SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT COMMITTEE'S INQUIRY INTO THE PROVISIONS OF THE FAIR WORK AMENDMENT (PROTECTING PENALTY AND OVERTIME RATES) BILL 2025.

Per Capita

August 2025

Per Capita is an independent think tank, dedicated to fighting inequality in Australia. We work to build a new vision for Australia, based on fairness, shared prosperity, and social justice.

Per Capita welcomes the opportunity to provide feedback on the Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 (the Bill). The Bill aims to ensure that penalty and overtime rates in modern awards are not reduced, and that awards do not contain terms that substitute entitlements to receive penalty or overtime rates where those terms would have the effect of reducing that additional remuneration employees would otherwise receive.

Per Capita supports these aims. This amendment to the *Fair Work Act* as an important step in ensuring these entitlements remain a secure part of the modern award safety net that millions of Australians rely on.

Why Penalty and Overtime Rates Matter

Penalty and overtime rates are a critical part of the take home pay for millions of Australians. These rates recognise that some work hours come at a personal cost. Working on weekends, public holidays, late at night or very early in the morning often means missing family time, sport, school events and other activities. On weekend days, Australians spend on average two hours more per day on social, community and recreation activities than on weekdays.[1] While penalty rates cannot give back the time lost, they do aim to compensate workers for it.

Penalty rate cuts in recent years

In 2017, the Fair Work Commission (FWC) ruled that penalty rates would be reduced across a number of modern awards, including those covering hospitality and retail workers. The decision was made in part on the suggestion that lower wage costs would lead to longer trading hours on Sundays and public holidays, and an overall increase in hours worked.[2] Despite these expectations, research shows this did not occur. Analysis by the University of Wollongong published two years after the cuts first commenced found no evidence of increased employment in hospitality and retail, nor any relative rise in the prevalence of Sunday, public holiday or weekly employment for modern award employees or employers.[3] Similarly, the Centre for Future Work found that job growth in retail and hospitality sectors slowed after the cuts, with all net new roles created being part-time.[4]

[1] Australian Bureau of Statistics, *How Australians Use Their Time, 2020-21 Financial Year* (Catalogue No 4153.0, 7 October 2022).
[2] *4 Yearly Review of Modern Awards — Penalty Rates* [2017] FWCFB 1001
[3] Martin O'Brien, 'Cutting Penalty Rates Was Supposed to Create Jobs. It Hasn't, and Here's Why Not', The Conversation (Online, 16 May 2029) < https://theconversation.com/cutting-penalty-rates-was-supposed-to-create-jobs-it-hasnt-and-heres-why-not-117178>.
[4] Jim Stanford, *Update on Penalty Rates and Job-Creation: Two Years Later* (Briefing Note, 1 July 2019).

Who is at risk?

Around 2.9 million employees rely on a modern award to set their wages and conditions. This accounts for just under a quarter of all employees (24.2%).[5] Women make up 59.7% of these workers, casual employees account for almost 48.3%, and 45% of workers aged 18 to 24 are award reliant.[6] For many workers, penalty and overtime rates make up an essential part of their take-home pay and is the difference between meeting essential expenses and falling behind. Reductions in the total take home pay of award reliant employees caused by cuts to overtime and penalty rates would disproportionately affect workers with less workplace power (casual and young employees) and cuts to these rates is also likely to disproportionately impact women, potentially widening the gender pay gap.

In industries and occupations already experiencing skill shortages, reducing take home pay risks making those shortages worse. This is especially true when skill shortages are driven by retention gaps.

The Bill will not apply retrospectively. It does not introduce additional obligations for employers. Enterprise bargaining remains the main avenue for employers and employees, together with their representatives, to negotiate and customise terms and conditions of employment. What the Bill does do is ensure that employees whose terms and conditions are set by the minimum safety net provisions of modern awards retain their rights to fair remuneration for overtime work, work at unsocial, irregular or unpredictable hours, and work on weekends and public holidays. Rights that can be eroded, as demonstrated by the FWC's 2017 *Penalty Rates Decision*.

