Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025

Professor Andrew Stewart
Professor of Work and Regulation, Queensland University of Technology
Adjunct Professor of Law, University of Adelaide

This submission is made in my capacity as an expert in employment law and workplace relations. It concerns the Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 (**the Bill**), which seeks to amend the *Fair Work Act 2009* (Cth) (**FW Act**) to "protect" the penalty and overtime rates prescribed by modern awards. There are several respects in which I believe the intended effect of the Bill could and should be clarified.

What counts as a rate reduction?

The first issue concerns the proposed new s 135A(1)(a) of the FW Act, which would require the Fair Work Commission (**FWC**) to ensure that "the rate of a penalty rate or an overtime rate that employees are entitled to receive is not reduced".

This would plainly prevent, say, a Saturday penalty rate in a modern award from being reduced from 150% to 125%. And arguably, though this is perhaps less clear, it would stop the complete removal of such a rate, on the basis that this would effectively reduce the rate from 150% to 100%.

But suppose the rate itself were left untouched, but the circumstances in which it applied were narrowed: for example, by broadening the circumstances in which ordinary hours can be worked on a Saturday without a penalty applying. Would this count as a rate reduction? The same could apply to overtime rates, for example by changing the circumstances in which additional hours worked by a part-time employee count as overtime.

One indication that these situations might not count as a rate reduction lies in the difference between the drafting of proposed s 135A(1)(a) and proposed s 135A(1)(b), which is considered further below. The latter explicitly requires consideration of any effect that particular award terms might have in reducing an employee's remuneration. The fact that similar language does ***not*** appear in proposed s 135A(1)(a) might be taken to indicate that such an assessment is not required in that context and that all that matters is whether a "rate" changes.

Rather than leaving this issue to later argument, it would be helpful for the intent of the new s 135A(1)(a) to be clarified.

Substituting penalty or overtime rate entitlements: Scope of the new restriction

Proposed s 135A(1)(b) deals with modern award terms "that substitute employees' entitlements to receive penalty rates or overtime rates". Such terms would not be permitted to "have the effect of reducing the additional remuneration referred to in paragraph 134(1)(da) that any employee would otherwise receive". The cross-referenced provision refers to additional remuneration for working overtime, weekends, public holidays, shifts, or other "unsocial, irregular or unpredictable hours".

Leaving aside for a moment the question of whether this applies to current award provisions, this new provision would, as the Explanatory Memorandum (**EM**) for the Bill makes clear, prevent the FWC from agreeing to any new "exemption rate", unless it was set sufficiently high to prevent employee from receiving lower remuneration than under the penalty or overtime rates that would otherwise have applied.

The question, however, is what other types of provision might be affected. One obvious possibility is an annualised wage arrangement of the sort that currently appears in around 20 modern awards.[1] Awards are expressly permitted by s 139(1)(f) to include such terms, on the basis that they "provide an alternative to the separate payment of wages and other monetary entitlements", so long as they include "appropriate safeguards to ensure that individual employees are not disadvantaged". A term providing for an annualised wage would plainly qualify as one that substitutes an entitlement that would otherwise exist to penalty and/or overtime rates. Hence the FWC would be required by the new s 135A(1)(b) to assess whether an annualised rate was high enough to ensure no loss of remuneration. That requirement, it may be noted is expressed in a way that is different to, and more specific than, the broader and more flexible notion of providing safeguards against "disadvantage". On the face of it then, the FWC would need to consider whether the requirements of *both* s 139(1)(f) and the new s 135A(1)(b) were met.

To give an example of how those requirements can differ, existing annualised wage provisions in modern awards typically provide for a reconciliation process under which an affected employee's pay must be audited to ensure that they have not been paid less than they would have received under the penalty or overtime rate provisions of the award.[2] This meets the requirement to provide a safeguard against disadvantage. But it is premised on the notion that there might be situations where an employee *could* receive less under their annualised salary – something that the more stringently worded s 135A(1)(b) is supposed to

[1] These provisions were reviewed by the FWC during the "four-yearly" award review: see *4 Yearly Review of Modern Awards – Annualised Wage Arrangements* [2022] FWCFB 51.

