

SUBMISSION

INQUIRY INTO THE PROVISIONS OF THE FAIR WORK AMENDMENT (PROTECTING PENALTY AND OVERTIME RATES) BILL 2025

8 AUGUST 2025

The Australian Retailers Associations (ARA) and National Retail Associations (NRA) welcome the opportunity to provide feedback on the *Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025* (the Bill).

The ARA and the NRA (the Associations), which propose to amalgamate into the Australian Retail Council (ARC), represent a \$430 billion sector that employs 1.4 million Australians—one in ten workers—making retail the nation's largest private sector employer and a cornerstone of the Australian economy.

Our combined membership spans the full breadth of Australian retail: from family-owned small and independent businesses, which comprise 95% of our membership, to the largest national and international retailers that support thousands of jobs and sustain communities across both metropolitan and regional Australia. Our industry operates more than 155,000 retail outlets nationwide, with the majority of those also represented by an online or e-commerce presence.

A strong retail sector delivers widespread benefits to all Australians, with a significant portion of every dollar spent in retail flowing back into employees, suppliers, superannuation funds, and local communities. The Associations are united in advocating for the policy settings, reforms and collaboration that will drive growth, resilience, and long-term prosperity for Australian retail and the millions who rely on it.

EXECUTIVE SUMMARY

The Associations oppose the passage of the Bill. The Bill unnecessarily constrains the powers of the Fair Work Commission (**Commission**) in carrying out its statutory function of maintaining a fair and relevant safety net of employment conditions through the modern award system. The Bill does not merely introduce a 'principle', it introduces a complicated prohibition.

As Australia's independent industrial relations tribunal, the Commission is already well placed to determine whether a variation will achieve the modern awards objective as specified in the *Fair Work Act 2009* (Cth) (**FW Act**), taking into account the circumstances of employees and employers covered by the relevant award. By prohibiting any award variation that might theoretically reduce penalty or overtime rates for even a single employee, the Bill would foreclose sensible, evidence-based reforms that simplify awards, support compliance, foster flexibility and lift productivity. The Bill would even prohibit a variation to the award that was supported by the relevant union and that would deliver uplifts in entitlements for a significant proportion of the workforce.

The ARA and NRA's concern is illustrated by the ARA's application to the Commission to introduce a voluntary exemption rate (providing for a very beneficial annualised salary) into the *General Retail Industry Award 2020* (**GRIA**). Modelling presented by the ARA in that case demonstrates the vast majority of employees would be earning more under the proposed exemption rate than under current award conditions, while enjoying the stability of predictable income and significantly enhanced flexibility (something routinely sought by senior employees). Employees who prefer the status quo could simply decline the offer and continue receiving penalties under the GRIA. However, if the Bill applies to the ARA's application, all employees would miss out. The Commission is best placed to weigh competing considerations and to determine the appropriate balance for each industry. The prohibition contemplated by the Bill (noting it is not a mere 'principle' as claimed by the Government) would deny the Commission the opportunity to undertake that balanced assessment where a theoretical reduction in an employee's overall entitlements is identified, stifling beneficial developments for employees and employers across all industries, not just retail.

BODY OF SUBMISSION

Benefits of exemption rates, and the application of the ‘any employee’ test

Exemption rates set at the right level and with appropriate safeguards (as proposed by the ARA), can provide tangible benefits to employees and employers, and there are already examples of this working successfully across the modern award system.

The ARA’s proposed exemption rate:

- delivers higher total remuneration to most participating workers;
- replaces potential fluctuations in earnings with a steady and known salary, assisting employees to budget, secure finance and meet long-term commitments;
- contains safeguards on the number of hours to be worked by employees before additional payments are required to be paid;
- maintains separate entitlements in respect of public holidays and breaks;
- recognises the seniority and responsibilities of managerial and specialised roles, and the corresponding flexibility sought by such employees; and
- requires the express, informed consent of each employee—those who see no advantage may simply refuse.

In respect of any proposal for reform to a modern award (including those advanced or supported by unions), it may be that some individuals would be better off under the existing structures. That fact alone should not preclude reform where it is in the interests of the majority of industry participants, particularly where such reform only introduces an alternative remuneration path and doesn’t replace existing structures. A legislative prohibition would mean that gains that could be enjoyed by a large number of employees under a variety of proposals may now not be realised. The Commission, as the independent industrial relations tribunal, and informed by comprehensive evidence from employers, unions and other stakeholders, is equipped to determine whether, on balance, the variation advances the modern awards objective and whether additional protections are warranted. The Bill restricts the Commission’s power to consider such matters.

