



# **FAIR WORK AMENDMENT (PROTECTING PENALTY AND OVERTIME RATES) BILL 2025**

**ACCI Submission to the Senate Education and Employment Committee**

**8<sup>th</sup> August 2025**



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# 1. Introduction

1. The Australian Chamber of Commerce and Industry (ACCI) is grateful for the opportunity to make this submission to the Senate Education and Employment Legislation Committee (the Committee) to assist in its inquiry into the *Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025* (the Bill).
2. The Bill and the associated Explanatory Memorandum were introduced into Parliament on 24 July 2025 and passed successfully through the House of Representatives on 31 July 2025. During debate on 31 July, the Bill was amended to include a new Section 135A (3) underpinned by a Supplementary Explanatory Memorandum.
3. The referral of the Bill to this Committee for inquiry was made on 31 July 2025 and was welcomed by ACCI. It is important that the Bill, its provisions and potential ramifications receive appropriate and thorough scrutiny.
4. Where references to 'the Bill' are made throughout this submission they are done so with reference to the amended Bill as passed by the House of Representatives.
5. ACCI would be pleased to appear before the Committee as and where required and stands ready to furnish the Committee with any other related information as requested.

# 2. Summary

6. ACCI opposes the Bill as passed by the House of Representatives and urges the Committee to recommend that it not be passed by the Senate.
7. The detailed grounds and reasons for the above position are canvassed in the remaining sections of this submission and cover a range of both policy and technical matters. While some technical matters are capable of being addressed via amendment, these would not resolve the more fundamental policy concerns held by ACCI.
8. ACCI does not accept the premise underpinning the Bill and submits that its provisions are out of step with the needs and reality of modern workplaces. Any reduction in the range of existing or future options for workplaces to achieve, maintain or improve flexibility and productivity should be resisted as this risks business viability, investment and jobs. This is particularly so for small business workplaces, who already struggle with a mammoth list of regulatory compliance burdens, ongoing encroachment of managerial prerogative, and a range of other financial and economic pressures.
9. The provisions in this Bill will only create further rigidity and complexity in a legislative regime that is already unwieldy, highly technical and confusing, and virtually impenetrable for those to whom it applies. History demonstrates that when such changes have been made, they are virtually set in stone and become features of a system that should be capable of evolving and adapting to future workplace and economic needs. This is particularly regrettable in circumstances where the Bill is ostensibly

targeted at preventing the FWC from exercising independent decision-making powers in one single proceeding but will have significant and ongoing adverse consequences for all workplaces and all Modern Awards both now and in the future.

10. The Bill is also at complete odds with the stated values and policy direction of the current Australian Government who have variously indicated a *“need to be willing to break with old orthodoxies and pull new levers to advance the national interest”* as a way to *“drive growth, improve competition, lift productivity and create the next generation of prosperity and opportunity”*.<sup>1</sup> It is also inconsistent with the overall object of the FW Act which is to *“provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.”*<sup>2</sup>

11. Key matters and concerns canvassed in this submission include, in summary, include:

- a. **The Bill goes further than the relevant election promise:** The Bill goes further than the commitments made during the May 2025 Federal election, dealing with matters other than penalty rates as promised.
- b. **Hinders flexibility and productivity:** The Bill represents a real risk to current and future levels of workplace flexibility, by jeopardizing the capacity for workplaces to adopt flexible work practices and/or respond nimbly to business or operational needs. This hinders or removes an option that should be rightly available to workplaces to assist in maintaining or improving workplace and business productivity. Importantly, this will have a significant impact on WFH considerations involving Modern Awards, and practical ramifications for a current WFH case currently afoot in before the FWC.
- c. **Reduces simplicity and increases complexity:** The Bill risks removing Modern Award terms that allow workplaces to adopt simple and efficient payroll practices and forcing employers to adopt complex and time-consuming record and calculation practices.
- d. **Jeopardises wage certainty for employees:** The Bill risks removing the certainty of earnings which flow from rolled-up rate arrangements for employees, such as the regular amount paid under exemption or salary terms and creates conditions where the regular pay packets of employees could vary significantly from one pay cycle to the next.
- e. **Undermines FWC role and independence:** The Bill is clearly a vote of no-confidence in the ability and independence of the FWC as the national industrial relations umpire. Its provisions depart from the long-standing independent arbitration and conciliation body with responsibility to make determinations related to the terms and conditions of employment in Australian workplaces and prevent the FWC from acting swiftly and nimbly in response to changing economic and societal circumstances.
- f. **The Bill exceeds its stated policy intent:** The effects of the Bill exceed the stated policy intent to protect penalty and overtime rates prescribed in Modern Awards and jeopardises

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<sup>1</sup> PM Albanese - A Future Made in Australia Address to Queensland Media Club

<sup>2</sup> Section 3 - FW Act 2009

(through proposed new Section 135A(1)(b)) the ability for Modern Awards to contain or retain terms involving 'rolled-up' rates (such as exemption, substitution or salary clauses).

