Law Council
OF AUSTRALIA

Office of the President

12 August 2025

Senator Marielle Smith
Chair
Senate Education and Employment Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: eec.sen@aph.gov.au

Dear Chair

Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025

The Law Council welcomes the opportunity to provide a submission regarding the Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 (Cth). This submission has been prepared with the assistance of the Industrial Law Committee of the Law Council of Australia's Federal Dispute Resolution Section.

The Law Council does not wish to comment on the substance of the Bill. However, we raise one point of clarification in relation to the Bill's Explanatory Memorandum (**EM**).

In two places, the EM states that one of the primary purposes of the Bill is:

> *… closing loopholes in the modern awards safety net that allow employers to 'roll up' penalty and overtime rates into a single pay rate, that do not fairly compensate award-reliant employees for the penalty rates and overtime they would have otherwise received.*[1]

In the Law Council's view, this characterisation of the Bill is misleading.

There is no 'loophole' that allows employers to roll up penalty rates and pay less than the Award. There are two established lawful means to 'roll up' penalty rates into a salary:

1. a common law salary which absorbs and offsets Award entitlements; and
2. an annualised wage arrangement through an Award term.

Under both 1 and 2, the employee's salary cannot be less than what the employee would have earned had they been paid under the Award.[2] Mechanisms are in place to prevent, identify and respond to instances of underpayment.[3]

[1] Explanatory Memorandum, Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 (Cth), 1-2.
[2] See, eg, *Clerks—Private Sector Award 2020* cl 18.2 (Annualised wage not to disadvantage employees); *Legal Services Award 2020* cl 18.2 (Annualised wage not to disadvantage employees).
[3] These mechanisms include, for example, detailed record keeping requirements and mandatory reviews annually and at the termination of employment.

Telephone +61 2 6246 3788 • *Email* mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale Street, Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

As Identified by the Minister in her Second Reading speech,[4] there have been and are applications before the Fair Work Commission for 'exemption rates', which allow for people to be paid a certain percentage above the Award (for example, 25 per cent) and therefore not receive penalty rates. However, this is not a 'loophole', either. This process requires an application to be made to the Commission to amend the Award to include the exemption rate. After hearing from all the interested parties, the Full Bench may then decide that this arrangement meets the requirements and principles of the *Fair Work Act 2009* (Cth).

Rather, the Bill—under proposed paragraph 135A(1)(b)—requires the Commission, when considering the type of application described above, to ensure that the Award does not include terms that substitute employees' entitlements to receive penalty rates or overtime rates where those terms would have the effect of reducing the additional remuneration that any employee would otherwise receive.

For further comment or clarification on any of the matters raised in this submission, please contact John Farrell, Executive Policy Lawyer [redacted].

Yours sincerely



Juliana Warner
President

[4] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 2025,3 (Amanda Rishworth, Minister for Employment and Workplace Relations).