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Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600
By email: eec.sen@aph.gov.au

Dear Committee Secretary,

Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 – Questions on Notice

This correspondence is in response to the five questions on notice from Senate Kovacic following Ai Group's appearance before the Committee on 13 August 2025 in Melbourne. Ai Group has previously responded to four of the five questions and answers the final question herein.

Question: At paragraph 40 of Ai Group's submission, you propose various technical changes to the Bill, can you explain what your concerns are with the drafting of those provisions?

Ai Group has three major concerns that we would here seek to emphasise:

1. Unless the Bill is amended, there is an unacceptable risk the FWC will be compelled to alter existing terms and conditions in modern awards, notwithstanding the inclusion of subsection (3) that states the FWC is not required to exercise its powers.
2. The requirement for the FWC to 'ensure' particular outcomes risks setting an unreasonably high bar with insufficient discretion for the FWC.
3. The 'ensure' element also risks making modern awards susceptible to attack on the basis of invalidity as it could impose the correctness standard of appeal to decisions of the FWC regarding modern awards instead of the House v King standard.

The amendments are described in paragraph 40 of our earlier submission to resolve technical issues with the Bill. 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.

For ease of reference, the current wording for the chapeau is: [emphasis added]

> (1) In exercising its powers under this Part to make, vary or revoke modern awards, **the FWC must ensure that**:

Concern 1 – the risk the FWC will be compelled to alter existing arrangements

Ai Group's concerns stem from the phrase "the FWC must ensure" in combination with the words "modern awards do not include". The provisions may be read as requiring the FWC, when exercising any of its relevant powers going forward, to remove or alter existing 'substitution terms' that offend s.135A(1)(b). Although we accept that the Bill will not require the Commission to initiate any broad review of existing award terms, this may nonetheless be required when a party makes an application seeking a variation to such terms.

Where parliament has sought to guide the FWC's powers, two approaches are generally taken in the *Fair Work Act 2009*. They are:

a) Approach one (the default): Require the FWC to reach a level of satisfaction before it can exercise certain powers. For example:
    i. In unfair dismissals, the FWC can only make orders for reinstatement and compensation where "it is satisfied" the person has been unfairly dismissed;
    ii. In applications for protected action ballot orders, the FWC must grant the order if "it is satisfied each applicant has been, and is, genuinely trying to reach agreement";
    iii. In industrial action, the FWC has various discretionary and mandatory powers that must be exercised to terminate or suspend industrial action if it is satisfied particular circumstances exist (e.g. where it is satisfied the action is threatening to cause significant economic harm for example).
b) Approach two (extremely limited): Require the FWC to ensure particular outcomes are met by deploying the phrase 'must ensure'. For example:
    i. The modern awards objective states that "*The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net*"; and
    ii. In the 4 yearly reviews, the FWC was required to ensure that specified persons had a reasonable opportunity for specified persons to make written submissions to it about default fund terms.

There are a few other examples where 'ensure' is featured in the Act, though they tend to only indirectly relate to the FWC. This includes, relevantly, the potential for annualised wage arrangement terms to be included in modern awards provided the term 'ensures' individuals are not disadvantaged (s.139(1)(f)(iii)).

The first option is the default approach in the FW Act wherever parliament has wanted to limit the FWC being able to exercise powers to particular circumstances. The latter approach is rarely used in the FW Act. We understand s.135A is only meant to apply to future exercises of power in relation to terms not currently in the awards. Given this, we do not understand why the government has elected to take this alternative approach in the Bill that is only used in very particular sections currently. Those sections have led to the FWC altering existing terms and conditions in awards, which is the opposite of what we understand the government's intention is here. Notably, section 139(1)(f) has led to, and in the FWC's view necessitated, the development of what are widely regarded as unworkable annualised wage arrangements provision

Our major concern is that Bill will require the FWC to disturb existing terms and conditions in awards. The Government has insisted it won't have this outcome, based we assume on Departmental advice, and have sought to reassure parties by including new sub-section (3):

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

We welcome efforts to clarify the operation of the Bill but are concerned that the change has not gone far enough. Indeed, subsections (3) and (1) are now arguably contradictory. Subsection (1) requires the FWC to ensure particular outcomes. Subsection (3) says subsection (1) does not require the FWC to exercise powers. Of course, the FWC only achieves outcomes by exercising powers. How the FWC will navigate these competing obligations remains to be seen. It would be preferable to provide the FWC clarity rather than leave it to the institution to guess.