- g. **No certainty as to when proposed new Section 135A will be considered:** Neither the Bill nor the original (or supplementary) Explanatory Memoranda provide any certainty as to the circumstances in which the substantive element of the Bill (the proposed new Section 135A) can be triggered to become an live consideration for the Fair Work Commission (FWC) when exercising its powers under Part 2-3 of the *Fair Work Act 2009* (FW Act). While the amendment of 31 July 2025 purports to provide clarity on this point, it remains deficient, and uncertainty remains.
  - h. **Substitution test uses unreasonably high bar:** The test proposed pursuant to proposed new Section 135A(1)(b) requires consideration of "any" employee rather than an employee that may actually be affected, or reasonably likely to be affected, which is an unreasonably high bar and unnecessary to afford protection this provision purports to create. Further, there are drafting deficiencies which fail to clarify that "additional remuneration" is limited to that which the employee would have received under a Modern Award.
  - i. **Jeopardises existing Modern Award terms which work well:** Uncertainty associated with the circumstances as to when proposed new Section 135A, combined with the unreasonably high bar associated with the substitution test, risks undoing or removing a range of existing Modern Award terms that work well and operate uncontroversially.
12. The above issues, considered conjunctively with the existing principles guiding FWC's decision making powers pursuant to Part 2-3, can only lead the Committee to conclude that the rationale for the Bill is flawed and recommend that it not be passed by the Senate.

### 3. Overview of the Bill

13. The Bill proposes to include a new element in Part 2-3 of the FW Act, which deals with Modern Awards. Part 2-3 contains a range of existing sections that deal with issues such as:
- a. Modern Awards Objective (s.134)
  - b. What can be included in Modern Awards (s.136)
  - c. Achieving the Modern Awards Objective (s.138)
  - d. Terms that may be included in Modern Awards (subdivision B)
  - e. Terms that must be included in Modern Awards (subdivision C); and
  - f. Terms that must not be included in Modern Awards (subdivision D).
14. A key element of Part 2-3 is the Modern Awards Objective (s.134) which requires that the FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and

relevant minimum safety net of terms and conditions. The Modern Awards Objective applies when the FWC performs or exercises its modern award powers, which are the FWC's functions under Part 2-3 (which the Bill proposes to amend) and also the FWC's functions or powers under Part 2-6 as they relate to modern award minimum wages.

15. The Modern Awards Objective sets out a comprehensive range of factors for the FWC to take into account to achieve its object when exercising its power under Part 2-3 as follows:

- (a) relative living standards and the needs of the low paid; and*
- (aa) the need to improve access to secure work across the economy; and*
- (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and*
- (b) the need to encourage collective bargaining; and*
- (c) the need to promote social inclusion through increased workforce participation; and*
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
- (da) the need to provide additional remuneration for:*
  - (i) employees working overtime; or*
  - (ii) employees working unsocial, irregular or unpredictable hours; or*
  - (iii) employees working on weekends or public holidays; or*
  - (iv) employees working shifts; and*
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

16. The Bill seeks to insert a proposed new section 135A in Part 2-3 of the FW Act.

17. The proposed new proposed Section 135A has two core elements that will require consideration in circumstances where the Commission is exercising its Part 2-3 powers to make, vary or revoke a Modern Award (per proposed section 135A(1)).

18. The first of these elements is set out in proposed section 135A(1)(a) which has the practical result of preventing the FWC from reducing the specified penalty or overtime rate in Modern Awards. For example, the FWC would be prohibited from deciding to change an existing penalty rate from 150 per cent to 120 per cent.

