

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

Submission by the Australian Council of Trade Unions to the
Senate Education and Employment Legislation Committee
of the Australian Parliament

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Introduction

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. For nearly 100 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates that together have nearly 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

The ACTU welcomes the opportunity to take part in the Senate inquiry into the *Fair Work Amendment (Protecting Overtime and Penalty Rates) Bill 2025 (the Bill)*. Many of the 2.6 million employees reliant on modern awards rely on penalty rates to help make ends meet, particularly critical as Australia emerges from a cost of living crisis that has hit them hard. These workers are more likely to be lower paid, in insecure working arrangements, younger and women.

Yet recent employer applications to the Fair Work Commission (**FWC**) would have the effect, if successful, of reducing this additional remuneration via rolled up or exemption rates.

The introduction in this Bill of a new principle into the *Fair Work Act 2009 (FW Act)* that protects the rate of a penalty rate or overtime rate is therefore welcome. It is a simple amendment that guides the work of the Commission, and helps to strengthen the role of modern awards in providing a fair and relevant minimum safety net of terms and conditions.

A clear election commitment of the Albanese Government in response to FWC proceedings on foot, the ACTU encourages the Senate to pass the Bill promptly.

Summary of the Bill

The Bill will insert s.135A in the FW Act. Section 135A(1) will require the Fair Work Commission, when exercising its powers under Part 2-3 to make, vary or revoke modern awards, to ensure that:

- (a) the rate of a penalty rate or an overtime rate that employees are entitled to receive is not reduced; and
- (b) awards do not include terms substituting employees' entitlements to receive penalty or overtime rates, where those terms would have the effect of reducing the additional remuneration referred to in s.134(1)(da)¹ that any employee would otherwise receive.

This new principle will be applied by the FWC after it has first applied the modern awards objective (s.134), when considering applications to make, vary or revoke awards. The principle will prevent the percentage rate of a penalty or overtime rate in an award being reduced. It will also preclude substituted terms, such as exemption rates, where these would result in a reduction in the additional remuneration any employee would receive if they had been paid under an award term providing for penalty or overtime rates.

The Explanatory Memorandum for the Bill gives the example of an award variation application proposing an exemption rate for Level 3 employees.² They would be paid at least 120% of their minimum weekly rate, but excluded from a range of award entitlements including overtime, shift and weekend/public holiday penalty rates. The example indicates that, applying new s.135A(1)(b), the FWC could not make the award variation because of evidence demonstrating that one or more employees would earn less than they currently do under the award. The evidence provided on behalf of the employees includes deidentified rosters and model rosters, enabling the FWC to apply the principle based on the working patterns and comparative remuneration of affected employees. In the ACTU's view, this evidentiary basis is necessary to ensure that an identifiable employee does not have to come forward with evidence of the detrimental impact of a proposed award variation, given the risks of reprisal they may face from the employer.

¹ Section 134(1)(da) forms part of the modern awards objective, requiring the FWC to ensure that awards provide a fair and relevant minimum safety net of terms and conditions, taking into account the need to provide additional remuneration for employees working: overtime; unsocial, irregular or unpredictable hours; on weekends or public holidays; or shifts.

² *Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill, Explanatory Memorandum*, pages 7-8.

New s.135A(2) will exclude from the application of the principle in s.135A(1):

- s.144 dealing with flexibility terms, meaning that the existing framework for making individual flexibility arrangements under an award remains in place;
- FWC's powers under s.160 to vary awards to remove ambiguity or uncertainty or to correct an error – although the Explanatory Memorandum states that s.160 does not enable the FWC to substantively vary award terms.³

The amendments will apply prospectively from commencement, including in relation to applications to make, vary or revoke awards that are already before the FWC but not decided.

The amendments will also apply to awards made before the legislation's commencement. This will enable unions to make applications to vary existing award terms, e.g. requesting the FWC to use the new principle to remove exemption rate clauses or other loaded rates provisions such as annualised salaries where they have the effect of reducing the additional remuneration employees should otherwise receive.

