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Committee Secretary
Senate Education and Employment Committees
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Parliament House
Canberra ACT 2600
By email: seniorclerk.committees.sen@aph.gov.au

Dear Committee Secretary,

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

Ai Group respectfully seeks leave to supplement its written submissions dated 8 August 2025 with this brief letter.

At paragraph 18 of our earlier submissions, Ai Group detailed the record keeping obligations under the FW Act, FW Regulations and, in particular, modern awards. We wish to emphasise two points regarding those record keeping obligations:

1. First, they are unworkable. It is unrealistic to expect widespread compliance with the obligations. This is a significant problem for modern awards which the Bill seeks to set in stone. It is not appropriate to impose harsh penalties for non-compliance, including imprisonment, where the independent tribunal itself acknowledge strict compliance is unlikely.

2. Second, a key reason why Ai Group has asked the FWC to insert exemption clauses into modern awards is to remedy this problem. The Bill appears intended to frustrate our attempts to do so.

Currently, under the Banking Award and the Clerks Award, employers who remunerate employees by way of annualised salaries face severe penalties, including millions in fines and even imprisonment, unless they record and monitor all hours of work and undertake periodic reconciliations. There are a few modern awards that contain exemption rate clauses which relieve this burden for managerial and professional employees who are paid annual salaries that exceed the minimum wages by a specified amount.[1]

Some awards, including the Banking Award and Clerks Award, contain ‘annualised wage arrangement clauses’. Until 2020, those clauses did not require employers to record start

[1] Registered and Licensed Clubs Award 2020, clause 18.4, which exempts managers on 20% or 50% above the minimum rates; Professional Employees Award 2020, clause 18.6, which exempts professional employees who are paid 25% above the minimum rates to overtime and other provisions; Hospitality Industry General Award 2020, clause 25, which exempts managerial staff who are paid at least 125% of the minimum annual salary in the award; Business Equipment Award 2020, clause 16, which exempts ‘technical stream’ employees who are paid a salary that exceeds $76,795 or higher.

and finishing times or undertake periodic reconciliations. However, in 2018, the FWC considered the requirements of s.139(1)(f) of the FW Act in the context of annualised wage arrangement clauses in modern awards. Section 139(1)(f) states that modern awards may include the following kind of term: (Emphasis added)

> (f) annualised wage arrangements that:
>
> (i) have regard to the patterns of work in an occupation, industry or enterprise; and
>
> (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
>
> (iii) include appropriate safeguards **to ensure that individual employees are not disadvantaged**;

The FWC observed: (Emphasis added)

> [105] The requirement in s 139(1)(f)(iii) is that an annualised wage arrangements term include "*appropriate safeguards to ensure that individual employees are not disadvantaged*". To "*ensure*" there is no disadvantage is, on the ordinary meaning of the language used, to make certain that it does not happen, so the safeguards required must be sufficient to allow that state of certainty to be achieved. Assessing whether disadvantage exists is inherently a comparative exercise, but the provision does not expressly state what the comparator is. However, the immediate context makes it clear enough that the comparison is between the benefits to the employee under the alternative afforded by an annualised wage arrangement compared to the normal "*separate payment of wages and other monetary entitlements*" under the relevant award. Because the subject matter is remuneration, it is necessarily implicit that the question of whether there is disadvantage involves a mathematical comparison between remuneration under the annualised wage arrangement and the remuneration which would otherwise be payable under the award's provisions. That the subject matter is *annualised* wage arrangements suggests that the issue of disadvantage may be assessed over the course of a year (and not necessarily within the pay periods prescribed in the award). **Therefore, in summary, a permissible annualised wages term must guarantee that, over the course of a year, an employee does not receive any less remuneration under the arrangement than would otherwise be payable under the provisions of the award.**[2]

Having so found, the FWC considered it was compelled to vary the annualised wage arrangement clauses that did not impose record keeping and periodic reconciliation requirements. On 23 December 2019, the Commission published its draft variation determinations for the annualised salaries clauses in modern awards. On 12 February 2020, the Commission varied the Clerks Award and Banking Award and inserted the annual reconciliation requirement and included the obligation on the employer to keep a record of

[2] [2018] FWCFB 154.

the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking reconciliations.[3]

The amendments to the annualised wage arrangement provisions caused widespread concern and complaints in industry.

In a twist of irony, with the onset of the pandemic just weeks away, arguably the most significant change to working patterns in recent years was about to occur. The resulting widespread shift to remote working or 'working form home arrangements' and the greater levels of flexibility many employees subsequently came to enjoy, combined with new practical challenges relating to recording working hours performed in such a context only exacerbated the practical challenge for employers of complying with the new award provisions.

The FWC itself expressed "*grave doubts*" annual reconciliation requirements in annualised wage arrangements "*would actually be the subject of widespread compliance*."[4] The FWC also noted that strict compliance with such a term "…*would obviate many of the benefits of an annualised wages arrangement which we have earlier identified. There would be little if any benefit in administrative simplicity: the employer would still have to keep records of all hours worked."* However, it ultimately considered it had no discretion in this regard in light of the inflexibility of s.139(1)(f).

The absence of exemptions rates in modern awards is imposing an oppressive regulatory burden.

By adopting similar wording in proposed section s.135A of the Bill, it effectively replicates the major difficulties that arise from s.139(1)(f) that is the catalyst for the current regulatory quagmire. In so doing, the Bill will stifle the FWC's discretion to implement a fair alternate remuneration method to the hourly rate regime that is unworkable in some contexts. There must be a better way.

The Bill proceeds on an assumption that the purpose of exemption rate clauses sought by some parties is to reduce penalty rates and overtime. That is not true. The purpose is to provide a workable method by which employers can pay employees high levels of remuneration, particularly for managers and professionals or other staff the have a degree of autonomy over their precise working hours, without imposing an impossible regulatory burden. It seeks to provide an alternate, but nonetheless fair and indeed beneficial system for remunerating workers.

Given the above context, and for reasons identified in our submissions, the Australian Industry Group has not only identified our strong objection to the Bill, we have also sought to constructively propose sensible variations to it so that it reflects a less simplistic and heavy handed regulatory response while still enhancing protections for workers.

[3] PR716593.
[4] [2018] FWCFB 154, [120].

Yours sincerely,

Brent Ferguson
Head of National Workplace Relations Policy