19. The second element is set out in proposed section 135A(1)(b) and has the practical effect of preventing provisions in Modern Awards that allow employers to 'roll up' penalty and overtime rates into a single pay rate, if such a provision would have the effect of resulting in a reduction of the additional remuneration employees would ordinarily otherwise be entitled to for working penalty or overtime hours.

20. Section 135A(2) indicates that the proposed new provision 135A(1)(a)-(b) do not limit the operation section 144 (flexibility terms) or 160 (ambiguities or errors).

21. Section 135A(3) features in the Bill by way of government amendment made during debate on 31 July 2025. It indicates that nothing in Section 135A(1) requires the FWC to exercise its powers under Part 2-3 to make, vary or revoke modern awards.
22. Part 2 of Schedule 1 confirms that the Bill will apply to circumstances under which the FWC exercises its powers under Part 2-3 in relation to both existing and future Modern Awards, including in relation to matters currently afoot.
23. The cumulative practical effects of the Bill are that it will create a blunt, hard line that artificially prevents and interferes with how the FWC independent approaches the considerations to which it must take into account when exercising its Modern Award powers and in achieving the Modern Awards Objective.
24. This means that even if the FWC determines that a variation meets the comprehensive range of factors contained in s.134 as necessary to better meet the Modern Awards Objective, it will be prohibited from granting the variation where it results in a reduction to the rate of a penalty or overtime rate that already exists in a Modern Award, or where it results in a provision that would have the effect of resulting in a reduction of the additional remuneration any employee would ordinarily otherwise be entitled to for working penalty or overtime hours.

## 4. Concerns about the Bill

25. As noted above, ACCI holds a range of significant policy and technical concerns about the Bill and its provisions.

### **(a) Goes further than the clear election commitment**

26. The first of these concerns is that the Bill goes further than the public policy promise made during the 2025 federal election which was as follows:

*“A re-elected Albanese Labor Government will legislate to protect penalty rates in awards, ensuring the wages of around three million workers do not go backwards.*

*Penalty rates are an essential feature of minimum terms and conditions in modern awards and should not be reduced.”<sup>3</sup>*

27. The above announcement makes it abundantly clear that the commitment extended to (a) penalty rates only and (b) a legislative change to prevent penalty rates being reduced.
28. However, the Bill as presented goes further than this very clear election commitment in two ways.
  - a. It applies to not just penalty rates, but a range of additional amounts such as overtime rates and other forms of additional remuneration contained at s.134(da) of the existing FW Act. This is confirmed in the Bill at proposed new section 135A(1)(b) which deals with other

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<sup>3</sup> Senator Murray Watt - Minister for Employment and Workplace Relations - *Labor will protect your weekend penalty rates from Dutton* - 19 April 2025 – extracted from <https://alp.org.au/news/labor-will-protect-your-weekend-penalty-rates-from-dutton/>



amounts that clearly exceed and go further than just penalty rates, which exceeds the clear promise made during the election.

- b. The Bill also has the further effect of creating a legislative limitation on the FWC's independent capacity to include terms in modern awards that deal with the substitution of penalty or overtime rates, such as exemption rates or salary clauses. This is confirmed with reference to proposed new section 135A(1)(b). Once again, the issue of substitution terms (such as exemption terms or salary terms) was not mentioned or referenced in the commitments made publicly during the election campaign and exceeds the promise made at that time.

29. While ACCI raised serious concerns about the clear policy election commitment at the time it was made, this Bill goes far further than that promise and raises far broader concerns as detailed later hereunder. It is therefore not supported.

**(b) Exceeds stated policy intent**

30. The stated policy intent of the Bill is *"to protect penalty and overtime rates for modern award-reliant employees."*<sup>4</sup>
31. ACCI submits that the Bill exceeds this stated policy intent by creating a further legislative limitation on the FWC's independent capacity to include terms in modern awards that deal with the substitution of penalty or overtime rates, such as exemption rates or salary clauses, via proposed new section 135A(1)(b).
32. This limitation is not necessary to achieve the stated aim of the Bill, which does not mention salary or exemption terms. As it deals only with penalty rates and overtime rates, this is sufficiently met by proposed new Section 135(A)(1)(a) therefore rendering Section 135A(1)(b) unnecessary.