New s.135(3) will clarify that s.135A(1) does not require the FWC to exercise its powers to make, vary or revoke modern awards. Therefore the new principle would not operate to require the FWC to undertake a review of all modern awards, or initiate a review of award terms outside the scope of an application before it.⁴

Why the Bill is needed

Many of the 2.6 million employees reliant on modern awards rely on penalty rates to help make ends meet, particularly critical as Australia emerges from a cost of living crisis that has fallen on them hard. Compared to other employees, they are more likely to be younger, female, casually employed and lower paid than the general labour force.⁵ Two thirds of them are also concentrated in accommodation and food services, retail, health care and social assistance and

³ Ibid, page 8.

⁴ Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill, Supplementary Explanatory Memorandum, page 1.

⁵ ABS Employment Earnings and Hours, May 2023.

administration, where shift work, or working nights, weekends or unsocial, irregular or unpredictable hours are common. The additional remuneration received for working such hours is a significant component of the pay of many of these workers.

Millions more employees also indirectly rely on modern awards, as the baseline of terms and conditions when negotiating for a collective agreement or individual arrangement. Penalty and overtime rates in modern awards also indirectly underpin their entitlements for working such hours.

When introducing the Bill into Parliament, the Minister for Employment and Workplace Relations stated the objective of the reform as follows:

... right now, the modern award safety net can be undermined. Currently, penalty rates and overtime rates in modern awards can be rolled up into a single rate of pay that leaves employees worse off. There are current cases on foot where employers in the retail, clerical and banking sectors have made applications to the [FWC] to trade away penalty rates of lower paid workers on awards. ... This legislation will mean that proposals like these cannot be included in modern awards, ... and ensures penalty and overtime rates of low-paid workers are protected.⁶

The ACTU strongly opposes attempts by employers to trade off workers' penalty and overtime rates, including through the introduction of "exemption rates" as proposed by employer parties in the current retail, clerical and banking/finance award variation cases. For example, the Australian Retailers Association (**ARA**) is seeking to vary the General Retail Industry Award to introduce a "salaries absorption" clause for staff at Retail Employee Level 4 to Retail Employee Level 8. Employees who agree to the arrangement would be paid at least 125% of their minimum weekly rate (or 135% for those working in late trading stores), but would not be entitled to the benefit of a range of award provisions including overtime and penalty rates. Retail workers earning as low as \$53,680 per annum would be impacted by this award variation. The ACTU and our affiliate, the Shop, Distributive and Allied Employees Association (**SDA**), estimate that:

⁶ Minister for Employment and Workplace Relations, The Hon. Amanda Rishworth MP, *Second Reading Speech – Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025*, 24 July 2025.

If the application succeeds, individual retail workers stand to lose \$5,000 a year in wages earned through penalty rates, allowances and overtime.⁷

The SDA examined 21 sample employee rosters, finding that in 13 of them, employees would be worse off, including by up to \$16,000 a year in the worst case scenario.⁸

While the ARA proposal requires the agreement of an employee to such an arrangement, in practice there would be little or no genuine choice for employees in many cases. Such terms would quickly become mandatory conditions of commencing employment, particularly where workers lack bargaining power.

In addition to the loss of workers' take-home pay, our concerns with exemption rates and other loaded rates provisions include that:

1. In the experience of many ACTU affiliates, the loaded rate is often not set high enough to ensure that employees are receiving at least the equivalent of their minimum award entitlements; and
2. Employers frequently do not comply with requirements to record working hours and carry out periodic reconciliations to ensure employees have not been paid less than the award otherwise requires. In fact the ARA has stated that its proposed exemption rate in the retail award would "reduce the 'administrative and regulatory burden' of conducting reconciliation processes".⁹

In one of the other cases, Australian Industry Group (**Ai Group**) is seeking the removal of an even broader range of employees' entitlements under the Clerks – Private Sector Award, in exchange for an unspecified exemption rate. Again, included in its rationale is the (perceived) necessity to alleviate the need for employers to maintain and verify records of employees' working hours, as these requirements "result in considerable inefficiencies and costs, and they compound the regulatory burden facing employers".¹⁰

⁷ SDAEA, [Retail workers face losing \\$5,000 a year – and it won't stop there](#), Media Release, 20 March 2025.

