**Senate Standing Committees on Education and Employment**

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

**QUESTION ON NOTICE**
**Date of hearing: 13 August 2025**

**Outcome: | WR | Employment Conditions**

**Department of Employment and Workplace Relations Question No. IQ25-000017**

Senator Maria Kovacic provided in writing.

***13 August 2025 | WRITTEN | Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025***

**Question**

- Proposed s 135A(2) preserves the operation of s 144, which allows individual flexibility arrangements (IFAs). However, could the Department confirm whether, in practice, the Commission could still determine – through dispute resolution or enforcement proceedings – that an IFA is invalid if it results in a reduction of penalty rates contrary to s 135A(1) and leaves an employee worse off, even if the employee knowingly agreed to and preferred that arrangement for reasons such as increased flexibility?
    - In other words, does the "worse off" concept in s 135A(1) ultimately override individual choice available under s 144?
- Under the proposed Bill, if an employee works from home and arranges their hours to suit their personal circumstances would they still be entitled to a penalty rate for those hours? What assessment has the Commission made of the impact this may have on an employer's ability to offer such flexible work arrangements?

- Under proposed s 135A(1)(b), would common award provisions such as annualised wage arrangements and time-off-in-lieu of overtime be prohibited unless they ensure that no employee is ever financially worse off compared to receiving separate penalty and overtime rates?
    - If that is not the intent, does the Department believe the Bill needs to amended to make this exclusion explicit? Has advice to this effect been provided to the Minister, and/or any other stakeholders?
- If a penalty or overtime rate itself remains unchanged, but the circumstances in which it applies are narrowed – for example altering when part-time hours count as overtime – would this be treated as a rate reduction under proposed s 135A(1)(a)?
    - Given that s 135A(1)(b) expressly refers to the effect on remuneration but s 135A(1)(a) does not, how does the Department interpret the distinction in how these subsections would operate?
- Under proposed s 135A(1)(b), is the Commission required to consider only known or likely patterns of work when assessing whether a term reduces remuneration, or must it also consider hypothetical scenarios – for example, an employee who works exclusively on Sundays or only on public holidays?
    - Does the Department believe the broader drafting of s 135A(1)(b) allows the Commission to take a practical, holistic view of potential disadvantage, or could it result in decisions being based on extreme or unlikely work patterns?

- In cases such as annualised wage arrangements, how would the Commission reconcile the requirement under s 139(1)(f) to include safeguards against disadvantage with the stricter requirement in proposed s 135A(1)(b) to ensure no loss of remuneration?
    - Which requirement would take precedence if both applied?
- Can the Department clarify whether proposed s 135A(1)(b) would apply only to new substitution terms in modern awards, or whether it would also capture existing award provisions that have the same effect?

**Answer**

The Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 (the Bill) would establish a principle for the Fair Work Commission (Commission) to apply to ensure penalty and overtime rates are not reduced or substituted in a way that diminishes the additional remuneration any employee would otherwise receive from those penalty and overtime rates.

The principle will apply when the Commission is exercising its powers to make, vary or revoke a modern award that directly relate to award terms about the payment of penalty and overtime rates. The Bill will commence from the day after receiving Royal Assent and not apply retrospectively, meaning existing award arrangements will continue to operate following passage of the Bill.

It will be up to the independent Commission to determine how the principle is interpreted and applied in practice to any future award variation process through its usual consultative processes where stakeholders will have the opportunity to present their views and supporting evidence to the Commission for consideration.

Under s 590 of the *Fair Work Act 2009* (Fair Work Act), the Commission has powers to inform itself in relation to any matter before it, as it considers appropriate. This includes, but is not limited to, inviting oral or written submissions, requiring information to be provided, conducting inquiries and undertaking or commissioning research. As with all award matters, it will be for the Commission to assess what kind of evidence is relevant to its determination and the probative value of any information it receives. For example, in the General Retail Industry Award matter (AM2024/9 and others), parties have relied on a mix of hypothetical and real rosters. The Commission's discretion in determining the probative value of evidence presented to it remains unchanged.

Proposed s 135A(2) of the Bill preserves the operation of individual flexibility arrangements under s 144 of the Fair Work Act. This section is carved out of operation of the principle to allow employers and employees to vary award terms to meet genuine business and employee needs, provided the arrangement does not leave the employee worse off than under the award terms in accordance with s 144(4)(c) of the Fair Work Act. Provided that this requirement is met, the individual flexibility arrangement does not need to meet the test in either proposed s 135A(1)(a) or (b) of the Bill.

The Bill does not amend s 139(1)(f) of the Fair Work Act, which allows for annualised wage arrangements which require employers to reconcile an employee's actual wage with their award entitlements to ensure they are not financially worse off.

The Department of Employment and Workplace Relations cannot comment on how the Commission may exercise its discretion in hypothetical scenarios or how it may choose to inform itself in particular circumstances.

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**QUESTION ON NOTICE**
**Date of hearing: 13 August 2025**

**Outcome: | WR | Employment Conditions**

**Department of Employment and Workplace Relations Question No. IQ25-000019**

Senator Marielle Smith provided in writing.

***13 August 2025 | WRITTEN | Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025***

**Question**

The committee has received evidence that the bill could be strengthened with an amendment to explicitly require employers to keep time and wages records even if an exemption rate is in place.
Is the Department confident that the bill as it stands offers enough protection to ensure that workers will not be exposed to exploitation if employers are not required to maintain accurate records of pay and hours worked where an exemption rate is in place?

**Answer**

Operation of the Bill

Proposed s 135A(1)(b) of the Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 (the Bill) would require the Fair Work Commission (Commission) to ensure modern award terms that substitute penalty and overtime rates are only approved where the Commission determines the additional remuneration any employee would otherwise receive from their penalty and overtime rates would not be reduced.

It will be a matter for the independent Commission to satisfy itself that this new standard is met through its usual consultative processes where stakeholders will have the opportunity to present their views and supporting evidence to the Commission for consideration.

The Department of Employment and Workplace Relations notes that in contemporary considerations of terms that substitute employee entitlements, the Commission has required record keeping as a means of assessing whether an employee is worse off under a substitution term.

- For example, standardised annualised wage arrangements in modern awards require recording of hours worked. This reconciliation process works as the principal mechanism to ensure 'rolled up' rates do not leave employees worse off.

Non-compliance

Section 535 of the *Fair Work Act 2009* (Fair Work Act) requires an employer to make and keep employee records as prescribed by the *Fair Work Regulations 2009* (Fair Work Regulations) for 7 years.

Under the Fair Work Regulations, where a penalty rate or loading is to be paid for overtime hours worked by an employee, an employer must make and keep a record of the number of overtime hours worked each day by the employee or the start and finish times of the overtime hours worked by the employee (regulation 3.34). Modern awards may supplement these requirements.

Non-compliance with the Fair Work Act and applicable modern award terms is enforced by the Fair Work Ombudsman in accordance with the agency's Compliance and Enforcement Policy. If an employer does not meet their record-keeping or pay slip obligations, and cannot give a reasonable excuse, they will need to disprove any allegations of underpayment including in the context of applicable modern award terms. Additionally, record-keeping and pay slip breaches may attract fines issued by the Fair Work Ombudsman via infringement notices or result in other enforcement action, such as litigation.

Recent amendments to the Fair Work Act have introduced greater sanctions for employers underpaying their employees. Through the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* and *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*, the government legislated to criminalise intentional wage theft and increase civil penalties for underpayment-related breaches. These reforms will be subject to an independent statutory review commencing in late 2025.