**(c) No certainty as to when proposed new Section 135A will be triggered**

33. Neither the Bill nor the original (or supplementary) Explanatory Memoranda provide any certainty as to the circumstances in which the substantive element of the Bill (the proposed new Section 135A) can be triggered to become a live consideration for the FWC when exercising its powers under Part 2-3 of the FW Act.
34. The terms of the Bill as originally introduced made it clear that proposed new Section 135A would be triggered as an active consideration every time the FWC exercised its Modern Award making powers pursuant to Part 2-3.
35. This proposition was evidenced by:
  - a. Part 2 of Schedule 1 which confirmed it will apply to all circumstances under which the FWC exercises its powers under Part 2-3 in relation to both existing and future Modern Awards, including in relation to matters currently afoot; and

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<sup>4</sup> Page 1 - Explanatory Memorandum

- b. Section 135A(2) which created an express exclusion for new section 135A(1) to limit the operation section 144 (flexibility terms) or 160 (ambiguities or errors). The result of this express limitation confirms that the FWC was not otherwise limited as to when new Section 135A(1) will apply, as is reinforced by the Explanatory Memorandum which notes (with our emphasis)<sup>5</sup>:

*“New subsection 135A(2) would expressly exclude the principle from limiting the operation of section 144 (flexibility terms) and section 160 (variation to remove ambiguity or uncertainty or to correct error). The Bill is not intended to impact the existing framework for the making of individual flexibility arrangements under a flexibility term in a modern award or the Commission’s discretion to vary a modern award to remove an ambiguity or uncertainty or to correct an error. Section 160 does not give the Commission discretion to substantively vary the terms of modern awards.”*

36. As a result of this uncertainty, ACCI and other employer parties all reached the same conclusion that proposed Section 135A would be operative on every occasion the FWC exercised its Part 2-3 Modern Award powers. The concerns arising from this conclusion are dealt with below at in the section 5.

**(d) Amendment does not clarify operation of new Section 135A**

37. In recognition of the concerns arising from the conclusion referenced above, an amendment was successfully moved by the Government during debate about the Bill on 31 July 2025. The amendment will add a new section (3) to proposed Section 135A which states as follows:

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

38. The amendment was accompanied by a Supplementary Explanatory Memorandum which stated that the purpose of the amendment was to “clarify that the operation of the principle at new subsection 135A(1) would not require the Fair Work Commission to undertake a review of all modern awards.”<sup>6</sup>
39. The Supplementary Explanatory Memorandum went on to say that the effect of this amendment would be as follows:

*The effect of the amendment would be to clarify that the principle would not operate to require the Commission to:*

- a. undertake a review of all modern awards*
- b. initiate a review of any award terms outside the scope of an application before the Commission, or*
- c. exercise its powers under Part 2-3 of the Fair Work Act to make, vary or revoke modern awards.*

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<sup>5</sup> Page 8 - Explanatory Memorandum

<sup>6</sup> Page 1 – Supplementary Explanatory Memorandum

40. While recognising that the Government has, via this amendment, rightfully recognised the existence of concerns about uncertainty as to when proposed new Section 135A would be triggered, it does not adequately address the concerns ACCI holds and remains seriously deficient for numerous reasons:

- a. **Doesn't require – but doesn't expressly prevent:** While the amendment is couched in terms of not 'requiring' the FWC to exercise its powers under Part 2-3, it does not expressly 'prevent' the FWC from doing so if it chooses. This means the concerns detailed below at Section 5 remain real and valid.
- b. **Does not reflect detail outlined in the Supplementary Explanatory Memorandum:** While the amendment itself refers to the general FWC powers under Part 2-3, the Supplementary Explanatory Memorandum is more nuanced and makes additional references to "*reviews of all Modern Awards*" and "*award terms outside the scope of an application before the Commission.*"

These additional details provide some information into how the Government anticipates Section 135A(1) will operate, indicating that it would not require the FWC to conduct a general review of Modern Awards. Instead, it would apply only in circumstances involving "an application" and, even then, only to the specific terms that are subject of that application. However, this is not what the actual amendment states. The words of proposed new section 135A (3) do not contain these words or reflect these details and remains, as noted above, expressed far more broadly. This means the concerns detailed below at Section 5 remain real and valid.