Case study: aged and disability care and support workers

The Aged and Disabled Carers occupation group (ANZSCO 4231) is the second largest occupation in Australia, employing 367,200 people (2.5 % of national employment). Majority of workers in this group are women, with women accounting for 76% of employees.[7] This occupation group has been in a persistent skill shortage that has been driven by retention gaps.[8] Where skill shortages are driven by retention gaps, simply increasing the number of qualified workers does not solve the problem. In these circumstances, the main issue is workers not remaining in the role. Improving retention, and thus reducing the skill shortage in these occupations, requires better pay and conditions, access to professional development, and clearer career pathways.[9]

Low wages are a major driver of attrition for workers in this occupation group.[10] Average wages are around $133 per week lower than the national average.[11] For full time Aged and Disabled Carers, ABS data shows that average total cash earnings are around $80 per week higher than average ordinary time earnings. This difference, which is about $4,160 a year in additional take home pay, reflects overtime earnings in the occupation.[12] Any reduction in these earnings could further undermine retention and exacerbate existing workforce shortages, affecting the delivery of essential care and support these workers provide to hundreds and thousands of Australians.

This case study highlights the need to preserve the safety net provided by modern awards and to prevent changes to pay rates that would erode a worker's take home pay.

---

[5] Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2023* (Catalogue No 6306.0, 24 January 2024). Owner managers of incorporated enterprises have been excluded.
[6] Ibid.
[7] Jobs and Skills Australia, *National Occupation Trend - May 2025* (Data, 2025) https://www.jobsandskills.gov.au/sites/default/files/2025-07/national_occupation_trend_-_may_2025_1.xlsx.
[8] Jobs and Skills Australia, 'Occupation Shortage List' (Web Page) https://www.jobsandskills.gov.au/data/occupation-shortages-analysis/occupation-shortage-list.
[9] Jobs and Skills Australia, *2024 Occupation Shortage Drivers Report* (Report, 14 October 2024).
[10] See, eg, Workforce Innovation and Development Institute, RMIT University, *The Retention Challenge: An Exploration of the Experience and Intentions of Recent Entrants in the Disability Sector* (Report, November 2022); CEDA, *Duty of Aare: Aged Care Sector in* Crisis (Report, 2022)
[11] Jobs and Skills Australia, *Occupation Data - May 2025* (Data, 2025) https://www.jobsandskills.gov.au/sites/default/files/2025-07/occupation_profiles_data_-_may_2025.xlsx
[12] Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2023*, TableBuilder.

Provisions of the Bill

While Per Capita strongly supports the passage of this Bill, we note the potential for some provisions, as drafted, to create new loopholes or lead to unintended consequences.

Proposed section 135A(1)(a) ensures the numerical value of penalty and overtime rates in modern awards is not reduced, while s135A(1)(b) prevents these entitlements from being substituted with other arrangements that would reduce the additional remuneration employees receive. However, the Bill does not clearly prevent the FWC from varying awards to alter the span of ordinary hours, which could change when penalty or overtime rates apply. Such a change might not be considered a substitution. If so, it could lower an employee's take home pay without breaching the current provision.

To address this, s 135A(1)(a) could be amended to read:

(1) In exercising its powers under this Part to make, vary or revoke modern awards, the FWC must ensure that:
   (a) the rate of a penalty rate or an overtime rate that employees are entitled to receive and the circumstances or span of hours in which that rate is payable is not reduced.

Proposed section 135A(1)(b) may unintentionally prohibit the FWC from approving award terms that replace penalty or overtime entitlements with arrangements that could benefit employees, such as time off, in lieu or annualised wage arrangements found in many modern awards. If this is not the intention, the proposed amendment should be clarified to allow substitutions where the FWC is satisfied they provide affected employees with equal or greater overall value, whether monetary or otherwise. The drafting would need to be precise to avoid weakening penalty and overtime protections, while preserving genuinely beneficial arrangements and the core purpose of the new protections.

Conclusion

From the earliest days of Australia's industrial relations system, it has been understood that decent work is about more than what occurs in the workplace. It is about protecting the time workers need for rest, family and community life. When work takes up that time, it should be fairly compensated. This principle has long been part of our workplace laws, but recent changes to modern awards have shown that penalty and overtime entitlements can be reduced. This Bill is an important safeguard to prevent that from happening again.

Per Capita supports its swift passage and notes the value of ensuring any potential unintended consequences are addressed in the drafting.

We thank the members of the Senate Education and Employment Committee for considering our submission.