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Committee Secretary
Senate Education and Employment Committee
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

Thank you for the Committee's email of 18 August 2025 and the five additional Questions on Notice (QON) from Senate Kovacic following Ai Group's appearance before the Committee on 13 August 2025 in Melbourne and its lodgement of an initial written submission (#17) and supplementary submission (#17.1). Ai Group's additional responses are as follows:

Productivity

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?

The Bill will undoubtedly reduce the ability of the Commission to make necessary changes to awards that improve productivity, no matter how compelling the case.

For example, it will hamper the ability of the Commission to implement 'exemption rate' clauses or similar 'substitution rate' changes, or modify the penalty rates regime currently found in awards. Changes to these kinds of provisions can improve productivity, or, at the very least, remover barriers to organisations and employees working in a way that facilitates improvements to productivity.

To the extent that the Bill ultimately operates as an impediment to the adoption of exemption rates in awards that do not contain them, it will directly hamper efforts to vary awards to improve productivity. In this regard we emphasise two points:

Firstly, exemption rates for relatively highly paid employees provide a fair solution to the administrative burden and financial cost associated with time recording and reconciliations that are currently required by the notoriously unworkable annualised wage arrangements provisions that were inserted into many awards. It would also provide employees with benefits such as predictable stable wage significantly above current award rates, rather than

one that fluctuates between pay periods. Crucially, the time and cost savings associated with relieving parties of this administrative burden will mean their resources can be directed towards more productive endeavours.

In advancing this point, we also observe that it is no answer to suggest that awards will still be able to be amended to include exemption rates provided that the Commission *ensures* they do not reduce the otherwise payable remuneration for *any* employee. By adopting such a heavy handed requirement there is every likelihood that the Commission will never be able to be convinced that an exemption rate is permissible. The Bill potentially shuts the door on the possibility of the Commission amending awards in a way that will improve productivity. reduce the current regulatory burden and undoubtedly encourage employers to pay thousands of employees at above award wages, due to the concern that some employees *might* receive less pay as a result.

Secondly, by removing the application of *some* of the highly restrictive and prescriptive provisions in awards to highly paid employees, an exemption rate can relieve an employee and employer of the necessity to work according to a rigid pattern of hours as prescribed by an award and instead permit the employee to adopt a pattern of hours that best accords not only with their personal circumstances, but also with the requirements of their role. This is obviously appropriate in the context of senior, professional or managerial employees that are engaged to achieve a particular outcome and who enjoy relative autonomy over their hours. Hence, we have proposed that, at the very least, there should be an exemption in the Bill for these kinds of workers if they are highly paid.

We separately note that by setting in stone the penalty rate regime currently contained in an award, the Bill effectively sets in stone current working practices. This is the despite the fact that a Full Bench of the Commission has accepted, after properly hearing evidence on the matter, that penalty rates can be a disincentive to an employer offering work at particular times (**Penalty Rates Decision**).[1] This will mean that the current quantum of penalty rates will remain fixed no matter how compelling the case for any modification to them and no matter how modest the changes. This will operate as a barrier to an employer offering additional work, and by extension, offering additional remuneration to its employees. It will hamper the ability of employers to improve their productivity by making better use of their capital assets or implementing more productive systems of work if that different use of assets or systems of work requires the working of a broader range of hours at times that attract unsustainable penalty rates.

Take for example, the fast food, hospitality and retail sectors. There can be no doubt that there has, over time, been an increased demand for the services of such sectors at a broader range of times as consumer patterns have changed. Similarly, as has been recognised by the Commission, many employees want to work outside of what may be regarded as standard 9-5 weekday working hours given they are, to a large extent, often young people balancing other commitments, such as study. In the Penalty Rates Decision, the Commission considered these sectors and the extensive evidence put to it, despite union opposition, and

[1] Decision – 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001

determined in a carefully reasoned judgment to modestly reduce some penalty rates for some employees. This has undoubtedly facilitated greater work opportunities and productivity for some employers as organisations are better able utilise not only labour but their capital assets to achieve increased outputs.

Take for example the road transport industry. There is a growing imperative to undertake many road freight tasks outside of peak traffic hours to enhance productivity. This imperative is only likely to grow as the size of our road freight tasks increase and traffic problems associated with population growth intensify. However, the current overtime and shift worker provisions in the *Road Transport and Distribution Award 2020* are not fit for purpose. Indeed, in a previous review of this award, there was mutual recognition by the major industrial parties with an interest in that instrument, the TWU and the Australian Industry Group, that an amendment to the award was necessary to address this issue but no consensus as yet as to what the appropriate variation would be. While no party is currently advancing an application to vary that award to deal with this issue, it is foreseeable that the Commission may need to reassess the existing penalty rates regime within the award in order to ensure that the road transport industry (which operates on notoriously tight profit margins) is able to effectively meet to the demands of the future.