**(e) Substitution test an unreasonably high bar**

41. Notwithstanding the concerns expressed above at items (a) and (b) above, the test proposed pursuant to proposed new Section 135A(1)(b) requires consideration of "any" employee rather than an employee that may actually be affected, or reasonably likely to be affected.
42. ACCI submits that this is an unreasonably high bar. The practical steps necessarily involved to meet such a high bar is that any term involving substitution will require a comparison involving:
  - a. every possible hypothetical scenario;
  - b. under every possible circumstance;
  - c. that could ever possibly occur in any workplace to which a Modern Award has application; and that
  - d. these tests be satisfied in relation to any employee that may possibly be employed pursuant to its terms.
43. The practical impact of such an unreasonably high bar is that any proposal for a substitution term would be virtually, if not actually, impossible to satisfy. The result is that such a term, which may be of significant financial benefit to an overwhelming majority of employees, will fail the test in proposed

new Section 135A(1)(b) in circumstances where one single individual employee does not meet the high bar in a hypothetical scenario that may never actually exist in reality.

**(f) Risks undoing existing Modern Award terms**

44. As a result of the concerns raised at sections (b) to (e) above, ACCI submits that the proposed Section 135A(1) is capable of application to existing terms within Modern Awards that allow for the terms that substitute penalty rates and overtime rates, such as exemption clauses, salary clauses or other 'rolled-up' rate arrangements.
45. Were this to be the case, ACCI submits existing clauses in Modern Awards risk being unwound or removed. This is because:
- a. the obligations imposed on the FWC by proposed Section 135A(1) are couched in terms of "the FWC must ensure" that Modern Awards do not contain terms if they fail to meet the unreasonably high bar created by proposed Section 135A(1)(b); and
  - b. part 2 of Schedule 1 confirms that the Bill will apply to circumstances under which the FWC exercises its powers under Part 2-3 in relation to both existing and future Modern Awards; and
  - c. many existing terms in Modern Awards that provide for exemption, substitution or salary arrangements are expressed in such a way so as to apply to specified classes or categories of employees covered by the Award – and not "any" employee covered by a Modern Award as required by proposed Section 135A(1)(b).
46. This means that a range of existing terms in Modern Awards are at risk.
47. For example, the *Business Equipment Award 2020* [MA000021] contains several exemption clauses that apply to certain classes of specified employees, where they earn a certain specified amount or greater. Clauses 16.1 and 16.2 extracted from this Award are attached hereto at **Annexure A**.
48. Similarly, the *Registered and Licensed Clubs Award 2020* [MA000058] contains exemption clauses which operate in comparable manner for managerial level employees. Examples of such exemption clauses extracted from this Award are also attached hereto at **Annexure A**.
49. Notably, the above arrangements are expressed in such a way so as to apply to specified classes or categories of employees covered by the Award – and not "any" employee covered by a Modern Award as required by proposed Section 135A(1)(b).
50. ACCI submits that clauses such as those above which are existing terms in Modern Awards are at risk if the provisions of the Bill pass without significant amendment.

## 5. Ramifications arising

51. In light of the concerns outlined above, ACCI submits that there will be a range of adverse and significant ramifications that will arise should the Bill proceed to pass the Senate.

### **(a) Bill is out of step with needs of 24/7 economy**

52. ACCI submits that this Bill is entirely out of step with the needs of a 24/7 economy and inconsistent with the need for Australian workplaces to remain internationally competitive and productive.

53. The existing Fair Work framework is already notoriously complex and acts as a significant handbrake to drive productivity within the broader economy. It acts as a significant disincentive for business growth and the attraction of investment. It hinders the capacity for employment growth, greater business activity and better wages for workers.

54. The Bill will only make this current situation even worse. Such an outcome would be extremely disappointing for all, especially at a time when the Federal Government is actively encouraging dialogue about initiatives with the aim of avoiding the circumstances noted in the above paragraph.

### **(b) Hinders flexibility and productivity**

55. ACCI submits that the Bill represents a very real risk to current and future levels of workplace flexibility, by jeopardising the capacity for workplaces to adopt flexible work practices and to respond nimbly to business and operational needs.

56. This risk arises due to the reasons outlined at Section 4 (f) above, which demonstrates how the Bill is likely to result in the removal of existing Modern Award terms that create substitution arrangements involving penalty rates and overtime rates, such as exemption terms or salary terms.

57. Further, not only will the Bill also have a practical effect of jeopardising existing terms, it will also have the effect of preventing future attempts to include such terms in those Modern Awards where they do not currently exist.

58. Exemption and salary terms have existed as a feature within the Award system for many decades. These are terms that work for both employers and employees and are an option that should rightly be available to workplaces to assist in maintaining or improving workplace and business productivity.