⁸ Australian Financial Review, "HYPERLINK "<https://www.afr.com/work-and-careers/workplace/penalty-rates-battle-could-leave-retail-workers-5k-worse-off-union-20250311-p5liq>"[Penalty rates battle could leave retail workers \\$5k worse off: union](#)", 11 March 2025.

⁹ "Retailers seeking to 'tear up rules' that bit them: ACTU", *Workplace Express*, 30 January 2025.

¹⁰ FWC Application to Vary the Clerks – Private Sector Award by AiGroup, 31 July 2024.

The ACTU's position is that the appropriate avenue for employers to obtain any flexibility in the application of award terms is not by undermining the safety net for award-reliant employees, but rather through the negotiation of an enterprise agreement. Where employers seek trade-offs of this nature in enterprise bargaining, employees have certain statutory safeguards including the application by the FWC of the "better off overall test"¹¹, as well as usually having the bargaining power, through their trade union, to negotiate a genuinely fair outcome. The Bill would introduce necessary safeguards for employees against penalty and overtime rate reductions in the award context, including the requirement that the FWC assess whether a term substituting overtime or penalty rates would result in a reduction in remuneration for any employee.

Responding to employer criticisms of the Bill

In response to the Bill, the Ai Group has claimed that it will "neuter the Fair Work Commission's ability to be the independent umpire and will provide less flexibility when Australia workers want more".¹² Both claims are wrong.

The Bill does not in any way impede the independence of the FWC, nor intrude upon its role as the impartial arbiter of terms in modern awards. The statutory criteria which guide the FWC in this role include the modern awards objective in s.134 of the FW Act, and the minimum wages objective in s.284. It is always open to the Parliament to adjust these criteria, as it did with the addition of improving access to secure work and achieving gender equality in the workplace in 2022,¹³ and as it did in the attempt to provide additional protection of award penalty rates in 2013 with the addition of s.134(1)(d). However, this adjustment to the modern awards objective was undermined by the decision in the *2017 Penalty Rates Case*, and would be undermined further if the current employer applications to vary awards referred to in the Minister's Second Reading Speech were successful. As the Minister also stated, the Bill "introduces a high-level principle, not a prescriptive rule".¹⁴ It would be up to the FWC to assess whether specific modern award terms satisfy the principle, in each case that comes before it.

¹¹ FW Act ss. 193-193A.

¹² Ai Group, [Penalty rates bill will make it harder to offer flexibility when workers want more](#), 24 July 2025

¹³ Section 134(1)(aa) and (ab), inserted in the modern awards objective by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*.

¹⁴ Minister for Employment and Workplace Relations, The Hon. Amanda Rishworth MP, *Second Reading Speech – Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025*, 24 July 2025.

Nor will the Bill impede any flexibility sought by employers. The only thing it impedes is attempts to cut employees' pay. Employers are still free to advance applications or positions that leave employees better off overall, either through award variations sought, or through enterprise bargaining or individual flexibility agreements.

Employer organisations have also argued that the Bill “reduce avenues for lifting productivity.” and “runs contrary to the government’s stated ambitions to lift productivity”.¹⁵ However all the Bill does is prevent the reduction of the rate of penalty rates in modern awards. While that might rule out a chance to increase company profits, that has nothing to do with improving productivity. Labour productivity measures the quantity of economic output divided by the labour time to produce it – cutting pay doesn’t come into that measure and nor should it. Nor does the Bill prevent employers and employees from discussing and agreeing on measures to improve workplace flexibility, as discussed above.