Ultimately, the Bill robs the Commission of its capacity to modify the key aspects of the rules governing payment for work that both directly and indirectly impact productivity. At a time when we should be looking at urging the Commission to assess how our outdated, highly complex and unworkable award system can be simplified and modernised, the Bill ties the Commission's 'hands' in a way that will constrain its ability to facilitate productivity growth and instead perpetuate known problems in the system. This will foreseeably result in the awards system increasingly operating as a brake on efforts by employers and industry to improve innovation and productivity.

Small Business

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?

The record keeping requirements currently contained in the Fair Work Regulations 2009 and awards are unworkable in many contexts for many small and medium sized businesses. They create costly and unwarranted administrative burdens for employers and compliance with such provisions is unachievable in practice for many of these employers.

The results of a recent survey conducted by Swinburne University at the Commission's request in the context of proceedings considering how to vary the *Clerks - Private Sector Award 2020* to remove award-derived barriers, puts into sharp focus the nature and extent of difficulties employers face in recording hours of work for employees working remotely in order to comply with the current annualised wage arrangements clause of the award. The

survey, unsurprisingly, demonstrates that overwhelmingly employers who allow employees to work from home have no visibility over the precise working hours such staff undertake and, in many instances, permit employees to select the precise hours they work irrespective of the constraints under the award.

It is not possible to accurately identify the precise impact of additional record keeping obligations on existing record keeping or substitute rate arrangements. We note that the intent of the Bill is, as we understand it, to not disturb existing arrangements (although we note that it would be beneficial for the Bill to be amended to ensure that it does not have this impact). Nonetheless, it would undoubtedly fundamentally undermine the utility of these types of provisions.

The relief from onerous record keeping requirements achievable through 'exemption rate provisions' or 'substitution terms' is particularly beneficial for small employers or medium sized employers that typically take a trusting and informal approach to the monitoring of hours of work of staff. The relief is also particularly important because such businesses often lack the economies of scale, or frankly the resources, to implement potential technological solutions or managerial practices that are necessary to ensure compliance with the exceptionally onerous record keeping requirements that the workplace relation system otherwise requires.

Individual Flexibility Arrangement (IFAs)

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

Individual flexibility arrangements are not a workable alternative to exemption rate clauses. Any suggestion that they are reflect, at best, a lack of appreciation of their technical limitations and the practical difficulties that employers face when they use them. Indeed, any such suggestion is arguably misleading of how this individual flexibility arrangements operate in practice.

All modern awards contain clauses providing for individual flexibility arrangements. The Commission has nonetheless accepted the necessity to include exemption rates in modern awards. Indeed, the Commission only relatively recently determined to include an exemption rate in the *Professional Employees Award 2020*.[2]

The individual flexibility term in awards provides a restrictive mechanism through which an employer can enter into an arrangement with a current employee to vary the application of *some* award provisions to suit their needs. They do not offer the degree of flexibility afforded through an exemption rate and their utility is hampered by a raft of considerations.
In relation to the difficulties or limitations related to the use of IFAs we note:

[2] Clause 18 - Determination – Variation of Professional Employees Award 2020 on Commission's own Motion; Decisions [2023] FWCFB 13 and [2023] FWCFB 58.