59. Such terms have operated without controversy and continue to provide a wide range of positive benefits to Australian workplaces. They represent one of the few remaining areas within the Fair Work system that remains open and available to deliver mutually beneficial gains to all.

60. One important example of how this Bill may hinder the future inclusion of terms in Modern Awards is the current working from home (WFH) test case (AM2024/34), which is currently before the FWC. This case, initiated at the FWC's own motion, seeks to develop a WFH term for the Clerks Award that supports employers and employees make workable arrangements, and remove barriers to WFH that are present within the existing award.

61. Therefore, proposed new Section 135A is likely to have the effect of preventing the FWC from inserting a WFH provision that enables an employee to choose to work their ordinary hours over a greater span of daily hours than those set out in the applicable modern award, even if it came at the request of the employee.
62. For example, a WFH provision enabling an employee to work some of their ordinary hours outside the prescribed span of daily hours provided would be prohibited, even if the arrangement was requested by the employee – for instance, to accommodate childcare responsibilities.
63. Given the recent debate about WFH arrangements, and the related commitments made by some State governments, it is perplexing to understand why this Bill is being pursued at this time and exemplifies the broad range of unintended consequences that will derive if passed into law.
64. Therefore, the provisions of this Bill represent not only a risk to such terms where they currently exist but effectively removes them as a future option for inclusion in Modern Awards where they do not currently feature.

**(c) Reduces simplicity and increases complexity**

65. The Bill risks removing Modern Award terms that allow workplaces to adopt simple and efficient payroll practices through the use of exemption and salary terms. It also effectively prevents such terms being included in other Modern Awards where they do not already exist.
66. This will force employers to adopt complex and time-consuming record and calculation practices, and lock-in these practices in moving forward. This will be an unproductive and unnecessary outcome for employers that will cost more time and more money, reducing the amount of time and money available to manage and invest in their own business, and impact improvements in wages for employees.
67. For employers, administration using such terms is easier and provides cost predictability. Employers don't need to calculate changing penalty rates each week, which is particularly beneficial for small businesses who are far more likely to do payroll themselves.
68. Similarly, the removal of such terms will negatively impact the level of workplace compliance with workplace relations laws. Forcing employers into managing the various penalty rates and applicable payments for their entire workforce, will increase the potential for inadvertent payroll errors.
69. Provisions in Modern Awards dealing with penalty and overtime provisions are notoriously difficult to navigate, particularly for small businesses. Clauses that deal with late night and early morning penalties are especially complex and prone to being applied incorrectly, specifically the 'part of an hour' which attracts the full penalty amount and clauses involving public holidays/part-day public holidays and late night/early morning penalties.
70. Lastly, salaried personnel generally offer employer more stability and reliability in the workforce. They are more responsive to flexibility in rostering decisions and avoid the need to engage casual employees when operational circumstances necessitate additional support.



71. Removing this flexibility will therefore hinder job security for employees and likely result in employers finding more utility in hiring a second person to manage overtime costs, thereby denying paid work opportunities where they currently exist.

**(d) Jeopardises wage certainty for employees**

72. The Bill risks removing the certainty of earnings which flow from rolled-up rate arrangements for employees, such as the regularly amount paid under exemption or salary terms and creates conditions where the regular pay packets of employees could vary significantly from one pay cycle to the next.
73. ACCI submits that many employees actively want the certainty of being on a stable arrangement and having the same guaranteed income week to week, even if their hours and shifts vary. This is useful for things like bank loans, financial stability and planning, guaranteed income when accessing leave etc.
74. Removing the ability for such arrangements to exist will represent a backwards step for employees and may act to disincentivise the attractiveness of finding employment in workplaces and industries covered by Modern Awards which contain terms allowing such arrangements.