To demonstrate our concern, we ask the Committee to assume the Bill passes in its current form and the FWC is considering an application to vary an aspect of the exemption rate in the Registered and Licensed Clubs Award 2020. In this circumstance, there is a risk the FWC will take the view that because they are exercising powers under Part 2-3 of the Act, the new section mandates it must ensure the award does not contain impermissible substitution terms. If they consider the current exemption clause to fall foul of the provision, they may need to remove the current exemption clause or alter it to bring the clause in to alignment with the new section.

Our intention in proposing amendments is to remove or reduce the risk that the Bill would cause a disturbance to existing provisions by requiring that the FWC "must *be satisfied that by exercising its power, it will not…cause to be included in a modern award…"* a substitution term that has the prohibited effect. This would clearly not require it to interfere with existing terms and would bring s.135A(1) into conformity with s.135A(1)(3). The inclusion of the proposed statutory note would hopefully serve to put the matter beyond doubt.

Concern 2 – An oppressive burden with little discretion

The requirement to 'ensure' modern awards do not include impermissible substitution terms which would have the effect of reducing an individual's remuneration is unreasonably high.

It is higher than that which would apply under our proposed amendments, which would instead require the FWC to be satisfied that the exercise of its powers will not have the effect of those outcomes.

We understand from representations by the Department and government that s.135A is intended to be a 'principle'. Plainly, the term is not a principle and is instead an express prohibition on certain matters.

The risk is that the FWC will not include 'substitution terms' that deliver any practical benefit because of some slight possibility, no matter how remote, of an outlier employee's working pattern leading to higher remuneration. This would foreseeably mean that the safeguards imposed to avoid such a situation may ultimately undermine any utility of a such a term. This is analogous to precisely what the FWC said in relation to the annualised wage arrangement terms when it inserted the now notoriously problematic periodic reconciliations and time recording requirements in annualised wage arrangements because of a view it was compelled to do so by s.139(1)(f), which essentially provides that annualised wage arrangement terms must ensure employees are not disadvantaged.

If the current wording of the Bill is retained, it may be viewed by the Commission as limiting its ability to address the controversy and dissatisfaction in industry over the annualised wage arrangement clauses included in awards because of s.139(1)(f) through an exemption rate. For convenience, we here also note the concern of Professor Stewart that the Bill may require the Commission to disturb existing provisions, including annualised wage arrangements, in order to align them with what he perceives, in effect, to be an even more onerous requirement than s.139(1)(f). These concerns should be addressed by the Committee recommending that the Bill is not passed. Absent such an approach, the modest changes proposed by Ai Group should be recommended, at the very least.

We understand the Department's view (as expressed during the public hearing) to be that the wording in the Bill is to the same effect as that proposed by Ai Group. That view, if it is held, is incorrect. There is obviously a significant difference between reaching a state of satisfaction before exercising powers on the one hand and having an absolute requirement to ensure a particular outcome in the other. The latter is an ongoing obligation and a heavy burden.

Concern 3 – Appellate standard

Our other concern relates to the appeal standard of the FWC decisions. Reaching a state of satisfaction is generally regarded as an indicator of 'House v King' standard of appeal rather than the correctness standard of appeal. If someone can establish that a modern award contains a term that contravenes s.135A(1)(a) or (b), they could seek a declaration from a court of competent jurisdiction that the FWC has failed to carry out its statutory obligations and that the modern award is beyond power. Where the House v King standard applies, the risk is lessened. Put simply, the retention of the word 'ensure' rather than adopting a reference to 'satisfaction' in the chapeau of s.135A increases the likelihood that the Commission will fail to meet the requirements of s.135A and that, should this occur, any

resulting 'substitution' term may be invalid. At the very least it raises the prospect of disputation over such matters.

Yours sincerely,

Brent Ferguson
Head of National Workplace Relations Policy