- IFAs must result in the employee being better off overall at the time the arrangement is made as compared to the alternative of not making the arrangement. The burden is on the employer to prove the employee is better off. In the absence of time recording, it is extremely difficult to prove employees are in fact better off overall. For example, if an employer and employee vary the overtime provisions in the award such that they have no application to the employee, how does the employer prove the employee is better off overall under the arrangement unless the arrangement includes a requirement to record all time worked?
- There will always be a degree of uncertainty as to whether the arrangement satisfies the requirements of an IFA. If the employee is found to not be better off overall, the employer will be liable for civil remedy provisions (i.e. significant financial penalties). This ever-present uncertainty over an IFA's satisfaction of the better off overall test, absent time recording, is one of the key reasons why IFAs are not a suitable alternative to exemption clauses.
- IFAs are unilaterally revocable by employees. The resulting lack of certainty is a fundamental disincentive for employers to enter into them.
- IFAs can only be entered into after the employee commences employment. This means the employer must make an offer of employment and only then when the person commences employment the employer can propose an alternative remuneration structure. This is clunky, administratively burdensome and does not promote harmonious workplace relations.
- IFAs also attract a heavy administrative burden. The largest company in Australia was last year penalised over $10 million for breaching its individual flexibility clause by offering IFAs prior to employment commencing. If the largest Australian company cannot implement IFAs, what hope do the rest of employers have? It is fanciful to suggest IFAs are a viable alternative to properly considered, and properly balanced, award-based exemption rate terms.
- IFAs do not permit the variation of all award terms. Without seeking to be comprehensive, we observe they do not, for example, permit the variation of terms related to minimum engagement or payment provisions, leave, the payment of wages or, crucially, the unworkable annualised wage arrangements provisions in awards.

The FWC has repeatedly found that IFAs are not widely used.[3] We also note that any suggestion that an uptake in working from home arrangements has been or could be facilitated by IFAs is particularly optimistic, if not plainly incorrect. This is a development that particularly warrants considering the inclusion of exemption rate or some other form of 'substitution terms' so as to enable the Commission to provide a workable framework for regulating this changed working dynamic.

For context, we also observe that the Productivity Commission found in 2015 that the main regulatory impediments to parties using IFAs are:

[3] Fair Work Commission, 'General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009 2021-2024' November 2024.

- That the notice period for either party to terminate an IFA is exceptionally short, which increases the risks - particularly, but not exclusively - for employers
- IFAs are not exposed to independent scrutiny, which may make employees concerned about whether they are disadvantaged by their terms as compared to the applicable award
- The better off overall test is not simple to apply, particularly in the context of an IFA, and consequently reduces the possibility of their effective use..[4]

Claims that IFAs could be an alternative to exemption rates run counter to more 15 years of experience and independent scrutiny of their use.

If it is the view from unions or the Government, that exemption rates or 'substitution terms' are not necessary because of the availability of IFA, this is an issue that can be (or in the case of the Retail Award should have been) ventilated before the Full Bench in the context of the various proceedings on foot that the Bill appears to be directed towards. In this regard we would however repeat our observation that the Commission has included exemption rates provisions in awards that also contain the model individual flexibility terms. Ultimately, the Commission should be trusted to weigh the various exemption rate proposals before it without interference from the Parliament.

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?

Employers have mixed experiences in using IFAs, and the majority do not use them.

The FWC's General Manager has repeatedly found that IFAs are not widely used. His most recent report (2021–2024) confirms this trend, noting that uptake remains low despite legislative provisions intended to support flexibility. Relevantly, the General Manager reported in 2024 that "*Interviewees across all types of stakeholders reported that IFAs were not widely use*d".[5]

The General Manager also reports there was a concern by employers that an IFA could be unilaterally terminated by the employee, leading to uncertainty."[6] We have earlier referenced this limitation on their utility.

IFA arrangements were also reviewed in the Productivity Commission's 2015 major investigation into Australia's workplace relations framework. The Productivity Commission estimated at that time that only around 2 per cent of all employees covered by the Fair Work Act had formed IFAs. Absent further research, it is entirely possible that this figure may have

[4] Productivity Commission (2015) Workplace Relations Framework, Vol 2, p.723
[5] https://www.fwc.gov.au/documents/reporting/gm-ifa-2021-2024.pdf
[6] General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009, p.8

fallen in the intervening decade, with an even smaller proportion of contemporary Australian employees likely to have ever entered into an IFA.

One area in which IFAs have recently been used by employers is in the early education sector in order to facilitate the employer's eligibility for Worker Retention Payment.[7] However, this is a uniquely narrow and specific example with no wider relevance. It is entirely unrelated to issues of exemption rates or penalty rates as relevant to the Bill before the Committee.

Question: In the hearing on 13 August, unions asserted that low-paid employees would be worse off under the proposed applications currently before the Fair Work Commission. What is AI Group's response to this?

The material before the Committee could not safely substantiate a concern that employees would be worse off under the applications currently before the Commission.

We understand that representatives from the Australian Services Union (**ASU**) and the Finance Sector Union (**FSU**), and various union members that gave evidence to the Committee during the morning of 13 August 2025 stated that:

- The ASU has one member who receives a base salary of $67,000 who will lose penalty rates and overtime under the Australian Industry Group's proposal and will be $17,000 per year worse off if the application is granted.
- The FSU has many members who earn $60,000 per year who will be significantly worst off under the Australian Industry Group's proposal.