Reducing complexity to increase flexibility and productivity

The complexity of modern awards is frequently acknowledged as an issue by all industry stakeholders. Former Minister for Employment and Workplace Relations Tony Burke encouraged the Commission to consider using the 2022 review of modern awards to identify what could be done to make awards easier to use. Exemption rates have this potential, and a Full Bench of the Commission has previously acknowledged that exemption rates may reduce complexity.¹ Our application was made in good faith out of a genuine desire to make awards easier to use, and to increase productivity in the retail industry.

For small and medium businesses who face difficulty in applying the GRIA, an exemption rate provides a practical means of ensuring that they are complying with the award in a way that provides benefits to their employees. Our members are investing considerable amounts to ensure award compliance, however the complexity of the GRIA often makes this difficult to achieve. The Full Bench of the Commission has previously observed that the inclusion of an exemption rate would promote compliance.ⁱ In our view, efforts to simplify awards in the interests of promoting compliance should be encouraged.

Exemption rates provide employers with greater ability to organise their businesses in a way that maximises flexibility for employees whilst increasing productivity. A simplified compliance framework will allow for this flexibility and productivity improvement to the benefit of all industry participants.

¹ *Restaurant & Catering Industrial* [2021] FWCFB 4149 [92].

Modern awards must be adaptable

It is important that modern awards keep pace with economic realities, modern business practices and the changing desires of employees, particularly in small businesses. Modern awards should not be a blocker to fair arrangements that are considered suitable by employers and employees.

A number of awards already contain exemption rates which have been determined in the context of each industry. It is not clear why it is assumed that any exemption rate that might be included in an award in future would threaten the integrity of the modern awards safety net, while the existing exemption rates do not. Whether an exemption rate is appropriate is a matter for the Commission to determine in the context of each application and in relation to the particular industry or occupation. The Commission has previously found exemption rates to be consistent with the modern awards objective.

During the pandemic, exemption rates were introduced into the *Restaurant Industry Award 2020*. In its determination, the Commission recognised managed flexibility was an appropriate response to the difficult circumstances facing the industry.² The Associations are concerned that had the Bill been in place at that time, the flexibility to make such a variation would have been curtailed. Further, future proposals designed to mitigate the impacts of extraordinary circumstances, like the pandemic, will be unable to proceed if a single employee will receive reduced entitlements. Critically, the Bill would prohibit such arrangements, even where those arrangements enjoyed the support of the relevant union and a majority of employees.

Enterprise bargaining is not a real or practical answer

It is not realistic or reasonable to suggest that exemption rates should only be achievable through enterprise bargaining. Over 51% of retail workers and over 75% of award-reliant retail employees are employed by small or medium-sized businesses. While large retailers in the sector have engaged in enterprise bargaining, there are significant barriers to small and medium-sized businesses bargaining. Small and medium-sized businesses often lack the resources and experience to make an enterprise agreement. Further, changes to the enterprise bargaining framework like the introduction of the intractable bargaining regime have made enterprise bargaining less attractive to small businesses who would have significant difficulty adapting to an imposed outcome if bargaining were to fail.

The practical effect of the Bill is that, if the Commission identifies a detriment, award-reliant salaried workers will never receive the benefits that come from an exemption rate, and that small and medium business will be forced to continue operating with considerable regulatory complexity.

Further, the Bill is likely to make it more difficult to make enterprise agreements. While the Explanatory Memorandum to the Bill asserts that the Bill would not impact the making of enterprise agreements, the Bills Digest states that the Bill may make it more difficult for enterprise agreements including rolled up rates to be approved in the future. We consider the observation made by the Bills Digest is correct, and that that this confusion alone is likely to have a stifling effect on agreement making. In our view, simplifying awards is likely to encourage agreement making particularly among small and medium businesses. An exemption rate in the relevant award would provide a straightforward starting point for businesses to bargain for terms and conditions of employment that leave employees better off overall.