**(e) Increases the complexity of agreement making**

75. The materials and commentary accompanying the introduction of the Bill suggest that the provisions of the Bill will not affect agreement making.
76. For example, the Explanatory Memorandum states<sup>7</sup>:

*“Similarly, the Bill would not impact the making of enterprise agreements, which would remain the appropriate mechanism to negotiate employee entitlements, including penalty and overtime rates, subject to the Commission’s approval and important legislative safeguards.”*

77. ACCI submits that these suggestions are incorrect.
78. First, the above-quoted paragraph from the Explanatory Memorandum appears to imply that only proposed enterprise agreements require the FWC’s approval and the application of important legislative safeguards. Such a claim ignores the fact that it is the sole responsibility of the FWC to make, vary or revoke Modern Awards. Any applications made by interested parties to change Modern Award terms require FWC approval. Similarly, the FW Act already contains a range of important legislative safeguards as outlined in Section 3 earlier in this submission, such as the Modern Awards Objective.
79. Second, the relevant Bills Digest makes the following observations<sup>8</sup>:

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<sup>7</sup> Explanatory Memorandum – page 8

<sup>8</sup> Page 7 - Parliamentary Library | Bills Digest No. 2, 2025–26

*“This existing requirement makes it very difficult to get enterprise agreements that include ‘all up’ or ‘rolled up’ rates of pay to be approved where one or more employees have patterns of work where a substantive proportion of the hours worked attract penalty or overtime rates under existing modern award provisions.”*

*“The measures in the Bill designed to prevent ‘rolled up’ rates of pay being incorporated into modern awards that currently contain penalty and overtime rates, may indirectly make it slightly more difficult for enterprise agreements containing ‘all up’ or ‘rolled up’ rates of pay to gain approval in the future. This is because the Bill, if enacted, would ensure that the comparator used by the FWC when applying the better off overall test—the relevant modern award—will continue to include penalty and overtime rates, rather than ‘rolled up’ rates of pay.”*

80. ACCI agrees with the above paragraphs, and it represents independent confirmation of a significant ramification about which the Committee should be aware if the Bill becomes law.
81. Since 2022, the Federal Government has continually emphasised its desire to increase the rate of agreement making and been vocal in outlining the benefits of enterprise bargaining, particularly as a way to increase the rate of real wage growth.
82. Regrettably, a range of changes to agreement making processes made during the last parliamentary term have made the enterprise agreement making process far harder and have only acted to discourage and disincentivise many workplaces from considering this option.
83. ACCI submits that the provisions of the Bill, if passed, will only add to the difficulties noted in the above paragraphs and result in an outcome that is inconsistent with current direction of Federal Government policy to encourage greater rates of enterprise bargaining. Put simply, it will make enterprise bargaining - an already difficult process - even harder.

**(f) Undermines FWC role and independence:**

84. The Bill is clearly a vote of no-confidence in the ability of the FWC as the national industrial relations umpire to do the job required of it pursuant to Part 2-3 of the FW Act. This is a role that the FWC (and its predecessor variants) has held and discharged since 1904.
85. This Bill will, for the first time in over 120 years, depart from the long-standing and bi-partisan principle of having an independent arbitration and conciliation body with responsibility to make determinations related to the terms and conditions of employment in Australian workplaces.
86. ACCI submits that there is no evidence or justification to depart from such an important and fundamental principle and to do so risks opening the door to further incursions on the FWC's independence and powers.
87. Further, the Bill will prevent the FWC from acting swiftly and nimbly in response to changing economic and societal circumstances. This is because the terms of the Bill apply even in circumstances where the FWC decides to act on its own initiative, as opposed to circumstances involving an application by an interested party.



88. The recent Covid pandemic was an example where this occurred. In recognition of the need for provide workplaces with working arrangements to accommodate an unprecedented event, the FWC made a range of changes to Modern Award terms. While it sometimes did this in response to applications advanced with the consent of both employer and employee parties, a significant proportion of its work occurred at its own initiative.
89. If the provisions of the Bill under consideration had existed at that time, the above situation would either not have occurred or not delivered outcomes that were anywhere nearly as effective. This would have led to even worse outcomes and ramifications for workplaces than were otherwise suffered and created significant potential for even greater damage to the broader Australian economy overall.
90. ACCI submits that the Bill will undermine the capacity for the FWC to function effectively and responsively and is an unreasonable incursion into its long-standing independence as the industrial umpire.