As to the ASU's member example, the Australian Industry Group's proposal does not apply to employees who earn $67,000 under the *Clerks – Private Sector Award 2020*. The ASU also neglected to indicate the classification that applies to the employee under the Award. However, there are 5 levels, and assuming the member is at least Level 2, the exemption clause does not apply unless the employee's base salary is $70,733.00.

For the same reason, the proposed variation would have no bearing on any FSU members who are paid $60,000 salaries. That is because the exemption rate in the *Banking, Finance and Industry Award 2020* would not apply until an employee is on at least $73,352 for Level 3 employees or $89,777 for Level 6 employees.

[7] https://www.education.gov.au/early-childhood/providers/workforce/wages

As such, the employee evidence and associated contentions from union witnesses, provided during morning of 13 August 2025:

- cannot be relied upon in regard to the proposed award variation actually before the FWC; and
- therefore, cannot provide any support for the passage of the proposed amendments.

The attempt to have the Committee rely on such inaccurate and misdirected assertions reinforces why exemption rates need to be a matter for the FWC to deal with carefully through robust arbitral proceedings rather than through rushed consideration of a Bill that would usurp the tribunal's role and independence. The Bill will deny the Commission the opportunity to apply proper scrutiny and consideration of proposals to improve the operation of awards. This will be to the detriment of workers, employees and the broader community.

The proposals have the potential to make modern awards workable for thousands of employees and to make it easier for employers to commit to pay employees' salaries set at levels well above minimum award wages. It is deeply concerning that this significant benefit could potentially be scuttled by a few bald assertions from union representatives, based on a fundamental misreading representation of what is proposed.

This point aside, to suggest the Commission would blindly leave employees $17,000 worse off is fanciful. Therein lies another key dimension that must be considered whereby the Government by introducing the Bill being considered in this inquiry, fails to accord the recognition and respect to which the Commission is due.

Proposals to vary awards are considered extremely carefully by the Commission, with the applicant bearing the substantial burden of establishing the case for the proposed changes it seeks. This is particularly the case where any respondent party contends there is a prospect of detriment to employees. Moreover, the Commission is not required to vary award in the precise terms sought by an applicant. It is free to grant a remedy in different terms (and often does). In the context of the exemption rate proposals this may mean, for example, that if the Commission is moved to introduce some kind of enhanced flexibility in response to the concerns raised by employers, it may elect to build additional safeguards into the provisions which employers have proposed. Indeed, The Australian Industry Group's submission has indicated, in effect, that we may support additional safeguards if unions identify any legitimate concerns about our proposals (noting that they have not yet filed submission in response to our proposals as party of the ongoing 'exemption rate' proceedings concerning the Clerks or Banking Awards). Relevantly, our submission in support of exemption rates in the Clerks and Banking Awards states:

> "Although we maintain the view that accepting our proposal is the appropriate course, we reiterate that the Commission's task is not limited to resolving the current proceedings through merely weighing whether or not to grant the precise form of clause proposed by either ABI or Ai Group. We accordingly remain open to working cooperatively through these proceedings, including if necessary through an iterative process comparable to that which has been adopted in the context of many major award cases, to address any legitimate issues or concerns that might be identified in relation to the proposal that we have advanced. This may of course include

> suggesting modifications to the specific form of clause that we have proposed, if this is warranted."

These issues should be worked through in the usual way in proceedings before the Commission, rather than being dealt with through a parliamentary committee that is effectively being asked to jump at shadows.

The Australian Industry Group can see no basis to not allow the independent tribunal (being the Commission) to determine the proposals that are brought before it based on the existing terms of legislation, and the merits of the respective cases brought before it. The Parliament has afforded the Commission a raft of radical new powers to regulate the labour market and economy during the last term of Government. It should not now curtail its longstanding discretion in relation to the setting of award terms in the problematic ways proposed by the Bill.

Technical Amendments

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?

We are giving further consideration to the final of the Senator's questions "*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?*". Given substantial time constraints for the finalisation of reporting, we thought it important to get our responses to the first four questions to you as soon as possible.

We intend to revert to the Committee as soon as possible on the final question, but prior to doing so refer you to the Australian Industry Group's initial submission from paragraphs [40] to [47].

Yours sincerely,

Brent Ferguson
Head of National Workplace Relations Policy