The role of the Fair Work Commission

As the Associations have indicated, in our view it is appropriate for the Commission to determine on a case-by-case basis whether the inclusion of exemption rates satisfies the modern awards objective. Consideration should be given to all proposals that provide wage increases for most employees, increased flexibility and boosts to productivity. The effect of the Bill is to discourage constructive proposals being made, and in doing so, the economy loses out on opportunities for increased productivity. A blanket prohibition on a variation which reduces penalty rates for a single employee does not allow for a nuanced determination to be made on the facts of each case.

² *Restaurant & Catering Industrial* [2021] FWCFB 4149 [52].

The Explanatory Memorandum to the Bill describes new section 135A as a 'principle'.³ However, it is not an interpretive 'principle' but a complex prohibition. The Explanatory Memorandum states that the Commission would exercise its discretion to interpret and apply the principle in a way that is appropriate and fair in the circumstances.⁴ However, new section 135A provides, at a high level, that the Commission *must ensure* that penalty rates are not reduced. This does not impart any discretionary power to the Commission, or any notion of appropriateness or fairness.

In contrast, section 157 of the FW Act provides that the Commission *may* make a determination varying a modern award if it is satisfied that the determination is necessary to achieve the modern awards objective. Under section 157, the Commission is provided latitude to determine whether the variation is necessary, and a residual discretion to determine whether to exercise that power. The modern awards objective itself provides a list of criteria which the Commission must take into account in ensuring that modern awards provide a fair and relevant minimum safety net of terms and conditions, including the need to provide additional remuneration for employees working overtime and unsocial hours. The FW Act therefore already provides the Commission with a discretionary power to be exercised in the interests of fairness and appropriateness. The Bill removes this discretion and does not import consideration of appropriateness or fairness.

The application of the Bill beyond exemption rates

Further concerns in relation to the drafting of the Bill include that it is not clear whether it is intended to apply, or would in fact apply, to prohibit changes which would reduce or alter the *circumstances* in which a penalty rate or overtime amount is payable, rather than just a reduction of the rate itself. For example, it is not clear whether the Bill would prevent the Commission from varying a modern award to change the times at which certain penalty rates or overtime rates would be applicable (including where such change was supported by the relevant union). Such a prohibition would mean that a modern award could never be varied to adapt to new economic and labour dynamics in the relevant industry.

This is particularly concerning given the rapid rate of change to working arrangements across the economy (including working from home, and the uptake of artificial intelligence) and is likely to significantly hamper moves to increase productivity across various industries.

By way of example, the Commission is currently reviewing the *Clerks – Private Sector Award 2020* to develop a specific 'working from home' term that takes account of the different terms and conditions that may be appropriate when working from home. In that context, the Commission has explicitly raised the prospect that it may be appropriate for modifications to occur to a range of clauses including those dealing with ordinary hours and breaks. For the reasons outlined above, such changes may be prohibited by new section 135A if they would decrease an employee's entitlements through the reduced application of penalty or overtime rates.

RECOMMENDATIONS

The ARA and NRA recommend that the Senate does not pass the Bill.

The Commission already has the capacity to determine whether a proposal to vary a modern award satisfies the modern awards objective, including specific reference to the need to compensate employees who work overtime, unsociable hours, on weekends and public holidays and shifts. The Commission has considered such proposals in the past, and there is no suggestion that they have decided previous applications incorrectly. On this basis, there is no justification for further limiting the Commission's discretion.

The Associations recommend that if any Bill is to be passed, it is amended to operate as a further matter for the Commission to take into *account* in determining whether to exercise its discretion to vary an award, or in

³ Explanatory Memorandum to the Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025, 6.

⁴ Explanatory Memorandum to the Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025, 1.

determining the modern awards objective. This would be in line with the explanation provided by the Explanatory Memorandum to the Bill.

Finally, consistent with ordinary legislative principles, the Associations recommend that the Bill be amended to provide that the amendments do not apply in relation to the exercise of the Commission's powers to vary an award, where the application for the variation of the award was made before commencement. The ARA and other parties have provided significant amounts of material to enable the Commission to make an informed determination as to whether the variation to the GRIA sought would achieve the modern awards objective. The Associations consider the Commission is appropriately placed to determine the application that has been made by the ARA.

The Associations appreciate the opportunity to contribute to this important discussion.

The Associations encourage the Senate to continue engaging with business groups and service providers to ensure amendments to the FW Act achieve the object of the Act, providing workplace relations laws that are fair, flexible and promote productivity.

Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.

ⁱ *Restaurant & Catering Industry* [2021] FWCFB 4149 [110].