## 6. Conclusion

91. For the reasons outlined above, ACCI does not support the Bill and urges the Committee to recommend that it not be passed into law.
92. As established above, there are a broad range of both technical and policy concerns that arise when careful consideration is given to the provisions in the Bill that will undoubtedly result in significant adverse ramifications for Australian workplaces should it proceed.
93. ACCI submits that while some of these ramifications could be lessened via legislative amendment, this does not change the fact that the Bill and its underpinning rationale is fundamentally flawed.
94. ACCI submits that the Committee should find that the Bill represents a backwards step for Australian workplaces, employers and employees. It will not only hinder the future pursuit of flexibility, productivity and simplicity, but risks removing options to achieve this where they currently exist and is entirely at odds with contemporary economic circumstances and the stated policy direction of the current Federal Government.
95. To that end, the Committee should find that the Bill is bad for business, bad for employees, and bad for the broader economy, and recommend that it not pass into law.

## 7. About ACCI

The Australian Chamber of Commerce and Industry represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

ACCI strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth, and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education, and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

# Annexure A – Examples of Exemption Terms in current Modern Awards

## **BUSINESS EQUIPMENT AWARD 2020 [MA000021]**

### **16.1**            *Exemptions for employees in the technical stream*

*The following award provisions will not apply to an employee in the technical stream in receipt of a salary of \$76,795 or higher:*

- (a) clause 12—Ordinary hours of work and rostering;*
- (b) clause 13—Meal breaks;*
- (c) clause 14.4—Higher duties;*
- (d) clause 17.2(c)—First aid allowance;*
- (e) clause 17.2(d)—Representation allowance;*
- (f) clause 17.3(d)—Area allowance;*
- (g) clause 17.3(e)—Living away from home allowance;*
- (h) clause 20—Overtime;*
- (i) clause 21—Special provisions for dayworkers;*
- (j) clause 22—Special provisions for shiftworkers; and*
- (k) clause 28.4—Payment for time worked on a public holiday.*

### **16.2**            *Exemptions for employees in the clerical stream*

*Except as to:*

- (a) clause 1—Title and commencement;*
- (b) clause 3—The National Employment Standards and this award;*
- (c) clause 4—Coverage;*
- (d) clause 5—Individual flexibility arrangements;*
- (e) clause 23—Annual leave;*
- (f) clause 24—Personal/carer's leave and compassionate leave;*
- (g) clause 26—Community service leave;*
- (h) clause 27—Family and domestic violence leave*
- (i) clause 28—Public holidays;*
- (j) clause 30—Consultation about changes to rosters or hours of work;*
- (k) clause 31—Dispute resolution; and*
- (l) clause 32—Termination of employment (not including clause 32.2).*

*the terms of this award will not apply to any employee in the clerical stream in receipt of a salary which exceeds the appropriate rate prescribed in clause 14.2 in which they are employed by 10%.*

## REGISTERED AND LICENSED CLUBS AWARD 2020 MA000058

18.4 *Non-application of particular provisions of this award to employees within particular classifications receiving specified salaries*

(a) *Managerial classifications—levels 6–13 inclusive in clause 18.3*

(i) *Subject to the requirements of the [NES](#), the provisions of clauses:*

- 15—Ordinary hours of work (other than clause 15.8—Special provisions for accrued rostered days off—club managers);
- 17.2—Meal breaks;
- 18.11—Higher duties;
- 19.2(c)—Broken periods of work allowance;
- 22—Overtime;
- 23—Recall to duty—club managers; and
- 24—Penalty rates (other than penalty rate provisions relating to public holidays (see clause 24—Penalty rates));

*will not apply to a club manager receiving a salary of **20%** in excess of the minimum annual rates for the appropriate classification prescribed in Schedule A—Classification Definitions.*

(ii) *Subject to the requirements of the [NES](#), the provisions of clauses:*

- 15—Ordinary hours of work;
- 17.2—Meal breaks;
- 18.11—Higher duties;
- 19.2(c)—Broken periods of work allowance;
- 19.3(b)—Meal allowance—club managers;
- 19.3(d)—Uniforms—club managers;
- 19.3(e)—Vehicle allowance;
- 22—Overtime;
- 23—Recall to duty—club managers;
- 24—Penalty rates; and
- 31.4—Additional arrangements for full-time employees

*will not apply to club managers receiving a salary in excess of **50%** above the minimum annual rate for the appropriate classification prescribed in Schedule A—Classification Definitions.*

(iii) *To avoid doubt, where a club manager is not paid in accordance with either clause 18.4(a)(i) or clause 18.4(a)(ii) above, the club manager will be entitled to the benefits of all relevant provisions of this Award.*

## ACCI Members

### State and Territory Chambers



### Industry Associations





**Australian  
Chamber of Commerce  
and Industry**