[2] See eg Clerks – Private Sector Award 2020 cl 18.2(b).

avoid ever occurring. This suggests that to comply with the new provision, an annualised rate would need to be set higher than one which might be considered to satisfy s 139(1)(f).

A further type of award provision that might be affected by the new limitation is one allowing for time off in lieu (TOIL) of overtime. A TOIL provision typically allows an employer and employee to agree in writing that where overtime is worked, time off will be granted in the future instead of the payment of the overtime rate that would otherwise apply. All awards that provide for overtime now include such a clause, following a determination by the FWC in 2016 that the practice is one that "may encourage greater workforce participation, particularly by workers with caring responsibilities".[3] Despite this level of acceptance, and the understanding that workers may benefit from choosing to work fewer hours rather than taking extra money, such a provision could on the face of it fall foul of the new restriction.

If the intention of the amendment is not to affect annualised wage arrangements or TOIL provisions, it would be helpful for this to be specified.

Assessing reductions in remuneration

A further question about the new s 135A(1)(b) concerns the extent to which the FWC would be expected to hypothesise about possible reductions in remuneration. The example given in the EM refers to evidence about the impact of a proposed exemption rate on car park employees with a certain pattern of work. But there is nothing in the new provision to limit the FWC's consideration to known or even likely patterns of work.[4] It might be argued, for example, that the FWC should consider whether a proposed new exemption rate could hypothetically reduce the remuneration of an employee who only ever worked on Sundays, or (to take a more extreme example) only on public holidays.

The drafting of s 135A(1)(b) can be contrasted in this respect with s 139(1)(f), which requires the FWC in setting an annualised rate to "have regard to the patterns of work in an occupation, industry or enterprise" and, as mentioned above, to include appropriate safeguards against disadvantage. In my view that approach is both more flexible and more appropriate than the proposed new limitation, not least in permitting the tribunal to take a more practical and holistic view as to whether employees would be disadvantaged by (for example) a new exemption rate.

[3] *4 Yearly Review of Modern Awards – Award Flexibility* (2016) 257 IR 49, [37].

[4] Compare in this respect s 193A(6) of the FW Act, which requires the FWC, in assessing whether employees are better off overall under a proposed enterprise agreement, to consider only "patterns or kinds of work, or types of employment, if they are reasonably foreseeable at the test time".

Impact of the new substitution term limitation on existing award provisions

The proposed limitation in s 135A(1)(a) would not by definition require any change to existing award provisions, since it precludes only a future *reduction* of a penalty or overtime rate. However, the new s 135A(1)(b) is not limited in that way. It makes no mention of the need for there to be an application to the FWC to add a new term of the type that the provision seeks to regulate. Its requirement is expressed in the present tense: the FWC must ensure that modern awards "do not include" terms that have the prohibited effect. That requirement is to apply whenever the tribunal is exercising its powers under Part 2-3 of the FW Act to make, vary or revoke a modern award. Nor is there anything in the transitional provision proposed by the Bill, to be added as cl 127 of Sch 1 to the FW Act, that would prevent the new limitation applying to existing award provisions.

It is true that, thanks to an amendment in the House of Representatives, there is now a clarification that the new s 135A(1) is not to be taken as requiring the FWC to exercise its powers to make, vary or revoke an award (proposed s 135A(3)). But all that ensures is that the FWC would not be required, on commencement of the new limitation, to conduct an immediate review of every modern award to ensure it did not contain a term with the prohibited effect. It does not alter the fact that as soon as an application *of any kind* was made to the FWC under Part 2-3 to vary an award, that would appear to trigger the operation of the new s 135A(1)(b) and require a review of any potentially affected provisions in that award.

Even if the new provision was not interpreted to have that effect, it would plainly be open for the FWC to be asked to vary an existing award to bring it into compliance with the new s 135A(1)(b). As such, all provisions falling within the scope of the new limitation, which as noted above might include not just exemption rates but annualised wage arrangements and even TOIL clauses, could be subject to challenge.

Once again, it would be helpful to be clearer as to whether proposed s 135A(1)(b) is to affect only proposed new substitution terms, or any existing award provision that has the requisite effect.