A related argument put by the Productivity Commission in a report in 2015 was that there “are likely [to] be some positive employment impacts, though less than those sometimes claimed by the proponents of reduced penalty rates” of a reduction in the level of penalty rates.²¹ Even this claim was eventually disproven in practice.

In its decision in *4-Yearly Review of Modern Awards – Penalty Rates (2017 Penalty Rates Case)*,¹⁶ a Full Bench of the FWC acceded to an application by employer parties to reduce Sunday and public holiday penalty rates in the hospitality, retail, fast food and pharmacy awards. The Sunday reductions were phased in over periods of 3 to 4 years, while those for public holidays were immediate. This decision was made despite the inclusion of s.134(1)(da)¹⁷ in the legislation in 2013, which was intended “to ensure that work at hours which are not family friendly is fairly remunerated”.¹⁸ In the *2017 Penalty Rates Case*, the Full Bench considered that the s.134(1)(da) requirement that the FWC take into account the “need to provide additional remuneration” for employees working on weekends or public holidays did not require that each modern award provide additional remuneration for employees working on weekends or public holidays. Instead,

¹⁵ Ibid; Australian Retailers Association, [Penalty rates Bill undermines choice, flexibility and remuneration for employees and employers](#).

¹⁶ (2017) 265 IR 1.

¹⁷ See note 1 above, introduced by the *Fair Work Amendment Act 2013* with effect from 1 January 2014.

¹⁸ Minister for Workplace Relations, The Hon. Bill Shorten MP, *Second Reading Speech – Fair Work Amendment Bill 2013*, 21 March 2013.

the FWC's assessment required consideration of matters such as the impact on the relevant employees of working at those times (including impacts on their health and work/life balance); and the extent to which working at such times is a feature of the particular industry.¹⁹ Further, s.134(1)(da) "is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned".²⁰

Among the reasons for the Full Bench's decision to reduce penalty rates in the relevant sectors was its agreement with the conclusion of that Productivity Commission Final Report, quoted above. In the Full Bench's view: "there may be some modest gains in employment as a consequence of a reduction in penalty rates."²¹ However, several studies have shown that the anticipated increase in employment did not transpire.

For example, Markey and O'Brien's 2021 research "demonstrate[d] conclusively that the phasing in of wage premium (penalty rate) reductions from 2017 did not impact positively on employment in [the] Retail and Hospitality sectors".²² This study also identified a decline in average weekly hours and earnings for employees working under the retail and hospitality awards, after the first two stages of Sunday penalty rate reductions arising from the *2017 Penalty Rates Case*.²³ The authors concluded that the "FWC penalty rates decision was a major and costly exercise, which appears to have been ill-founded, given the lack of employment impact".²⁴

The decision and its subsequent impact serve as a cautionary tale, and yet another reason why the Senate should pass the Bill before it.

¹⁹ (2017) 265 IR 1 at [190].

²⁰ Ibid at [195].

²¹ (2017) 265 IR 1 at [686].

²² Raymond Markey and Martin O'Brien, "Analysing the Impact of Sunday Wage Premiums Reductions: Implications for Minimum Wage Research" (2021) 63:5 *Journal of Industrial Relations* 728, at 745.

²³ Ibid, 740.

²⁴ Ibid, 746. See also Martin O'Brien, Raymond Markey and Eduardo Pol, "The Short Run Impact of Penalty Rate Cuts on Employment Outcomes in Retail and Hospitality Sectors in Australia" (2018) 37:3 *Economic Papers* 270; Martin O'Brien and Raymond Markey, "Labour regulation reform and sectoral employment outcomes: a case study of public holiday penalty rate reductions in Australia" (2020) 27:7 *Applied Economic Letters* 559; Jim Stanford, *Update on Penalty Rates and Job-Creation: Two Years Later*, Briefing Note, Centre for Future Work, Australia Institute, 1 July 2019.

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