Senate Education and Employment Legislation Committee

Inquiry into the provisions of the *Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025*

Australian Chamber of Commerce and Industry

RESPONSE TO QUESTIONS ON NOTICE

19th August 2025

QUESTION:

> ***The Prime Minister and the Treasurer have identified productivity as a key priority for this term of government. In your view, what impact will this Bill have on productivity, and in particular on the ability of small businesses to focus on their core operations rather than diverting resources to administrative and regulatory compliance?***

ACCI refers to our submission as filed with the Committee dated 8th August 2025, in particular paras 11 and 65-79 therein.

QUESTION:

> ***What would be the likely impact on small and medium-sized businesses, and their employees, if additional record-keeping obligations were introduced in relation to exemption or substitution rate arrangements? Have you quantified this in terms of potential financial loss, or the additional business hours that would be required for regulatory compliance?***

ACCI refers to the answer given to the above question and notes further that if the time per payroll process taken for an employer to make one payment to each employee using an exemption rate is, for example, one minute, then the total time spent verifying and processing the payroll for 30 employees would equate to 30 minutes.

If, however, the exemption method was not available to an employer, then an employer would (using the Business Equipment Award as an example) need to:

Examine the time and roster records for each employee;

Compare that record against the Modern Award terms to check that if the roster record for each individual employee involved:

- Work was performed within or outside of the ordinary hours of work and rostering provisions at clause 12, whether this triggered any penalty rates, and calculate those rates;
- Whether Meal breaks were taken in accordance with clause 13;
- Whether the employee performed any higher duties pursuant to clause 14.4, and if so, calculate the relevant allowance payable to the employee;
- Whether the employee was entitled to any of the following allowances:
    - First aid;
    - Representation
    - Area allowance; or
    - Living Away from Home Allowance;

      And then calculate the days and times upon which each individual employee might have triggered eligibility for these allowances, and calculate the value of same having regard to the provisions of clauses 17.2 (c) (d) and (f);
- Whether an employee worked overtime in accordance with clause 20 and, if so, calculate the amount of the overtime for each employee;
- Whether an employee was entitled to special provisions for dayworkers (clause 21) and shift workers (clause 22) and if so, calculate the value of such provisions; and
- Whether an employee worked on a public holiday, and if so, calculate the amount of payment required pursuant to clause 28.4.

If we make the very conservative assumption that each of the above steps take an experienced employer, say, 1 minute for each step, then it would mean an additional 12 minutes payroll time for each individual employee.

For a business with 30 employees, this would total 360 minutes per payroll cycle, or 6 hours. This would see an employer spend 5.5 hours more payroll time each cycle for a staff of 30 employees, compared to using the exemption rate method.

If such additional payroll time was required for say, 5000 businesses, this would be the equivalent of 1143 additional business days, or 3.13 years.

QUESTION:

To what extent can individual flexibility arrangements serve as an alternative to exemption rate clauses?

Individual flexibility arrangements (IFAs) are materially different from exemption rate clauses and the extent to which they serve as an alternative is minimal.

Largely, this arises because of the technical differences between each arrangement and the way in which they arise, in that:

- Exemption rate arrangements (generally speaking) need only be confirmed in writing once at the commencement of the employment relationship and will continue to apply as an ongoing arrangement. This allows for the arrangement to provide certainty and stability as to the nature of the arrangement moving forward, with both parties having a clear understanding of how it will apply. This generates earnings certainty to employees and allows employers to estimate rostering and wage costs moving forward as well as allowing an employer to enjoy payroll simplicity (one payment per employee per cycle) rather than forcing the use of a methodology for determining penalty and overtime rates on a prescriptive, resource-intensive, time consuming and inflexible hourly basis.
- Exemption rates are usually broadly expressed in Modern Awards so that they can have application to particular cohorts or classes of employees (such as, with reference to particular classifications – such as managerial employees in the Registered Clubs Award – or with reference to particular streams of classification – such as Technical Stream employees in the Business Equipment Award.
- IFAs may only be negotiated once an employment relationship has commenced, and then only apply to a particular employee and employment relationship. They are negotiated on an employee by employee basis and, because of this, are unable to have uniform application to the terms applicable to other employees in the business.
- Exemption rates, in return for generous salary minimums specified by a particular Award, allow for the non-application of a range of specified Award clauses (sometimes 10-12 in number) and are not limited to a specified or limited number provisions as IFAs are (which are limited to 5 matters).
- IFAs can be terminated at any time, by written agreement between the employer and the employee; or by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013). Because of this, IFAs do not provide the same degree of stability and certainty to employees and employers when compared to exemption provisions.

QUESTION:

> ***What has been the experience of businesses in using individual flexibility arrangements, and what feedback can you provide on their practical application in the workplace?***

IFAs have had little or no practical take-up in most businesses, mainly for the reasons outlined in the question immediately prior. They provide no certainty and stability to either party and the administration obligations are significant when compared to exemption provisions. In addition:

Enterprise agreements can vary or limit the matters that can be included in an IFA. It is common for union agreements, particularly in certain sectors, to significantly reduce the matters that can be included in an IFA thereby making them virtually impossible to use or entirely irrelevant.

IFAs can be unilaterally terminated by either party which does not provide business certainty.

A November 2024 from the General Manager of the Fair Work Commission[1] undertook research about the use and take-up of IFAs and found:

- Interviewees across all types of stakeholders reported that IFAs were not widely used;
- IFAs were not utilised more widely due to a limited understanding and awareness of the entitlement;
- a concern by employers that an IFA could be unilaterally terminated by the employee, leading to uncertainty;
- requests for IFAs were refused by employers was due to operational requirements. This could be in circumstances where a change to working hours or working from home was sought but the role was required to deal with customers or provide a service, or for security reasons, or because businesses did not have capacity to change the working arrangements of other employees; and
- Almost half of enterprise agreements had a flexibility term that differs from the model flexibility term and specifies which term(s) can be varied.

[1] General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009, 2021–2024, Commonwealth of Australia (Fair Work Commission) 2024

QUESTION:

> ***In your submission, you expressed concerns regarding the circumstances in which the provisions of the Bill would be triggered. Could you elaborate on these concerns?***

ACCI refers to our submission as filed with the Committee dated 8th August 2025, in particular paras 33-50 therein.

However, in short, ACCI submits that the provisions of the Bill are open to be triggered by the Commission:

- Any time it exercises its powers under Part 2-3 to make, vary or revoke a Modern Award; and
- In relation to any future attempt to insert a provision into a Modern Award of a rolled-up rate, such as an exemption or annualised salary provision; and
- In relation to any EXISITNG provision already contained in a Modern Award that contains a rolled-up rate, such as an exemption or annualised salary provision.

As noted in our evidence to the Committee, this places provisions such TOIL, WFH, salary and other exemption rates almost impossible to make in the future and jeopardises the ongoing existence of such provisions in Modern Award terms where they currently apply and work for both employers and employees.