

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: Fair Work Commission (FWC)

Department of Employment and Workplace Relations Question No. IQ25-000016

Senator Maria Kovacic provided in writing.

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

Question

- Based on the current provisions of the Fair Work Act 2009, does the Commission currently have the capacity to prevent a reduction of penalty rates in modern awards without further legislative amendment?
- How does the Commission apply the modern awards objective under s 134 of the *Fair Work Act 2009* when considering applications that may affect penalty rates?
- If this Bill passes, could workers lose the ability to negotiate flexible pay deals that better suit their circumstances?
- Under the current legislative framework, to what extent can employees and employers enter into pay arrangements that accommodate individual employee circumstances, and how would the proposed amendments affect this capacity?
- Please outline any potential negative impacts the proposed Bill would have on the content or application of modern awards, including any limitations on the Commission's ability to vary awards in response to applications.
- Does removing the Commission's discretion undermine its independence as the industrial umpire? If so, how?
- Is it appropriate that the Government make this legislative change before the Commission has even ruled on current applications?
 - What effect would the enactment of the Bill have on the Commission's ability to determine those matters?
- Would the proposed amendments alter the Commission's ability to assess applications on their merits under the Fair Work Act 2009? If so, please specify the practical consequences.
- 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), could 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 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 Commission 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?
- 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 Commission 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?
- Proposed s 135A(2) preserves the operation of s 144, which allows individual flexibility arrangements (IFAs). However, could the Commission confirm whether, in practice, it 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?

Answer

The Fair Work Commission has provided the following response

1. Based on the current provisions of the Fair Work Act 2009, does the Commission currently have the capacity to prevent a reduction of penalty rates in modern awards without further legislative amendment?

The Commission’s role is to perform its functions under the *Fair Work Act 2009* (the Act) in accordance with the Act. Certain people and organisations can ask us to make a new modern award or change or revoke an existing modern award.

Before the Commission can grant an application to vary a modern award, the Commission is required to consider the modern awards objective set out in s.134 of the Act.

Staff of the Commission cannot speculate about how Commission Members (the Tribunal) might deal with a hypothetical application.

2. How does the Commission apply the modern awards objective under s 134 of the Fair Work Act 2009 when considering applications that may affect penalty rates?

The Commission consists of the President, Vice Presidents, Deputy Presidents, Commissioners and Expert Panel Members, supported by a General Manager and specialist staff.

Commission Members perform quasi-judicial functions under the Act. They are independent statutory office holders appointed by the Governor-General on the recommendation of the Australian Government.

Staff of the Commission cannot speculate about how Commission Members (the Tribunal) might deal with a matter.

The Commission publishes all relevant documents and decisions relevant to modern award matters on our website, via our [major cases](#) webpage and our [applications to create or change an award](#) webpage.

3. If this Bill passes, could workers lose the ability to negotiate flexible pay deals that better suit their circumstances?

The Commission's role is to perform its functions under the Act in accordance with the Act. The Commission does not enter into the policy debate about proposed changes to the law.

Questions about legal policy and how particular clauses of the Bill are intended to operate should be directed to the Department of Employment and Workplace Relations (DEWR), as the department with responsibility for workplace relations.

4. Under the current legislative framework, to what extent can employees and employers enter into pay arrangements that accommodate individual employee circumstances, and how would the proposed amendments affect this capacity?

Individual employees can make an individual flexibility arrangement (IFA) with their employer. An IFA is a written agreement used by an employer and employee to change the effect of certain clauses in their award or enterprise agreement.

Section 144(1) of the Act requires that:

- (1) A modern award must include a term (a ***flexibility term***) enabling an employee and his or her employer to agree on an arrangement (an ***individual flexibility arrangement***) varying the effect of the award in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer.

The IFA clause in a modern award sets out the terms of that modern award that can be varied by the IFA.

An employer has to make sure that the employee is better off overall with the IFA than without it, compared to their award or enterprise agreement at the time the IFA was made.

5. Please outline any potential negative impacts the proposed Bill would have on the content or application of modern awards, including any limitations on the Commission's ability to vary awards in response to applications.

Please see answer to question 3.

6. Does removing the Commission's discretion undermine its independence as the industrial umpire? If so, how?

The Commission does not enter into the policy debate about proposed changes to the law.

7. Is it appropriate that the Government make this legislative change before the Commission has even ruled on current applications?

What effect would the enactment of the Bill have on the Commission's ability to determine those matters?

The Commission's role is to perform its functions under the Act in accordance with the Act. The Commission does not enter into the policy debate about proposed changes to the law.

Should the Act be amended, the Commission as constituted by its Members (the Tribunal) would consider the impact of any change to the law in the course of considering those matters.

8. Would the proposed amendments alter the Commission's ability to assess applications on their merits under the Fair Work Act 2009? If so, please specify the practical consequences.

Before the Commission can grant an application to vary a modern award, the Commission is required to consider the modern awards objective set out in s.134 of the Act.

Under the proposed amendments, in some circumstances, the Commission would be required to also consider section 135A.

9. 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?

Staff of the Commission cannot speculate about how Commission Members (the Tribunal) might deal with a hypothetical application.

Questions about legal policy and how particular clauses of the Bill are intended to operate should be directed to DEWR.

10. Under proposed s 135A(1)(b), could 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?

Please see answer to question 9.

11. 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)?
o Given that s 135A(1)(b) expressly refers to the effect on remuneration but s 135A(1)(a) does not, how does the Commission interpret the distinction in how these subsections would operate?

Please see answer to question 9.

12. 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?

Please see answer to question 9.

13. 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?

Please see answer to question 9.

14. Can the Commission 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?

Please see answer to question 9.

15. Proposed s 135A(2) preserves the operation of s 144, which allows individual flexibility arrangements (IFAs). However, could the Commission confirm whether, in practice, it 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?
o In other words, does the “worse off” concept in s 135A(1) ultimately override individual choice available under s 144?

Please see answer to question 9.

The Commission does not have a role in relation to the enforcement of individual flexibility arrangements. Questions related to enforcement of these workplace instruments should be directed to the Fair Work Ombudsman.