of the 2025 election.<sup>6</sup>

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<sup>1</sup> Burke MP, T. (2024, January 18). Press conference, Sydney [Transcript]. Ministers' Media Centre. [Press conference, Sydney | Ministers' Media Centre](#)

<sup>2</sup> Burke MP, T. (2024, May 22). *APPOINTMENTS TO THE FAIR WORK COMMISSION — Tony Burke MP*. <https://www.tonyburke.com.au/media-releases/2024/appointments-to-the-fair-work-commission>

<sup>3</sup> Rishworth MP, A. (2025, June 3). Press conference, Melbourne. Ministers' Media Centre. <https://ministers.dewr.gov.au/rishworth/press-conference-melbourne>

<sup>4</sup> FW Act, s 134.

<sup>5</sup> FW Act, s 3.

<sup>6</sup> See for example: [Labor will protect your weekend penalty rates from Dutton](#)

At a time when employees are themselves increasingly seeking flexibility and new ways of working (including under variations currently under consideration to develop work from home arrangements in the *Clerks – Private Sector Award 2020*), the FWC as an independent, expert arbiter, should have the discretion to consider whether managerial absorption arrangements and similar mechanisms are more appropriate to our evolving economy and the drive to increase productivity than an hour-by-hour assessment of penalty rates and overtime loadings.

Notably a feature of each of the relevant applications currently on foot to amend awards in this way is that the applicable *penalty rates would not be removed, but rather they would be absorbed into a higher ongoing base salary rate* (25-35% increase under the ARA's application to vary the *General Retail Industry Award 2020*, and 55% under Business NSW's application to vary the *Banking, Finance and Insurance Award 2020* ). Importantly, both those applications proposed significant safeguards for employee entitlements, including that the proposed arrangements would only operate by agreement between an employer and individual employee, and in the case of the *General Retail Industry Award 2020*, limiting their application to more senior classifications of the award where employees are in management level roles.

The ARA's application was premised on the objectives of improving flexibility including for the benefit of employees, enhancing productivity and reducing administrative burdens, thereby increasing efficiency.<sup>7</sup> In contrast, the Bill conflicts with the Government's stated goal of improving productivity in this term by locking in rigid and inflexible arrangements, thereby muting the conversation on labour productivity. This is a significant concern, as Australia's workplace relations system does not effectively support business investment and entrepreneurship. Without addressing this issue, improving living standards for all Australians will be all the more challenging.

Proposed absorption arrangements in awards aim to better recognise the seniority, responsibilities and variable working patterns of managers and higher-level staff. Currently, the lack of recognition undermines productivity and limits the practical ability for employers to provide flexibility for these managers in balancing personal and work commitments. This directly impacts on the aspirations and desires of this cohort of employees who wish to advance their careers and balance their family and other personal obligations.

Beyond the GRIA, and considering modern awards more broadly, there are multiple differing penalty rates and overtime triggers which apply inconsistently and inflexibly across many "7 day" industries. With the significant changes throughout global economies, it is critical to preserve the authority and powers of the FWC to review and test the appropriateness of legacy penalty rate frameworks and their fitness for purpose to grow employment and productivity in the Australian economy in the context of global competition.

Caution must also be exercised in the construction of the wording of the proposed legislation. For example, an unintended consequence of this proposed legislation is that it may well constrain employers and employees having the ability to decide and agree upon how work may be performed. For example, would a proposed change to a span of hours or ordinary hours clause or any additional hours mechanism be interpreted in light of section 135 A (b)? This underlines the risk of legislating to in effect, seek to direct and control the independence and objectivity of the tribunal, which has been

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<sup>7</sup> Australian Retailers Association, *Outline of Submissions*, General Retail Industry Award variations (AM2024/9 and others).

established based on its specialised expertise and to operate within given objectives of the Fair Work Act.

We thank you for the opportunity to provide this submission on this Bill.

Yours sincerely

**Wendy Black**

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